

## Articles

# Proving Actionable Racial Disparity Under the California Racial Justice Act

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*Racial disparity is a fact of the United States criminal justice system, but under the Supreme Court's holding in *McCleskey v. Kemp*, racial disparities—even sizable, statistically significant disparities—do not establish an equal protection violation without a showing of “purposeful discrimination.” The California Racial Justice Act (CRJA), enacted in 2020 and further amended in 2022, introduced a first-of-its-kind test for actionable racial disparity even in the absence of a showing of intent, allowing for relief when the “totality of the evidence demonstrates a significant difference” in charging, conviction, or sentencing across racial groups when compared to those who are “similarly situated” and who have engaged in “similar conduct.” Though the CRJA was enacted over two years ago, two obstacles have made its promised remedies exist largely only on paper: confusion about how to apply its new test and a lack of access to the data needed to demonstrate a significant difference. This Article attempts to overcome these obstacles by exploring and interpreting the “significant difference” test and by analyzing a database of disparities that enables controls for criminal history and geography (similarly situated) and overlapping elements (similar conduct) based on comprehensive data from the California Department of Justice. This Article also presents two case studies that demonstrate how defendants might establish an initial showing of significant difference sufficient to successfully move for discovery.*

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## INTRODUCTION

In California, as in the rest of the country, the criminal justice system is characterized by extreme racial disparities. Nationally, Black individuals are more likely to be arrested, detained pre-trial, sentenced to correctional supervision, and incarcerated than their non-Black counterparts.<sup>1</sup> In California, there are worse outcomes in patterns of arrest, conviction, conviction of a felony, and imprisonment among the Black population in nearly all fifty-eight California counties, from the smallest to the largest, from the least to most diverse: Black Californians are nearly three times as likely to have an arrest record as White Californians, four times as likely to have at least one felony conviction, and six times as likely to have received at least one incarceration sentence.<sup>2</sup> Black Californians in all but two counties are more likely to have a felony conviction than White Californians.<sup>3</sup> As stark as these disparities are, the Supreme Court held in *McCleskey v. Kemp* that under federal law these disparities are not sufficient to establish a violation of the 14th Amendment's Equal Protection Clause in the absence of proof of "purposeful discrimination."<sup>4</sup>

But things are different in California. Following the passage of the California Racial Justice Act (CRJA) of 2020, evidence of racial disparities in the criminal justice system *can* be the basis for relief by the courts.<sup>5</sup> This remarkable law gives by state statute what the *McCleskey* decision foreclosed constitutionally—a pathway to relief based solely on evidence of unexplained racial disparity.

The CRJA prohibits the state from "seek[ing] or obtain[ing] a criminal conviction, or seek[ing], obtain[ing], or impos[ing] a sentence on the basis of race, ethnicity, or national origin."<sup>6</sup> Among other circumstances, the statute is violated when the evidence demonstrates the presence of a "*significant difference* in seeking or obtaining convictions or in imposing sentences comparing individuals who have engaged in *similar conduct* and are *similarly situated*, and the prosecution cannot establish race-neutral reasons for the disparity."<sup>7</sup> To make the requisite showing, the defendant must present evidence

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1. Magnus Lofstrom, Brandon Martin & Steven Raphael, *Racial Disparities in Criminal Justice Outcomes: Lessons from California's Recent Reforms*, CATO INST. RSCH. BRIEFS ECON. POL'Y, no. 251, Feb., 2021, at 1, <https://www.cato.org/sites/cato.org/files/2021-02/RB251.pdf> ("While constituting only 13 percent of the nation's population, African Americans account for almost one-third of arrests and . . . of people under some form of community corrections supervision. African Americans are also more likely to be detained pre-trial, . . . and constitute a disproportionate share of those currently incarcerated relative to other . . . groups.").

2. See *infra* Table 2.

3. See *infra* Appendix, Figures A1, A3. The two exceptions are Alpine and Sierra Counties, with a combined estimated Black population of thirteen individuals according to recent Census Bureau statistics. *Id.*

4. *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987).

5. CAL. PENAL CODE § 745(a)(3) (West 2023) (amending CAL. PENAL CODE § 745(a)(3) (West 2020)).

6. *Id.* § 745(a).

7. *Id.* § 745(h)(1) (emphasis added).

that “may include statistical evidence, aggregate data, or nonstatistical evidence” of the difference.<sup>8</sup> In sharp contrast with *McCleskey*, which the CRJA’s legislative history calls out by name,<sup>9</sup> the Act specifically states that “[t]he defendant does *not need to prove intentional discrimination*.”<sup>10</sup>

But whereas many commentators predicted a flood of claims, there has only been a trickle. As of this writing, nearly three years after the enactment of the CRJA, there is only one published appellate decision pertaining to the sufficiency of statistical evidence required to make a CRJA claim.<sup>11</sup> The reasons are twofold: confusion about how to apply the CRJA’s “significant difference” test in a way true to the statute’s text and the legislature’s intent, and a lack of access to the empirical evidence (“statistical,” “aggregate,” or “non-statistical”) required to prove a violation.

This Article attempts to address both deficiencies. Drawing from the text and legislative history of the law—combined with construction by the legislature and courts—we interpret and analyze the CRJA’s “significant difference” test and explore the empirical analyses that might be used to support CRJA claims. Using comprehensive data from the California Department of Justice (“Cal DOJ”) of every adult arrest, charge, conviction, and sentence over the last ten years, we explore the application of the statute’s “just cause” standard for discovery by considering differences by race, ethnicity, or national origin in the charging, conviction, felony conviction, and sentencing of defendants. We then present patterns of disparity in connection with two case studies that illustrate how CRJA claims may be made in the presence of rich data. Our first case study focuses on “wobbler” crimes—crimes that, based on the same underlying conduct, could be charged as a felony or misdemeanor under identical sections of the California Penal Code. Our second case study considers situations in

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8. *Id.*

9. See *Criminal Procedure: Discrimination: Hearing on A.B. 256 Before the S. Comm. on Pub. Safety*, 2021 Gen. Assemb., Reg. Sess. 6 (Cal. 2021) (“The California Racial Justice Act is a countermeasure to a widely condemned 1987 legal precedent established in the case of *McCleskey v. Kemp*.”).

10. PENAL § 745(c)(2) (emphasis added).

11. *Young v. Superior Ct.*, 294 Cal. Rptr. 3d 513, 534 (Ct. App. 2022) (“[T]he statistical proof Young puts forward does not make out a particularly strong case of racial profiling . . . . The flaws in Young’s statistical proof, however, serve to illustrate how the good cause standard works. At this stage, he need not make a strong case but only a plausible one. . . . Statistical discovery could bolster this claim and rationally tie it to prosecutorial decisionmaking, at least as a *prima facie* matter.”). However, lower courts have ruled on numerous other motions, including in a case presided over by Contra Costa Judge David Goldstein on May 19, 2023, in which the court threw out the gang enhancements levied against four defendants reportedly on the basis of “a decade of data—what he called a ‘significant statistical disparity’—showing that gang charges are more often filed against Black people.” Nate Gartrell, *Judge Finds Contra Costa DA’s Filing Practices Are Racist, Dismisses Gang Charges in Murder Case*, THE MERCURY NEWS (May 22, 2023, 11:27 AM), <https://www.mercurynews.com/2023/05/19/judge-finds-contra-costa-das-gang-filing-practices-are-racist-dismisses-special-circumstances-charges-in-murder-case/amp/>. The data showed Black people were six to eight percent more likely to be charged with “special circumstance gang enhancements” than people who were not Black. *Id.*

which the same underlying conduct (related to pimping and pandering offenses) may be charged under a variety of statutory sections, each with different penalties attached. Our analysis is a “thought experiment” drawing from available empirical data to assist courts and practitioners with the implementation of the “just cause” and “significant difference” standards of the CRJA. We also address the CRJA’s related requirement that comparisons consider “similarly situated” defendants or “similar conduct” and attempt to demonstrate what these similarities might look like in practical terms.

Part I explores the Supreme Court’s jurisprudence on racial disparities and how the CRJA radically departs from it. Where the Supreme Court focuses on purposeful discrimination (disparate treatment), the CRJA expressly rejects this standard and enables discovery (and substantive claims) to proceed on the basis of differential outcomes (disparate impact). We discuss similar, failed Racial Justice Act efforts in Kentucky and North Carolina. Finally, we undertake a detailed description of how the CRJA’s standards of proof get more stringent as a claim proceeds from discovery to the merits.

Part II focuses on the CRJA’s statutory language, construing the meaning of the “significant difference” test and exploring what kinds of evidence might satisfy it. We also address the CRJA’s “just cause” standard for discovery and requirement that, on the merits, comparisons be made among groups that are similarly situated or who have engaged in similar conduct.

Part III presents data about racial disparities in the California criminal justice system. We also explain the design of our two case studies, which test for “similarly situated” defendants by comparing first-time offenders charged with “wobblers” and for “similar conduct” by examining the racial makeup of people charged with different crimes based on the same underlying conduct.

Part IV discusses our data sample and analysis, and Part V presents our findings. We recommend reading the findings in Part V alongside our guidance in Part II. We want to ensure that readers understand that standards like “clear and convincing,” “preponderance,” and “beyond a reasonable doubt” have analogues in the work we present. Data-based evidence, like other kinds of evidence, is not binary, yes or no. Though some of our discussion uses different terminology, the same question—how confident we are in the outcome, whether beyond a reasonable doubt or just more likely than not—is common to both legal and empirical investigations.

I. THE RACIAL JUSTICE ACTS:  
FROM PURPOSIVE DISCRIMINATION TO “SIGNIFICANT DIFFERENCES”

The 14th Amendment’s Equal Protection Clause prohibits states from denying “to any person within its jurisdiction the equal protection of the laws.”<sup>12</sup> While it would seem that the Equal Protection Clause would provide some redress for racial disparities in the criminal legal system, in practice, it has very rarely been relied upon in a court of law to do so. One of the few successful equal protection cases is *Yick Wo v. Hopkins*.<sup>13</sup> This 1886 case is still cited for the proposition that the Equal Protection Clause applies to law enforcement even though the law being enforced was a civil regulation concerning permits for laundries in wooden buildings.<sup>14</sup> What distinguishes this case is the almost one hundred percent racial disparity involved. All 150 Chinese laundry operators were arrested for violating the laundry ordinance; no non-Chinese applicant was.<sup>15</sup> All two hundred Chinese applicants were denied permits to continue operating their laundries in wooden buildings; only one non-Chinese applicant was denied, even though they were operating laundries “under similar conditions.”<sup>16</sup> The Court held that, “[t]hough the law itself be fair on its face[,] . . . if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, . . . the denial of equal justice is still within the prohibition of the Constitution.”<sup>17</sup>

*Yick Wo* was an easy case, perhaps, because the racial disparities were so extreme. When there are racial disparities that are not all-or-nothing, relief is much more difficult to obtain. In *McCleskey v. Kemp*, a study finding that defendants who killed White victims were 4.3 times more likely to receive the death penalty than defendants who killed Black victims was insufficient to establish an equal protection violation.<sup>18</sup> Denying *McCleskey*’s equal protection claim, Justice Powell, writing for the majority, ruled that “statistics, at most, may show only a likelihood that a particular factor entered into some decisions.” The Court reasoned that to rule otherwise would, “taken to its logical conclusion, throw[] into serious question the principles that underlie our entire criminal

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12. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

13. See generally *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that an ordinance, while race-neutral on its face, was administered in a discriminatory manner that violated the Equal Protection Clause).

14. *Id.* at 366–67.

15. *Id.* at 359. This Article uses the phrase “Chinese” here intentionally because under the Chinese Exclusion Act, people of Chinese descent were not eligible to be naturalized, and thus retained their original citizenship. Law of May 6, 1882, ch. 126, 22 Stat. 58, *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 344, § 1, 57 Stat. 600.

16. *Yick Wo*, 118 U.S. at 359.

17. *Id.* at 373–74.

18. 481 U.S. 279, 279–280, 289, 297 (1987).

justice system. . . . [I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."<sup>19</sup> While Powell cited a concern that the system would otherwise grind to a halt, Justice Brennan, writing in dissent, famously responded that "such a statement seems to suggest a fear of too much justice."<sup>20</sup>

Enacted in 2020, the CRJA accepts Justice Brennan's challenge to embrace the reality that the California justice system may, in fact, be characterized by disparities and bias, and that, despite the difficulties of determining where to draw the line, the legislature should not shrink from this task out of fear of "too much justice." The CRJA does by statute what the Supreme Court has seldom done by case law: It allows for relief in the absence of a showing of an intent to discriminate. The CRJA allows for evidence of disparate impact—statistical and otherwise—to provide grounds for relief on facts less extreme than those in *Yick Wo*. But the grant of authority to consider disparity does not automatically answer the questions that remain. How much disparity is too much? How much of a difference needs to be observed to provide grounds for relief? How are we to separate case (and crime) factors that would justify disparities from those made on the basis of race or other protected classifications?

In this Part, we discuss the legal backdrop to the CRJA: beginning with *McCleskey v. Kemp* and related Supreme Court caselaw; and then, briefly, two forebears to the CRJA, the Kentucky and North Carolina Racial Justice Acts. In each context we pay attention to the core question at the heart of the use of evidence of disparities: how to disentangle the role of impermissible racial bias from permissible race-neutral factors. Or, to put it in simpler terms, how do we separate race-influenced signals from race-neutral noise? We then describe the CRJA's approach in detail: patterns of disparity can be sufficient for relief, but only when differences are "significant" and documented at the county level among "similarly situated" persons engaged in "similar conduct."

A. ACTIONABLE RACIAL DISPARITIES AT THE SUPREME COURT:  
*MCCLESKEY V. KEMP* AND *UNITED STATES V. ARMSTRONG*.

"Even though racial bias is widely acknowledged as intolerable in our criminal justice system, it nevertheless persists because courts generally only address racial bias in its most extreme and blatant forms."<sup>21</sup>

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19. *Id.* at 314–15.

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

21. A.B. 2542, 2019–2020 Gen. Assemb., Reg. Sess. (Cal. 2020).

In the legislative history of the CRJA, the California legislature explicitly states its objective to reject *McCleskey*'s conclusion that racial disparities are "an inevitable part of our criminal justice system."<sup>22</sup> This case was explicitly cited because *McCleskey* was a Black man sentenced to death in Georgia for killing a White police officer.<sup>23</sup> *McCleskey* raised a 14th Amendment equal protection claim, arguing both that the race of the victim and the race of the perpetrator changed the likelihood of a death sentence.<sup>24</sup> In addition, he brought an 8th Amendment claim, arguing that the death penalty constituted "cruel and unusual punishment."<sup>25</sup> It was "arbitrary and capricious" since similarly situated White defendants did not receive the death penalty.<sup>26</sup> *McCleskey* relied on a carefully constructed study by David Baldus, Charles Pulaski, and George Woodworth that found a statistically significant relationship between the race of the victim and the likelihood of the death penalty.<sup>27</sup> According to the study, prosecutors were more likely to seek the death penalty for Black defendants compared to White defendants, and were even more likely to do so when the victim was White.<sup>28</sup> The majority opinion, denying relief, did not attack the validity of the study.<sup>29</sup> Instead, the majority said it was not a relevant criterion of proof.<sup>30</sup> The Supreme Court, citing precedent, observed that the Constitution prohibits only purposeful discrimination, not mere outcome disparities.<sup>31</sup> Thus, statistical evidence was not legally relevant since *McCleskey* provided no proof that purposeful discrimination was the motivating factor to seek the death penalty in his particular case.<sup>32</sup>

One problem with requiring proof of intentional discrimination is that discrimination may be present without being purposeful. Discrimination can occur through behaviors "that the perpetrator does not subjectively experience

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22. *Id.*

23. *McCleskey*, 481 U.S. at 283–85.

24. *Id.* at 291–92.

25. U.S. CONST. amend. VIII.

26. *McCleskey*, 481 U.S. at 306–07.

27. *Id.* at 286. For our discussion of the meaning and limitations of statistical significance, see *infra* Part II.B.

28. *McCleskey*, 481 U.S. at 286–87. A subsequent study concluded that "Baldus actually *understated* the race problems inherent to the operation of modern death penalty jurisprudence." Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585, 587 (2020) (emphasis in original). The Baldus study only looked at who was sentenced to death. *Id.* Subsequent research by Phillips and Marceau looked at who was actually executed, and they concluded that "the overall execution rate is a staggering seventeen times greater for defendants convicted of killing a white victim." *Id.*

29. *McCleskey*, 481 U.S. at 324 (Brennan, J., dissenting).

30. *Id.* at 289, 293–97.

31. *Id.* at 292.

32. *Id.* at 297 ("[W]e hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in *McCleskey*'s case acted with discriminatory purpose."). "[T]o prevail under the Equal Protection Clause, *McCleskey* must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* at 292 (emphasis in original).



as intentional,” as scientific studies have established.<sup>33</sup> As acclaimed sociologist David Williams and his co-author Toni Rucker have written, rather than discrimination being the “aberrant behavior” of a few, systemic discrimination is the product of “institutional policies and unconscious bias based on negative stereotypes.”<sup>34</sup> Discrimination based on racial stereotypes occurs “automatically and without conscious awareness even by persons who do not endorse racist beliefs.”<sup>35</sup> The legislative text creating the CRJA acknowledges these perspectives.<sup>36</sup>

Another problem with proving purposeful discrimination is that evidence of purpose is difficult to obtain, as illustrated by the Supreme Court case of *United States v. Armstrong*.<sup>37</sup> In that case, Christopher Armstrong, a Black defendant, filed a motion for discovery alleging that he was being targeted for prosecution on the basis of his race.<sup>38</sup> He cited the fact that every person prosecuted in the United States District Court for the Central District of California in 1991 for selling crack cocaine was Black.<sup>39</sup> Though Armstrong won his motion for discovery, the decision was reversed by the Ninth Circuit, and the Supreme Court upheld the reversal, holding that Armstrong was not entitled to discovery without “some evidence tending to show the existence of the essential elements of . . . discriminatory effect and discriminatory intent.”<sup>40</sup> Under *Armstrong*, it is an abuse of discretion for a judge to order discovery unless a defendant already has some of the evidence necessary to prove their case.<sup>41</sup> For Armstrong, that would have meant “identify[ing] individuals who were not black and could have been prosecuted for the offenses for which [he was] charged, but were not so prosecuted.”<sup>42</sup>

The combination of *McCleskey* and *Armstrong*—no relief on statistics alone and no discovery to find relevant evidence, respectively—effectively stops equal protection claims in their tracks.<sup>43</sup> For example, in *Floyd v. City of New*

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33. David R. Williams & Toni D. Rucker, *Understanding and Addressing Racial Disparities in Health Care*, 21 HEALTH CARE FIN. REV. 75, 79 (2000).

34. *Id.* at 75.

35. *Id.* at 79.

36. A.B. 2542, 2019-2020 Gen. Assemb., Reg. Sess. (Cal. 2020) (“There is growing awareness that no degree or amount of racial bias is tolerable in a fair and just criminal justice system, that racial bias is often insidious, and that purposeful discrimination is often masked and racial animus disguised.”).

37. See 517 U.S. 456, 465–67, 476 (1996).

38. *Id.* at 456, 459.

39. *Id.* at 459.

40. *Id.* at 468 (internal citation omitted).

41. See *id.*

42. *Id.* at 470.

43. For example, Professor David Sklansky has observed that “[a]lmost without exception, constitutional claims” involving racial disparities in crack cocaine offenses “have been rejected out of hand.” David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1283 (1995); see also Daniel J.

York, a case challenging New York City's stop-and-frisk program that had hundreds of thousands of stops each year, an equal protection violation was successfully established in only one instance.<sup>44</sup>

We focus on discovery in this Article because discovery provides a way to obtain the evidence the *McCleskey* court said an individual needed to support an equal protection claim. Statistics show smoke; discovery shows how the fire started. Consider how our understanding of *McCleskey*'s racial disparities might have changed with access to government files. For example, in 2016, the Supreme Court held in *Foster v. Chatman* that prosecutors in Muscogee County, Georgia, violated Timothy Tyrone Foster's right to an impartial jury by systematically striking Black jurors.<sup>45</sup> Foster provided materials from the District Attorney's office that, inter alia, included jury venire lists with names of Black jurors highlighted in green, as well as the letter "B" next to each of them.<sup>46</sup> The murder which Foster was accused of occurred in 1986—the same year the Supreme Court issued the *McCleskey* opinion.<sup>47</sup> And while *McCleskey*'s conviction was in 1978,<sup>48</sup> the *Foster* case has a temporal

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Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. ILL. L.F. 88, 92 (1973) ("[T]here have been few successful challenges to the equality of prosecutions."). Givelber provides a list of a few cases in footnote eighteen of his article but notes that to succeed on an equal protection claim for selective prosecution, a defendant would have to prove that he was the only (or one of a very few) offenders actually prosecuted, that the prosecutor knew that there were other violators, and that the decision to prosecute was based on protected characteristics. Givelber, *supra* at 92–94, 92 n.18; see also W. David Ball, *The Plausible and the Possible: A Bayesian Approach to the Analysis of Reasonable Suspicion*, 55 AM. CRIM. L. REV. 511, 524 (2018) ("As Goel and co-authors have explained[,] . . . *Washington v. Davis* requires a showing of racial animus, *Whren v. United States* says that the Fourth Amendment does not encompass equal protection concerns, *United States v. Batchelder* establishes that prosecutorial discretion is essentially unbounded, and *United States v. Armstrong* makes selective enforcement claims very difficult to prove.") (first citing Sharad Goel, Maya Perelman, Ravi Shroff & David Alan Sklansky, *Combatting Police Discrimination in the Age of Big Data*, 20 NEW CRIM. L. REV. 181, 202–04 (2017); then citing *Washington v. Davis*, 426 U.S. 229 (1976); then citing *Whren v. United States*, 517 U.S. 806 (1996); then citing *United States v. Batchelder*, 442 U.S. 114 (1979); and then citing *United States v. Armstrong*, 517 U.S. 456 (1996)).

44. Cornelio McDonald prevailed because, in his stop, "[t]he only suspect description was 'black male,' the street was racially stratified, and other non-black individuals were present and presumably behaving no differently than McDonald—yet only McDonald was stopped." 959 F. Supp. 2d 540, 633 (S.D.N.Y. 2013). McDonald had no contraband on him and was sent on his way. *Id.* at 632.

45. 578 U.S. 488, 513–14 (2016) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)); see also *Batson*, 476 U.S. 79, 86 (1986) ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."). *Batson* established a three-part test to determine whether the jury selection process is discriminatory. *Id.* at 80, 94–97. In the first step (also the most relevant to this Article), defendants are permitted to use statistical evidence to make a prima facie showing of purposeful discrimination in the prosecutor's exercise of peremptory challenges. *Id.* at 80, 95. If the defense is successful, the burden shifts to the prosecutor to provide a race-neutral explanation for exercising their peremptory challenge, then it goes to the trial court. *Id.* at 80, 97. But while *Batson* made it easier for defendants to initially show racial discrimination, the challenges have been ineffective and hard to overcome because prosecutors can present any race-neutral justification without scrutiny. *Id.* at 127–29.

46. *Foster*, 578 U.S. at 493–94.

47. *Id.* at 492.

48. *McCleskey v. Kemp*, 481 U.S. 279, 283 (1987).

connection to the 1970s as well: the Assistant District Attorney in Foster's case worked on a case where prosecutorial notes "designated prospective white jurors with a 'W' and prospective black jurors with an 'N.'"<sup>49</sup> This prosecutor was involved in a total of five death penalty cases of Black defendants in Georgia in the late 1970s, "and all of them had all-white juries."<sup>50</sup> In those cases, twenty-seven of the twenty-seven prospective Black jurors were struck by the prosecution.<sup>51</sup> Perhaps if Georgia had allowed further discovery based on the differences observed in *McCleskey*, it may have found the evidence of purposeful discrimination the Supreme Court purported to need.

Though Supreme Court precedent presents major obstacles to equal protection claims, the U.S. Constitution is only a "floor of protection"<sup>52</sup> and "a minimum, which the states may surpass as long as there is no clash with federal law."<sup>53</sup> So while the Equal Protection Clause provides little relief, it also poses no barrier to federal or state enactments of—and enforcement of—Racial Justice Acts. We now turn to two examples of state RJA's that predate the CRJA.

#### B. THE RACIAL JUSTICE ACTS OF KENTUCKY AND NORTH CAROLINA

Prior to the passage of the California RJA, Kentucky and North Carolina followed *McCleskey*'s suggestion that "[l]egislatures . . . are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."<sup>54</sup> The RJAs of Kentucky and North Carolina sought to liberalize the use of statistical evidence, but limited jurisdiction to death penalty cases. The Kentucky RJA has been used only a handful of times over twenty-five years, but it has never overturned a death sentence, and thus could fairly be described as delivering "too little justice." The North Carolina RJA was repealed after just four years and eight cases,<sup>55</sup> and, for the reasons described below, could be

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49. Bill Rankin, *Motion: Prosecutors Excluded Black Jurors in Seven Death-Penalty Cases*, WRAL NEWS (Mar. 20, 2018, 1:02 PM), <https://www.wral.com/motion-prosecutors-excluded-black-jurors-in-seven-death-penalty-cases/17430527/>.

50. *Id.*

51. *Id.*

52. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986).

53. *Id.* at 548.

54. *McCleskey v. Kemp*, 481 U.S. 279, 319 (1986) (internal quotation marks omitted) (citing *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)).

55. Rees Alexander, *A Model State Racial Justice Act: Fighting Racial Bias Without Killing the Death Penalty*, 24 GEO. MASON U. C.R. L.J. 113, 127–29 (2014).

described as succumbing to “a fear of too much justice.” As such, they provide valuable background to the CRJA.<sup>56</sup>

### 1. *The Kentucky Racial Justice Act*

In 1998, Kentucky became the first state to enact a Racial Justice Act following the release of a commissioned study that documented the extreme disparity in Kentucky’s system of capital punishment.<sup>57</sup> In the studied timeframe, *none* of the White defendants who killed Black victims were sentenced to death,<sup>58</sup> while one hundred percent of the thirty-three death row inmates had murdered a White victim.<sup>59</sup> To bring an RJA claim in Kentucky, a defendant must state “with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case.”<sup>60</sup> The motion must take place at the pretrial conference, and the burden is on the defendant to make this showing on the basis of “clear and convincing” evidence that race was a “significant factor” in the decision to seek death, based on statewide evidence.<sup>61</sup>

The Kentucky Racial Justice Act (KRJA) has rarely been used. Commentators have lamented both the statute’s high evidentiary burden and the lack of available data to meet it.<sup>62</sup> That is because Kentucky does not collect information on the characteristics of death-eligible cases since “[n]o records are systematically maintained about the race of victims and defendants, current charges, aggravating and mitigating circumstances or the strength of evidence in potential death-eligible cases,” and the state “does not track prosecutors’ notifications of pursuing the death penalty.”<sup>63</sup> As a result, “defendants cannot easily provide statistical evidence to support racial justice motions.”<sup>64</sup> In light of these realities, a 2018 review found that the KRJA has had “limited success” in

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56. An attempt to enact a Federal Racial Justice Act failed after multiple attempts. Justin R. Arnold, *Race and the Death Penalty After McCleskey: A Case Study of Kentucky’s Racial Justice Act*, 12 WASH. & LEE J. C.R. & SOC. JUST. 93, 95–98 (2005).

57. *Id.* at 98–102.

58. Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials, 1976–1991: A Study of Racial Bias as a Factor in Capital Sentencing*, 20 AM. J. CRIM. JUST. 17, 25 (1995).

59. Arnold, *supra* note 56, at 99.

60. KY. REV. STAT. ANN. § 532.300(4) (West 1998).

61. “A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought.” *Id.* § 532.300(2) (emphasis added).

62. Ellen A. Donnelly, *Can Legislatures Redress Racial Discrimination in Capital Punishment? Evaluating Racial Justice Acts in Response to McCleskey*, 82 J. CRIM. L. 388, 400 (2018) (noting the KRJA has been applied in a handful of cases, yet no death sentences have been vacated). “No death sentencing data, however, has a more troubling implication: defendants cannot easily provide statistical evidence to support racial justice motions.” *Id.* at 397.

63. *Id.* at 396–97.

64. *Id.* at 397.

redressing racial problems, and potentially “backfired” by “leveling-up” rather than “leveling-down” death sentencing.<sup>65</sup> That is, prosecutors throughout the state “may be automatically seeking the death penalty in all death-eligible cases to avoid possible racial justice concerns,” rather than using discretion to administer it more fairly and sparingly.<sup>66</sup>

## 2. *The North Carolina Racial Justice Act*

In 2009, a decade after the KRJA, the North Carolina General Assembly enacted the North Carolina Racial Justice Act (NCRJA). The NCRJA allowed courts to consider all relevant evidence, including statistical evidence, to determine whether race was a significant factor in seeking or imposing the death penalty.<sup>67</sup> Around the time the law was passed, about 54% of the death row population was Black<sup>68</sup> (compared to about 21% of the state population).<sup>69</sup> As in the KRJA, the NCRJA placed the burden on defendants to prove that race was a significant factor in decisions, but supported use of data at various levels of geography (county, the prosecutorial district, the judicial division, or the state) at the time the death sentence was imposed.<sup>70</sup> In relevant part, the evidence of disparity had to show that death sentences were sought or imposed significantly more frequently upon perpetrators of one race than another or when victims were of one race rather than another.<sup>71</sup> Defendants could assert claims at pretrial conferences or in post-conviction proceedings.<sup>72</sup>

During the statute’s short life, several cases were filed that relied heavily on a statistical study by professors at Michigan State University (“MSU study”) that concluded there was disparate impact in seeking and imposing the death penalty on Black defendants through peremptory juror strikes and sentencing decisions.<sup>73</sup> In *State v. Robinson*, for example, the defendant presented expert

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65. *Id.* at 396–97.

66. *Id.* at 397.

67. S.B. 461, 2009 Gen. Assemb., Reg. Sess. (N.C. 2009).

68. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2088 (2010).

69. Calculation based on data from the 2010 U.S. Census, showing that approximately 2.0 million of 9.5 million residents, or 21%, were Black. *Change in the Black Population of North Carolina*, N.C. OFF. OF STATE BUDGET & MGMT., [linc.osbm.nc.gov/pages/black\\_nc](http://linc.osbm.nc.gov/pages/black_nc) (last visited Dec. 19, 2023).

70. N.C. S.B. 461 § 15A-2011(c). In the 2012 Amendment, the geographical limitations were changed to allow defendants to present evidence in their county and prosecutorial district at the time the death sentence was imposed only.

71. *Id.* § 15A-2011(b).

72. *Id.* § 15A-2012(a)(1).

73. Catherine M. Grosso & Barbara O’Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1550–51 (2012). Statewide, prosecutors struck 52.6 percent of eligible Black venire members compared to only 25.7 percent of all other eligible venire members. *Id.* at 1548–49. Thus, there was less than a one in one thousand chance that

testimony and statistical evidence at the county level which showed that prosecutors struck around half of eligible Black venire members but only about a quarter of eligible venire members of other races.<sup>74</sup> The state rebutted this evidence with testimony from several judges, but the state provided no statistical evidence.<sup>75</sup> The North Carolina Supreme Court concluded the MSU study was valid, reliable, consistent, and relevant to the question of whether race was a significant factor in racial disparities in peremptory challenges.<sup>76</sup> Subsequent cases that cited the report also succeeded.<sup>77</sup>

Unfortunately for proponents of the statute, arguments of “too much justice” followed. In 2011, prosecutors advocated for repeal of the NCRJA on the basis of four allegations: that, contrary to the purpose of the statute, White inmates were taking advantage of the law; that implementing the law was cost-prohibitive; that the law created a “quagmire” in the courts; and finally, that contrary to the statute’s language, its application could result in inmates being released rather than serving life in prison as intended.<sup>78</sup> The Act was subsequently amended in 2012, and then repealed the following year.<sup>79</sup>

### C. THE CALIFORNIA RACIAL JUSTICE ACT

Like the Kentucky and North Carolina Racial Justice Acts, the CRJA does away with *McCleskey*’s requirement of purposeful discrimination. However, the CRJA applies much more broadly to *all* offenses, *all* stages of prosecution (charging, conviction, and sentencing), and *all* kinds of sentences, not just capital sentences.<sup>80</sup> It also allows for a wide variety of types of proof that will

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one would observe a disparity of this magnitude if the jury selection process were actually race neutral. *Id.* at 1548 n.86. The study was first published in 2010 and then updated in 2011. *See* Ord. Granting Motion for Appropriate Relief at 91, *State v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012).

74. *See* Ord. Granting Motion for Appropriate Relief, *supra* note 73, at 58 (“Across all strike-eligible venire members’ in the MSU Study, the Court finds that prosecutors statewide struck 52.6% of eligible black venire members, compared to only 25.7% of all other eligible venire members.”).

75. *Id.* at 107.

76. *Id.* at 45 (“[T]he Court finds the MSU Study to be a valid, highly reliable, statistical study of jury selection practices in North Carolina capital cases between 1990 and 2010.”).

77. *See, e.g.*, Ord. Granting Motion for Appropriate Relief at 138–40, 209–10, *State v. Golphin, Walters & Augustine*, No. 97 CRS 47314–15, No. 98 CRS 34832, 35044, No. 01 CRS 65079 (N.C. Super. Ct. Dec. 13, 2012).

78. JournalNow Staff, *Prosecutors Seek Repeal of Racial Justice Act*, WINSTON-SALEM J., [https://journalnow.com/prosecutors-seek-repeal-of-racial-justice-act/article\\_f32f8bf3-4cf1-5943-9067-ec0510898dcd.html](https://journalnow.com/prosecutors-seek-repeal-of-racial-justice-act/article_f32f8bf3-4cf1-5943-9067-ec0510898dcd.html) (Apr. 16, 2021); *see also* James E. Coleman, Jr., *District Attorneys vs. The Law*, THE NEWS & OBSERVER (Nov. 18, 2011), <https://infoweb-newsbank-com.ezproxy.sfpl.org/apps/news/document-view?p=AMNEWS&docref=news/13B1ADD2EF06FC78>.

79. The repeal applied retroactively, vacating all decisions affirming the North Carolina Racial Justice Act. *State v. Ramseur*, 834 S.E.2d 106, 106–07, 118 (N.C. 2020). In 2020, however, the North Carolina Supreme Court in *Ramseur* held that vacating the decisions was unconstitutional. *Id.* at 111, 120.

80. CAL. PENAL CODE § 745(a)(3)–(4) (West 2023).

support a legal remedy.<sup>81</sup> The CRJA's discovery provisions alone significantly expand a petitioner's ability to find information relevant to both racial discrimination and racial disparities, a significant departure from *United States v. Armstrong*.<sup>82</sup>

These core tenets can best be understood in light of the CRJA's findings of legislative intent which, while uncodified, were voted upon by the entire legislative body and signed by Governor Gavin Newsom when the bill was enacted, just months after the killing of George Floyd and a summer of protests:

- Discrimination in our criminal justice system . . . has a deleterious effect not only on individual criminal defendants but on our system of justice as a whole.
- We cannot simply accept the stark reality that race pervades our system of justice.
- Even though racial bias is widely acknowledged as intolerable in our criminal justice system, it nevertheless persists because courts generally only address racial bias in its most extreme and blatant forms.
- Current legal precedent often results in courts sanctioning racism in criminal trials.
- Existing precedent tolerates the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials.
- Existing precedent also accepts racial disparities in our criminal justice system as inevitable.
- There is growing awareness that no degree or amount of racial bias is tolerable in a fair and just criminal justice system, that racial bias is often insidious, and that purposeful discrimination is often masked and racial animus disguised.
- It is the further intent of the Legislature to provide remedies that will eliminate racially discriminatory practices in the criminal justice system, in addition to intentional discrimination. It is the further intent of the Legislature to ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences.<sup>83</sup>

Amendments passed in 2022 to apply the CJRA retroactively were similarly justified on the basis that they would address the "state's troubled history of prosecuting and incarcerating people of color at much higher rates than the general population . . . so our criminal justice system can begin to reckon with systemic racism and correct past injustices."<sup>84</sup>

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81. *Id.* § 745(c)–(e).

82. 517 U.S. 456, 457, 470 (1996).

83. See A.B. 2542, 2019-2020 Gen. Assemb., Reg. Sess. (Cal. 2020).

84. Assemb. Floor Analysis: A.B. 256, 2021-2022 Gen. Assemb., Reg. Sess., at 3–4 (Cal. 2022).

The CRJA provides a mechanism for defendants and the convicted in a particular county to challenge a charge, conviction, or sentence if it is sought or obtained in a racially disparate manner.<sup>85</sup> The CRJA specifically addresses four types of conduct. The first two forms focus on the particulars of the case at hand: first, the exhibition of bias or animus towards the defendant by the state, a witness, or juror;<sup>86</sup> and, second, the use of discriminatory language about or exhibition of bias or animus towards the defendant in court (unless quoting another person).<sup>87</sup> The third and fourth forms of conduct, which concern charging<sup>88</sup> and sentencing,<sup>89</sup> combine case-specific information with system-wide information. They require “evidence . . . that the prosecution more frequently sought or obtained” harsher charging, conviction, or sentencing outcomes against people who are of the same race as the defendant.<sup>90</sup> The totality of the evidence must demonstrate that there is “a significant difference” in convictions or sentencing across race when comparing individuals who are “similarly situated” and who have engaged in “similar conduct,”<sup>91</sup> but there must also be some evidence of individual, case-level factors.<sup>92</sup> In the Subpart below, we explore what we call “pattern of disparity” claims,<sup>93</sup> wherein the individual’s racial group is treated differently than other racial groups and the challenged prosecution falls into this pattern.<sup>94</sup>

### 1. *From Purposeful Discrimination to Patterns of Disparity*

To make a “pattern of disparity” claim under the CRJA, a defendant must make two showings, one individual and one systemic. First, in the charging or conviction context, the defendant must show that they were “charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and [were] similarly situated.”<sup>95</sup> Second, “the evidence [must] establish[] that the prosecution *more frequently sought or obtained* convictions for more serious offenses against people who share the defendant’s race, ethnicity, or national origin in the county

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85. PENAL § 745(a)(4). Throughout the CRJA, racial disparities also encompass ethnicity and national origin. *Id.* § 745(a). We will subsequently refer to differences based on race as a shorthand for all three types of differences.

86. *Id.* § 745(a)(1).

87. *Id.* § 745(a)(2).

88. *Id.* § 745(a)(3).

89. *Id.* § 745(a)(4).

90. *Id.* § 745(a)(3)–(4).

91. *Id.* § 745(h)(1).

92. *See infra* Part I.C.2 (discussing *Young v. Superior Court*, 294 Cal. Rptr. 3d 513 (Ct. App. 2022)).

93. This Article uses the phrase “pattern of disparity claim” to refer to claims under subsections 745(a)(3)–(4) of the California Penal Code.

94. PENAL § 745(a)(3)–(4).

95. *Id.* § 745(a)(3).



where the convictions were sought or obtained.”<sup>96</sup> A similar standard applies in the context of sentencing, where a defendant must show, first, that “a longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense.”<sup>97</sup> However, there are two distinct ways to meet the requisite “pattern of disparity” showing in the context of sentencing: that “longer or more severe sentences were more frequently imposed” either when taking into account the *race of the defendant* or when taking into account the race of the *victim*.<sup>98</sup>

Subsection 745(h)(1) goes on to explain that “[m]ore frequently sought or obtained” or “more frequently imposed” means that the relevant evidence demonstrates a “*significant difference* in seeking or obtaining convictions or in imposing sentences comparing individuals who . . . are similarly situated” and who have “engaged in similar conduct.”<sup>99</sup> Particularly interesting—and challenging to a social scientist—is the explicit statement that “[s]tatistical significance is a factor the court may consider, but is not necessary to establish a significant difference.”<sup>100</sup>

In September 2022, Governor Newsom signed into law an amendment to the CRJA, AB 256 (“CRJA Amendment”).<sup>101</sup> In addition to making the Act retroactive, the CRJA Amendment provided a number of additions, clarifications, and context for understanding the “significant difference” test.<sup>102</sup> According to the legislative findings accompanying the CRJA Amendment, the purpose of the changes was to clarify that evidence “may include statistical evidence, aggregate data, or nonstatistical evidence,” and to indicate that “the defendant does not need to prove intentional discrimination.”<sup>103</sup> The legislative history of the CRJA Amendment includes the opinion of the California District Attorneys Association (CDAA) that the original CRJA was “riddled with ambiguous language,” including “more serious offense,” “similar offenses,” “similarly situated,” and “more frequently sought.”<sup>104</sup> The CDAA testimony continues by stating that:

The definition of more “frequently sought or obtained” or more “frequently imposed” means statistical data demonstrates a “significant” difference in the comparative groups. But no definition of “significant” is provided[.] Is a 5,

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96. *Id.* (emphasis added).

97. *Id.* § 745(a)(4).

98. *Id.* This incorporates the findings of the Baldus study, where race of the victim and defendant are both taken into account in determining racial disparity. See *supra* notes 28-32 and accompanying text.

99. PENAL § 745(h)(1) (emphasis added).

100. *Id.*

101. *Id.* § 745.

102. A.B. 256, 2021-2022 Gen. Assemb., Reg. Sess. (Cal. 2022).

103. PENAL § 745(c)(2), (h)(1).

104. Assemb. Floor Analysis: A.B. 256, 2021-2022 Gen. Assemb., Reg. Sess., at 3 (Cal. 2021).

10, 50, or 80 percent differential significant? The statute leaves it entirely up to the individual judge to decide without any guidance.<sup>105</sup>

The CDAA testimony concludes that, “it is yet unknown how to assess the relevant time period for comparison purposes. If there is a disproportion based on statistics going back 25 years but no disproportion going back 10 years, which is the relevant statistic?”<sup>106</sup>

While the CRJA Amendment stopped short of providing definitive numerical answers to these questions, it did provide more detail about what some of the terms mean. Importantly, the amendment substituted the phrase “statistical evidence or aggregate data” with the phrase “totality of the evidence,” which it then went on to define.<sup>107</sup> As revised, subsection 745(h)(1) specifies that the requisite pattern of disparity is shown when “*the totality of the evidence* demonstrates a significant difference.”<sup>108</sup> The amended law now further specifies the type of evidence that can be used to prove a significant difference, stating that such evidence “may include statistical evidence, aggregate data, or nonstatistical evidence,” inviting defendants to present a variety of types of evidence of patterns of racial or ethnic disparity in their relevant jurisdiction.<sup>109</sup>

The CRJA Amendment also clarifies to whom the defendant and others of the defendant’s race should be compared in order to show disparity.<sup>110</sup> Specifically, it states that the appropriate point of reference should be individuals who are “engaged in *similar conduct* and are *similarly situated*.”<sup>111</sup> The phrase “engaged in similar conduct” replaced the phrase “committed similar offenses” in the amendment process.<sup>112</sup> As such, it clarifies that comparisons are to be made on the basis of the defendant’s conduct, rather than, for example, on the basis of system-generated data such as arrests, charging, conviction, or sentencing.

This understanding is reinforced by the addition of a new subsection, 745(h)(6), which clarifies what constitutes “similarly situated.”<sup>113</sup> As the statute

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105. *Criminal Procedure: Discrimination: Hearing on A.B. 256 Before the Assemb. Comm. on Pub. Safety*, 2021-2022 Gen. Assemb., Reg. Sess. 13 (Cal. 2022) (statement of California District Attorneys Association).

106. *Id.*

107. PENAL § 745(h)(1).

108. *Id.* (emphasis added) (“[T]he totality of the evidence demonstrates a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have engaged in similar conduct and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity. The evidence may include statistical evidence, aggregate data, or nonstatistical evidence. Statistical significance is a factor the court may consider, but is not necessary to establish a significant difference.”).

109. *Id.*

110. *Id.*

111. *Id.* (emphasis added) (stating that the amendment “compar[es] individuals who have engaged in similar conduct and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity.”).

112. *Id.* § 745(h)(1) (amending CAL. PENAL CODE § 745(h)(1) (2021)).

113. *See id.* § 745(h)(6).

now reads, being similarly situated does “not require that all individuals in the comparison group are identical” but rather that “relevant [factors] in charging and sentencing are similar.”<sup>114</sup> This language of the CRJA Amendment further cabins the relevance of criminal history, stating that “[a] defendant’s conviction history *may* be a relevant factor to the severity of the charges, convictions, or sentences.”<sup>115</sup> The choice of the equivocal word “may” appears to be explained by the sentence that follows, which hints at the well-worn challenge of criminal history itself being biased: “If it is a relevant factor and the defense produces evidence that the conviction history may have been impacted by racial profiling or historical patterns of racially biased policing, the court shall consider the evidence.”<sup>116</sup> Next, we will provide further details about the procedure for arguing a CRJA motion and how a violation can be proven.

## 2. *Discovery, Procedures, and Proof*

As the court in *Young v. Solano County*—the only published decision interpreting the Act to date—stated, the plain language of the Act contemplates “escalating burdens of proof.”<sup>117</sup> That is, the more that the defendant is asking for, the more they must prove. Under this framework, the CRJA allows for liberal discovery when a violation of the CRJA is far from certain upon a showing of good cause, but the strength of the evidence required increases when a judge evaluates whether she should conduct a hearing, and yet again when the ultimate decision about a CRJA violation is made.<sup>118</sup> These escalating burdens are summarized in Table 1.

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114. *Id.*

115. *Id.* (emphasis added).

116. *Id.*

117. *Young v. Superior Ct.*, 294 Cal. Rptr. 3d 513, 529 (Ct. App. 2022).

118. PENAL § 745(c)–(d).

If shown . . .	Defendant entitled to . . .
Good cause	Discovery subject to redaction or a protective order per subsection 745(d)
Prima facie showing of a violation (defendant produces facts that, if true, establish that there is a substantial likelihood that a violation of subdivision, per subsection 745(h)(2))	Trial court hearing per subsection 745(c)
Proof of a violation by preponderance of the evidence	A remedy specific to the violation per subsection 745(e)

Table 1: The “Escalating Burdens” of Proof in the CRJA.

*Young v. Solano County* addressed discovery under the CRJA.<sup>119</sup> Clemon Young, Jr., was pulled over for a traffic violation and subsequently arrested for possession of ecstasy for sale.<sup>120</sup> Young moved for discovery under the CRJA, arguing that his race made it more likely for him to be stopped, then searched, and then prosecuted.<sup>121</sup> He presented statewide statistics in support of his motion and combined this with specific details about his particular stop that, he argued, made racial profiling enough of a possibility that he should be entitled to discovery.<sup>122</sup> The trial court denied the motion.<sup>123</sup> On appeal, the First District Court of Appeal vacated the order denying discovery and remanded the motion for further consideration.<sup>124</sup>

In a section of the ruling titled “Legislative Findings and Legal Landscape Prior to the Act,” the court spends a great deal of time discussing *Armstrong* and *McCleskey* before explaining why these standards do not apply to CRJA claims.<sup>125</sup> The opinion focuses primarily on *United States v. Armstrong* as “the leading case” governing discovery standards in cases alleging selective prosecution.<sup>126</sup> *Armstrong* required “rigorous evidentiary scrutiny” of claims supporting selective prosecution discovery motions because of the “presumption of regularity accorded to prosecutorial decisionmaking” and the resources that

119. *Young*, 294 Cal. Rptr. 3d at 526 (“To our knowledge, we are the first appellate court to address the discovery provision of the Racial Justice Act.”).

120. *Id.* at 516.

121. *Id.* at 518.

122. *Id.*

123. *Id.*

124. *Id.* at 517, 537.

125. *Id.* at 520–26.

126. *Id.* at 523–24; *see also id.* at 531 (“In essence, the Attorney General invites us to take the same approach under the Racial Justice Act that the *Armstrong* court took. We decline to do so.”).

defending prosecution claims would consume.<sup>127</sup> But, as the opinion notes, the California legislature made a different policy choice, “creating a discovery-triggering standard that is low enough to *facilitate potentially substantial claims*, even if it came at some cost to prosecutorial time and resources.”<sup>128</sup> In the words of the court, “[p]reventing a defendant from obtaining information about charging decisions without first presenting that same evidence in a discovery motion is the type of [ ] Catch-22 the Act was designed to eliminate.”<sup>129</sup>

The statute provides that a petitioner may get discovery after filing a motion showing good cause, provided the asked-for records are not privileged.<sup>130</sup> According to the CRJA, the defendant is entitled to all evidence relevant to a potential violation “in the possession or control of the state.”<sup>131</sup> The legislature’s intent is “to ensure that individuals have access to all relevant evidence . . . regarding potential discrimination . . . .”<sup>132</sup> Good cause, according to the *Young* court, should be interpreted along the lines of “the good cause standard governing disclosure of law enforcement personnel records—*Pitchess* discovery—” as both “parties and amici agree[d].”<sup>133</sup> The *Young* court elaborated that *Pitchess* discovery is “relatively relaxed,” explaining that good cause is shown when a movant shows subject-matter “materiality” and a “reasonable belief that the agency has the information sought.”<sup>134</sup> Good cause is, the *Young* court summarized, a “plausible factual foundation” that the “misconduct could or might have occurred.”<sup>135</sup> Applied to the CRJA, the court explained, the standard is “even more relaxed,”<sup>136</sup> given that the CRJA may be “proved up in several different ways” so “the threshold showing for good cause must be commensurately broad and flexible.”<sup>137</sup> Ultimately, the *Young* court concluded that this broad discovery is “harmonious not just with the text of section 745, but its structure as well,” noting that the standards of proof increase from good cause (granting discovery), to a prima facie showing (granting a hearing), to a preponderance of the evidence (establishing a violation).<sup>138</sup>

In counties that made no data available, a high, *Armstrong*-type burden would be almost insurmountable, which would insulate those counties from

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127. *Id.* at 525.

128. *Id.* at 531.

129. *Id.*

130. CAL. PENAL CODE § 745(d) (West 2023).

131. *Id.*

132. A.B. 2542, 2019-2020 Gen. Assemb., Reg. Sess. (Cal. 2020).

133. *Young*, 294 Cal. Rptr. 3d at 528.

134. *Id.* (internal citations and quotation marks omitted); *see also id.* at 528 (describing the standard, applied to the CRJA, as “minimal”).

135. *Id.* at 528 (internal citations and quotation marks omitted).

136. *Id.* at 529.

137. *Id.*

138. *Id.*

scrutiny and accountability. Thus, without more liberal discovery standards, counties would be unfairly rewarded for failing to make data available.

The *Young* opinion shows how the required amount of aggregate data and significant difference depends on the interplay between the particulars of a case and the evidence of patterns of disparity available—at a safe distance from *McCleskey*'s requirement that the evidence demonstrate “purposeful discrimination.”<sup>139</sup> Specifically, Young alleged that he was never cited for a traffic violation, despite being stopped for one; that the police used excessive force; and that the stop was made by an officer who “had ample opportunity to observe him and take note of his skin color.”<sup>140</sup> In support of his request for discovery, Young cited “statewide data and data from another county”<sup>141</sup> that “blacks are more likely to be searched during the course of traffic stops than other citizens,”<sup>142</sup> though the *Young* court found his data lacked “any of the statistical controls” present in other profiling cases.<sup>143</sup>

While the court in *Young* characterized the systemic evidence for Young's claim as “unimpressive,” it nevertheless found that it provided a sufficient basis for discovery once combined with the “specific facts [that] arguably provide[d] circumstantial proof” of racial profiling.<sup>144</sup> As the court put it, even though “the statistical proof Young puts forward does not make out a particularly strong case of racial profiling,” these “flaws . . . serve to illustrate how the good cause standard works. At this stage, he need not make a strong case but only a plausible one.”<sup>145</sup> This suggests that bare numbers will not necessarily be enough to grant substantive motions under the CRJA, and certainly not with statewide data alone. But, when combined with other case-level factors, it can be sufficient.

The *Young* court finally discussed the breadth of Young's discovery request. It first stated that evidence about “racial bias in arrests may be potentially relevant to an allegation of racial bias in charging.”<sup>146</sup> Racial bias in discretionary choices about whom to arrest “will be reflected in the pool of suspects the District Attorney ultimately decides to charge, and *may* therefore taint the charging process.”<sup>147</sup> Movants for discovery may ask for evidence that

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139. *Id.* at 520.

140. *Id.* at 530.

141. *Id.* at 534.

142. *Id.* at 516.

143. *Id.* at 534.

144. *Id.*

145. *Id.*

146. *Id.* at 532.

147. *Id.* (alteration in original); see also *id.* at 533–34 (discussing Justice Blackmun's observation in *McCleskey* that “each element of discretionary decision-making must be taken into account in interpreting the aggregate statistics,” as well as the conclusion in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), that “discretionary decision-making” about the granting of laundry business permits “had the effect of exposing only Chinese nationals to subsequent criminal enforcement” and thus violated equal protection).

goes “beyond discrete conduct by a particular actor on a particular occasion” because one class of proof authorized by the Legislature—statistical evidence or aggregate data—requires broad, systemic evidence by definition.<sup>148</sup> The court then suggested some discretionary considerations to use when evaluating the scope of discovery granted, including “whether the material requested is adequately described” and “reasonably available,” as well as whether its disclosure would create an unreasonable burden or delay, or whether disclosure would violate privacy or confidentiality rights.<sup>149</sup> But the court concludes that these limitations are about scope, not about whether discovery should be granted *vel non*: “[w]here the defendant makes a showing of plausible justification” of a potential violation of the CRJA, “it will likely be an abuse of discretion to totally foreclose discovery.”<sup>150</sup>

The *Young* decision is instructive for a number of reasons. First, it illustrates that trial courts may have difficulty adjusting to the new legal standards of the CRJA, given how they have grown used to considering discovery under *Armstrong* and violations under *McCleskey*.<sup>151</sup> Second, it shows just how liberal the new discovery standards are.<sup>152</sup> The decision goes through the ways in which discovery is to be construed very liberally, citing extensively from the legislative findings.<sup>153</sup> Finally, it suggests a standard to use in discovery with which California courts are already familiar—*Pitchess*<sup>154</sup>—and provides an illustration of why *Young*’s initial showing sufficed to grant his motion for discovery, subject to limitations on the breadth and scope of the discovery.<sup>155</sup>

Besides the “good cause” standard that applies at the discovery-seeking stage, there are two other stages where proof is evaluated in the CRJA process, each of which has a different standard. To receive a hearing, a *prima facie* showing of a violation must be made.<sup>156</sup> To obtain an ultimate disposition

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148. *Young*, 294 Cal. Rptr. 3d at 535.

149. *Id.* at 536.

150. *Id.* (internal citations and quotation marks omitted).

151. *Id.* at 518 (citing the trial court’s statement that it was “not comfortable . . . because there’s so little guidance” and welcoming “further guidance” on appeal); see also *id.* at 523–26 (a section entitled “*United States v. Armstrong*”).

152. *Id.* at 530.

153. See, e.g., *Young*, 294 Cal. Rptr. 3d at 520, 526–27. See also *id.* at 526 (“[L]egislative findings . . . properly may be utilized as an aid in construing a statute.” (internal citations and quotation marks omitted)); *id.* at 526–27 (“Because uncodified findings of legislative intent are voted upon by the entire legislative body, enrolled and signed by the Governor, they may be entitled to somewhat greater weight than traditional legislative history materials . . . . Given the specificity of the findings accompanying the Racial Justice Act, we give the detailed statement of intent we have here considerable weight.”).

154. *Id.* at 528 (citing CAL. EVID. CODE § 1043(b) (West 2023) (named after *Pitchess v. Superior Ct.*, 522 P.2d 305 (1974))).

155. *Id.* at 535.

156. CAL. PENAL CODE § 745(c) (West 2023).

(leading to relief or a denial of relief) at a hearing, a defendant must prove a violation by a preponderance of the evidence.<sup>157</sup>

To get a hearing, the “[p]rima facie showing” means that the defendant produces facts that, if true, establish that there is a substantial likelihood” that a violation of the CRJA occurred.<sup>158</sup> A “substantial likelihood” requires more than a mere possibility, but less than a standard of more likely than not.”<sup>159</sup> Again, the evidence can be statistical, but it can also consist of “aggregate data, expert testimony, and the sworn testimony of witnesses.”<sup>160</sup> This information can be discovered upon a showing of good cause.<sup>161</sup>

At the hearing, the question is whether there is “a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have engaged in similar conduct and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity.”<sup>162</sup> In order to be entitled to relief, a defendant must prove a violation by a preponderance of the evidence.<sup>163</sup>

Because the CRJA has not been around long enough to produce judicial opinions on the granting of a hearing and the ultimate proof of a violation, we leave our analysis here. We also note that once discovery has been conducted, case-level factors will likely have been accounted for via detailed analyses of dockets not possible in the Cal DOJ data we use, which is why we focus on the “good cause” standard in this Article. In the context of the significant differences test, the evidence obtained after discovery in each case will be dispositive.

## II. CONSTRUING THE CRJA’S SIGNIFICANT DIFFERENCE TEST

As already described, the CRJA allows criminal defendants to challenge a substantive ruling upon a showing of unjustified “significant difference” in general patterns of punishment (charging, conviction, or sentencing) by race, coupled with specific facts that fit this general pattern.<sup>164</sup> But this still begs the question of what exactly makes a difference significant in the eyes of the court, how such a showing must be made, and how the various tiers of proof specified by the statute might be met by systemic empirical evidence. At the outset, it is important to note that discovery requests only require a showing of “good

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157. *Id.* § 745(c)(2).

158. *Id.* § 745(h)(2).

159. *Id.*

160. *Id.* § 745(c)(1). The statute also refers to “aggregated data.”

161. *See supra* Part I.C.2 and Table 1.

162. PENAL § 745(h)(1).

163. *Id.* § 745(a).

164. *Id.* § 745(a)(3), as discussed *supra* Part I.C.1.



cause.”<sup>165</sup> Not until the hearing stage is a showing of a “significant difference” required.<sup>166</sup>

California courts look first to the words of a statute, and their usual and ordinary meaning, in order to determine how to apply them, keeping in mind the legislature’s intent.<sup>167</sup> If the statute is ambiguous, the court may consider related statutes and canons of construction.<sup>168</sup> In this Part, we apply the rules of statutory construction to explore the ordinary meaning of key terms of the CRJA’s significant difference test, drawing upon the words of the statute as well as the social science and legal conceptions of its terms. In addition, because the current statute reflects amended language, we follow the canon of statutory interpretation that a recently enacted version of a statute is generally given more weight than the earlier enactment and that the amendments themselves convey information about the intent of the legislature.<sup>169</sup>

We begin by exploring some of the categories of evidence allowed under the CRJA. We then propose a working understanding of the “significant difference” test in the context of the CRJA, informed by the ordinary meaning of the words of the statute. But even if agreement on the conceptual definition of a “significant difference” can be reached, how can it be demonstrated? The amended CRJA specifically contemplates at least three types of evidence, which we turn to next.

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165. See discussion *supra* Part I.C. and Table 1.

166. See discussion *supra* Part I.C. and Table 1.

167. *People v. Arias*, 195 P.3d 103, 107 (Cal. 2008) (discussing the following rules of statutory construction:

- (1) Courts look to the Legislature’s intent to effectuate a statute’s purpose.
- (2) Courts give the words of a statute their usual and ordinary meaning.
- (3) A statute’s plain meaning controls the court’s interpretation unless the statutory words are ambiguous.
- (4) If the words of a statute do not themselves indicate legislative intent, courts may resolve ambiguities by examining the context and adopting a construction that harmonizes the statute internally and with related statutes.
- (5) A literal construction does not prevail if contrary to the apparent legislative intent.
- (6) If a statute is amenable to two alternative interpretations, courts will follow the one that leads to the more reasonable result.
- (7) Courts may consider legislative history, statutory purpose, and public policy to construe an ambiguous statute.
- (8) If a statute defining a crime or punishment is susceptible of two reasonable interpretations, courts will ordinarily adopt the interpretation more favorable to the defendant.
- The rules of statutory construction are applicable in both civil and criminal proceedings.).

168. *Id.*

169. Chris Micheli, *Statutory Construction Guidelines for Bill Drafting in California*, 52 U. PAC. L. REV. 457, 465 (2021).

### A. CATEGORIES OF EVIDENCE UNDER THE AMENDED CRJA

In establishing whether “the totality of the evidence demonstrates a significant difference in seeking or obtaining convictions or in imposing sentences,” the amended CRJA states that the evidence “may include statistical evidence, aggregate data, or nonstatistical evidence.”<sup>170</sup> These categories of evidence are not defined in the statute, but they encompass a wide range of possibilities.

We understand the terms “statistical evidence” and “aggregate data” to refer to forms of quantitative evidence based on summaries of key indicators drawing on multiple cases or instances (meaning, a sample). Merriam Webster defines “aggregate” as “formed by the collection of units or particles . . . [an] amount”<sup>171</sup> and “aggregate data” as “information about aggregates or groups such as races, social classes, or nations.”<sup>172</sup> As it appears in other California statutes, the term “aggregate data” often refers to collective data that does not contain individually identifying information.<sup>173</sup> In a similar vein, “statistical evidence” has been described in other contexts as representative of “observations” that are the product of experimental or observational study.<sup>174</sup>

These forms of quantitative evidence might come from existing secondary sources, such as the Judicial Council of California’s report analyzing racial patterns in the California criminal justice system,<sup>175</sup> or involve new analysis of available data.<sup>176</sup> Statistical evidence could also entail summaries or analyses of

170. PENAL § 745(h)(1).

171. *Aggregate*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/aggregate> (last visited Nov. 19, 2023).

172. *Id.*

173. See, e.g., CAL. HEALTH & SAFETY CODE § 131230 (West 2017) (“Aggregate data shall be public, but individual identifying information shall remain confidential.”); CAL. BUS. & PROF. CODE § 805.2 (West 2007) (“The independent entity shall not release the case files or other information it obtains to any individual, agency, or entity, including the board, except as aggregate data, . . . but in no case shall information released under these exemptions be identifiable . . .”).

174. Jeffrey D. Blume, *Tutorial in Biostatistics: Likelihood Methods for Measuring Statistical Evidence*, 21 STAT. MED. 2563, 2564 (2002) (“An experiment or observational study produces observations which, under a probability model, represent statistical evidence.”).

175. E.g., JUD. COUNCIL OF CAL., DISPOSITION OF CRIMINAL CASES ACCORDING TO THE RACE AND ETHNICITY OF THE DEFENDANT: 2021 REPORT TO THE LEGISLATURE (2021) (finding that race and ethnicity had a significant impact on conviction rates, the level of conviction offense, and prison sentencing rates).

176. Typical summary statistics would include means and medians of quantitative outcomes, such as sentence length (e.g., a mean of twelve months and a median of nine months), or counts of binary outcomes, such as whether a defendant was found guilty or not guilty. To make racial comparisons, counts must be rendered into proportions of a relevant at-risk group—for example, felony charges for Black men as a proportion of all charges for Black men, compared to the same statistics for White men (or, alternatively, all non-Black men as we discuss *infra* in Part II.C.).

In some cases, it might be informative to present the data in terms of racial representation—for example, the proportion of all arrested individuals in a county who are Black, compared with the proportion of the overall county population who are Black. Statistical evidence could include not just single point estimate

the data (such as regression models) to provide estimates of differences controlling for factors thought to be “race-neutral” influences on the outcome. So one might control for education level on the theory that, say, higher education levels result in lower criminal activity. Controlling for education level would involve comparing criminal justice outcomes for individuals of similar educational attainment, removing education’s influence on criminal justice outcomes as a means of isolating the effects of other variables (that is, race). As we argue below, selecting truly “race-neutral” controls for criminal justice outcomes is not a straightforward exercise.

The CRJA also permits “nonstatistical evidence.”<sup>177</sup> Such evidence could presumably include case studies, histories, patterns of practice, testimony of experts on racial disparities, training materials or internal memoranda, and evidence that comes from datasets that are too small or limited to support conventional statistical analysis. This is particularly relevant for counties with small populations, like Alpine County.

#### B. “SIGNIFICANT DIFFERENCE”

The requisite showing under the relevant provisions of the CRJA is made when “the totality of the evidence demonstrates a significant difference . . . . [S]tatistical significance is a factor the court *may* consider, but is not necessary to establish a significant difference.”<sup>178</sup> No published opinion has yet discussed the meaning of the phrase “significant difference.” While it is clear that the phrase is not a synonym for statistical significance, we are still left with the question of what will suffice to make a difference “significant.”<sup>179</sup> Merriam

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values, but also estimates of uncertainty, such as confidence intervals—for example, a point estimate of the mean racial gap in sentence length of three months, with a 95% confidence interval of one to five months. Translated, this means that our best single estimate of the true racial gap is three months, with 95% confidence that the true gap lies within the range of one to five months. This is the same concept that gives us “margins of error” in political polling.

Statistical evidence could also include statistical significance, such as *p*-values for some hypothesis of interest. Typically, a *p*-value indicates how likely we would be to observe the data we have if a given hypothesis were true. So the statement “a *p*-value of .01 for a hypothesis that race has no effect on sentence length” means that, if it were in fact true that race had no effect, there is only a one percent chance that we would observe the data we have on racial gaps in sentencing. The “no effect” hypothesis is called the “null hypothesis.” Given the evidence we present, the hypothesis of no effect seems highly implausible. Statisticians would thus say “we can reject the null hypothesis at a *p*-value of one percent.” By convention, *p*-values of less than .05 are deemed to be “statistically significant,” though this rule of thumb has lost favor in the past decade, as we discuss *infra* in Part II.B.

177. CAL. PENAL CODE § 745(h)(1) (West 2023).

178. *Id.* (emphasis added).

179. The legislature declined to put a numerical range on this term in its Amendment. *See supra* notes 104-105 and accompanying text (discussing CDAA comments to the CRJA).

Webster defines significant as “important” and “of a noticeably or measurably large amount.”<sup>180</sup>

According to the CRJA, courts “may consider” statistical significance in demonstrating a significant difference actionable under the CRJA. While it is clear that the phrase is not a synonym for statistical significance, we are still left with the question of what “significant difference” means. Though there are multiple references in the statutory text in the California Code to “significant difference,” a review of these texts reveals a variety of types of differences, including in degree<sup>181</sup> and kind.<sup>182</sup>

This Article next considers whether “significant difference” has a common legal or statistical definition that could inform its ordinary meaning. Our research suggests that it does not. In common usage by social scientists, “significant difference” is often used simply as shorthand for “statistically significant difference” and does not appear to have a standard meaning independent of that interpretation. Tellingly, if one looks up “significant” in the index to Joshua Angrist and Jörn-Steffen Pischke’s widely used book on econometrics, *Mastering ‘Metrics: The Path from Cause to Effect*, the only entry is “significance. See statistical significance.”<sup>183</sup> But this clearly is not the meaning contemplated by the statute. Although the CRJA allows that “[s]tatistical significance is a factor the court may consider,” statistical significance “is not necessary to establish a significant difference.”<sup>184</sup>

Because statistics can be misleading in ways not readily apparent to the untrained eye—and because statistics are likely to be used in CRJA litigation—we briefly explain the ways in which statistical results are akin to degrees of certainty in the law (such as “beyond a reasonable doubt” and “preponderance of the evidence”) with which lawyers are familiar. Put another way, statistical evidence is not the only, or even the primary, way to prove disparity. To put statistical evidence on an equal footing with other forms of evidence, however, we need to briefly explain why numbers do not speak for themselves and are not more certain or precise than other kinds of evidence just because they have decimal points. Statistics are extremely useful; they are not, however, the final word.

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180. *Significant*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/significant> (last visited Nov. 19, 2023).

181. See, e.g., CAL. GOV’T CODE § 95014 (West 2022) (“A significant difference is defined as a 25-percent delay in one or more developmental areas.”).

182. CAL. HEALTH & SAFETY CODE § 43640 (West 2021) (referring to differences between changes in models as significant).

183. JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, *MASTERING ‘METRICS: THE PATH FROM CAUSE TO EFFECT* 280 (2015).

184. CAL. PENAL CODE § 745(h)(1) (West 2023).

A standard approach to applying statistical significance in a claim under the CRJA might involve, say, comparing the mean length of sentences imposed on Black versus White defendants with similar criminal histories who have been convicted of the same crime in the same county. Conventional statistical practice requires very strong evidence against a hypothesis in order to reject it—typically, a *p*-value of five percent or lower.<sup>185</sup> This convention places a high value on avoiding a “false positive”—that is, rejecting the hypothesis that defendants were treated equally when, in fact, they weren’t. This standard amounts to a “presumption of innocence” of racial disparities, and a correspondingly high burden of proof to establish a statistically significant difference.<sup>186</sup>

The CJRA’s legislative findings suggest that the CRJA is concerned more with false negatives (finding no disparity or discrimination where it in fact exists) than false positives (finding disparity or discrimination where there is none), making conventional statistical significance ill-suited to measuring significant differences.<sup>187</sup> The stated goal of the Act is to root out and reduce racial bias in the criminal justice system “because racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution, and violates the laws and Constitution of the State of California.”<sup>188</sup> Further, “[i]t is the intent of the Legislature to ensure that *race plays no role at all* in seeking or obtaining convictions or in sentencing.”<sup>189</sup> The California Legislature “reject[s] the conclusion that racial disparities within our criminal justice [system] are inevitable, and to actively work to eradicate them.”<sup>190</sup>

If the goal of the legislature were to minimize false positives (reducing the number of erroneously finding discrimination when there is none), then the standard of proof for finding a violation under the CRJA would be stringent. It is not. A violation requires proof by a preponderance of the evidence,<sup>191</sup> and, according to the Supreme Court, the “preponderance of the evidence” standard represents the lowest level of proof.<sup>192</sup> Preponderance of the evidence means more likely than not—a “fifty percent plus a feather” standard—which is much less stringent than both the “reasonable doubt” legal standard and the ninety-five

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185. See ANGRIST & PISCHKE, *supra* note 183.

186. See Ball, *supra* note 43, at 536 (arguing that “in systems where there is evidence of racial disparity, we should assume that there is average racism in the individual case”).

187. See A.B. 2542, 2019-2020 Gen. Assemb., Reg. Sess. (Cal. 2020).

188. *Id.*

189. *Id.* (emphasis added).

190. *Id.*

191. CAL. PENAL CODE § 745(e) (West 2023).

192. *Addington v. Texas*, 441 U.S. 418, 423–24 (1979).

or ninety-nine percent threshold of statistical significance.<sup>193</sup> A motion for a hearing can be granted on less evidence, requiring only that a defendant produce facts that, if true, establish that there is a “substantial likelihood” of a violation.<sup>194</sup> Courts could, of course, also adopt a less stringent standard for statistical significance. In a recent case, the Washington Supreme Court noted that the legal conventions about false positives (in that case, eleven percent, or a  $p$ -value of .11) were different from the conventions of statistics or social science.<sup>195</sup> In *State v. Gregory*, what would be an unacceptably large  $p$ -value to a statistician using statistical significance was instead described as “at the very most, . . . an 11 percent chance.”<sup>196</sup> That is, legal norms are different from statistical norms, depending, in part, on the interests at stake. Small  $p$ -values are important to scientists, but when it comes to the chance that race might have had a “meaningful impact” on how the death penalty was administered, as in *Gregory*, courts and legislatures can come to different conclusions.<sup>197</sup>

We also note that statisticians themselves do not equate statistical significance with “proof” that a given relationship is “true.” Indeed, in 2016, the American Statistical Association (ASA) went so far as to issue a “Statement on Statistical Significance and P-Values,” which, among other things, stated that “[s]cientific conclusions and business or policy decisions should not be based only on whether a  $p$ -value passes a specific threshold.”<sup>198</sup>

The advice of the ASA Statement suggests a way forward in the use of empirical evidence that does not rest on the rigidly binary reject-or-accept practice of statistical significance, nor on its conservative convention of

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193. For one co-author’s views on how context changes statistical analysis, see Ball, *supra* note 43, at 532 (“Even absent evidence of the influence of race in a particular case, [ . . . ] it would be a mistake to assume that there is no racial influence. We must, instead, assume that there is an average racial influence. When courts disregard race in their prior estimates of being stopped by the police—analyzing the facts the officer reports without considering the ways in which race might also have played a role—they are, in effect, saying we have no prior evidence of racial influence on criminal law. That is decidedly not the case.”).

194. PENAL § 745(c), (h)(2).

195. *State v. Gregory*, 427 P.3d 621, 634 (Wash. 2018).

196. *Id.* It should be emphasized, however, that this is not an entirely accurate characterization of the results. “At . . . most . . . 11 percent” is true if all relevant variables were accounted for. The same is true, of course, for any conclusions made about statistics, including low  $p$ -values considered statistically significant. Many thanks to Dan Epps for this insight.

197. *Id.*; see also Steven N. Goodman, *Why Is Getting Rid of P-Values So Hard? Musings on Science and Statistics*, 73 AM. STATISTICIAN 26, 27 (2018) (discussing how proof criteria such as  $p$ -values are social norms).

198. Ronald L. Wasserstein & Nicole A. Lazar, *The ASA Statement on P-Values: Context, Process, and Purpose*, 70 AM. STATISTICIAN 129, 131 (2016). Further, “[a]  $p$ -value, or statistical significance, does not measure the size of an effect or the importance of a result.” *Id.* at 132. In a recent overview of the literature on statistical significance, the economist Guido Imbens suggested that in using statistical evidence to guide policy or other decisions,  $p$ -values and hypothesis tests ought to be downplayed: “. . . what is most relevant for the decision maker is the point estimate [e.g., the observed difference in mean sentences] with some measure of the uncertainty of that point estimate . . . [e.g., a confidence interval], and some sense of the robustness and identification issues.” Guido W. Imbens, *Statistical Significance, P-Values, and the Reporting of Uncertainty*, 35 J. ECON. PERSPS. 157, 163 (2021).

minimizing the risk of false positives. When empirical evidence of disparity between similarly situated individuals is presented, the factfinder should begin by keeping in mind what is actually measured, and the strength and weaknesses of these measurements. Then, when looking at the analysis of the data, relevant considerations include the *magnitude*, *uncertainty*, and *robustness* of estimated differences. A simple and flexible approach to assessing the magnitude and uncertainty of a difference is to estimate a central *point estimate* of the difference along with a *confidence interval* around it, representing a range of plausible values or “margin of error” based on the data.<sup>199</sup>

Judgments of whether the magnitude of the disparity is large enough to qualify as a “significant difference” that justifies action under the CRJA are just that—judgments—and will require bringing in evolving precedents and benchmarks for comparison.<sup>200</sup> Courts will also have to decide how to weigh considerations of magnitude versus uncertainty. For example, is a small but precisely estimated disparity more concerning than a larger but noisier one?<sup>201</sup> We cannot offer much guidance here, except to suggest that presenting the evidence as confidence intervals of differences in meaningful comparisons is a better place to start than statistical significance. As with so much, a picture is worth a thousand words.

Finally, in addition to magnitude and uncertainty, the *robustness* of the findings should be considered by checking the sensitivity of the estimates to changes in the sample or modest modifications of the comparisons being made. If a slight change results in dramatically different outcomes, the findings are not robust. If changes to the sample data do not dramatically change outcomes, we can have greater confidence (more robustness) in the effects we see. Disparities

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199. David Romer, *In Praise of Confidence Intervals*, 110 AEA PAPERS AND PROC. 55, 58 (2020). This is discussed further in Part IV of this Article.

200. On the issue of magnitude or effect size in statistics, see, for example, Charles F. Manski, *Treatment Choice With Trial Data: Statistical Decision Theory Should Supplant Hypothesis Testing*, 73 AM. STATISTICIAN 296, 297 (2019); Stephen T. Ziliak, *How Large Are Your G-Values? Try Gosset's Guinnessometrics when a Little “p” Is Not Enough*, 73 AM. STATISTICIAN 281, 282–83 (2019). Examples of threshold differences for magnitudes can be found in the law, but they vary with the context. For example, section 95014 of the California Government Code states that “[a] significant difference is defined as a 25-percent delay in one or more developmental areas.” CAL. GOV'T CODE § 95014 (West 2022). In the context of employment discrimination, the Federal Uniform Guidelines on Employee Selection Procedures suggests a “four-fifths rule,” whereby a “selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact.” 29 C.F.R. § 1607.4(D) (2004).

201. The effect of sample size means that comparisons involving small numbers of people (e.g., counties with small populations or rarely charged offenses) are likely to involve high degrees of uncertainty and wide confidence intervals. With comparisons across many counties and offenses and small samples, it is inevitable that some estimated differences will be greatly exaggerated, and others greatly underestimated, simply by chance. In our discussion of the data below, we note some potential strategies for mitigating this problem through aggregating across offenses or counties; such strategies likely introduce their own imprecisions into the comparisons and therefore involve tradeoffs. We will discuss this in Part III, *infra*.

that hold up across a broader set of comparisons offer greater confidence in the conclusion that a pattern of bias has been identified.

C. RACIAL COMPARISONS, “SIMILARLY SITUATED” AND “SIMILAR CONDUCT”

There are two distinct, but related, concepts in the CRJA that discuss the criteria for distinguishing between race-based differences and race-neutral differences: similarly situated and similar conduct.<sup>202</sup> The significant difference test requires “comparing individuals who have engaged in similar conduct and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity.”<sup>203</sup> Such analyses are to compare individuals “in the county where the sentence was imposed.”<sup>204</sup> But what kinds of comparisons are appropriate? And what do the phrases “similarly situated” and “similar conduct” mean?

To identify racial disparities, at least two types of comparisons seem plausible: first, comparisons between two or more races, as in the majority versus minority, White versus Black statistics that are frequently reported. Indeed, when the CRJA amendments were first introduced, the relevant statistics were reported in such a form.<sup>205</sup> However, one could imagine comparisons between a certain group and others (e.g., Black v. non-Black) also being made, consistent with the statute. Tellingly, the statute also explicitly contemplates that defendants may belong to more than one racial, ethnic, or national group, and that “a defendant may aggregate data among groups to demonstrate a violation of [the CRJA].”<sup>206</sup> This would seem to support, in the alternative, mixed race groupings as well as, potentially, lumping racial sub-groups into a larger group (e.g., Asian) as well as maintaining the distinctiveness of the subgroup (e.g., Vietnamese).

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202. The notion of similarly situated offenders and similar conduct maps onto the offense/offender distinction in sentencing—the difference between who you are and what you did. As described by Professor Douglas A. Berman, “offense conduct (e.g., harms to victims, whether a weapon was used, the amount of money stolen or drugs trafficked) and offender characteristics (e.g., an offender’s prior criminal history, employment record, family circumstances) have both played a significant role in sentencing decision making, and both types of considerations remain central in modern sentencing systems.” Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 277 (2005) (tracing how the reliance on conduct and characteristics have changed with the role of sentencing as either rehabilitative or retributive).

203. CAL. PENAL CODE § 745(h)(1) (West 2023).

204. *Id.* § 745(a)(4).

205. Assemb. Floor Analysis: A.B. 256, 2021-2022 Gen. Assemb., Reg. Sess., at 3 (Cal. 2022) (“Controlling for conviction history and current offense, Black men convicted of a felony were still 42 percent more likely to be sentenced to prison than a white man convicted of a felony. Similarly, Latino men convicted of a felony were 32.5 percent more likely to be sent to prison.”).

206. PENAL § 745(i).



Turning to the phrase “similarly situated,” the CJRA itself states that the phrase “means that factors that are relevant in charging and sentencing are similar and do not require that all individuals in the comparison group are identical.”<sup>207</sup> This point bears emphasis due to other types of cases involving case comparisons, such as qualified immunity, where similar does, effectively, mean identical.<sup>208</sup> A “defendant’s conviction history *may* be a relevant factor to the severity of the charges, convictions, or sentences.”<sup>209</sup> In the case that it is presented as “a relevant factor and the defense produces evidence that the conviction history may have been impacted by racial profiling or historical patterns of racially biased policing, the court shall consider the evidence.”<sup>210</sup> A review of the multiple ways that the phrase “similarly situated” is used in other laws shows that the meaning of the phrase is highly contextual, and implies a relevance of the domain in question.<sup>211</sup> The statute is silent regarding consideration of gender (whether similarly situated would usually require comparing individuals of the same gender identity) or “timeframe” (whether comparisons should be limited to a certain period of time adjacent to the time of the complaint).

Another important question is whether or not, in comparing individuals, population level comparisons or comparisons conditional on previous steps in the criminal justice process are appropriate. As we discuss below, we believe the language of the statute supports both types of comparisons.<sup>212</sup>

As for “similar conduct,”<sup>213</sup> our research indicates that there is no common legal definition of the phrase, though there is some guidance from the California Evidence Code.<sup>214</sup> It is difficult to isolate how we might find evidence of different system responses to similar conduct, even if we can agree on what similar conduct means. Holding defendant behavior more or less constant, the

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207. *Id.* § 745(h)(6).

208. *See, e.g.,* Joanna C. Schwartz, *Qualified Immunity’s Boldest Lie*, 88 U. CHI. L. REV. 605, 613, 617 (2021). Describing the Sixth Circuit’s incorporation of this standard, Schwartz cites a Sixth Circuit case where “officers . . . released their police dog on a burglary suspect who was sitting down with his hands up. Although a prior Sixth Circuit decision had held that it was unconstitutional to release a police dog on a suspect who was lying down, the Sixth Circuit granted qualified immunity because, it held, that decision did not clearly establish the unconstitutionality of the officers’ decision to release a police dog on a person who was seated with their hands in the air.” *Id.* at 617–18 (citing *Baxter v. Bracey*, 751 F. App’x 869, 869–72 (6th Cir. 2018)).

209. PENAL § 745(h)(6) (emphasis added).

210. *Id.*

211. *See, e.g.,* CAL. HEALTH & SAFETY CODE § 1366.23 (West 1998) (noting that in regard to an insurance regulation, “a qualified beneficiary . . . shall be . . . treated as similarly situated employees for contract purposes”).

212. *See infra* Part III.A.1.

213. We note that the CRJA amendment replaced the word “offense” with “conduct.” PENAL § 745(a)(3) (amending CAL. PENAL CODE § 745(a)(3) (2021)).

214. The Evidence Code discusses a three-pronged test for uncharged similar conduct, CAL. EVID. CODE § 1101 (West 1997), and a four-factor test for impeaching witnesses with prior felonies, CAL. EVID. CODE § 788 (West 1967).

system may respond by charging or not charging the similar conduct, but it may also result in charging more or less severe offenses, as we explore in greater depth below.<sup>215</sup> The inferences we can draw about what “really happened” based on system responses is subject to a host of complications.<sup>216</sup>

The distinction between “similarly situated” (an offender characteristic) and “similar conduct” (an offense characteristic) is not neat-and-tidy, however. In *Ewing v. California*, the Supreme Court considered a challenge to California’s “three strikes” sentencing law, where prior offenses (including wobblers) enhance the sentence one receives for a new offense.<sup>217</sup> Is a recidivist offender punished more severely because of something about them (being differently situated), or because committing the current crime having done so before is somehow worse (engaging in different conduct)? The majority’s opinion seemed to conflate the two.<sup>218</sup> Citing *Rummel v. Estelle*, the *Ewing* Court first described extra punishment in offender terms, arguing that the state “was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State.”<sup>219</sup> The *Ewing* Court also said California’s three strikes law targeted “the class of offenders who pose the greatest threat to public safety: career criminals.”<sup>220</sup> But just a few pages later, the court cited *Witte v. United States*, which justified recidivist enhancements in terms of the conduct itself: “the enhanced punishment imposed for the later offense . . . [is] ‘a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.’”<sup>221</sup> It is difficult to make sense of what, exactly, is being punished: the person or the deed.<sup>222</sup> Ultimately, we see these categories as being different ways of selecting focus—emphasizing different parts of the photo by cropping it.

### III. STUDY DESIGN

In this Part, we turn to our two case studies, which are designed to illustrate how quantitative evidence might establish good cause for discovery under the

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215. See *infra* Part III.B.

216. See discussion *infra* Part III.B.

217. See, e.g., *Ewing v. California*, 538 U.S. 11, 17 (2003) (discussing how wobblers can become felonies due to prior offenses, and also how prior offenses can be vacated because they violate the spirit of the Three Strikes law). We define and discuss wobblers in great detail *infra* Part III.

218. *Id.* at 21.

219. *Id.* (citing *Rummel v. Estelle*, 445 U.S. 263, 284 (1980)).

220. *Id.* at 24.

221. *Id.* at 25–26 (ellipsis in original) (citing *Witte v. United States*, 515 U.S. 389, 400 (1995)).

222. See also W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 905, 920, 938 (2009) (analyzing the role of offense/offender conduct in parole release hearings to illustrate how indeterminate sentences map on to different purposes of punishment: offense facts, which give a term of years, and parole release, which measures offender rehabilitation).

CRJA. Each case study is designed to distinguish between race-based differences and race-neutral differences among similarly situated individuals engaged in similar conduct.

Generating comparisons for similarly situated individuals engaged in similar conduct comes down to decisions over whether and how to “condition” the comparisons on non-racial characteristics of persons or circumstances. In practice, this will involve restricting the sample of cases being compared. For example, the CRJA notes that one relevant difference that would render two people not similarly situated is a “defendant’s conviction history.”<sup>223</sup> For the similarly situated condition, then, we generate comparisons that control for criminal history: first-time offenders, those with prior felony convictions, and those without prior felony convictions. For reasons we describe below, including the fallibility of criminal history information (as acknowledged by the CJRA itself), we also include *all* observations, whatever the criminal history of the defendant. Other dimensions of a defendant being “similarly situated” include geography and time, which we reflect in our analysis as well. As we discuss below, there are many relevant factors—both race-neutral and race-based—that we cannot account for in our analysis. However, at the “discovery-seeking” stage, only “good cause” need be shown: the standard is relaxed, not rigid, and facts generated by discovery can be used to clarify whether the discrepancies were race-neutral or race-based.

A CRJA violation also requires comparisons to be made between those who engage in “similar conduct” but are treated differently by prosecutors.<sup>224</sup> Courts are used to comparing statutory elements to determine similar offenses—by code section, not by underlying conduct, via the *Blockburger* test—but the amendments to the CRJA make it clear that courts are to look at the similarity of underlying criminal conduct, not statutory language.<sup>225</sup> Our second case study compares the charging decisions associated with a group of offenses known as “wobblers”—offenses whose elements and names are the same, but which can be charged as either felonies or misdemeanors—to see if there are significant racial differences in whether one is charged with the felony or misdemeanor version of the statute.<sup>226</sup>

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223. CAL. PENAL CODE § 745(h)(6) (West 2023).

224. *Id.* § 745(a)(3).

225. *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (noting that the Double Jeopardy clause is not violated if each offense “requires proof of an additional fact which the other does not”). The U.S. Supreme Court briefly held that the Double Jeopardy clause also barred subsequent prosecutions for similar conduct, *Grady v. Corbin*, 495 U.S. 508, 521 (1990) (“The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct.”), but this was overturned three years later, *United States v. Dixon*, 509 U.S. 688, 711 (1993) (“The case was a mistake. We do not lightly reconsider a precedent, but, because *Grady* contradicted an unbroken line of decisions, contained less than accurate historical analysis, and has produced confusion, we do so here.”) (internal quotes omitted).

226. See *infra* Part III.A.2.

In that second case study, we also examine a series of Penal Code sections implicating “similar conduct” that cover sex trafficking, pimping, and pandering. All of the crimes have overlapping elements, and thus encompass similar conduct.<sup>227</sup> Yet each of these crimes has a different name and, crucially, a different magnitude of criminal penalties. We look at these Penal Code sections to see if there are significant racial differences. If so, we believe that this provides evidence that “similar conduct” is being treated differently by the criminal legal system.

#### A. SIMILARLY SITUATED: THEORY AND DESIGN

We begin our analysis by looking at some population-level statistics about race, demonstrating that the meaning of these statistics depends, in part, on what data “controls” are used. That is, if one compares all Black people and all White people, one picture emerges, but if one looks at all arrested people who are Black and all arrested people who are White, a different picture emerges. We then turn to the details of our study design involving wobblers.

##### 1. *Population Comparisons v. Conditional Comparisons*

System-generated data, such as databases of criminal records that include racial identifiers, offer the potential to bring large amounts of quantitative evidence to bear on questions of racial disparities at various points in the criminal justice process. Racial disparities in arrest rates, charging, convictions, and sentencing can be quantified and organized by specific offense and for individuals with comparable criminal histories, county by county. Such comparisons might be thought to provide comparisons of similarly situated individuals engaged in similar conduct, and we leverage some carefully designed comparisons of this nature in our cases.

Yet such comparisons require careful interpretation and warrant some skepticism. Sources of error in both directions—toward over- or under-identifying racial bias—are likely to be present. As an illustration of these potential challenges, consider a simple comparison by race of rates of involvement in different stages of the criminal justice system, based on data from the Cal DOJ.<sup>228</sup>

Table 2 summarizes representation ratios of criminal records for the three largest racial groups in California: Black, Hispanic, and White.<sup>229</sup> Each representation ratio measures the over- or under-representation of that racial

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227. That is, this second-and-a-half case study satisfies the *Blockburger* test.

228. Details regarding the sample are provided *infra* Part IV.A.

229. This Article uses the term “Hispanic” because this is the term used in the Criminal Offender Record Information (CORI) racial identifier variable. For population comparisons in this article, the CORI category “Hispanic” is compared with the American Community Survey ethnicity category “Hispanic or Latino.”

group relative to its population compared with White Californians. For example, the first ratio of 2.65 indicates that Black Californians are 2.65 times as likely as White Californians to have an arrest record, relative to their population in the state. The overrepresentation of Black and Hispanic Californians in the system at all stages is evident and is especially stark for Black Californians. A second pattern strikingly evident in the table is the gross disparity in felony convictions and prison sentences for Black Californians.

		<i>Representation ratio relative to CA White population</i>				
<i>Race</i>	<i>Number of individuals</i>	<i>At least one arrest</i>	<i>At least one court disposition</i>	<i>At least one conviction</i>	<i>At least one felony conviction</i>	<i>At least one prison sentence</i>
Black	601059	2.65	2.61	2.63	3.93	5.86
Hispanic	1870028	1.21	1.16	1.20	1.20	1.59
White	1457585	1.00	1.00	1.00	1.00	1.00

*Table 2: Representation by race in California criminal records data, relative to White Californians, for individuals with records over the period 2010-2021.*

Sources: Cal DOJ CORI data and American Community Survey.<sup>230</sup>

The overrepresentation of Black individuals also holds across nearly every California county, and for men and women separately. Appendix Figures A1, A2, and A3 display representation ratios for each county-by-race combination for arrests, charges, and felony convictions, respectively.<sup>231</sup>

The comparison of disparities at each step in the process—conditional on the step that preceded it—provides a rather different lens on the issue. Because each step represents a decision point where discretion is exercised, the steps reveal disparities in outcomes for individuals who arguably are more similarly situated, in the specific sense of having gotten to that stage in the process. Table 3 shows the rate at which each race experiences the indicated step in the process—conditional on reaching the step that precedes it—from arrest to court

230. See *American Community Survey Data via API*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs/data/data-via-api.html> (July 13, 2023); see also Kyle Walker, Matt Herman, *TIDYCENSUS*, <https://walker-data.com/tidycensus> (noting that American Community Survey summary tables were accessed through the Census Bureau API interface using the R package tidycensus) (last visited Nov. 18, 2023).

231. See Appendix, Figures A1–A3.

decision, conviction, and sentence. For example, forty-one percent of Black defendants who have been arrested have a subsequent court disposition.<sup>232</sup>

There are large racial disparities at the arrest stage, where Black Californians are substantially overrepresented, but these disparities narrow at subsequent stages of the criminal process until sentencing, where Black and Hispanic Californians who are convicted of crimes are sent to prison at higher rates than White Californians. The higher rate of prison sentences is the result of convictions on more serious charges on average as well as differences in prior criminal histories.<sup>233</sup>

<i>Race</i>	<i>Number of incidents (cycles)</i>	<i>Incidents involving arrest per 100 population</i>	<i>Percent with court disposition conditional on arrest</i>	<i>Percent with conviction conditional on court disposition</i>	<i>Percent with prison sentence conditional on conviction</i>
Black	2697580	119.8	41.0	74.6	11.1
Hispanic	6485876	42.2	45.6	79.4	7.4
White	5597383	39.0	45.2	74.8	5.6

*Table 3: Conditional probabilities of sequential steps in criminal records, by race, for individuals with records over the period 2010-2021.*

Sources: Cal DOJ CORI data and American Community Survey

The patterns observed in the data are consistent with multiple interpretations, which are not mutually exclusive. The disparities in arrest rates could reflect racial differences in the incidence of actionable conduct, a reflection of racial bias in policing, or a combination of both.<sup>234</sup> The

232. The actual unit of analysis is what the CORI data refer to as a cycle—specifically, an incident, usually originating with an arrest on one or more charges, and the subsequent steps through court decisions and sentencing relating to that incident. Individuals may experience multiple cycles, a fact that explains the larger sample sizes compared to Table 2.

233. Studies accounting for racial differences in sentence length tend to find that racial differences in current offenses and criminal histories account for a sizable part (but not all) of the racial differences in sentencing. *See, e.g.,* M. Marit Rehani & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320 (2014). *See also* JUD. COUNCIL OF CAL., DISPOSITION OF CRIMINAL CASES ACCORDING TO THE RACE AND ETHNICITY OF THE DEFENDANT: 2021 REPORT TO THE LEGISLATURE (2021).

234. A recent study by the Public Policy Institute of California found that “traffic stops are the key driver of racial disparities in both the likelihood of an individual being stopped and the likelihood of a search, enforcement, intrusiveness, and/or use of force during that stop.” Deepak Premkumar, Magnus Lofstrom & Andrew Skelton, *Police Use of Force and Racial Disparities During Traffic Stops*, PUB. POL’Y INST. OF CAL.: BLOG (Feb. 2, 2023), <https://www.ppic.org/blog/police-use-of-force-and-racial-disparities-during-traffic-stops/> (citing Magnus Lofstrom, Joseph Hayes, Brandon Martin & Deepak Premkumar, *Racial Disparities in Law Enforcement Stops*, PUB. POL’Y INST. OF CAL. 4 (Oct. 2021), <https://www.ppic.org/?show-pdf=true>

considerably smaller disparities in charging and court outcomes, conditional on arrest, could be consistent with less bias after arrest or with considerable bias masked by selection effects. What we mean by “selection effects” is that these compared groups are different across other dimensions in addition to race, and those differences might explain the similar results. For example, if more Black people are arrested per criminal activity, it may be that the evidence against Black defendants is, on average, weaker than that against White defendants, and therefore observing identical or similar rates of prosecution or conviction per arrest would actually be consistent with disparate treatment of Black and White defendants. In this instance, the conditioning variable—arrests—is not itself race neutral and does not provide a comparison of *similarly situated* individuals. The cumulative nature of decisions in the criminal justice system thus points to the potential for “over-controlling.”<sup>235</sup>

The CRJA appears to be sensitive to the possible role of cumulative bias: “If . . . the defense produces evidence that the conviction history may have been impacted by racial profiling or historical patterns of racially biased policing, the court shall consider the evidence.”<sup>236</sup> That said, selection effects of this nature are intrinsically difficult to observe or measure. Data analysis tries to uncover relationships among the data, but if there are relationships in the world that we are unaware of or unable to control for, our analysis will be tainted.<sup>237</sup>

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&docraptor=true&url=https%3A%2F%2Fwww.ppic.org%2Fpublication%2Fracial-disparities-in-law-enforcement-stops%2F (analyzing data on “nearly 4 million stops made in 2019 by the 15 largest law enforcement agencies in the state”)); see also Magnus Lofstrom, Joseph Hayes, Brandon Martin, Deepak Premkumar & Stephanie Barton, *Policy Brief: Racial Disparities in Law Enforcement Stops*, PUB. POL’Y INST. OF CAL. 1 (Oct. 2021), <https://www.ppic.org/wp-content/uploads/policy-brief-racial-disparities-in-law-enforcement-stops.pdf> (“Stops of Black Californians more often lead to no enforcement than stops of white Californians, but are more intrusive. During stops, Black people are more likely to be searched, yet searches are less likely to yield evidence.”).

235. Dean Knox, Will Lowe, & Jonathan Mummolo, *Administrative Records Mask Racially Biased Policing*, 114 AM. POL. SCI. REV. 619, 619–20, 631 (2020); see also Norman Fenton, Martin Neil & Steven Frazier, *The Role of Collider Bias in Understanding Statistics on Racially Biased Policing*, CORNELL UNIV. ARXIV 1, 3, 6 (2020), <https://arxiv.org/pdf/2007.08406.pdf>.

236. CAL. PENAL CODE § 745(h)(6) (West 2023).

237. In their important study of racial disparities in federal sentencing, M. Marit Rehaavi and Sonja Starr found that conditioning on offenses charged at arrest reduces estimated racial differences in sentence length by about half. Rehaavi & Starr, *supra* note 233, at 1323. That is, a big reason Black defendants end up with longer federal sentences is that they tend to be initially charged with much more serious offenses. Controlling for criminal history further diminishes (but does not eliminate) that racial sentencing gap. Yet offense severity charged at the time of arrest is precisely the kind of law enforcement decision that could introduce selection bias in the quality of the case handed off to federal prosecutors, potentially biasing the results in the direction of underestimating bias against Black defendants exercised at the level of prosecution and sentencing. Concerns about selection bias have been brought out clearly in one of the authors’ criticisms of work by Roland Fryer on racial disparities in police use of force. David Ball, *Using Bayesian Analysis of Police Killings*, WASH. MONTHLY (July 14, 2016), <https://washingtonmonthly.com/2016/07/14/using-bayesian-analysis-of-police-killings/>. On cumulative disparities and selection effects, see also Joshua Grossman, Julian Nyarko & Sharad Goel, *Racial*

A related problem with over-controlling is what Ian Ayres calls “included variable bias.”<sup>238</sup> Oftentimes studies control for poverty, housing, and education as “root causes” of crime that could provide race-neutral reasons for offending rates, and, accordingly, show that racial disparities are really “just” a poverty or homelessness or educational problem.<sup>239</sup> The problem is that this assumes that these control factors are themselves independent of race—an assumption that should invite a lot of skepticism.<sup>240</sup> For example, if race predicts higher contact with law enforcement officers and higher rates of eviction, then explaining contacts with the criminal legal system as a function of homelessness would hide the fact that racism drives both. Unless we assume that allocation of wealth, education, and housing, among other factors, are not related to racial factors, we are controlling for a great deal of the built-in discrimination when we control for them.

## 2. *Racial Disparities in Charging: Wobblers as a Case Study in Similarly Situated*

To identify and compare defendants who are similarly situated, we focus on a subset of crimes known as “wobblers.” Recall that wobblers are crimes in the California Penal Code that can be charged as either felonies or misdemeanors,<sup>241</sup> but they are presumptively felonies “unless charged as a misdemeanor by the People or reduced to a misdemeanor by the sentencing court under Penal Code section 17, subdivision (b).”<sup>242</sup> In other words, the same section of the Penal Code can be charged as a felony or a misdemeanor, but it is a misdemeanor “only when the court takes affirmative steps to classify the crime as a misdemeanor.”<sup>243</sup> This occurs . . . most notably when the prosecuting attorney files . . . a complaint specifying that the offense is a misdemeanor . . .

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*Bias as a Multi-Stage, Multi-Actor Problem: An Analysis of Pretrial Detention*, 20 J. EMPIRICAL LEGAL STUD. 86, 87, 89 (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4049370](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049370), and Nick Petersen, *Examining the Sources of Racial Bias in Potentially Capital Cases: A Case Study of Police and Prosecutorial Discretion*, 7 RACE & JUST. 7, 9–10, 12–13, 25 (2017).

238. Ian Ayres, *Testing for Discrimination and the Problem of “Included Variable Bias”* (Yale Univ., Working Paper, 2010), <https://ianayres.yale.edu/sites/default/files/files/Testing%20for%20Discrimination.pdf>. For a fuller, more recent discussion of the included variable bias problem in criminal justice, see Jongbin Jung, Sam Corbett-Davies, Ravi Shroff & Sharad Goel, *Omitted and Included Variable Bias in Tests for Disparate Impact*, CORNELL UNIV. ARXIV 1, 2, 4–5, 9 (2019), <https://arxiv.org/pdf/1809.05651.pdf>.

239. Ayres, *supra* note 238, at 3.

240. For a brief history of discriminatory federal lending practices and how those practices explain current racial disparities in pollution-related health outcomes, see Haley M. Lane, Rachel Morello-Frosch, Julian D. Marshall & Joshua S. Apte, *Historical Redlining is Associated with Present-Day Air Pollution Disparities in U.S. Cities*, 9 ENV'T SCI. & TECH. LETTERS 345, 345–46, 348 (2022).

241. PENAL § 17(b).

242. *People v. Statum*, 50 P.3d 355, 356 (Cal. 2002).

243. *People v. Park*, 299 P3d 1263, 1269 (Cal. 2013).



or [a]fter a judgment imposing a punishment other than imprisonment in the state prison.”<sup>244</sup>

California courts have provided several policy justifications for wobblers: to promote rehabilitation,<sup>245</sup> to encourage plea deals,<sup>246</sup> to vest the District Attorney with the ability to be more lenient,<sup>247</sup> and to provide flexibility, given the variance in the severity of offense facts and the characteristics of the offender.<sup>248</sup> This discretion can be rightly exercised via factors laid out in the Uniform Crime Charging Standards issued by the California District Attorneys Association (listing, *inter alia*, prior record (offender characteristic), severity of the crime (offense fact), and probability of future criminal conduct (perhaps both offense fact and offender characteristic)).<sup>249</sup>

Wobblers are significant. They account for just under a third of the penal-code dispositions in our criminal records data. They do, in fact, wobble—in our data, about thirty-six percent of dispositions on wobbler offenses were charged as misdemeanors. Wobblers are particularly important for criminal history. Prior felonies trigger repeat-offender sentence enhancements (“three strikes”) in California; prior misdemeanors—even if charged under the same penal code section—do not.<sup>250</sup> Misdemeanors show more racial effects in empirical

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244. *People v. Chaides*, 177 Cal. Rptr. 3d 866, 870 (Ct. App. 2014) (internal citations and quotation marks omitted, ellipses in the original).

245. *Park*, 299 P.3d at 1267 (“As a general matter, the court’s exercise of discretion under section 17(b) contemplates the imposition of misdemeanor punishment for a wobbler ‘in those cases in which the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon.’”) (internal citations omitted).

246. *Malone v. Superior Ct.*, 120 Cal. Rptr. 851, 853 (Ct. App. 1975) (noting that the purpose of this provision is “to permit the selection of offenders who merit more lenient treatment, to encourage guilty pleas by limiting the potential penalty and to save court time and expense”).

247. *Necochea v. Superior Ct.*, 23 Cal. App. 3d 1012, 1016 (Ct. App. 1972) (“[T]he purpose of 17, subdivision (b)(4) is not to vest the prosecutor with the judicial prerogative of decreeing in the form of a judgment the misdemeanor-felony nature of the crime, but rather to vest the district attorney with the right to extend more lenient treatment to an offender.”).

248. *People v. Tran*, 195 Cal. Rptr. 3d 638, 643 (Ct. App. 2015), *modified* Dec. 4, 2015 (“The conduct underlying these offenses can vary widely in its level of seriousness. Accordingly, the Legislature has empowered the courts to decide, in each individual case, whether the crime should be classified as a felony or a misdemeanor. In making that determination, the court considers the facts surrounding the offense and the characteristics of the offender.”) (internal citations omitted).

249. CAL. DIST. ATT’YS ASSOC., UNIFORM CRIME CHARGING STANDARDS 20–21 (1996).

250. *See, e.g.*, Elsa Y. Chen, *The Liberation Hypothesis and Racial and Ethnic Disparities in the Application of California’s Three Strikes Law*, 6 J. ETHNICITY CRIM. JUST. 83, 84 (2008). Chen found that Black defendants were disproportionately affected by prior felony wobblers on second and third strikes. *Id.* “African-Americans have 1.85 times greater odds of receiving third strike sentences than Whites,” *id.* at 92, and “the disparity between African-Americans and [W]hites in Three Strikes sentencing is greater for wobbler offenses (odds ratio=1.56) than it is for non-wobbler offenses (odds ratio = 1.44),” *id.* at 94. Hispanic defendants were disproportionately under-affected, a finding Chen attributed to the use of deportation instead of the criminal legal system. *Id.* at 98.

studies.<sup>251</sup> Where there is more discretion about whether to pursue charges or to drop them, we see more racial disparities (when comparing Black people and White people).

Wobbler charging is a discrete moment of discretion that could reveal racial disparities for similarly situated individuals. We compare the rate at which wobblers are charged as a felony for minority defendants versus White Californians. Because the law explicitly advises that criminal history should be a factor in deciding whether to reduce a wobbler charge to a misdemeanor, we consider not only the set of all wobbler dispositions, but also dispositions restricted to those individuals with a prior felony conviction, those without a prior felony conviction, and first-time offenders. Considering the sample of first offenses also avoids the myriad ways in which criminal history, charging, convictions, and sentencing can affect whether a given person is “similarly situated” to another along a dizzying array of dimensions.

Note, though, that if there is a racial discrepancy for first-time offenders, with some racial groups having their charges dismissed or reduced (or even not being arrested), and others being convicted for felonies, then perhaps we should be suspect of “controlling” for criminal history. We would, again, be “controlling” for one of the main sources of disparate impact and disparate treatment.

#### B. SIMILAR CONDUCT: THEORY AND DESIGN

Our second case study explores racial disparities in the charging of different offenses—with punishments that differ by orders of magnitude—that are based on similar conduct. We begin our analysis by discussing theoretical difficulties with determining the “real” conduct that someone engaged in or the “real” rates of offending by a given racial group. We refer to several prior studies that attempted to measure baseline offending rates in ways that could then be

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251. For example, Carlos Berdejó’s study of plea-bargaining tracks not just the system result (the disposition/plea), but the process by which those results were made, using data from Wisconsin. Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1190–91 (2018). Berdejó’s study compared charges along two dimensions at two points in the process: the number of charges and the “most serious” charge at both the time of filing and at disposition. *Id.* at 1191. Berdejó found that White felony charges were more likely to be dropped, but he also found that less serious offenses (e.g. misdemeanors) had more racial disparities, suggesting that White first-time offenders arrested for low-level offenses got even more favorable treatment. *Id.* And because this data does not include offenders who are not arrested, or who never have their charges filed at an initial appearance, this may underestimate the disparity. *Id.* Berdejó argues that the lack of information in the judicial process (given the volume of cases) means that system actors rely on stereotypes: race is used as a proxy for recidivism (the likelihood of reoffending) and latent criminality (the seriousness of future offenses). *Id.* at 1191–92. That is, White people are seen as making a mistake they likely won’t repeat, and, if they do commit another crime, that they won’t do something worse. Low-level offenses, again, change criminal history, which may explain Berdejó’s finding that racial disparities are lower for more serious crimes, since this category includes crimes deemed serious because they are committed by people with prior offenses.

compared to arrests, charges, and convictions. We then turn to the details of our study design involving the multiple ways in which certain sex offenses are criminalized and explain how this design addresses these problems.

### 1. *Similar Conduct: What's in a Name?*

There is not much daylight between what *is* a specific crime and what a system actor decides to *call* a specific crime. Every time an alleged criminal act is “observed,” its characterization as a crime and its classification as a specific offense involve a discretionary judgment.

Consider a physical altercation in the home, where one domestic partner throws an object at another. The object misses the victim but bounces off the wall and ends up glancing off the victim’s shoulder. This altercation could be charged as misdemeanor battery against a spouse.<sup>252</sup> It could also be “corporal injury resulting in a traumatic condition,”<sup>253</sup> a wobbler depending on the extent of the glancing blow, since “traumatic condition” can include minor injuries.<sup>254</sup> It could be charged as simple assault, a misdemeanor, which is an attempt “coupled with a present ability, to commit a violent injury on the person of another;”<sup>255</sup> or simple battery, a misdemeanor, which is “any willful and unlawful use of force against the person of another.”<sup>256</sup> If the thrower says “I will hurt you,” this could also be a criminal threat, a wobbler, which is a threat “to commit a crime which will result in death or great bodily injury to another person.”<sup>257</sup> Some of the charges would depend on the object thrown. But consider that even this is not so clear cut. California Penal Code 245(a)(1) criminalizes assault with a deadly weapon, not a firearm. California courts have found the following items to be deadly weapons—a butter knife,<sup>258</sup> a cigarette lighter,<sup>259</sup> a shoe,<sup>260</sup> a pencil,<sup>261</sup> and a car key.<sup>262</sup> Now consider the role of intent. If someone is standing outside someone else’s house, is it not a crime at all, or is it attempted burglary?<sup>263</sup> The key will be how the person stood outside and

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252. CAL. PENAL CODE § 243(e)(1) (West 2023).

253. *Id.* § 273.5(a).

254. *See id.* § 273.5(d) (2023) (“‘Traumatic condition’ means a condition of the body, such as a wound, or external or internal injury, including, but not limited to, injury as a result of strangulation or suffocation, whether of a minor or serious nature, caused by a physical force.”).

255. CAL. PENAL CODE § 240 (West 1872).

256. *Id.* § 242.

257. CAL. PENAL CODE § 422(a) (West 2011).

258. *In re B.M.*, 217 Cal. Rptr. 3d 294, 297, 301 (Ct. App. 2017), *rev'd*, 431 P.3d 1180 (2018).

259. *In re T.D.*, 2005 WL 1864150, at \*3 (Cal. Ct. App. Aug. 5, 2005).

260. *People v. Graham*, 455 P.2d 153, 168–69 (Cal. 1969).

261. *People v. Page*, 20 Cal. Rptr. 3d 857, 862 (Ct. App. 2004).

262. *People v. Koback*, 235 Cal. Rptr. 3d 675, 681, 683 (Ct. App. 2018).

263. *See* CAL. PENAL CODE § 459 (West 1872).

whether a police officer determined that it evinced an intent to commit “grand or petit larceny or any felony.”<sup>264</sup>

Such judgments are particularly important when it comes to the subject of our second case study, sex offenses, but judgment is also intrinsic to how almost every other crime is mapped onto particular behavior. Perhaps the only crimes for which this may not be true involve biomarkers, such as blood alcohol content (BAC) as proof of Driving Under the Influence (DUI), but, even then, a BAC over a particular threshold is just an irrefutable presumption of intoxication. A teetotaler can be arrested and found guilty of a DUI if their low BAC still impairs them, so biological indicia are not the final word. Moreover, as John MacDonald and Stephen Raphael note, a decision to label something a crime is, itself, a policy choice.<sup>265</sup>

These subtleties can mislead scholars and judges. In *United States v. Armstrong*, the Supreme Court said a lack of prosecutions for White individuals and crack was “proof” of differential underlying rates of offending.<sup>266</sup> But it is equally plausible that some of the gap is due to differences in police and prosecution decisions. Likewise, in 1982, Alfred Blumstein concluded that arrest rates explained eighty percent of disparities in incarceration,<sup>267</sup> but in so doing, largely overlooked the possibility that arrest rates themselves were the result of disparate treatment by police.<sup>268</sup>

Some studies have accounted more directly for offending rates. In New Jersey, a study seeking evidence that Black drivers were pulled over disproportionately (“Driving While Black”) controlled for population by race (using census data), population of highway drivers by race (by observing highway traffic and noting the race of drivers), and the population of speeders by race (by having observers drive in cruise control and note the race of those who passed them).<sup>269</sup> This study provided compelling evidence that Black/White

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264. *Id.*

265. John MacDonald & Steven Raphael, *Effect of Scaling Back Punishment on Racial and Ethnic Disparities in Criminal Case Outcomes*, 19 CRIMINOLOGY & PUB. POL’Y 1139, 1140 (2020) (“This discrimination/behavior dichotomization obscures the role of criminal justice policies in generating inter-group disparities. . . . These policy prescriptions often embody the discretionary decision-making of state legislatures and may be based in part on class or race differences in the rates at which underlying sanctioned behaviors occur in the population.”) (internal citations omitted).

266. See discussion *supra* Part I.A.

267. Alfred Blumstein, *On the Racial Disproportionality of United States’ Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1267–68 (1982).

268. Though Blumstein writes that his inquiry is about whether differential rates of imprisonment are “a consequence of disproportionate involvement in criminal activity,” *id.* at 1261, he uses arrests as his measure of criminal activity, *id.* at 1267–68, turning to differential arrest rates near the end of the paper but concluding that “the arrest process . . . is reasonably representative of the crime process for at least . . . serious crime types” and that racial bias is “less than sufficient” to explain differential arrest rates, *id.* at 1278.

269. David A. Harris, *The Stories, the Statistics, and the Law: Why Driving While Black Matters*, 84 MINN. L. REV. 265, 277–78 (1999) (discussing a study by John Lamberth).

disparities in being pulled over could not be explained by either gross population numbers or by frequency of moving violations.<sup>270</sup>

Other studies have looked at stop outcomes (or “hit rates”)—how often those who were stopped had drugs or weapons, for example.<sup>271</sup> Biased policing against a certain racial group could, generally, tend to manifest itself in a lower rate of finding contraband—meaning, a lower hit rate—for members of that group. That is, if more people of a given race are stopped on lower levels of suspicion, searches are less likely to be successful. But such studies have their own drawbacks, one of which is that they may be subject to bias for omitted payoffs—a police officer can stop someone for one reason (broken tail light) and find something that then justifies the stop (for example, contraband), or they can stop pretextually (suspicion of drugs not arising to reasonable suspicion) but use a traffic violation to legitimize the stop (the broken tail light).<sup>272</sup> In *Whren v. United States*, the Supreme Court held that the Fourth Amendment cannot be used as a separate mechanism for challenging racial profiling and that, as long as a stop is “objectively” justified, the Constitution does not require an analysis of whether there were other reasons animating the stop (for example, racial profiling).<sup>273</sup> This holding produces the perverse result that under *McCleskey*, subjectivity/racial animus must be proven despite objective/system data, while under *Whren*, subjectivity is irrelevant as long as there is objective data.

While we get some sense of the occurrence of crime from victimization surveys and “calls for service” (when people dial 911), those examples are imperfect.<sup>274</sup> There are various reasons that reports of crime or crime victimization could differ systematically from actual crimes committed in ways

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270. *Id.* at 279. There are other studies that have done the same. A nationwide study found that, on average, Black individuals were more than three times as likely to be arrested for marijuana possession as White individuals, despite similar rates of usage. ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 4, 8 (2013), [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-re11.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-re11.pdf). “Veil of darkness” studies compare the racial composition of police traffic stops after the sun goes down, making race harder to perceive, though this may be mediated by street lighting, tinted windows, or the racial composition of neighborhoods. See, e.g., Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NAT. HUM. BEHAV. 736, 737 (2020). See also Jennifer Doleac, *Racial Bias in the Criminal Justice System*, in A MODERN GUIDE TO ECONOMICS OF CRIME 290 (Edward Elgar Publ’g, 2022) (citing Felipe Goncalves and Steven Mello, *A Few Bad Apples? Racial Bias in Policing*, 111 AM. ECON. REV. 1406, 1411–12 (2021)). After the sun goes down, racial disparities in traffic stops narrow. *Id.*

271. For analysis of these studies by one of the authors, see W. David Ball, *supra* note 43, at 525–26.

272. *Id.* at 526–27; see also Doleac, *supra* note 273, at 288.

273. *Whren v. United States*, 517 U.S. 806, 813 (1996).

274. See, e.g., NAT’L RES. COUNCIL, ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT 109–26 (Candace Kruttschnitt, William D. Kalsbeek, Carol C. House eds., The Nat’l Acads. Press 2014). See also Justin L. Sola & Charis E. Kubrin, *Making the Call: How Does Perceived Race Affect Desire to Call the Police?*, 12 J. EXPERIMENTAL CRIMINOLOGY 1, 2 (2023).

that correlate with race or other characteristics.<sup>275</sup> For example, marginalized groups may be less likely to be surveyed or to report something truthfully (such as someone whose immigration status makes them subject to deportation is less likely to call 911, which may result in under-reporting of domestic violence).<sup>276</sup> People may also be victimized without knowing it is a crime. For example, women in the United States report behavior that would constitute sexual assault at much higher levels than those who say they were raped.<sup>277</sup> Further, calls for service may vary based on one's trust of the police. Filing a report for stolen property is something people with insurance do, but others may not. As it is widely appreciated, for most police encounters there is no requirement that someone be arrested, and someone can also be arrested for a fine-only crime.<sup>278</sup> Thus, while the CRJA does not specify that arrest rates are part of the disparate impact analysis, they certainly are relevant for both aggregate data and for "charges sought."<sup>279</sup>

## 2. *Pimping, Pandering, and Human Trafficking for the Purpose of Prostitution*

Our case study for "similar conduct" focuses on a constellation of offenses relating to pimping, pandering, and human trafficking for the purpose of prostitution. These different labels cover very similar activity: essentially, supplying people who will work as prostitutes (pandering), obtaining financial benefits from their prostitution (pimping), and, in some cases, doing either of these things by force or fear or without the consent of the people engaging in prostitution (human trafficking). Even these labels obscure the fact that force or

275. Sola & Kurbin, *supra* note 274, at 2–3.

276. NIK THEODORE, DEP'T OF URB. PLAN. & POL'Y, UNIV. OF ILLINOIS AT CHICAGO, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT 1, 6 (2013).

277. Laura C. Wilson & Katherine E. Miller, *Meta-Analysis of the Prevalence of Unacknowledged Rape*, 17 TRAUMA, VIOLENCE, & ABUSE 149, 149 (2016) ("The findings supported that over half of all female rape survivors do not acknowledge that they have been raped. The results suggest that screening tools should use behaviorally descriptive items about sexual contact, rather than using terms such as 'rape.'").

278. *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001). Police discretion is incredibly broad. Police can issue a warning or make a custodial arrest. They can also give someone a summons and citation—a formal charge that does not involve custody, just a requirement that someone appear in court at the date and time indicated on their citation. They can issue a fix-it ticket, where the case will be dropped if the person agrees to certain stipulations (this is most common for traffic offenses). A person can be booked and released at either a jail or a police station. Or they can be booked and bailed out. Even after arrest, there is discretion on both an individual and systemic level. In different jurisdictions there are differential rates of declension overall. *See, e.g.*, Luka Kutateladze, Rebecca Richardson Dunlea, Melba Pearson, Lin Liu, Ryan Meldrum & Don Stemen, *Reject of Dismiss? A Prosecutor's Dilemma*, PROSECUTORIAL PERFORMANCE INDICATORS, at 4 (July 2022), <https://prosecutorialperformanceindicators.org/wp-content/uploads/2022/07/PPI-Reject-Dismiss-Final.pdf>. Relationships between police and prosecutors are also different. For example, police and prosecutors are "loosely connected" in Los Angeles County, since most police work, either at the case level or in terms of departmental priorities, does not result in prosecutions. Petersen, *supra* note 237, at 11.

279. *See, e.g.*, *Young v. Superior Ct.*, 294 Cal. Rptr. 3d 513, 532–33 (Ct. App. 2022).

fear can be an element of pimping or pandering, and that, for example, pandering can involve financial benefits. We map out the landscape below.

The Penal Code defines “pimping” as “deriv[ing] support or maintenance in whole or in part from the earnings or proceeds of the person’s prostitution, or from money loaned or advanced to or charged against that person” or from compensation for soliciting prostitution, with knowledge that the “person is a prostitute.”<sup>280</sup> “Pandering” is defined as “[p]rocur[ing] another person for the purpose of prostitution.”<sup>281</sup> Finally, the Penal Code defines “human trafficking” as, generally, “depriv[ing] or violat[ing] the personal liberty of another with the intent to obtain forced labor or services,” but it carves out a specific deprivation for the purposes of prostitution and production of lewd material.<sup>282</sup> All three of the referenced statutes have specific sections dealing with the prostitution of minors.<sup>283</sup>

Having roughly defined these three major categories, note that there is substantial (and substantive) overlap among them. Human trafficking, as noted, involves the deprivation of human liberty,<sup>284</sup> but this deprivation includes deprivations achieved not only via “force” or “fear,” but also “fraud” and “duress.”<sup>285</sup> The Penal Code contains a list of factors for law enforcement to consider when evaluating whether someone is being trafficked, including signs of “fatigue” and whether they are “withdrawn, afraid to talk, or his or her communication is censored by another person.”<sup>286</sup> Pandering has subsections that mirror trafficking: causing someone to become a prostitute by “fraud” or “duress”<sup>287</sup> or to become or remain a prostitute via “threats” and “violence.”<sup>288</sup> While pimping focuses on financial gains from prostitution, pandering also includes “receiv[ing] or giv[ing] . . . any money or thing of value.”<sup>289</sup>

There are other code sections that largely duplicate pimping, pandering, and human trafficking. Indeed, the Penal Code itself makes reference to this overlap in Penal Code section 653.23(b),<sup>290</sup> which criminalizes, as a

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280. CAL. PENAL CODE § 266h(a) (West 2011).

281. *Id.* § 266i(a)(1).

282. CAL. PENAL CODE § 236.1(a)–(b) (West 2023).

283. *See, e.g.*, PENAL § 266h(b) (West 2011) (pimping a minor); PENAL § 266i(b) (West 2011) (pandering a minor); and PENAL § 236.1(c) (West 2023) (trafficking a minor for the purposes of prostitution or the production of lewd material).

284. PENAL § 236.1(a)–(b) (West 2023).

285. *Id.* § 236.1(h)(3). Note that the threat of harm can include “psychological, financial, or reputational harm.” *Id.* § 236.1(h)(8).

286. CAL. PENAL CODE § 236.2(a)–(b) (West 2012).

287. PENAL § 266i(a)(5) (West 2011).

288. *Id.* § 266i(a)(2), (4).

289. *Id.* § 266i(a)(6).

290. CAL. PENAL CODE § 653.23(b) (West 2023) (“Nothing in this section shall preclude the prosecution of a suspect for a violation of Section 266h or 266i or for any other offense, or for a violation of this section in conjunction with a violation of Section 266h or 266i or any other offense.”).

misdeemeanor, both pimping (“collect[ing] and receiv[ing] . . . the proceeds of . . . prostitution”)<sup>291</sup> and pandering (“[d]irect[ing], supervis[ing], recruit[ing], or otherwise aid[ing] another person in the commission” of prostitution).<sup>292</sup> Section 266(a) seems to cover all three of pimping, pandering, and human trafficking, since it criminalizes taking “any person against his or her will and without his or her consent, or with his or her consent procured by fraudulent inducement or misrepresentation, for the purpose of prostitution.”<sup>293</sup> Section 266 overlaps with pandering a minor (“inveigl[ing] or entic[ing] a person under 18 years of age . . . for the purpose of prostitution” or “aid[ing] or assist[ing] in that inveiglement or enticement,” including by any “fraudulent means”).<sup>294</sup> Section 266e criminalizes paying someone for the purpose of placing someone “for immoral purposes . . . against his or her will,”<sup>295</sup> and section 266f criminalizes the other side of the bargain, that is, receiving “money or other valuable thing” for placing someone “in custody, for immoral purposes,” though it includes those placed there with or without consent.<sup>296</sup>

Table 4 indicates our Penal Code Sections of Interest, along with the ways in which they overlap, arranged roughly in increasing order of severity of penalties.

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291. *Id.* § 653.23(a)(2).

292. *Id.* § 653.23(a)(1).

293. CAL. PENAL CODE § 266a (West 2015).

294. CAL. PENAL CODE § 266 (West 2020).

295. CAL. PENAL CODE § 266e (West 2011).

296. *Id.* § 266f.



Code Section	Description	Penalty
653.23(a)(1)	Directing, supervising, recruiting for prostitution	Misdemeanor, 6 months.
653.23(a)(2)	Receiving money for prostitution of another	Misdemeanor, 6 months.
266i(a)(1)	Pandering (recruiting for prostitution)	Felony, 3/4/6 years
266h(a)	Receiving money for prostitution of another	Felony, 3/4/6 years
266h(b)(1)	Same as 266h(a), for a minor between the ages of 16-18	Felony, 3/4/6 years
266h(b)(2)	Same as 266h(a), for a minor under the age of 16	Felony, 3/6/8 years
236.1(b)	Deprivation of liberty with intent to effect/maintain, inter alia, 266h, 266i, or pornography	Felony, 8/14/20 years (\$500,000 max fine)
236.1(c)	Same as 236.1(b), with a minor under 18	Felony, 5/8/12 years (\$500,000 max fine); 15 years to life if force, fear, fraud, duress

*Table 4: California Penal Code sections for offenses related to pimping, pandering, and human trafficking for the purpose of prostitution.*

Note, however, that there is still ample research to be done along the lines of Harris's "Driving While Black" study.<sup>297</sup> We do not have a clear sense of what the rates of prostitution are and how they might differ along demographic lines. For example, one might hypothesize that there is prostitution around large events such as NFL games or tech company user/developer expositions that might not result in street arrests or increased police activity. This is the kind of "other evidence" that may be relevant under the CRJA. The next Part describes our data and analysis.

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297. See discussion *supra* note 269.

#### IV. DATA AND SAMPLING CRITERIA

In this Part, we describe our data and analysis. First, we describe the comprehensive database of California criminal justice prosecution, from arrests to sentencing, on which we base our analysis. After describing some of its strengths and limitations, next we describe how we sampled this database to carry out our case study analyses, and the tradeoffs we faced, particularly in developing meaningful empirical profiles of counties with small populations.

##### A. CALIFORNIA DOJ CRIMINAL RECORDS DATA

To carry out our case study analyses we rely on a comprehensive dataset of all arrests, charges, convictions, and sentences in California (CORI), available to researchers through the California Department of Justice Automated Criminal History System (ACHS).<sup>298</sup> Our records were downloaded between September 23, 2021, and September 29, 2021. The analysis reported in this Article focuses on records linked to arrests dating from the beginning of 2010 through the time of download. For individuals with records in that interval, criminal histories include records dating to before 2010.

This database has served as the basis for numerous studies and has, among its advantages, a comprehensive coverage of all California counties and a hierarchical data structure. This structure allows us to observe the evolution of a charge across time from arrest through sentencing. Though the data are anonymized, individual records can be linked via an internal ID code, allowing the construction of individual criminal histories. Among its known disadvantages are that it does not include information on legal representation, plea-bargaining, or the conditions of the arrest, such as whether or not a weapon was present, which might legitimately be considered by the prosecution in deciding to characterize a crime as a felony or misdemeanor. Two additional shortcomings of the database are that they do not include juvenile records or out-of-state records.

For our study of wobblers we restrict the sample to males with dispositions on or after January 1, 2010, and compare outcomes by race for four different samples: (i) all individuals, (ii) individuals with at least one prior felony conviction at the time of the charging decision, (iii) individuals with no prior felony convictions, and (iv) first-offense cases, identified in the data as an individual's first "cycle." Because a cycle consists of a set of related arrests and court decisions flowing from an incident on a specific date—usually an arrest on one or more charges—the "no cycle" condition is a reasonable proxy for no prior system contact as opposed to no prior felony convictions. In our analysis,

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298. *Data Request Process*, STATE OF CAL. DEP'T OF JUST.: OFF. OF THE ATT'Y GEN., <https://oag.ca.gov/research-center/request-process> (last visited Nov. 18, 2023).

each incident or decision is assigned to the county jurisdiction identified in the CORI data, but priors are attached to an individual and could have occurred anywhere in the state, and at any time prior to the date of the decision in question (including before 2010).

The two key outcomes we focus on are binary outcomes: whether or not the wobbler was charged as a felony, and whether or not the case resulted in a felony conviction. The unit of observation is the disposition on a specific count. Because it is common for a single criminal incident to lead to dispositions on multiple offenses and/or multiple counts of a given offense, many individuals in the data are represented in multiple rows.

To identify wobbler offenses, we employed a list of wobblers developed from a few different sources and matched the specific Penal Code section numbers (for example, “245(a)(1)”) in our list to the section numbers in the offense descriptors in the Cal DOJ data. Given the very small numbers of cases for many offenses, we restrict our attention to the five most common wobblers in our data among male defendants statewide:

- Penal Code § 273.5(a): Inflict corporal injury on spouse/cohabitant
- Penal Code § 496(a): Receive stolen property
- Penal Code § 245(a)(1): Assault with deadly weapon not a firearm
- Penal Code § 594(a): Vandalism
- Penal Code § 459: Burglary (Second Degree)

For our case study analyzing discretion in charging of sex offenses, we calculate rates of charging relative to population for Black, Hispanic, and White Californians across the different offenses listed in Table 4. To the extent that these charges vary in severity of punishment but can be applied to similar conduct, we look for patterns of changing racial representation across the offenses.

For racial comparisons, we use the racial categories provided in the DOJ data *RACE\_DESCR* variable and restrict our comparisons to males identified as being Black, Hispanic, or White. DOJ racial categories are not directly comparable with Census-type categories. Most significantly, the DOJ racial categories are mutually exclusive, whereas the United States Census employs separate questions for racial identity and for Hispanic origin, and thus in the Census a person of Hispanic identity can be of any race. For comparisons of the DOJ data to the overall racial composition of the state and county populations, we estimate the latter using the American Community Survey (ACS) 5-year sample for 2016–2020 for the three ACS categories Black race, Hispanic origin, and White race not of Hispanic origin, which we take to correspond (imperfectly) to Cal DOJ’s Black, Hispanic, and White, respectively. Although the Cal DOJ’s race variable also identifies other ethnic groups, including Native

Americans and various Asian nationalities, the sample sizes for these groups are quite small in most counties.

#### B. THE CHALLENGE OF SMALL N

Other things being equal, the precision and reliability of estimates based on samples from a population tend to increase with sample size. Our 2010–2021 slice of the CORI data contains records for millions of individuals and tens of millions of criminal arrests and court dispositions, suggesting that sample size should hardly be a problem. But making comparisons of similarly situated individuals engaged in plausibly similar conduct requires taking subsamples of the data that can drastically reduce sample sizes. Consequently, there is an intrinsic tradeoff between similarity and sample size. For example, our wobbler analysis compares felony charging rates for individual wobbler offenses. Even the most commonly charged wobblers constitute only a small fraction of the full sample of offenses.

This tradeoff becomes particularly stark when we make comparisons county by county, given the small populations of many rural California counties, and the particularly small numbers of Black and other racial minority members in a number of them. Appendix Table A1 provides each county's population by race, as well as the number of individuals with any felony conviction on any charge, as a simple indicator of presence in the criminal records data. Scanning to the bottom of the table, the smallest counties have very small minority populations, and extremely sparse representation in the records data. Stratification by offense would further diminish these already tiny samples and create very small samples even in many larger counties.

There is no simple solution or single correct approach to dealing with these tradeoffs, and the language of the CRJA does not appear to provide specific guidance. In large counties, for comparisons of important offenses, sample sizes may be sufficiently large to provide reasonably precise estimates, as indicated by fairly small margins of error or narrow confidence intervals. For smaller counties and/or comparisons across less common offenses, quantitative evidence will be much less definitive. Some aggregation of data across multiple counties or multiple offenses is a strategy that might be used to identify broader patterns of racial disparity, while necessarily diluting the “similarity” of situation or conduct. More advanced statistical techniques, such as regression analysis, might be employed to include controls while combining data, although at the cost of reduced transparency and explainability. Consistent with the RJA's intent to expand, not restrict the types of proof that can be considered to justify “good cause” discovery, and to guard against racially tainted outcomes throughout California, not just in the largest counties, it is likely that a variety of approaches will be tried before the California courts, even if they are not all accepted.

## V. STATISTICAL EVIDENCE OF RACIAL DISPARITIES: CASE STUDY RESULTS

In this Part, we present the results of two case studies in which defendants engage in “similar conduct,” but prosecution outcomes may diverge. First, we consider racial disparities in the context of wobbler charging and conviction, in which satisfaction of the same basic elements of particular crimes can lead to felony or misdemeanor charges. Next, we consider racial disparities in the context of closely related charges that have overlapping elements: pimping, pandering, and human trafficking.

### A. RACIAL DISPARITIES IN WOBBLER CHARGING AND CONVICTIONS

Our first case study examines rates of felony charging and felony convictions of the five most common wobbler offenses for the four samples we identified, at times controlling for criminal history. For our case study, we focus on the results for the most populous county, Los Angeles County, but we make analogous results for other counties available in an online appendix.<sup>299</sup>

Felony charges, as well as felony convictions, are binary outcomes, and it is conventional to measure racial disparities by comparing rates of one of the outcomes as a percentage of the “at-risk” group. For felony charges, we count the number of dispositions for which a specific wobbler was charged as a felony and divide it by the total number of wobblers charged (as either a felony or misdemeanor). This ratio is the rate of felony charging. We compare this rate for Black (or Hispanic) defendants with the rate for White Californians. For our comparison metric, we use the *relative risk*. The relative risk of a felony charge for Black versus White defendants is the ratio of the Black felony charging rate to the White felony charging rate.

The relative risk has an intuitive interpretation. A relative risk of 1.0 indicates racial parity: Black and White Californians are charged with felonies at equal rates. Relative risks greater than 1.0 can be interpreted as multiples. For example, a Black–White relative risk of 1.25 would indicate that Black defendants are charged with a felony at a rate 1.25 times as great (or twenty-five percent greater) than White Californians.<sup>300</sup>

In Figure 1, we present the relative risks of felony charges on the most common wobbler offenses in Los Angeles County. Due to its large size, Los Angeles County presents a large number of cases and the best opportunity to get fairly precise estimates of rates and gaps. In this figure, the estimated relative risk is represented by a black dot, and a ninety percent confidence interval is

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299. See *infra* Appendix, Table A1.

300. Commonly used alternative measures for comparing rates include the difference in proportions and the odds ratio. All three should be consistent in the direction of disparity.

represented by the “whiskers” to either side of the point. The confidence interval can be thought of as a “margin of error,” which is partly a function of the number of cases: smaller samples tend to have larger errors. The relative risk of 1.0, indicating racial parity, is indicated by a vertical red line for reference.

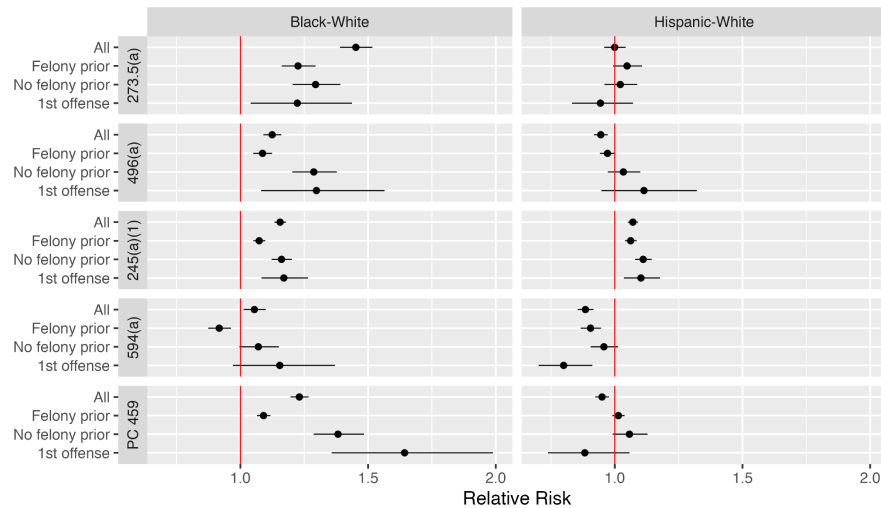


Figure 1: Relative risk of wobbler charged as felony at disposition, top five wobbler offenses, males, Los Angeles County<sup>301</sup>  
Source: CA DOJ CORI data, 2010–2021.

For the Black–White comparison, the dots lie mostly to the right of the red line, indicating that the rate of felony charging on these common wobblers tends to be greater for Black than White defendants, with the gaps on the order of ten to thirty percent. These gaps exist, and in some cases are even greater, when we control for criminal history by restricting the sample to individuals without felony conviction priors, or to first offenses. The relative risk measures for the Hispanic–White comparisons are generally much closer to racial parity.

Figure 2 uses a similar diagram to show the relative risk of a felony conviction on each of the same wobbler offenses as Figure 1. Racial disparities in felony charging would be less consequential if convictions turned out to be

301. Notes: Point estimate with ninety percent confidence intervals for relative risk. For reference, a vertical line is placed at relative risk of 1.0. The top five offenses are: PC 273.5(a) (inflict corporal injury on spouse/cohabitant); PC 496(a) (receive stolen property); PC 245(a)(1) (Assault with deadly weapon not a firearm); PC 594(a) (vandalism); and PC 459 (2nd Degree Burglary). Criminal history samples are (i) All: individuals, (ii) Felony prior: individuals with at least one felony conviction prior at the time of the wobbler decision, (iii) No felony prior: individuals with no felony conviction prior, and (iv) 1st offense: first-offense cases identified by first “cycle” in CORI data.

less disparate. For the three most common wobblers, Black–White disparities in felony conviction rates are similar to disparities in charging. In two offenses, however—Penal Code sections 245(a)(1) (assault with deadly weapon not a firearm), and 594(a) (vandalism)—there is no evidence of disparities. The Hispanic–White disparities are again small here.

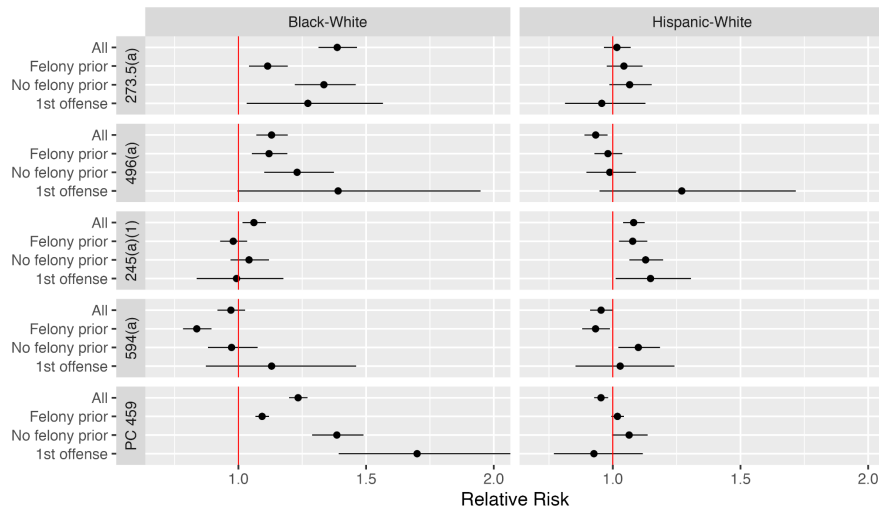


Figure 2: Relative risk of felony conviction on wobbler, top five wobbler offenses, males, Los Angeles County<sup>302</sup>  
Source: CA DOJ CORI data, 2010-2021.

This exercise for one county and five offenses could be extended to multiple counties and additional wobblers. As an illustration, Appendix Figure A3 presents relative risk diagrams of felony charging on the most common wobbler charge, Penal Code section 273.5(a) (inflict corporal injury on spouse or cohabitant), for each California county, in order from most populous to least. In the smaller counties toward the bottom of the figure, dots are missing because the data are too sparse to even calculate a relative risk—a good illustration of the small-N problem. In other cases, the margins of error are enormous, extending beyond the figure's boundaries in both directions, above and below 1.0. In these cases, small numbers render the comparisons extremely imprecise.

Despite variability in the location of points and margins of error, broad patterns can be discerned. Black and Hispanic defendants tend to be overrepresented in felony charging in a majority of counties for the top wobbler offenses, as indicated by representation ratios greater than 1.0, to the right of the

302. See *supra* Table 2.

red line in the figures. This pattern is summarized in Table 5 for the top five wobbler offenses. Although minority defendants are overrepresented in a majority of counties, the pattern is far from universal, which suggests the value of tailoring quantitative comparisons to specific cases.

	<i>Percent of counties with overrepresentation relative to White defendants</i>	
	<i>Black</i>	<i>Hispanic</i>
<i>Wobbler</i>		
PC 273.5(a): Inflict corporal injury on spouse/cohabitant	63.0	62.5
PC 496(a): Receive stolen property	68.6	60.3
PC 245(a)(1): Assault with deadly weapon not a firearm	75.5	83.6
PC 594(a): Vandalism	34.8	57.4
PC 459: Burglary (Second Degree)	73.9	70.6

*Table 5: Percentage of California counties in which Black or Hispanic defendants are overrepresented in felony charging on selected top wobbler offenses, individuals with no prior felony convictions.*

Sources: Cal DOJ CORI data.

#### B. CASE STUDY: PIMPING, PANDERING, AND HUMAN TRAFFICKING CHARGES

Our second case study uses a different set of comparisons to try to identify racial disparities in the charging for offenses for which the underlying conduct overlaps, and for which similar conduct may be charged more or less severely. In this case we focus on a case study of the charging of selected sex crime offenses in Santa Clara and Los Angeles Counties. In contrast to the wobbler case, we examine charging across six different Penal Code offenses.<sup>303</sup> In this case, racial disparities for similar conduct would appear as differences in representation by race across offenses that differ in severity.

The results are summarized in Table 6. The offenses are ordered roughly from most severe to least, by descending length of typical sentences: all but the last (section 653.23) are charged as felonies. The most striking feature of the table is the extreme overrepresentation of Black defendants in all six of these charges in both counties relative to population shares. The representation ratios in the second to last column indicate that in Santa Clara County, Black individuals are charged with these crimes at between **144 and 386 times** the rate

303. See *supra* Table 4.



at which White individuals are charged (relative to their share of county population). The Santa Clara numbers need to be treated with caution, given the extremely small numbers of cases, especially for non-Black individuals. But even in Los Angeles County, where the samples are larger, Black defendants are overrepresented relative to White defendants by a factor of between 38 and 270. For perspective, we can compare these representation ratios with the Black defendant representation ratio for dispositions in Table 2, which is only 2.6, roughly two orders of magnitude smaller than those for sex crime offenses in Santa Clara. Hispanic defendants also tend to be overrepresented in these offenses, but at a lower rate.

<i>County and Penal Code</i>	Number of dispositions			Charges per 100,000 population			Representation / White	
	<i>Black</i>	<i>Hispanic</i>	<i>White</i>	<i>Black</i>	<i>Hispanic</i>	<i>White</i>	<i>Black</i>	<i>Hispanic</i>
<b>Santa Clara County</b>								
(1) PC 236.1(b) Human trafficking	31	*	*	65.4	0.2	0.2	<b>385.8</b>	1.2
(2) PC 236.1(c) Human trafficking	81	12	*	171.0	2.5	1.2	<b>144.0</b>	2.1
(3) PC 266h(b)(2) Pimping prostitute under 16	19	*	*	40.1	0.2	0.2	<b>236.5</b>	1.2
(4) PC 266i(a)(1) Pandering	61	*	*	128.7	1.0	0.3	<b>379.6</b>	3.1
(5) PC 266h(a) or (b)(1) Pimping	150	36	11	316.6	7.5	1.9	<b>169.7</b>	4.0
(6) PC 653.23(a)(1) or (2) Supervise/ proceeds prostitution	55	*	*	116.1	0.4	0.5	<b>228.2</b>	0.8
<b>Los Angeles County</b>								

(1) PC 236.1(b) Human trafficking	100	16	*	12.34	0.33	0.31	<b>40.2</b>	1.1
(2) PC 236.1(c) Human trafficking	61	14	*	7.53	0.29	0.12	<b>65.3</b>	2.5
(3) PC 266h(b)(2) Pimping prostitute under 16	84	*	*	10.37	0.12	0.04	<b>269.9</b>	3.2
(4) PC 266i(a)(1) Pandering	404	83	32	49.86	1.71	1.23	<b>40.6</b>	1.4
(5) PC 266h(a) or (b)(1) Pimping	502	109	42	61.95	2.25	1.61	<b>38.4</b>	1.4
(6) PC 653.23(a)(1) or (2) Supervise/proceeds prostitution	787	166	66	97.13	3.42	2.54	<b>38.3</b>	1.3

*Table 6: Racial patterns in charging across six Penal Code offenses relating to pimping, pandering, and human trafficking, Santa Clara and Los Angeles Counties, 2010–2021.*<sup>304</sup>

Sources: Cal DOJ CORI data and American Community Survey

Turning to the comparisons that motivated the case study, the table reveals no consistent pattern of racial disparities across the offenses. Were it the case that Black defendants were “up-charged” on these offenses, we would expect to observe representation ratios to be greater for the more severe charges, and smaller for the less severe. In fact, in both counties the ratios bounce around and show no obvious correlation with severity of charge.

In sum, this case study reveals an extreme example of the lesson learned from comparing Tables 2 and 3: large racial disparities arise at the entry point to the criminal justice system—policing and arrests—and are less evident in downstream decisions over prosecution and charging, conditional on previous decision points. In the case of pimping and pandering charges, the extreme overrepresentation of Black defendants across all of the key offenses might be taken as the kind of evidence of “significant difference” that motivates the

304. The \* symbol is provided when there are less than ten observations, as required by confidentiality protections imposed by the California DOJ, which provided the relevant data.

CRJA, notwithstanding the absence of direct evidence regarding similarity of conduct. It also, however, points to the value of discovery in helping courts (and the system as a whole) determine the cause of these astronomical disparities. The case of wobblers suggests that patterns of racial disparity persist at certain key decision points, such as felony versus misdemeanor charging, conditional on having reached that point, and on similarity of situation in terms of criminal history. In the case of the wobblers examined, these patterns of disparity vary across conduct or offenses as well as jurisdictions.

### CONCLUSION

Across the state of California, extreme racial disparity in the criminal justice system is a fact of life: Black Californians are nearly three times as likely to have an arrest record as white Californians, and are four times as likely to have at least one felony conviction.<sup>305</sup> In almost every county, Black people are more likely to be arrested, charged, or convicted of a felony than their White counterparts.<sup>306</sup> The CRJA does not accept these facts as fixed, and instead provides a pathway to interrogate them, through the release of data through discovery, and where warranted, remedy. But to unlock the potential of this Act requires caution, a faithful and careful reading of the statute, and data.

Our Article has tried to supply these ingredients to inform use of the CRJA. We have focused on data required to support good cause discovery because, in many ways, it is the part of the CRJA that lends itself most readily to the kind of empirical analysis we have shown here. Proving an individual case requires the kinds of case-level details that only discovery can provide, but the disparities are stark enough—and the threshold for discovery liberal enough—that California will surely learn more about them.

It is worthwhile for policymakers to take note of how inadequate data quality and quantity make it difficult to identify and account for relevant factors that would make a case, course of conduct, or individual “similarly situated.” The aggregate data available to defendants or the courts in assessing the presence and causes of racial disparities may be lacking in the details of interest. Despite the comprehensiveness of the Cal DOJ data we study, only a limited number of variables are tracked. Controls for race, gender, age, county, offense(s), and priors are available, but other details about specific cases are not. The liberal discovery provisions of the CRJA are justified by the need to disclose richer and more detailed sources of evidence than are available through such aggregate data sources. Furthermore, even when the overall data set is enormous, as it is in the case of the Cal DOJ records data, small-sample problems can still occur,

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305. *See supra* Table 2.

306. *See infra* Appendix, Figures A1, A2, and A3.

especially when a county-specific lens is applied. Many California counties have quite small minority populations, so to ensure that the statute applies evenly to all populations in California, revisions to the code may be necessary. And while CRJA motions are designed to be brought in individual cases, the data that the Act is exposing conveys systemic problems that should also be dealt with through systemic remedies and structural injunctions, and not just individualized relief. But before we can act on disparities and evidence of bias, we need to know what these disparities are, and how to measure them. Our Article hopes to make a modest contribution to this work.

#### APPENDIX: TABLES AND FIGURES

County	County Population					Number of individuals with any felony conviction 2010-2021				
	Total	AAPI	Black	Hispanic	White	Total	AAPI	Black	Hispanic	White
Los Angeles	10040682	1513694	810286	4851344	2603280	217362	2841	63132	106255	37780
San Diego	3323970	412253	164042	1126266	1492165	52765	2269	9567	19202	20421
Orange	3170345	677031	54061	1071393	1262640	50199	2807	3319	22012	20787
Riverside	2437864	172379	157908	1204521	837847	52003	801	8523	24088	17444
San Bernardino	2162532	166705	176523	1163038	596262	57998	639	12383	26194	17349
Santa Clara	1924379	731804	47379	482101	589644	28489	2544	3207	14644	7213
Alameda	1661584	532897	171922	369546	508583	25690	1361	12344	5975	5189
Sacramento	1537948	273492	148884	360204	671965	34909	1946	11965	7278	12794
Contra Costa	1147788	205835	98569	295791	489135	13010	348	4691	2867	4614
Fresno	990204	106820	46182	528293	284169	32524	1421	4648	18435	7358
Kern	892458	44761	48530	480700	296505	28452	272	4245	13885	9807
San Francisco	874784	303518	44930	132865	348449	9942	592	4676	1778	2544
Ventura	845599	63182	15422	361648	379971	13368	294	729	7050	5103
San Mateo	765623	234638	18104	184490	295172	10777	1328	1937	3718	3208
San Joaquin	751615	124043	53116	313385	230857	18530	1006	4130	7123	5879
Stanislaus	546235	35269	16961	256424	222962	15857	417	1443	6368	7238

Sonoma	496801	22853	8266	134024	310607	9941	218	765	2952	5777
Tulare	463955	17928	7606	301919	128751	15529	260	700	10151	4207
Santa Barbara	444895	25206	8474	203207	195329	11174	171	706	6154	3997
Solano	444538	73381	60991	119294	165326	9803	417	3759	1907	3442
Monterey	432977	27290	11162	255512	127632	10600	290	978	6701	2477
Placer	391799	32848	6310	55932	280266	8181	246	673	1179	5865
San Luis Obispo	282517	10817	4865	64275	192959	6065	84	315	1691	3888
Merced	273661	21625	8190	164836	73587	3726	157	410	2011	1081
Santa Cruz	273170	14047	3472	91876	155409	5028	83	289	2047	2544
Marin	259441	15421	6001	41737	183259	3074	95	548	788	1571
Butte	223344	11460	3866	37585	158924	8695	213	548	1112	6567
Yolo	218774	32602	5694	69341	100258	4766	196	624	1636	2202
El Dorado	190345	9590	1586	24773	146919	4588	82	145	536	3733
Imperial	180580	2840	4716	152880	18393	6150	55	531	4404	1034
Shasta	179267	6053	1912	18566	141585	7825	198	348	652	6337
Madera	155925	3521	4919	90958	52109	5141	83	433	3012	1498
Kings	151090	5816	9820	82954	47717	6274	167	790	3477	1670
Napa	138572	10746	2862	47300	71817	2650	87	276	903	1344
Humboldt	136101	4456	1558	16228	99861	4602	77	207	344	3394
Nevada	99417	1258	410	9480	84317	2429	50	63	240	2040
Sutter	96315	16585	1894	30101	43635	2004	91	139	566	1149
Mendocino	87110	1877	424	22354	55847	2940	42	110	571	1922
Yuba	77524	5941	2632	22318	41849	2367	82	206	451	1575
Lake	64276	955	1583	13667	44490	2664	21	152	417	1912
Tehama	64176	1108	420	16435	43273	2976	67	72	600	2172
San Benito	61547	1808	523	37015	20567	1232	21	36	838	329
Tuolumne	54147	899	1007	6810	43139	1875	28	56	203	1546
Calaveras	45828	882	450	5710	36780	1082	14	23	93	925
Siskiyou	43516	707	668	5605	32878	1982	34	95	210	1520
Amador	39023	405	931	5591	29961	1370	47	76	225	981

Lassen	30600	727	2713	5893	19873	1320	26	124	287	814
Glenn	28060	889	218	11828	14298	1088	34	30	369	612
Del Norte	27692	930	747	5552	16928	1412	28	102	216	900
Colusa	21491	233	330	12840	7482	803	17	32	374	348
Plumas	18844	261	279	1749	15501	460	*	16	19	411
Inyo	17930	316	96	4115	10950	576	15	*	117	294
Mariposa	17319	248	266	2041	13666	580	18	14	97	429
Mono	14395	633	81	3893	9338	478	*	12	137	305
Trinity	12541	279	65	933	10073	798	18	27	91	640
Modoc	8853	176	123	1317	6830	229	*	*	31	169
Sierra	2898	*	*	293	2561	76	*	*	*	65
Alpine	1159	*	*	183	595	13	*	*	*	11

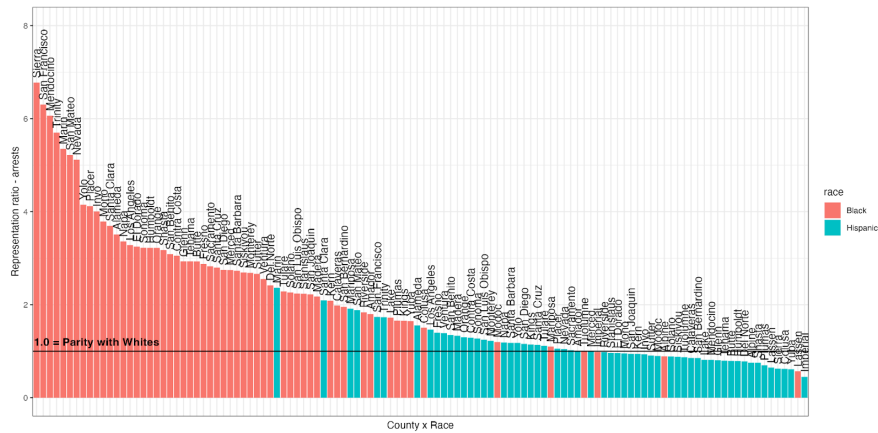
*Table A1: County populations and counts of individuals with any felony conviction in the county over the period 2010-2021<sup>307</sup> (arranged in descending order of county population).*

Sources: Cal DOJ CORI data and American Community Survey

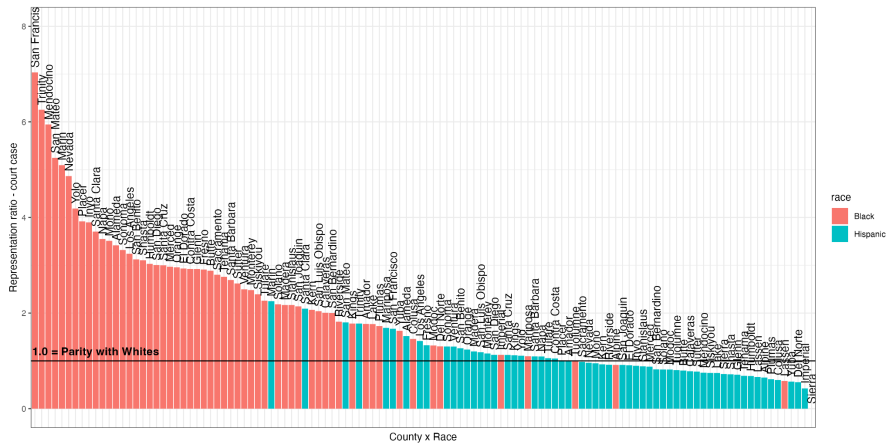
Figures A1–A3 illustrate representation of Black and Hispanic Californians relative to White Californians in arrests, charges, and in felony convictions, by county. In each figure, the height of each bar has the same meaning as the representation ratios in Table 2, and the bars are color-coded for Black and Hispanic Californians. The horizontal black line at 1.00 indicates parity with White Californians. The preponderance of salmon-colored bars to the left reflects the extreme overrepresentation of Black Californians in the criminal justice system across almost all counties, and especially in felony convictions, as displayed in Figure A3. The cases with Black representation below a value of 1 are for very small counties, specifically Alpine and Sierra Counties, who have a combined estimated Black population of 13 individuals according to recent Census Bureau statistics.

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307. The \* symbol is provided when there are fewer than 10 observations.



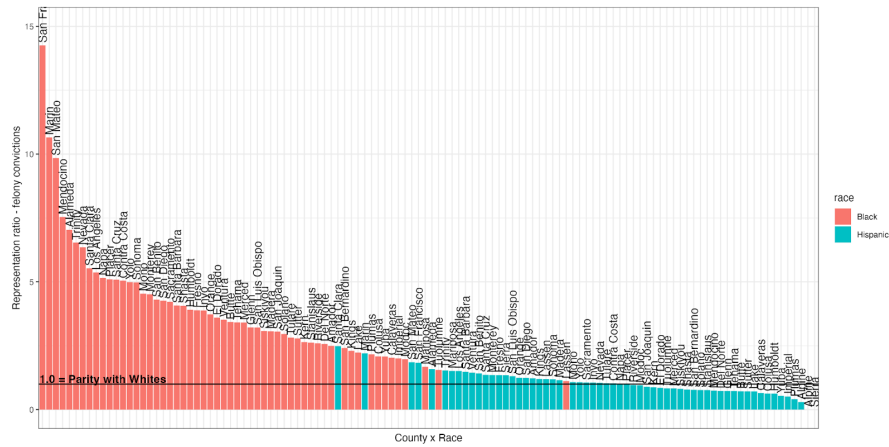
*Figure A1: Arrests: Representation of Black and Hispanic Californians relative to White Californians, by county, for individuals with records over the period 2010–2021.<sup>308</sup>*  
Sources: CA DOJ criminal records data and American Community Survey.



*Figure A2: Charges: Representation of Black and Hispanic Californians relative to White Californians, by county, for individuals with records over the period 2010–2021.<sup>309</sup>*  
Sources: CA DOJ criminal records data and American Community Survey.

308. Note: Ratio calculated as  $(\text{Arrests}_N / \text{Population}_N) / (\text{Arrests}_W / \text{Population}_W)$ , where subscript N indicates Nonwhite (Black or Hispanic) and W indicates White.

309. Note: Ratio calculated as  $(\text{Charges}_N / \text{Population}_N) / (\text{Charges}_W / \text{Population}_W)$ , where subscript N indicates Nonwhite (Black or Hispanic) and W indicates White.



*Figure A3: Felony convictions: Representation of Black and Hispanic Californians relative to White Californians, by county, for individuals with records over the period 2010–2021.<sup>310</sup>*

Sources: CA DOJ criminal records data and American Community Survey.

310. Note: Ratio calculated as  $(\text{Felony convictions}_N / \text{Population}_N) / (\text{Felony convictions}_W / \text{Population}_W)$ , where subscript N indicates Nonwhite (Black or Hispanic) and W indicates White.



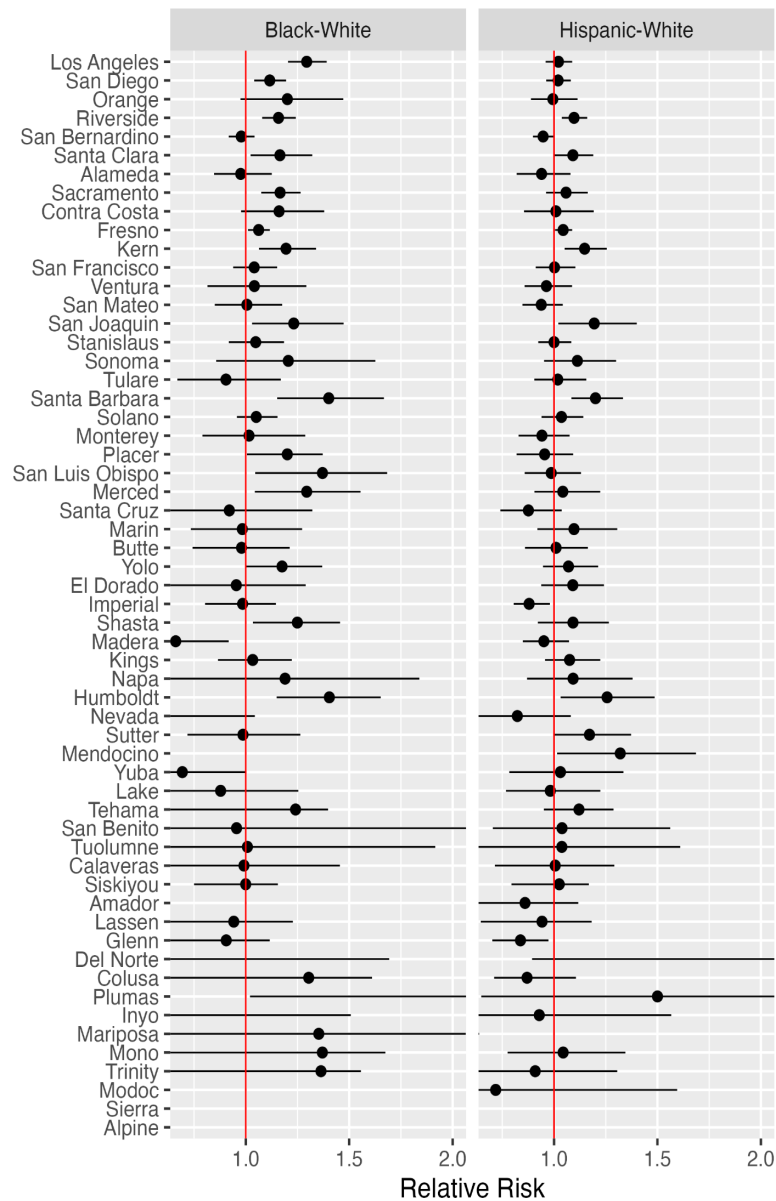


Figure A4: Relative risk of Penal Code § 273.5(a)  
 (inflict corporal injury on spouse or cohabitant) wobbler being  
 charged as felony at disposition, males with no prior felony conviction.  
 Source: Cal DOJ CORI data.

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