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How California's Racial Justice Act of 2020 Protects Criminal Defendants from Racial Discrimination and Why the Equal Protection Clause is Not Enough

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HOW CALIFORNIA'S RACIAL JUSTICE ACT OF 2020 PROTECTS CRIMINAL DEFENDANTS FROM RACIAL DISCRIMINATION AND WHY THE EQUAL PROTECTION CLAUSE IS NOT ENOUGH

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ABSTRACT

The Equal Protection Clause should prevent racial discrimination in the criminal legal system, yet Black people and people of color are disproportionately arrested, prosecuted, and incarcerated in the United States. This is partially due to the heavy evidentiary burden required to demonstrate an Equal Protection violation and the failure of the Supreme Court to ease that burden in McCleskey v. Kemp. With federal law largely ineffective, states such as California have passed legislation to provide more robust civil rights protections. This article explores how the Equal Protection Clause fails to provide a remedy for criminal defendants who experience racial discrimination in the criminal legal system, and how the California Racial Justice Act of 2020 provides an avenue for reform.

INTRODUCTION

Criminal convictions in the United States have far-reaching consequences that go beyond incarceration.[1] Convictions impact an individual's ability to secure employment, housing, and transportation,[2] making it more difficult to escape the cycle of poverty. They may also result in immigration consequences,[3] having one's right to vote[4] or own a firearm rescinded,[5] and stigma.[6] Criminal convictions sometimes even result in death.[7] The question of whether incarceration and other consequences of criminal convictions actually advance any legitimate societal interests[8] is not the subject of this paper. A brief review of these consequences instead serves to highlight the injustice of stark racial disparities in criminal convictions. Black and Hispanic Americans make up 32% of the U.S. population, but 56% of the U.S.

[1] *See* Brennan M. Wingerter, Nat'l Ass'n of Crim. Def. Law., Shattering the Shackles of Collateral Consequences: Exploring Moral Principles and Economic Innovations to Restore Rights and Opportunity 13-18 (2019), https://www.nacdl.org/getattachment/ae2c8e01-361d-4d42-98e8-c60e65325157/shattering-the-shackles-of-collateral-consequences-exploring-moral-principles-and-economic-innovations-to-restore-rights-and-opportunity.pdf.

[2] *See id.*

[3] Cong.Rsch. Serv., R45151, Immigration Consequences of Criminal Activity 1 (Updated 2021).

[4] U.S. Dep't of Just. Civ. Rts. Div., Guide to State Voting Rules that Apply After a Criminal Conviction 2 (2022).

[5] *See e.g.,* 18 U.S.C. 922(g) (2000).

[6] Wingerter, supra note 1, at 17-18.

[7] *See* Gregg v. Georgia, 428 U.S. 153 (1976).

[8] Studies have found that increased incarceration is generally not linked to lower crime rates. *Study Finds Increased Incarceration Has Marginal-to-Zero Impact on Crime*, Equal Just. Initiative (Aug. 7, 2017), https://eji.org/news/study-finds-increased-incarceration-does-not-reduce-crime/; Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Inst. of Justice (Jul. 2017), https://www.vera.org/publications/for-the-record-prison-paradox-incarceration-not-safer.

incarcerated population.[9] If Black and Hispanic Americans were incarcerated at the same rates as white Americans, the U.S. jail and prison populations would decrease by roughly 40%.[10] Black Americans in particular are incarcerated five times more than white Americans,[11] and Black men receive sentences 19.1% longer than similarly situated white men.[12] When our criminal legal system treats people differently according to their race, the impact of that racism extends far beyond the walls of a prison cell. When so much is at stake, an avenue to challenge racial discrimination in the criminal legal system is critical.

This article explores how the Equal Protection Clause of the Fourteenth Amendment fails to adequately protect criminal defendants from racial discrimination in the legal system, and how recent legislation in California provides an example for reform. It also briefly examines the attempts at reform that paved the way for this legislation. California's Racial Justice Act of 2020 enables criminal defendants to use statistical evidence to demonstrate racial discrimination by the state, which can provide more protection to criminal defendants impacted by racial discrimination.

Part I defines racial discrimination and identifies the types of biases that perpetuate it. Part II explores how racial discrimination manifests in the criminal legal system through the creation of laws, policing, and case processing. Part III explains that, despite racial discrimination being unconstitutional, the Supreme Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment makes it difficult for criminal defendants to successfully litigate race-based discrimination claims. Part IV demonstrates how racial discrimination manifests in the administration of the death penalty and explores various failed attempts to ease the burden defendants face in challenging race-based discrimination in the death penalty context. Finally, Part V explores why California's Racial Justice Act of 2020 is an example of legislation that will enable criminal defendants to obtain relief more easily from racial discrimination in the criminal legal system.

[9] *Criminal Justice Fact Sheet*, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet (last visited Jan. 13, 2023).

[10] *Id.*

[11] *Id.*

[12] GLENN R. SCHMITT ET AL., U.S. SENTENCING COMMISSION, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 6 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

I. WHAT IS RACIAL DISCRIMINATION?

Racial categories are socially constructed and created by humans.[13] Although these categories are not based on objective criteria, many people believe that race is an objective fact.[14] Physical differences do exist among people, but the construction of racial categories is an attempt to segregate people and assign them different social worth as defined by white supremacy.[15] Racial categories therefore carry significant social consequence.[16]

Bias is a prejudice or preference toward a certain group, person, or thing.[17] Individuals harbor bias because they are exposed to socially shared stereotypes and experiences.[18] There are two types of bias: explicit and implicit.[19] Explicit biases are beliefs that individuals consciously possess and express, whereas implicit biases are beliefs that exist subconsciously.[20] When bias is put into action through an individual's behavior, the result is usually discrimination.[21] An individual with implicit bias may behave in a manner inconsistent with their conscious attitudes because the biases automatically drive their behavior.[22] When individuals are working under time pressure, multitasking, or engaging in a competition, implicit biases are most likely to influence decision-making.[23] When individuals harbor racial biases, which most do, an individual's behavior results in racial discrimination.[24] The result is that "[w]ell-meaning people who consciously reject racism or other bias may unwittingly act in ways that result in discrimination..."[25]

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[13] Gregg Barak et al., CLASS, RACE, GENDER, AND CRIME 97 (Sarah Stanton ed., 5th ed. 2018).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Unconscious Bias Training*, UNIV. OF CAL. S. F., https://diversity.ucsf.edu/programs-resources/training/unconscious-bias-training (last visited Jan. 19, 2023).

[18] Isabel Bilotta et al., *How Subtle Bias Infects the Law*, 15 ANN. REV. OF L. AND SOC. SCI. 227, 228 (2019).

[19] *Id.*

[20] *Id.* at 228-29.

[21] *Id.* at 229.

[22] *Id.* at 228-29.

[23] *Id.* at 229.

[24] *Id.*

[25] Bailey Maryfield, *Implicit Racial Bias*, JUST. RSCH. AND STAT. ASS'N 1 (Dec. 2018), ttps://www.jrsa.org/pubs/factsheets/jrsa-factsheet-implicit-racial-bias.pdf.

II. HOW RACIAL DISCRIMINATION MANIFESTS IN THE CRIMINAL LEGAL SYSTEM

Racial biases are deeply embedded in the criminal legal system.[26] Racial disparities exist at each decision point within the system, which impacts subsequent decision points, and results in negative outcomes for Black people and people of color.[27] A complete discussion of racial discrimination in the criminal legal system is beyond the scope of this article. However, this section provides a brief overview of how racial discrimination manifests in the criminal legal system in three ways: defining criminal offenses, policing, and case processing and incarceration.

A. Defining Criminal Offenses

The United States has always created laws that discriminate based on race.[28] Although most laws explicitly based on race are now unconstitutional, the modern-day criminal legal system evolved from explicitly racist laws and policies from slavery.[29] Thus, the system today is facially race-neutral, but designed to exert control over people of color.[30] To take just one modern example, President Reagan aggressively expanded the war on drugs in the 1980s when drug crime had been declining, and only 3% of Americans reported being concerned about it.[31] Reagan's "us versus them" narrative allowed for policies that directly targeted Black communities, such as high mandatory minimums for low-level drug offenses, and sentencing disparities between powder and crack cocaine.[32] Today, there are still false perceptions of Black criminality, which research indicates contributes to calls for continued harsh policing practices and sentencing.[33]

B. Policing

The first interaction many people have with the criminal legal system is with law enforcement.[34] Stereotypes that associate Black and Brown people with criminal activity have resulted in policing behavior that impacts those

[26] Susan Nembhard & Lily Robin, URB. INST., *Racial and Ethnic Disparities throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices* 1 (2021), https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 2.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

communities more severely than white communities.[35] Black Americans, representing roughly 13% of the U.S. population, account for roughly 27% of arrests.[36] Black neighborhoods also are subject to higher rates of police-initiated contact, regardless of the neighborhoods' actual crime rates.[37]

Biases are particularly apparent when officers have more discretion: officers are more likely to stop Black and Latinx drivers than white drivers for infractions when they have discretion regarding whether to enforce those infractions or not.[38] Additionally, officers are more likely to search Black and Latinx drivers during those traffic stops, even though Black and Latinx drivers carry contraband at similar or lower rates than white drivers.[39] Research shows that variations in crime rates do not explain differential treatment based on race in policing. Rather, individual and systemic biases drive these disparities.[40]

C. Case Processing And Incarceration

Racial bias in the court system has been shown to affect pretrial outcomes both directly and indirectly.[41] Once arrested, Black Americans are more likely than white Americans to be detained pretrial, convicted, and experience lengthy prison sentences.[42] Black Americans are thus disproportionately incarcerated; in fact, they are 5.9 times as likely to be incarcerated than white Americans.[43] As of 2001, one of every three Black boys born that year could expect to go to prison in his lifetime, compared to one of every seventeen white boys.[44] Although Black Americans and Latinos comprise 29% of the U.S. population, they make up 57% of the prison population.[45]

Like discretion in policing, discretion in the criminal system contributes to these racial disparities. Decisions about pretrial detention are often discretionary and made arbitrarily based on a decision-maker's understanding of who is and is not dangerous.[46] People of color are thus more likely to be

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35 *Id.* at 3.

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at 4.

41 *Id.* at 5.

42 SENT'G PROJECT, *Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance: Regarding Racial Disparities in the United States Criminal Justice System* 1, 6 (2018), https://www.sentencingproject.org/app/uploads/2022/08/UN-Report-on-Racial-Disparities.pdf.

43 *Id.* at 1.

44 *Id.*

45 *Id.* at 6.

46 Nembhard & Robin, supra note 26, at 5.

assessed as safety or flight risks and detained pretrial.[47] They are also more likely to receive higher bail amounts than white people and be unable to pay.[48] Pretrial detention correlates with higher chances of conviction, less favorable plea deals, and longer sentences.[49]

Prosecutorial discretion also allows racial bias to infiltrate the legal system. Research indicates that prosecutors may be relying on race as a proxy for criminality and future dangerousness, which impacts plea offers.[50] Federal prosecutors are twice as likely to charge Black Americans with offenses that carry a mandatory minimum sentence than similarly situated white Americans.[51] Additionally, as a result of prosecutorial discretion, white people are more likely to have their initial charges dropped or lessened, and are thus more likely to be convicted of crimes without incarceration time or not be convicted at all.[52] This creates disparities in the types of charges people of color are convicted of and the penalties they receive, affecting their sentencing outcomes.[53]

Racial discrimination that results in unfair sentencing is not limited to prosecutors. Implicit bias is most likely to impact an individual's behavior in moments of stress and time pressure.[54] Public defenders, often overworked and forced to analyze situations quickly with incomplete information, could easily act based on implicit bias.[55] This could influence a public defender's belief in their client's innocence or guilt, and whether the attorney advises their client to take a plea.[56] This could, in effect, influence how much effort and how many resources the public defender puts into their client's case.[57] This could negatively impact Black clients and other clients of color.[58]

Finally, the discretion in jury selection and jury decision-making allows for racial discrimination.[59] During jury selection, prosecutors and defense attorneys may remove potential jurors by using peremptory challenges.[60] Although peremptory challenges based on race are constitutionally prohibited,

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47 *Id.*

48 *Id.*

49 SENT'G PROJECT, supra note 42.

50 Nembhard & Robin, supra note 26, at 5.

51 SENT'G PROJECT, *supra* note 42, at 7-8.

52 Nembhard & Robin, *supra* note 26, at 5.

53 *Id.*

54 Jessica Blakemore, *Implicit Bias and Public Defenders*, 29 GEO. J. LEGAL ETHICS 833, 839 (2016).

55 *Id.* at 839-840.

56 *Id.* at 840.

57 *Id.*

58 *Id.*

59 Bilotta et al., *supra* note 18, at 235.

60 *Id.*

racial minority groups are still underrepresented in the majority of jury pools and final juries.[61] Once a jury is selected, research shows that mock jurors are more likely to find defendants guilty and recommend harsher sentences if they belong to a different racial group than their own.[62]

III. PROVING RACIAL DISCRIMINATION UNDER THE EQUAL PROTECTION CLAUSE

Congress enacted the Equal Protection Clause of the Fourteenth Amendment to prohibit states from denying "any person within its jurisdiction the equal protection of the laws."[63] The clause's central purpose was to eliminate racial discrimination by the states.[64] Under the Equal Protection Clause, any governmental action that discriminates based on race is "suspect," and must be analyzed under a strict scrutiny test.[65] The strict scrutiny test presumes a governmental action that treats people differently based on race is unconstitutional, unless the government can show a compelling justification for the action and that it is the least restrictive means of achieving that end.[66] However, the Equal Protection Clause does not generally offer protection against actions and laws that are facially race-neutral, even if those actions and laws have race-based effects.[67] For the Equal Protection Clause to protect against facially race-neutral laws, a claimant must show that the law has a race-based effect, and that the government acted with the intent to discriminate based on race.[68]

U.S. v. Armstrong demonstrates the limited ability of the Equal Protection Clause to protect against facially race-neutral governmental action. In U.S. v. Armstrong, respondents were indicted on cocaine base drug charges under 21 U.S.C. §§ 841 and 846.[69] In every one of the twenty-four § 841 or § 846 cases closed by the prosecutor's office in 1991, the defendant was Black.[70] The respondents thus filed a motion for discovery, alleging that they were

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61 *Id.*

62 *Id.*

63 U.S. CONST. AMEND. XIV, § 1.

64 *See, e.g.,* Loving v. Virginia, 388 U.S. 1, 10 (1967).

65 Hunt v. Cromartie, 526 U.S. 541, 546 (1999).

66 Loving, 388 U.S. 10.

67 Laura G. Jensen, *Deadly Bias: Why North Carolina's Legacy of Systemic Racism Within Capital Sentencing Necessitates the Reinstatement of the Racial Justice Act*, B.U. PUB. INT. L.J. 251, 254-255 (2021).

68 Washington v. Davis, 426 U.S. 229, 239-40 (1976).

69 U.S. v. Armstrong, 517 U.S. 456, 458 (1996).

70 *Id.* at 459.

selected for prosecution because they were Black.[71] The Supreme Court denied the discovery motion.[72] The Court held that a selective prosecution claim has the same requirements as an Equal Protection claim.[73] A claimant must therefore show that the federal prosecutorial policy had a discriminatory effect and was motivated by discriminatory purpose.[74]

In order to do so, the Court explained that the respondents would have had to show that similarly situated individuals of a different race were *not* prosecuted under the relevant statutes, instead of simply showing that only members of their own race *were* prosecuted.[75] The Court was only able to point to one case, *Yick Wo v. Hopkins*, to demonstrate a successful selective prosecution claim under this standard.[76] *Yick Wo* was decided 100 years before *Armstrong*, and the Court failed to cite any other case in those 100 years in which a defendant succeeded making this claim.[77]

The Court took a slightly stronger stance against racial discrimination in jury selection, but still developed a framework that favored the government. In Batson v. Kentucky, the Court held that the Equal Protection Clause forbade prosecutors from striking potential jurors solely on account of their race or on the assumption that Black jurors as a group would be unable to impartially consider the State's case against a Black defendant.[78] The Court explained that a defendant may show that the prosecutor racially discriminated against a jury member if "the facts and circumstances raise an inference" that the prosecutor used peremptory challenges to exclude a potential juror based on race.[79] However, the Batson Court explained that the government may refute this finding with a race-neutral explanation for challenging the juror.[80] This essentially allowed race-based jury striking to continue, as the Court accepted virtually any race-neutral explanation as valid.[81] Some prosecutors' associations have since distributed pamphlets listing race-neutral reasons to strike jurors.[82]

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71 *Id.*

72 *Id.* at 470.

73 *Id.* at 465.

74 *Id.*

75 *Id.*

76 *Id.* at 466.

77 CYNTHIA LEE ET AL., CRIMINAL PROCEDURE CASES AND MATERIALS, 658 (West, 2d ed. 2018).

78 Batson v. Kentucky, 476 U.S. 79, 89 (1986).

79 *Id.* at 96.

80 *Id.* at 97.

81 Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015), https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors.

82 *Id.*

IV. RACIAL DISCRIMINATION'S ULTIMATE HARM: THE DEATH PENALTY

Perhaps nowhere else in the criminal legal system is racial discrimination as obvious and devastating as in the administration of the death penalty.[83] In the 1987 case McCleskey v. Kemp, the Supreme Court barred the use of statistical evidence to prove such racial discrimination, which essentially "condoned the expression of racism in a profound aspect of our law."[84] To understand the impact of the decision and the extent to which racial discrimination infiltrates the criminal legal system, it is critical to understand the way the death penalty is administered in the United States.

A. Death Penalty Background

The death penalty, like the U.S. criminal system generally, is rooted in white supremacy. Before the Civil War, the law explicitly prescribed different punishments based on race.[85] For example, an enslaved person was liable to be executed for any offense for which a free person would face three years in prison.[86] In fact, enslaved persons in Virginia could be executed for sixty-six different crimes, whereas white Virginians could only be executed for committing murder.[87] These differences were explicitly race-based; free Black persons could also receive capital punishment for crimes white persons could not,[88] and legislatures attributed these different punishments directly to race.[89] After the Civil War, explicitly race-based sentencing became unconstitutional, but racism remained in capital punishment.[90] Southern states gave all-white juries expanded discretion in capital sentencing, which allowed them to take race into account.[91] Executions sometimes occurred merely fifty minutes after a capital jury was sworn; [92] the line between official execution and lynching was thin.[93]

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[83] Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective, in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY 96, 96 (Charles J. Ogletree, Jr. & Austin Sarat, eds. 2006).

[84] Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1388 (1988) (quoting Anthony Lewis, ABROAD AT HOME: *Bowing to Racism*, N.Y. TIMES, Apr. 28, 1987, at A31).

[85] Banner, *supra* note 83, at 99.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* at 101.

[91] *Id.* at 100.

[92] *Id.* at 106.

[93] *Id.*

B. Aggravating Circumstances and Mitigating Evidence: How Capital Sentencing Provides Juries With Unguided Discretion

Today, capital juries still have wide discretion in sentencing.[94] Not all convicted murderers are eligible for capital punishment; before a judge or jury may provide a death sentence, they must find that at least one statutory aggravating circumstance exists.[95] If a judge or jury finds that an aggravating circumstance is present, the defendant is merely *eligible* for the death penalty; the sentencer may still decide on a lesser sentence.[96] The defense has the right to provide unlimited mitigating evidence to influence the judge or jury's sentencing decision.[97]

Statutes that define aggravating circumstances are meant to curtail jury discretion and prevent the arbitrary administration of the death penalty.[98] Otherwise, juries could essentially "reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die."[99] In practice, however, these statutes do very little to limit jury discretion. In *Gregg v. Georgia*, the Court found that Georgia's discretionary statutes at issue eliminated the arbitrariness in capital sentencing.[100] However, Georgia's statute authorized the death penalty if the murder involved "depravity of mind" or "aggravated battery to the victim."[101] These circumstances describe most, if not all, murders.[102] Since *Gregg*, the Court has made hollow attempts at striking down discretionary statutes that encompass nearly all murders.[103] However, the Court has frequently upheld vague aggravating factors, and the Court has never limited the application of a state's list of aggravating factors, leaving some states with long lists that encompass almost all murders.[104]

Capital jury discretion is wider still because there are no limits on

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[94] Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 47, 59 (James R. Acker et al. eds., 1998).

[95] Gregg, 428 U.S. 196-97.

[96] Lockett v. Ohio, 438 U.S. 586, 604 (1978) (stating that mandatory death penalty statutes are unconstitutional and that sentencers must consider mitigating evidence).

[97] *Id.* (holding that capital sentencers shall not be precluded from considering as mitigating factors "any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.").

[98] *See* Gregg, 428 U.S. 189 (1976).

[99] *Id.* at 197.

[100] *Id.* at 195.

[101] *Id.* at 162-66.

[102] Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH L. REV. 1, 58 (2007).

[103] *See* Godfrey v. Georgia, 446 U.S. 420, 432-33 (1980) (holding that the phrase "outrageously or wantonly vile, horrible or inhumane in that [they] involved . . . depravity of mind . . . " was too vague to be a constitutionally valid aggravating circumstance).

[104] Scott w. Howe, *Furman's Mythical Mandate*, 40 U. MICH. J. L. REFORM 435, 447 (2007).

mitigating evidence that defendants may offer during sentencing.[105] Juries may consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[106] Although this gives the defense ample opportunity to argue for their client's life, it also contributes to wide jury discretion. As the NAACP argued, "'Kill him if you want' and 'Kill him, but you may spare him if you want' mean the same thing in any man's language."[107]

C. How Capital Jury Discretion Leads to Heightened Risk of Racial Discrimination

The wide jury discretion in capital sentencing makes the death penalty particularly vulnerable to the infiltration of racial discrimination.[108] Without specific, objective standards to decide which defendants should receive the death penalty, juries rely on their subjective judgments to make the decision.[109] The Supreme Court has observed that a "juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether [the] crime involved aggravating factors."[110] The Court also pointed out that racial bias in jurors may make them "less favorably inclined toward [the defendant's] evidence of mental disturbance as a mitigating circumstance."[111]

D. Attempts and Failures at Evolving Equal Protection Jurisprudence in the Death Penalty Context

i. McCleskey v Kemp

It is exceedingly difficult to prove racial discrimination in criminal prosecutions because a defendant must prove that they suffered a discriminatory effect and that there was discriminatory intent by the government.[112] In McCleskey v. Kemp, a capital defendant attempted to make these showings by using statistical evidence of racial discrimination in the administration of

[105] *See* Lockett, 438 U.S. 604.

[106] *See id.*

[107] Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 392 (1995).

[108] Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 442-43 (1995) (stating that "breadth of the death penalty statutes and the unfettered discretion given to . . . juries provide ample room for racial prejudice to influence whether death is . . . imposed,").

[109] *See* Gregg, 428 U.S. 197 (noting impermissibly vague death penalty statutes enable juries to "reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die.").

[110] Turner v. Murray, 476 U.S. 28, 35 (1986).

[111] *Id.*

[112] United States v. Armstrong, 517 U.S. 456, 468 (1996).

the Georgia death penalty.[113] Mr. McCleskey was convicted of murdering a police officer, which allowed the jury to consider the death penalty under Georgia law.[114] Perhaps more significantly to Mr. McCleskey's case, the victim was also white.[115] The jury sentenced Mr. McCleskey to death.[116]

Mr. McCleskey filed a petition for a writ of habeas corpus.[117] He claimed that the process for capital sentencing in Georgia was administered in a racially discriminatory manner, thus violating the Eighth and Fourteenth Amendments of the United States Constitution.[118] To prove that Georgia's capital sentencing scheme discriminated based on race, Mr. McCleskey relied on the Baldus Study.[119]

The Baldus Study was the most comprehensive statistical analysis ever performed on race and capital sentences in a single state.[120] The study analyzed over 2,000 Georgia murder cases that took place in the 1970s using multiple regression analysis.[121] The results showed significant race-based disparities in the administration of the death penalty, despite controlling for 230 nonracial variables that could have accounted for the disparities.[122] Most notably, the study found that, "defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks."[123] In other words, a murder victim being white had a similar influence on sentencing as a defendant having a prior conviction for armed robbery, rape, or murder.[124] The Baldus study also found that racial disparities existed well before juries imposed the death sentences; prosecutors sought the death penalty in 70% of cases with black defendants and white victims, 32% of cases with white defendants and white victims, 15% of cases with black defendants and black victims, and 19% of cases involving white defendants and black victims.[125]

The Supreme Court accepted the Baldus Study as true and assumed the

[113] *See* McCleskey v. Kemp, 481 U.S. 279, 286 (1987).

[114] *Id.* at 284-85.

[115] *Id.* at 321 (noting that, among defendants similarly situated to Mr. McCleskey, twenty out of every thirty-four of them "would not have been sentenced to die if their victims had been black" rather than white) (Brennan, J., dissenting).

[116] *Id.* at 285.

[117] *Id.* at 286.

[118] *Id.*

[119] *Id.*

[120] Kennedy, *supra* note 84.

[121] McCleskey, 481 U.S. 286.

[122] *Id.* at 287.

[123] *Id.*

[124] Kennedy, *supra* note 84, at 1398.

[125] McCleskey, 481 U.S. 287.

validity of its conclusions.[126] The Court noted that Mr. McCleskey's Equal Protection claim extended to "every actor in the Georgia capital sentencing process," including the jury, the prosecutor, and the State itself.[127] However, the Supreme Court did not accept the statistical study as sufficient evidence of a constitutional violation by any of these actors.[128] According to the Court, to have prevailed under the Equal Protection Clause, Mr. McCleskey would have had to prove that "the decisionmakers in his case acted with discriminatory purpose."[129] The Court found that the Baldus Study failed to do so.[130] It reasoned that statistical evidence could not prove intent in jury deliberations because a jury's decision rests on too many variables to draw inferences about its conclusions based only on general statistics.[131]

Similarly, the Court found that statistical evidence could not be used to show discriminatory intent by prosecutors, who have "wide discretion."[132] Finally, the Court explained that to demonstrate Georgia's death penalty statute violated the Equal Protection Clause, Mr. McCleskey would have to show the state legislature passed the statute with the intent to inflict adverse effects upon racial minorities.[133] Again, the Court highlighted the necessary discretion afforded to legislatures, and refused to infer a discriminatory purpose based only on statistical evidence of disparate impact.[134]

The Court, at the end of its decision, highlighted additional concerns that informed its reasoning. Mr. McCleskey's claim, "taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[135] In his dissent, Justice Brennan characterized this concern as a fear of "too much justice."[136] The Court also ended its decision by noting that legislatures could decide if they wanted to use statistical studies in the future, but that the Court could not make that decision.[137]

ii. North Carolina's Racial Justice Act

In 2009, the North Carolina legislature followed the Court's guidance, and

[126] *Id.* at 289.
[127] *Id.* at 292.
[128] *Id.* at 292-99.
[129] *Id.* at 292.
[130] *Id.* at 293.
[131] *Id.* at 294.
[132] *See id.* at 296.
[133] *Id.* at 298-99.
[134] *Id.*
[135] *Id.* at 314-15.
[136] *Id.* at 339.
[137] *See id.* at 319 (1987) (reasoning that "[l]egislatures also are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with flexibility of approach *that is not available to the courts*[.]'") (quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976)) (emphasis added).

passed the Racial Justice Act.[138] The Act stated that no person could be given the death penalty if their sentence was "sought or obtained on the basis of race."[139] It prohibited race from being a "significant factor" in the decision to seek or obtain the death penalty in the county, prosecutorial district, judicial division, or State at the time the sentence was imposed.[140]

To establish that race was a significant factor, a defendant could use the type of statistical evidence rejected in McCleskey.[141] A defendant could show that (1) death sentences were sought or imposed significantly more frequently based on the race of the defendant; (2) death sentences were sought or imposed significantly more frequently based on the race of the victim; or (3) race was a significant factor in peremptory challenges during jury selection.[142] If the defendant successfully showed that race was a significant factor, the state could offer evidence, including statistical evidence, to rebut the finding.[143] If the state failed to rebut the finding, the death sentence would be replaced with life imprisonment without the possibility of parole.[144] A defendant could conduct this inquiry prospectively at pretrial conferences, or retroactively in the case of death row inmates.[145]

North Carolina's courts soon vacated four death sentences under the Racial Justice Act.[146] Marcus Robinson, Quintel Augustine, Christina Walters, and Tilmon Golphin, all on death row, showed that race was a significant factor that led to their death sentences.[147] Each defendant's death sentence was vacated and replaced with the lesser sentence of life in prison without parole.[148]

The Racial Justice Act's legacy was not long. In 2012, the North Carolina General Assembly revised the Act so that statistics alone could not prove discrimination, and the race of the victim could not be considered.[149] In 2013,

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[138] North Carolina Racial Justice Act, N.C. GEN. STAT. §§ 15A-2010 to 15A-2012 (2009) (repealed by S.L. 2013-154 § 5(a), 2013 N.C. Sess. Laws 368, 372 (effective June 19, 2013)).

[139] *Id.* § 15A-2010.

[140] *Id.* § 15A-2011.

[141] *See id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] Ed Pilkington, *North Carolina Judge Reduces Three Death Sentences Over Racial Bias*, GUARDIAN (Dec. 13, 2012), https://www.theguardian.com/world/2012/dec/13/north-carolina-judge-reduces-death-sentences (reporting the reversal of three death sentences, and mentioning a fourth that was reversed several months earlier).

[147] *Id.*

[148] *Id.*

[149] An Act to Amend Death Penalty Procedures. S.L. 2012-136, §3(e), 2012 N.C. Sess. Laws 472, 472–73; *see also* N.C. GEN. STAT. § 15A-2011 (2009).

the General Assembly repealed the bill entirely.[150]

V. A ROAD FORWARD: WHY CALIFORNIA'S RACIAL JUSTICE ACT IS A MODEL FOR OTHER LEGISLATURES

Although various legislation has failed to make a lasting impact on remedying racial discrimination in the criminal legal system, the California Racial Justice Act of 2020 offers a way forward.[151] The Act allows criminal defendants to use the type of statistics banned in McCleskey to challenge all criminal convictions, rather than only convictions that resulted in death sentences.[152] This will enable criminal defendants to challenge racism in jury selection, sentencing, and policing.[153] Other legislation passed in the same year in California also offers significant improvements to racism in jury selection, which plays a major role in racist criminal convictions.[154]

A. CALIFORNIA RACIAL JUSTICE ACT OF 2020 BACKGROUND

On September 30, 2020, the California state legislature passed the California Racial Justice Act of 2020.[155] The Act goes further than the North Carolina Racial Justice Act, or any other Racial Justice Act passed throughout the United States.[156] The Act states 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."[157] Unlike other racial justice acts, the California Racial Justice Act applies to all criminal prosecutions and sentences, rather than only to death sentences.[158] Additionally, the California Racial Justice

[150] N.C. GEN. STAT. § 15A-2011 (repealed by S.L. 2013-154 § 5(a), 2013 N.C. Sess. Laws 368, 372 (effective June 19, 2013)). The repeal applied retroactively, meaning that Marcus Robinson, Quintel Augustine, Christina Walters, and Tilmon Golphin would again be put on death row. However, in 2020, the North Carolina Supreme Court ruled that the retroactive portion of the bill violated the state's constitutional prohibition on *ex post facto* laws. *North Carolina Supreme Court Restores Life Sentences to Three Prisoners Whose Death Sentences Violated Racial Justice Act*, DEATH PENALTY INFO. CTR, (Sep. 28, 2020), https://deathpenaltyinfo.org/news/north-carolina-supreme-court-restores-life-sentences-to-three-prisoners-whose-death-sentences-violated-racial-justice-act.

[151] *See infra* Part V(A) and (B).

[152] *See infra* Part V(B).

[153] *See id.*

[154] *See id.*

[155] California Racial Justice Act, 2020 Cal. Stat. Ch. 317.

[156] Kentucky passed a Racial Justice Act that is more limited than both California and North Carolina's Racial Justice Acts. Julia Vitale, *The Racial Justice Act: Its Origin and State Interpretations*, INTERROGATING JUST. (Mar. 9, 2021), https://interrogatingjustice.org/death-sentences/the-racial-justice-act-its-origin-and-state-interpretations/.

[157] CAL. PENAL CODE § 745 (West 2021). The Racial Justice Act is also codified at sections 1473 and 1473.7 of the California Penal Code. Section 1473 concerns habeas petitions under the act. Section 1473.7 concerns motions to vacate for people no longer in custody.

[158] *Id.*

Act does not have a causal requirement; defendants are not required to prove that racial discrimination was a "significant factor" in the sentence sought or imposed.[159] Rather, the defendant can establish a violation if they prove by a preponderance of evidence that:

> (1) The judge, attorney in the case, a law enforcement officer . . . expert witness, or juror exhibited bias or animus toward the defendant because of . . . race, ethnicity, or national origin . . . .
>
> (2) During the defendant's trial . . . the judge, attorney . . . law enforcement officer . . . expert witness, or juror used racially discriminatory language about the defendant's race, ethnicity, or national origin . . . or otherwise exhibited bias or animus . . . because of the defendant's race, ethnicity or national origin, whether or not purposeful . . . .
>
> (3) Race, ethnicity, or national origin was a factor in the exercise of peremptory challenges. The defendant need not show that purposeful discrimination occurred in the exercise of peremptory challenges to demonstrate a violation of subdivision (a).
>
> (4) The defendant was charged or convicted of a more serious offenses than defendants of other races . . . who commit similar offenses and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race . . . in the county where the convictions were sought or obtained.
>
> (5)(A) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race . . . than on defendants of other races . . . in the county where the sentence was imposed.
>
> (5)(B) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race . . . than in cases with victims of other races . . . in the county where the sentence was imposed.[160]

If the defendant makes a successful showing, the trial court must hold a

[159] Marnie Lowe, *Fruit of the Racist Tree: A Super-Exclusionary Rule for Racist Policing Under California's Racial Justice Act*, 131 YALE L. J. 1035, 1040-41 (2022).

[160] CAL. PENAL CODE § 745(a)(1-5(b)) (West 2021).

hearing, where a defendant may utilize statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses.[161] A defendant may also file a motion requesting all evidence relevant to the potential violation that the state possesses.[162] If a violation is found, the court must provide a remedy specific to the violation.[163] Remedies include, but are not limited to: reseating a juror, declaring a mistrial, empaneling a new jury, and dismissing enhancements or reducing charges.[164]

The State of California clearly stated that the purpose of the law was to condemn racial discrimination and eradicate it from their criminal system.[165] The preamble to the Racial Justice Act states that "[i]t is the intent of the Legislature to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any state of a criminal trial, is intolerable. . . ."[166] The intention of the bill was to tackle the type of racial discrimination that the *McCleskey* Court made impossible to fight, which the Act directly mentions.[167] The law states that the Supreme Court was wrong to conclude that racial disparities in our criminal system are inevitable, and that "under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish."[168] The law also clearly states that tackling intentional discrimination is not enough: "Implicit bias," the law states, "although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias."[169]

B. HOW THE CALIFORNIA RACIAL JUSTICE ACT MAKES IT EASIER FOR CRIMINAL DEFENDANTS TO PROVE DISCRIMINATION IN COURT

The California Racial Justice Act will prevent racial discrimination in the criminal legal system more effectively than the Equal Protection Clause.[170] The Racial Justice Act does not require criminal defendants to show that the government intended to discriminate against them based on race, which is a nearly impossible task.[171] Thus, criminal defendants will more easily be able

[161] *Id.* § 745(c)(1).
[162] *Id.* § 745(b).
[163] *Id.* § 745(e).
[164] *Id.* § 745(e)(1)(A)-(D).
[165] 2020 Cal. Stat. Ch. 317.
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *See* People v. Bryant, 253 Cal. Rptr. 3d 289, 307 (Cal. Ct. App. 2019) (Humes, J., concurring) (stating that the evidentiary showing demanded by the Equal Protection Clause is almost impossible to meet under any circumstances).
[171] *Id.*

to prove racial discrimination in jury selection, sentencing, and policing.

iii. Jury Selection

It is especially important that people of color are fairly represented on juries, because prosecutors' offices and members of the judiciary are overwhelmingly white.[172] Thus, when people of color are not represented fairly on juries, decisions about whom to arrest, whom to prosecute, and how to punish are primarily made by individuals who have not experienced racial bias.[173] Additionally, the voice of one juror who has experienced racial bias can go a long way; on capital juries, having just one Black juror can influence whether the jury issues the death penalty.[174]

Although *Batson* prohibits race-based peremptory challenges during jury selection, many jurors are still excluded because of their race.[175] Racial discrimination continues because the *Batson* framework allows prosecutors to make peremptory challenges based on race if they can justify doing so with a race-neutral reason.[176] When *Batson* passed, Justice Thurgood Marshall stated that the decision "[would] not end the racial discrimination that peremptories inject into the jury-selection process."[177] So far, Justice Marshall's prediction has been correct. A study that examined Mississippi trials from 1992 to 2017 found that Black prospective jurors were four times more likely to be struck than white prospective jurors.[178] In California, a study found that prosecutors used peremptory strikes on prospective Black jurors in nearly 72% of cases between 2006 and 2008, but on prospective white jurors less than 1% of cases.[179]

Furthermore, there are rarely consequences for prosecutors who racially discriminate in jury selection.[180] Under the Civil Rights Act of 1975, it is a federal crime to exclude any citizen from a jury because of race.[181] However, no one has ever been convicted under the statute. A recent study also failed to find a single instance of a prosecutor being found guilty of an ethics

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[172] *Race and the Jury: Illegal Discrimination in Jury Selection*, EQUAL JUST. INITIATIVE (2021), https://eji.org/report/race-and-the-jury/.

[173] *Id.*

[174] *See generally* BENJAMIN FLEURY-STEINER, JURORS' STORIES OF DEATH: HOW AMERICA'S DEATH PENALTY INVESTS IN INEQUALITY 66 (2004) (Chapter 5: Voices of Resistance) (interviewing capital jury members and presenting anecdotal evidence of having at least one Black jury member influences the jury's decision).

[175] *Race and the Jury: Illegal Discrimination in Jury Selection*, *supra* note 172.

[176] *Id.* Racial discrimination also continues because of structural issues that continue to keep Black people and people of color out of juries. *Id.*

[177] Batson, 476 U.S. 102-103.

[178] *Race and the Jury: Illegal Discrimination in Jury Selection*, *supra* note 172.

[179] *Id.*

[180] *Id.*

[181] *Id.*

violation due to a *Batson* violation.[182]

California's Racial Justice Act makes it easier for defendants to show that a peremptory challenge was race-based because the defendant does not need to show that purposeful discrimination occurred.[183] Under *Batson* precedent, a prosecutor could provide any race-neutral reason for striking a juror, so a defendant would have to prove intent to discriminate to succeed.[184] California's Racial Justice Act itself does not go as far as to ban pretextual reasons for jury strikes; however, in the same session that it passed the Racial Justice Act, the California State Legislature did so in Assembly Bill No. 3070.[185]

Assembly Bill 3070 states that *Batson* fails to eliminate racial discrimination because prosecutors can justify peremptory strikes based on stereotypes associated with protected groups.[186] The new law considers invalid several race-neutral justifications for juror strikes that are commonly used to mask racial discrimination.[187] Having a distrust of law enforcement, having a close relationship with people who have been arrested, being from a certain neighborhood, receiving state benefits, and having a child outside of marriage are amongst the commonly used justifications that are now presumptively invalid.[188] To overcome this presumption, the factfinder must determine it is highly probable that the reasons for the peremptory challenge are unrelated to explicit or implicit bias and are genuinely about the juror's ability to be fair and impartial in the case.[189] Assembly Bill 3070 also explicitly allows the defendant to use evidence of whether the prosecutor or the prosecutor's office has used peremptory challenges disproportionately against any racial group.[190] This arms criminal defendants with more power to challenge prosecutors who systematically prevent Black people from being on juries, and it prevents prosecutors from using many pretextual justifications to exclude Black jurors and jurors of color.

The Racial Justice Act, combined with Assembly Bill No. 3070 will significantly help prevent racially discriminatory peremptory strikes because a defendant will not have to prove intentional discrimination by the prosecutor, and the court will presume invalid many race-neutral justifications typically used to exclude jurors based on race. The law will also enable the defendant

[182] *Id.*

[183] *See id.*

[184] *Id.*

[185] ASSEMB. 3070, 2019-2020 STATE ASSEMB. REG. SESS. (CA. 2020), codified at CAL. CIV. PRO. § 231.7 sec.1(b) (West 2021).

[186] CAL. CIV. PRO. § 231.7 sec.1(b) (West 2021).

[187] *Id.* § 231.7(e)(1)-(13).

[188] *Id.* § 231.7(e)(1)-(13).

[189] *Id.* § 231.7(f).

[190] *Id.* § 231.7(e)(3)(G).

to show that the prosecutor or prosecutor's office has a history of disproportionately striking jurors of color.

iv. Sentencing

Prosecutors are afforded a great deal of discretion to make charging decisions.[191] However, this discretion allows explicit and implicit bias to influence sentencing decisions. In a report by the Sentencing Commission, researchers found that sentences for Black men were 19.1% longer than sentences for white men between 2011 and 2016.[192] The report also found that, controlling for violence in each defendant's personal histories, Black men received 20.4% longer sentences than similarly situated white men,[193] and were significantly less likely to receive a non-government sponsored downward departure or variance.[194] Federal prosecutors also charge Black men with crimes that require mandatory minimum sentences 65% more often than any other similarly situated defendants.[195] Similarly, prosecutors are also more likely to charge Black defendants under habitual offender laws, which carry longer sentences.[196]

Although there are clearly race-based disparities in sentencing in the aggregate, a single defendant would struggle to prove race-based discrimination in their own prosecution under the Equal Protection Clause.[197] Defendants would be required to demonstrate that similarly situated individuals were not prosecuted similarly to them, and that the prosecutor had the intent to discriminate based on race.[198] The California Racial Justice Act of 2020 provides defendants the power to challenge race-based disparities in prosecutorial decisions based on aggregate data about sentencing practices generally.[199] By allowing defendants to use statistical evidence in their racial discrimination claims, the Racial Justice Act enables defendants to compare the severity of the charges and sentences compared to similarly situated defendants of different races. Rather than proving a prosecutor had discriminatory intent when making a charging or sentencing decision, the defendant can prove that the prosecutor's office generally sentences members of one race

[191] *See e.g.,* U.S. v. Batchelder, 422 U.S. 114, 125 (1979) (stating that the decision of whether to prosecute and what charges to file generally rests with the prosecutor's discretion).

[192] SCHMITT ET AL., *supra* note 12.

[193] *Id.* at 17.

[194] *Id.* at 2 (A downward departure is a court's imposition of a sentence lesser than the sentencing guidelines propose); *Departure*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[195] *Race and Sentencing*, NAT'L ASS'N OF CRIM. DEF. LAW., (Nov. 23, 2022), https://www.nacdl.org/Content/Race-and-Sentencing.

[196] *Id.*

[197] *See supra* Section III.

[198] Armstrong, 517 U.S. 465.

[199] *See supra* Section V(a).

more severely than another.

The Act provides criminal defendants with a tool to combat the implicit biases prosecutors have that contribute to systemic racial disparities in sentencing. This is critical because the source of racial disparities in the criminal legal system "is deeper and more systemic than explicit racial discrimination."[200] Over time, California's Racial Justice Act will more effectively keep prosecutors accountable and prevent them from acting on implicit and explicit racial biases. If the statistical data from their office indicates systemic disparities based on race, the courts will prevent the government from sentencing and convicting future defendants unfairly based on race.[201] It will thus serve as a limit on the prosecutor's discretion.

v. Policing

California's Racial Justice Act could and should have an impact on policing as well.[202] Section 745(a)(1) prohibits the state from seeking or obtaining a criminal conviction when a law enforcement officer involved in the case exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin.[203] Unlike other sections of the law which limit violations to the courtroom, Section 745(a)(1) does not limit where the racial animus occurred to establish a violation.[204] As a result, the law can be interpreted to apply to out-of-court law enforcement conduct, such as during investigations and arrests.[205] Because no part of the Act requires intentional bias, Section 745(a) could and should apply to prevent implicit bias that results in racial discrimination in policing.[206] California's Racial Justice Act could thus serve as a deterrent to law enforcement from exhibiting purposeful or non-purposeful racial bias.[207]

CONCLUSION

There are significant limitations to California's Racial Justice Act. The Act as originally passed was not retroactive. Until later legislation remedied this, people who were subjected to racial discrimination in the criminal legal

[200] SENT'G PROJECT, *supra* note 42, at 1.

[201] *See* Hannah Laub, *How California's Racial Justice Act of 2020 Protects Criminal Defendants From Racial Discrimination and Why the Equal Protection Clause is Not Enough*, 26 RICH. J. PUB. INT. L. REV. 1, 19-20 (2023).

[202] *See generally* Lowe, *supra* note 159, at 1035.

[203] CAL. PENAL CODE § 745(a)(1) (West 2021).

[204] *Id.*

[205] Lowe, *supra* note 159, at 1042.

[206] *Id.* at 1042-43.

[207] *Id.* at 1055.

system before January 1, 2021, did not have an opportunity to obtain relief.[208] The law is also limited to the State of California, so the Supreme Court's *McCleskey* decision continues to set an impossibly high bar for criminal defendants who experience racial discrimination in the criminal legal system throughout the United States. However, the Racial Justice Act is an example of concrete action that legislatures can take to reduce racial discrimination in the criminal legal system. Combined with California's Assembly Bill 3070, which reduces counsel's ability to strike potential jurors based on race, California has protected constitutional rights that the *McCleskey* and *Batson* left vulnerable through the California Racial Justice Act of 2020.

[208] The California Racial Justice Act for All was passed in 2022, so today the Racial Justice Act is retroactive. Press Release, Assemblymember Ash Karla, California Racial Justice Act for All Signed Into Law (Sept. 20, 2022), https://a25.asmdc.org/press-releases/20220930-california-racial-justice-act-all-signed-law.

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