

MARNIE LOWE

Fruit of the Racist Tree: A Super-Exclusionary Rule for Racist Policing Under California's Racial Justice Act

ABSTRACT. This Comment explores a novel legal remedy for demonstrated racial bias or animus in police investigations presented in the recently enacted California Racial Justice Act (RJA) of 2020. The Comment contends that the California RJA, in attempting to address racism throughout the state's criminal justice system, establishes a "super-exclusionary rule" that affords relief from criminal punishments to people convicted following racist police conduct or practices. The Comment then examines the wide-ranging implications of such a rule for individuals facing criminal punishments, police and prosecutor policy, and public understanding of the racialized harms that policing can inflict. In doing so, this Comment argues that the super-exclusionary rule presents new mechanisms for police accountability and a vision for how a state might give substance to a full commitment to combatting racism in policing.

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INTRODUCTION

The firestorm of protests for racial justice that took place across the United States following George Floyd's murder by police swept through California with no less fervor, from the state's small towns to its major cities.¹ Passed in the wake of these protests, the California Racial Justice Act (RJA) of 2020 announced the state's goal of addressing racism throughout its criminal justice system.² Included in the statute, but largely overlooked by supporters and detractors alike, is language that prohibits law enforcement officers from exhibiting racial bias or animus during a criminal case.

These little-heralded provisions related to law enforcement represent a novel and significant legal approach to deter and redress police racism. The California RJA provides the legal framework for what this Comment terms a "super-exclusionary rule" that, in effect, jeopardizes all charges, convictions, and sentences obtained subsequent to racist policing. Like the Fourth Amendment exclusionary rule, the super-exclusionary rule employs the formal criminal adjudication process to deter unwanted police behavior, but with far greater reach. If applied as proposed here, the super-exclusionary rule could secure permanent relief from criminal penalties for people of color and force substantial shifts in police behavior. Beyond its initial impact within the state, the rule's wider implications extend into national conversations on racism and policing, as well as the reverberations of each throughout the criminal legal system.

Part I of this Comment summarizes the intent behind and the structure of the California RJA. Using the Fourth Amendment exclusionary rule as a conceptual foil, Part II introduces the California RJA's super-exclusionary rule and argues that it represents an unprecedented legal remedy for police racism. Part III explores possible applications of the super-exclusionary rule and its potential to ameliorate racialized harms that the criminal legal system inflicts on people of color. In laying out the rule's operation and implications, this Comment calls for an imaginative and expansive approach not only to the California RJA, but also to conceptions of racist policing itself.

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1. See Jill Cowan, *From Sacramento to San Diego, Californians Join Protests*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/us/california-george-floyd-protests.html> [<https://perma.cc/GAS3-NPB3>]; Vivian Ho, *George Floyd Protests in California Stretch from Biggest Cities to Smaller Towns*, GUARDIAN (June 1, 2020, 5:28 PM EDT), <https://www.theguardian.com/us-news/2020/jun/01/george-floyd-protests-california-cities> [<https://perma.cc/7SY4-ZMC9>].
 2. California Racial Justice Act, ch. 317, 2020 Cal. Stat. 3705.

I. CALIFORNIA'S RACIAL JUSTICE ACT

Public discussion of the California RJA's passage highlights the state legislature's intent to combat in-court racism that manifests in racially disparate outcomes across criminal adjudications. By calling this law a "Racial Justice Act," its sponsors invoked a body of existing legislation and legislative efforts that aimed to set aside the standards established in *McCleskey v. Kemp*.³ *McCleskey* was the 1987 Supreme Court case that held that statistical evidence of racial disparities was insufficient to prove unconstitutional racial discrimination in capital sentencing.⁴ The California RJA shares the aim of its namesakes, providing for relief based on the type of evidence rejected in *McCleskey*.⁵ In political messaging, the main sponsor of the California RJA championed this legislative intention, emphasizing that the law would "counter *McCleskey v. Kemp*"⁶ and "confront racism in the courts."⁷

However, the California RJA's text sets out aims well beyond undoing *McCleskey*. First, the law's preamble declares that "[i]t is the intent of the Legislature to eliminate racial bias from California's criminal justice system."⁸ The preamble defines this goal further, stating that the legislature intends

to remedy the harm to the defendant's case and to the integrity of the judicial system [that results from implicit bias,] . . . to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing[,] . . . to reject the conclusion that racial disparities within our criminal justice are inevitable, and to actively work to eradicate them.⁹

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3. 481 U.S. 279 (1987). See generally Ellen A. Donnelly, *Can Legislatures Redress Racial Discrimination in Capital Punishment? Evaluating Racial Justice Acts in Response to McCleskey*, 82 J. CRIM. L. 388 (2018) (providing context on *McCleskey* and evaluating the success of other states' Racial Justice Acts (RJAs) as counterweights).
 4. See 481 U.S. at 291-99 (Fourteenth Amendment); *id.* at 299-313 (Eighth Amendment).
 5. CAL. PENAL CODE § 745(h)(1) (West 2021). The California RJA also names *McCleskey* specifically in its prefatory legislative findings. California Racial Justice Act, sec. 2(f), 2020 Cal. Stat. at 3707.
 6. Grace Hase, *Ash Kalra's "Racial Justice Act" Aims to End Bias in Prosecution*, SAN JOSE INSIDE (July 6, 2020) (emphasis added), <https://www.sanjoseinside.com/news/ash-kalras-racial-justice-act-aims-to-end-bias-in-prosecution> [<https://perma.cc/3WRA-YFSP>].
 7. David Greenwald, *Racial Justice Act Introduced in Legislature to End Racial Disparities in the Criminal Justice System*, DAVIS VANGUARD (Mar. 12, 2020) (quoting Ash Kalra, Assembly Member, California Assembly), <https://www.davisvanguard.org/2020/03/racial-justice-act-introduced-in-legislature-to-end-racial-disparities-in-the-criminal-justice-system> [<https://perma.cc/3WDZ-5X8R>].
 8. California Racial Justice Act, sec. 2(i), 2020 Cal. Stat. at 3707.
 9. *Id.* at 3708.

Next, the law declares that “[i]t is the further intent of the Legislature to provide remedies that will eliminate racially discriminatory practices in the criminal justice system.”¹⁰ As discussed below, these declarations of intent support an expansive reading of the statute’s operative sections – one that would facilitate actual remedies for racism throughout the criminal legal system, both in court and out.

Following these statements of intent, the California RJA sets out those operative sections, which provide multiple avenues through which people being tried for or convicted of crimes can seek a remedy for racial bias in their cases. The main operative components of the California RJA are codified at section 745 of the California Penal Code.¹¹ Centrally, section 745(a) provides that “[t]he state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.”¹² It then details at least four ways in which a claimant can prove a violation. Most critically for this analysis, section 745(a)(1) establishes a violation if “[t]he judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant’s race, ethnicity, or national origin.”¹³ Mirroring the language of section 745(a)(1), section 745(a)(2) establishes a violation if any of those actors demonstrate the same conduct specifically “[d]uring the defendant’s trial, in court and during the proceedings,” with a focus on the use of racially discriminatory language.¹⁴ The other types of recognized violations include racial disparities in charging or conviction rates for similar offenses in the same county, as well as racial disparities in sentencing, either based on the race of the sentenced person or the race of their victim, in the same county.¹⁵

Those who can successfully demonstrate a California RJA violation are entitled to benefit from one of the statute’s provided remedies. Section 745(e) provides that “if the court finds, by a preponderance of evidence, a violation[,] . . . the court *shall* impose a remedy *specific to the violation* found from the following list.”¹⁶ Under the California RJA, a person can claim a violation through a trial court motion prior to judgment or through a petition for writ of

10. *Id.* sec. 2(j), 2020 Cal. Stat. at 3708.

11. CAL. PENAL CODE § 745 (West 2021). Other sections of the California RJA are codified at sections 1473 and 1473.7 of the California Penal Code.

12. *Id.* § 745(a).

13. *Id.* § 745(a)(1).

14. *Id.* § 745(a)(2).

15. *Id.* § 745(a)(3)-(4).

16. *Id.* § 745(e) (emphasis added).

habeas corpus after judgment.¹⁷ For successful claims made prior to judgment, the statute permits courts to “[d]eclare a mistrial, if requested [by the] defendant”;¹⁸ “[d]ischarge the jury panel and empanel a new jury”;¹⁹ or, “[i]f the court determines that it would be in the interest of justice, dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges.”²⁰ For successful claims made once a judgment has already been entered, the statute splits the available remedy depending on whether the violation implicates the conviction itself or only the sentence. If only the sentence was compromised, then the statute directs the court to vacate and resentence the person to a new sentence no greater than the one previously imposed.²¹ If the conviction itself was compromised, then the statute directs the court to order new proceedings that would be consistent with the protections of the California RJA, unless the court can modify the judgment to rectify a demonstrated racial disparity in the seriousness of the charge.²² Separate from these enumerated remedies, section 745(e)(4) provides that “[t]he remedies available under this section do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law.”²³

As mentioned above, the California RJA borrows its name from “Racial Justice Acts” previously enacted elsewhere, but its similarities to those other statutes largely end there. The other RJAs, one currently in effect in Kentucky and the other since repealed in North Carolina, apply only to capital sentences, whereas the California iteration applies to *any* criminal case and implicates both convictions and sentences.²⁴ The other RJAs also require that a person show that race

17. *Id.* § 745(b). The California RJA also provides that people no longer in custody can seek to have their records of conviction cleared if they demonstrate a violation of section 745(a). California Racial Justice Act, ch. 317, sec. 5, § 1473.7(a)(3), (b)(1), 2020 Cal. Stat. 3705, 3713 (codified at CAL. PENAL CODE § 1473.7(a)(3), (b)(1) (West 2021)). To constrain its scope, this Comment focuses on people who are currently or prospectively subject to criminal punishments.

18. CAL. PENAL CODE § 745(e)(1)(A) (West 2021).

19. *Id.* § 745(e)(1)(B).

20. *Id.* § 745(e)(1)(C).

21. *Id.* § 745(e)(2)(B).

22. *Id.* § 745(e)(2)(A).

23. *Id.* § 745(e)(4).

24. Compare KY. REV. STAT. ANN. § 532.300(1) (West 2021) (“No person shall be subject to or given a sentence of death that was sought on the basis of race.”), and N.C. GEN. STAT. § 15A-2010 (2012) (repealed 2013) (“No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.”), with CAL. PENAL CODE § 745(a) (West 2021) (“The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.”).

was a “significant factor” in the sentence sought or imposed,²⁵ whereas the California RJA does not impose any causal requirement. Further, the California RJA explicitly considers more forms of racial bias, such as the use of racist language, than did the previous RJAs, which focused more narrowly on statistically demonstrable racial disparities in sentencing.²⁶ Specifically of interest here, the California RJA explicitly applies to bias exhibited by law enforcement officers, among other actors,²⁷ whereas the other RJAs applied only to the behavior of courtroom actors.²⁸ Finally, like the North Carolina RJA, the California RJA provides that convicted persons may raise a claim through postconviction proceedings, while the Kentucky RJA encompasses only pretrial proceedings.²⁹ As explained in Part II, the California RJA’s broadened scope opens novel legal channels to seek redress for racism in the criminal legal system.

II. THE SUPER-EXCLUSIONARY RULE FOR RACIST POLICING

The California RJA provides the framework to assert that any person convicted following a police investigation tainted by racial bias or animus must be granted a reduction in criminal punishments. This legal structure amounts to a “super-exclusionary rule” that operates similarly to the Fourth Amendment’s exclusionary rule, but with far greater scope and impact.

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25. KY. REV. STAT. ANN. § 532.300(2) (West 2021); N.C. GEN. STAT. § 15A-2011(a), (c) (2012) (repealed 2013). A federal RJA proposed in 1988 did allow for the assertion of a prima facie case based on statistical data of racial disproportionality alone, but this proposal never came close to passing; later versions, also unsuccessful, abandoned this language. Donnelly, *supra* note 3, at 391-92 (detailing the history of congressional efforts to respond to *McCleskey*). Compare H.R. 4442, 100th Cong. § 3 (1988) (including such language), with H.R. 4017, 103d Cong. sec. 2, § 2921 (1994) (excluding such language).
26. See KY. REV. STAT. ANN. § 532.300(3) (West 2021); N.C. GEN. STAT. § 15A-2011(d) (2012) (repealed 2013).
27. CAL. PENAL CODE § 745(a)(1) (West 2021).
28. The Kentucky and North Carolina RJAs do not explicitly list out the actors to whom their prohibitions apply, as the California RJA does. KY. REV. STAT. ANN. § 532.300 (West 2021); N.C. GEN. STAT. § 15A-2010 (2012) (repealed 2013). However, both previous RJAs focused narrowly on sentencing decisions, which generally implicate only prosecutors, judges, and juries – this would make it difficult, if not impossible, to gain relief under those laws based on racially biased police conduct. The California RJA, in line with its more systemic aims, includes law enforcement officers among the legal actors who can affect a person’s criminal case.
29. Compare CAL. PENAL CODE § 745(b) (West 2021) (“A defendant . . . may file a petition for writ of habeas corpus . . . alleging a violation of subdivision (a).”), and N.C. GEN. STAT. § 15A-2012(a)(1) (2012) (repealed 2013) (“The claim shall be raised by the defendant at the pretrial conference . . . or in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes.”), with KY. REV. STAT. ANN. § 532.300(4) (West 2021) (“The claim shall be raised by the defendant at the pre-trial conference.”).

A. The Mechanics of the Super-Exclusionary Rule

1. Deriving the Super-Exclusionary Rule from the California RJA

The facial text of the California RJA establishes a mechanism by which a charged, convicted, or sentenced person can demonstrate a violation by presenting evidence of police racial bias exhibited prior to the commencement of in-court proceedings. As outlined in Part I, section 745(a)(1) establishes a violation if “a law enforcement officer involved in the case . . . exhibited bias or animus towards the defendant because of the defendant’s race, ethnicity, or national origin.”³⁰ The plain meaning of this phrase, which lacks any qualification as to time, place, or manner, grants section 745(a)(1) expansive reach.³¹ In contrast, section 745(a)(2) specifically addresses the same objectionable conduct by a law enforcement officer if it occurs “[d]uring the defendant’s trial, *in court* and during the proceedings.”³²

When read in conjunction with section 745(a)(2), section 745(a)(1) must be interpreted to apply to *out-of-court* law enforcement conduct – in other words, to police conduct during investigation and arrest. Were section 745(a)(1) instead taken to apply only to a police officer’s in-court conduct, it would be rendered wholly superfluous, a result that courts attempt to avoid under the rule against surplusage.³³ A more expansive reading also finds support in the California RJA’s broad goal to eliminate racism throughout the criminal legal system³⁴ – a system

30. CAL. PENAL CODE § 745(a)(1) (West 2021).

31. California has adopted the plain-meaning rule for statutory interpretation. See *Jarrow Formulas, Inc., v. LaMarche*, 74 P.3d 737, 740-41 (Cal. 2003) (“Where possible, ‘we follow the Legislature’s intent, as exhibited by the plain meaning of the actual words of the law . . .’” (quoting *Cal. Tchrs. Ass’n v. Governing Bd. of Rialto Unified Sch. Dist.*, 927 P.2d 1175, 1177 (Cal. 1997))); *Foxgate Homeowners’ Ass’n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1126-28 (Cal. 2001) (declining to limit the reach of a statute for policy reasons where the statute’s language was “clear and unambiguous”).

32. CAL. PENAL CODE § 745(a)(2) (West 2021) (emphasis added).

33. See *People v. Ramirez*, 169 Cal. Rptr. 3d 260, 264 (Ct. App. 2014) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous . . .” (quoting *Rodriguez v. Superior Ct.*, 18 Cal. Rptr. 2d 120, 125 (Ct. App. 1993))); see also *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (“The Court . . . hesitates ‘to adopt an interpretation of a [statute] which renders superfluous another portion of that same law.’” (quoting *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019))). This presumption is especially strong given that these consecutive sections were drafted and passed together, giving no inference that the legislature absentmindedly included a redundancy.

34. See *supra* Part I. California courts pay great deference to express declarations of legislative intent. See *Tyrone v. Kelley*, 507 P.2d 65, 71 (Cal. 1973) (“[A]bsent a single meaning of the

in which policing and investigation play as indisputable and influential roles as those played by prosecution and judgment.³⁵ As such, section 745(a)(1) can only be given meaning if it is read to include law enforcement conduct outside the context of formal proceedings.

The California RJA does not require the claimant to have suffered an injury due to the police's racial bias or animus, or the bias or animus to have had any effect on the claimant's investigation, arrest, trial, conviction, or sentencing. While section 745(a) generally addresses convictions and sentences sought "on the basis of race,"³⁶ the specific instance defined in section 745(a)(1) constrains how that general prohibition should be read. Section 745(a)(1) does not reference any causal requirement or required demonstration of adverse effect, leaving no textual hook for a judge to assert that a claimant must make such a showing.³⁷

Further, introducing an extratextual impact element would run counter to the apparent intent of the California legislature. One of the primary goals of the California RJA was to reduce the evidentiary burden that claimants would otherwise face in proving racial bias in their cases;³⁸ requiring claimants to prove causality or individual harm would counteract that overarching goal. As specified explicitly in one committee report on the then-bill, "Unlike existing habeas provisions, the bill's habeas provision does not require a showing that the bias was prejudicial to the criminal proceedings."³⁹ This unconventional dearth of limitations on section 745(a)(1)'s scope opens the door for expansive applications of the California RJA's protections, as explored in Part III.

Once a claimant demonstrates a violation under section 745(a)(1), the statute's remedial scheme requires that the court grant some form of relief from criminal penalties. The statute does not explicitly designate a remedy for racial bias or animus exhibited by a law enforcement officer, as it does for some other types of violations. However, section 745(e) mandates that the court grant *some*

statute apparent on its face, we must give it an interpretation based upon the legislative intent with which it was passed, and where the Legislature has expressly declared its intent, we must accept the declaration.").

35. See Joseph H. Tieger, *Police Discretion and Discriminatory Enforcement*, 1971 DUKE L.J. 717, 718 ("Police are endowed by our criminal laws with the power to select from the universe of violators those persons who shall be subject to the criminal process.").
36. CAL. PENAL CODE § 745(a) (West 2021).
37. In contrast, both the Kentucky and North Carolina RJAs affirmatively establish a causal standard, requiring that a claimant show that race was a "significant factor in decisions" to seek the death penalty. KY. REV. STAT. ANN. § 532.300(2) (West 2021); N.C. GEN. STAT. § 15A-2010(a) (2012) (repealed 2013). The California legislature had these models available for reference if it wished to impose a similar requirement, but it did not adopt this language.
38. See California Racial Justice Act, ch. 317, sec. 2(c), 2020 Cal. Stat. 3705, 3706.
39. *Criminal Procedure: Discrimination: Hearing on AB 2542 Before S. Comm. on Pub. Safety*, 2019-20 Reg. Sess. 13 (Cal. 2020).

remedy specific to the violation, even if the court retains some discretion as to the exact form that remedy takes.⁴⁰ Most of the statute's enumerated remedies are inapposite to address racial bias exhibited by law enforcement during investigation or arrest because those remedies concentrate on misconduct arising from the trial itself—any new trial proceedings would still be subject to the same pretrial defect that gave rise to the original claim.⁴¹ Putting these in-court remedies aside, all the remaining statutory remedies implicate a reduction in criminal penalties. The court may “dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges;”⁴² or it may order new sentencing proceedings that may not result in a greater sentence than previously imposed.⁴³ Outside of the statutory remedies, section 745(e)(4) permits the court to look to other existing remedies under law.⁴⁴ In the habeas context, existing remedies provided in the California Penal Code consist of discharge from custody,⁴⁵ or else an order that would “dispose of [the unlawfully-held] party as the justice of the case may require.”⁴⁶ In short, all of the available remedies represent some form of reduction in criminal punishment for the claimant.

Taken together, these statutory requirements yield the super-exclusionary rule: because racial bias or animus exhibited by an investigating law enforcement officer cannot be cured by new trial proceedings, courts must remedy demonstrated instances of racist policing by granting charging or sentencing relief to the affected person. This extraordinary mechanism for relief falls squarely within

40. Compare CAL. PENAL CODE § 745(e) (West 2021) (dictating that “the court *shall* impose a remedy *specific to the violation*,” making the provision of some remedy mandatory (emphasis added)), with *id.* § 745(e)(1) (allowing that “the court *may* impose any of the following remedies,” leaving the type of remedy to the court’s discretion in cases of successful claims raised prejudgment (emphasis added)).

41. For example, the statute authorizes empaneling a new jury or declaring a mistrial, neither of which would solve for racist misconduct that occurred prior to trial. *Id.* § 745(e)(1)(A)-(B).

42. *Id.* § 745(e)(1)(C).

43. *Id.* § 745(e)(2)(A).

44. *Id.* § 745(e)(4).

45. *See id.* §§ 1485, 1489.

46. *Id.* § 1484. This catch-all remedial statute has been interpreted to allow courts flexibility in fashioning remedies specific to the deprivation of the right suffered. *See, e.g., In re Crow*, 483 P.2d 1206, 1211 n.7 (Cal. 1971) (“Inherent in the power to issue the writ of habeas corpus is the power to fashion a remedy for the deprivation of any fundamental right which is cognizable in habeas corpus.” (citing CAL. PENAL CODE § 1484 (West 1971))). Here, no number of procedural do-overs could address racist police conduct during an investigation or arrest, effectively constricting the remedies the courts can construct that are genuinely responsive.

the California RJA's stated aim to eliminate all racial bias in California's criminal legal system by providing effective remedies for that bias.⁴⁷

2. *What Makes the Rule "Super"*

The name "super-exclusionary rule" refers, of course, to the exclusionary rule of Fourth Amendment doctrine. That exclusionary rule establishes, with serious practical implications, that the Fourth Amendment prohibition on unreasonable searches and seizures forbids the government from relying on unlawfully seized evidence⁴⁸ or any evidence derived from the results of an illegal search — colloquially referred to as "fruit of the poisonous tree."⁴⁹

In mechanics and intent, the California RJA's super-exclusionary rule shares much of its DNA with its Fourth Amendment cousin. Like the super-exclusionary rule, the Fourth Amendment exclusionary rule imposes in-court consequences for investigatory misconduct by police. Both rules are transsubstantive, meaning that they do not vary in application based on the substantive crime alleged; even for serious charges, the rules (should) apply with equal force.⁵⁰ Further, "the [exclusionary] rule's prime purpose is to deter future unlawful police conduct."⁵¹ This deterrent effect, explored further in Section III.B, is likewise one of the primary purposes of the super-exclusionary rule. Both rules aim to function as prophylactics by making police misconduct costly to prosecutors or, perhaps, a boon to people charged with crimes.

47. See *supra* text accompanying notes 8-10. This sort of "extraordinary" relief is not wholly without precedent. See, e.g., Samuel W. Wardle, Comment, *Extreme Circumstances Call for Extreme Measures: How United States v. Lyons' Radical Remedies Corrected a Grave Injustice*, 92 FLA. HIST. Q. 397, 398 (2013) (recounting Lyons's outright release from incarceration following a demonstrated *Brady* violation).

48. See *Weeks v. United States*, 232 U.S. 383 (1914) (applying the then-unnamed exclusionary rule to federal law enforcement officers); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the exclusionary rule against the states).

49. Justice Frankfurter coined this phrase in *Nardone v. United States*, 308 U.S. 338, 341 (1939), and the Court has used it regularly since, see, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016); *Segura v. United States*, 468 U.S. 796, 804 (1984); *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

50. There is some sense that courts are more reluctant to impose the Fourth Amendment exclusionary rule when they find the alleged crime to be particularly heinous. See, e.g., Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2003) ("[T]he judge facing a clearly guilty murderer or rapist who makes a Fourth Amendment or other constitutional claim will do her best to . . . keep the defendant in jail."); Donald A. Dripps, *The 'New' Exclusionary Rule Debate: From 'Still Preoccupied with 1985' to 'Virtual Deterrence'*, 37 FORDHAM URB. L.J. 743, 760 (2010) (referring to the "tendency of judges to consider offense severity in practice" when assessing Fourth Amendment challenges).

51. *United States v. Calandra*, 414 U.S. 338, 347 (1974).

However, as its name implies, the super-exclusionary rule provides far greater benefits to those who can successfully invoke its protections than does its Fourth Amendment analogue. Perhaps most obviously, the reach of the exclusionary rule is limited to particular pieces of evidence, leaving the rest of the investigation undisturbed. The super-exclusionary rule is not so limited – a single instance of police bias can taint an entire case and ultimately result in charging or sentencing relief. Relatedly, the California RJA as written does not require a claimant to establish any link between the law enforcement officer’s racial bias or animus and the substance or outcome of their case in order to be granted a remedy.⁵² This inoculates the super-exclusionary rule from many post hoc excuses for police misconduct, including those that have made the Fourth Amendment exclusionary rule far less effective.⁵³ On its face, the California RJA requires no injury or even impact to result from the demonstrated police racial bias or animus.⁵⁴

The California RJA also avoids consideration of an officer’s subjective intent, a pitfall of Fourth Amendment exclusionary-rule doctrine as it is currently constructed. Although the Supreme Court applies an “objective reasonableness” standard in Fourth Amendment challenges,⁵⁵ the good-faith exception to the exclusionary rule effectively excuses police misconduct unless the misconduct was “sufficiently deliberate” and the officer is “sufficiently culpable.”⁵⁶ The super-exclusionary rule, at least as presented in the California RJA’s text, is subject to no such carveout. In fact, the legislative findings accompanying the California RJA emphasize the need to address implicit racial bias and systemic racism, indicating that the California RJA disfavors scrutiny of a violative officer’s personal culpability or intent at all.⁵⁷

52. See *supra* notes 37-39 and accompanying text.

53. See, e.g., *Strieff*, 136 S. Ct. at 2061-63 (reviewing the attenuation doctrine); *Murray v. United States*, 487 U.S. 533, 537-43 (1988) (reviewing the independent-source doctrine); *Nix v. Williams*, 467 U.S. 431, 443-48 (1984) (reviewing the inevitable-discovery doctrine).

54. See *supra* notes 36-39 and accompanying text.

55. *Scott v. United States*, 436 U.S. 128, 137-38 (1978).

56. *Herring v. United States*, 555 U.S. 135, 144 (2009); see also 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.6(i), at 299-300 (6th ed. 2020) (critiquing *Herring* as a perversion of the good-faith exception).

57. See California Racial Justice Act, ch. 317, sec. 2(i), 2020 Cal. Stat. 3705, 3707 (“[R]acism 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. Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias.”).

Finally, the California RJA's statutory nature protects the super-exclusionary rule from the sort of judicial interpretive erosion to which the Fourth Amendment exclusionary rule has been vulnerable. Scholars of the Fourth Amendment exclusionary rule point out that some judges are hostile to enforcing the exclusionary rule because they perceive the suppression of otherwise "good" evidence to be extreme.⁵⁸ While the super-exclusionary rule is not entirely immune to the potential constraint of judicial noncooperation, the courts are more limited in their ability to whittle this rule away. The exclusionary rule is ultimately a judge-made prophylactic, attached to Fourth Amendment rights but not actually one of them itself.⁵⁹ In contrast, the super-exclusionary rule is statutory and accompanied by clear statements of legislative intent. Compared to the Fourth Amendment, the California RJA provides a far clearer set of boundaries with which judges must grapple.

The super-exclusionary rule thus builds on the strengths of the evidentiary exclusionary rule while avoiding many of its weaknesses, situating it as a unique and potentially powerful legal device. Importantly, the concept of the super-exclusionary rule does not depend on the construction provided in the California RJA—in other words, California or any other state could enact a statute that explicitly establishes a super-exclusionary rule if it so wished. This Comment focuses on the super-exclusionary rule located within the California RJA, partly to constrain this Comment's scope and partly because the relief the rule offers is currently and actually available to Californians under the California RJA. Should other states follow California's lead, the benefits outlined in the rest of this Comment would unfold on an even larger scale.

B. The Super-Exclusionary Rule as a Novel and Significant Remedy for Police Racism

The super-exclusionary rule for racist policing represents a singular and unprecedented channel to secure meaningful remedies for people subjected to law enforcement racial bias or animus. Its novelty and significance are perhaps best understood in contrast with other existing and proposed legal remedies.

58. See Frederick A. Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DEPAUL L. REV. 51, 82 (1980) (collecting judicial criticisms of the exclusionary rule's evidentiary "costs"); Donald E. Wilkes, Jr., *A Critique of Two Arguments Against the Exclusionary Rule: The Historical Error and the Comparative Myth*, 32 WASH. & LEE L. REV. 881, 883-84 (1975) (collecting scholarly critiques of the same); see also *supra* note 50 (noting another factor that might cause judges not to impose the exclusionary rule).

59. See *United States v. Calandra*, 414 U.S. 338, 348 (1974) ("In sum, the [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.").

1. *Comparison to Existing Legal Remedies for Police Racism*

The super-exclusionary rule offers more substantial relief and requires less of a claimant than do existing avenues to pursue legal remedies for racist policing. As mentioned above, the California RJA explicitly eliminates *McCleskey v. Kemp*'s burdensome barriers to proving purposeful discrimination by permitting the use of statistical evidence of racial disparities.⁶⁰ While this is a significant reform in and of itself, aggregate data can be difficult or onerous to obtain and present. The super-exclusionary rule's recognition of single instances of racial bias or animus is a noteworthy supplement to that reform.

The super-exclusionary rule also holds significant advantages over other common avenues used to seek redress for racist policing. The use of traditional civil-rights litigation under 42 U.S.C. § 1983 to address police racism has led to the expansion of the doctrine of qualified immunity, which protects individual offending officers from having to pay civil damages.⁶¹ Further, § 1983 has been severely constrained by restrictive standing requirements, which foreclose most forms of injunctive relief in favor of purely retrospective remedies.⁶² Admittedly, the super-exclusionary rule also fails to subject officers to direct monetary costs or offer injunctions for harmful practices. However, the rule is more directly responsive to the needs of charged or convicted people, who bear the heaviest burdens of racialized law enforcement. The remedy of charging or sentencing relief relates directly to the racist harms of the criminal legal system, while the typical civil remedy of monetary damages is more attenuated—after all, money cannot directly purchase one's freedom. Further, a California RJA claim can be brought as part of a person's criminal proceedings,⁶³ whereas a § 1983 suit must be raised in a civil action⁶⁴—a significant barrier for poor people who are guaranteed representation in criminal cases under the Sixth Amendment⁶⁵ but have no such

60. See CAL. PENAL CODE § 745(c)(1) (West 2021); California Racial Justice Act, sec. 2(f)-(g), 2020 Cal. Stat. at 3707 (noting the inadequacy of current law, which includes *McCleskey*).

61. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 892-95 (2014).

62. See Adam J. Smith, *Police Reform Through Section 1983*, 42 N. ILL. U. L. REV. (forthcoming 2022) (manuscript at 12-14), <https://ssrn.com/abstract=3790708> [<https://perma.cc/QA4B-V2RR>].

63. CAL. PENAL CODE § 745(b) (West 2021) ("A defendant may file a motion in the trial court . . . alleging a violation of subdivision (a).").

64. 42 U.S.C. § 1983 (2018).

65. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (holding that the Sixth and Fourteenth Amendments require states to provide counsel for indigent defendants charged with felonies); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (extending the *Gideon* right to hold that a criminal defendant may not be actually imprisoned without having been afforded counsel,

guarantee for related civil claims.⁶⁶ More substantively, § 1983 suits may only be brought for violations of constitutional or federal rights,⁶⁷ whereas the super-exclusionary rule may reach racist misconduct that does not rise to that level.⁶⁸

The super-exclusionary rule is also preferable to accountability mechanisms internal to law enforcement bodies. Thousands of victims of racial profiling and police misconduct file complaints with police departments every year in California alone, but those departments uphold less than one in ten of those complaints.⁶⁹ Although the police blame the high rejection rate on frivolous complaints,⁷⁰ it is not difficult to trace the self-protective interest that police departments have in denying allegations that their officers are racist. Even if a department wanted to discipline an officer for racist conduct, police unions have succeeded in securing extraordinary procedural protections for officers under investigation, making punitive actions exceedingly difficult to implement.⁷¹ The

including for misdemeanor convictions leading to prison time); *Scott v. Illinois*, 440 U.S. 367 (clarifying that the Gideon right does not extend to defendants merely charged under a statute providing for a prison sentence if the defendant was not actually sentenced to imprisonment).

66. *See, e.g., Lopez v. Reyes*, 692 F.2d 15, 17 (5th Cir. 1982) (holding that “appointment of counsel in a [federal] civil case is a privilege and not a constitutional right”). While California has taken steps to increase access to counsel in civil cases, it has thus far only established limited programs that provide counsel to indigent litigants in the contexts of housing, child custody, and certain guardianship or conservatorship disputes – not police misconduct suits. *See* Erin Gordon, *Advocates Promote a Right to Counsel in Civil Cases, Too*, ABA J. (Feb. 1, 2018, 2:55 AM CST), https://www.abajournal.com/magazine/article/right_to_counsel_in_civil_cases [<https://perma.cc/DXE8-4QRS>]. It should be noted, though, that neither California nor the Federal Constitution guarantee counsel in postconviction proceedings, meaning California RJA claimants will face similar challenges in obtaining representation if they seek relief through habeas. *See* Irene Oritseweyinmi Joe, Shelly Richter & Dayja Tillman, *The Reform Blindspot*, 74 SMU L. REV. 555, 559-61 (2021).
67. *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (“42 U.S.C. § 1983 . . . is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.”).
68. *See infra* Part III.
69. James Queally & Ben Poston, *For Years, California Police Agencies Have Rejected Almost Every Racial Profiling Complaint They Received*, L.A. TIMES (Dec. 14, 2020, 5:00 AM PT), <https://www.latimes.com/california/story/2020-12-14/california-police-racial-profiling-complaints-rejected> [<https://perma.cc/MTP5-7UNJ>].
70. *See id.*; James Queally, *California Police Uphold Few Complaints of Officer Misconduct and Investigations Stay Secret*, L.A. TIMES (Sept. 23, 2018, 4:00 AM PT), <https://www.latimes.com/local/lanow/la-me-police-misconduct-complaints-20180923-story.html> [<https://perma.cc/GFY4-87Y3>] (“Police officials argue that a large number of the complaints they receive are frivolous, filed by suspects they have arrested or others who have an ax to grind.”).
71. *See generally* Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016) (exploring special procedural protections afforded to officer suspects); Samantha Michaels, *The Infuriating History of Why Police Unions Have So Much Power*, MOTHER JONES (Sept./Oct. 2020), <https://>

super-exclusionary rule steps outside of internal-accountability processes and calls upon the courts to provide relief instead. While one may justifiably be skeptical that courts will reliably hold police accountable, judges are surely less partial to police than police are to themselves⁷² and, in principle, are meant to serve as checks on executive power.

Other political or legislative avenues to hold racist police accountable are similarly unsatisfactory for individuals who have been mistreated. Despite the police-reform movement's progress in shifting popular opinion on policing, law enforcement unions retain significant power in California politics.⁷³ This constrains future efforts to pass legislation that targets police racism directly, especially as the political will of the summer of 2020 continues to subside.⁷⁴ Any legislative reforms of police policies that do come to pass will almost certainly fail to provide specific redress in a given criminal case, particularly if that case is postjudgment. Legislation will seldom be written to single out an individual person or case;⁷⁵ further, reforms are unlikely to be made retroactive or otherwise target those already incarcerated, given the increased political costs of doing so.⁷⁶ While prospective legal changes will be critical to the success of the movement against police racism, the super-exclusionary rule is already available to people who have been harmed by racist policing and can provide them with individualized relief.

The avenues considered in this Section are certainly not exhaustive, but whatever the full scope of existing legal remedies, it is clear that they are both insufficient to provide reliable and meaningful relief to people who have been

www.motherjones.com/crime-justice/2020/08/police-unions-minneapolis [https://perma.cc/7RJ5-2E33] (describing the role that unions play in protecting police from misconduct allegations). California has enacted a Public Safety Officers Procedural Bill of Rights that contains many of the propolice protections Professor Levine criticizes. See Public Safety Officers Procedural Bill of Rights Act, CAL. GOV'T CODE §§ 3300-3313 (West 2021).

72. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562-63 (S.D.N.Y. 2013) (finding that the City of New York acted with deliberate indifference toward NYPD officers' racially biased use of stop-and-frisk, and ruminating on the requirements of the Equal Protection Clause).
73. See, e.g., Anita Chabria, *Stall Tactics. Distractions. Lobbying. How Police Reform Was Derailed in California*, L.A. TIMES (Sept. 2, 2020, 5:00 AM PT), <https://www.latimes.com/california/story/2020-09-02/california-police-reform-bills-derailed> [https://perma.cc/BJ8T-8MXW] (“[L]aw enforcement unions still hold serious sway at the Capitol . . .”).
74. See Jennifer Chudy & Hakeem Jefferson, *Support for Black Lives Matter Surged Last Year. Did It Last?*, N.Y. TIMES (May 22, 2021), <https://www.nytimes.com/2021/05/22/opinion/blm-movement-protests-support.html> [https://perma.cc/WC3P-93RN] (examining significant declines in support for the Black Lives Matter movement since the summer of 2020, particularly among Republicans and white Americans).
75. See CAL. CONST. art. IV, § 16.
76. To wit, the California RJA itself does not apply retroactively to judgments finalized before its enactment. CAL. PENAL CODE § 745(j) (West 2021).

subject to racist police conduct and insufficient to deter police from further engaging in that conduct. While the super-exclusionary rule would not solve the problems of deterrence and relief entirely, it adds a unique and more extensive option to the menu of legal strategies available to combat police racism.

2. *Comparison to Proposed Interventions in the Criminal Legal System*

Of course, the insufficiency of existing legal remedies for police racism has not escaped the notice of a wide range of scholars, yielding a wealth of innovative proposals to reduce police racism and racism in the criminal legal system at large. Still, the super-exclusionary rule differs in form, scope, and feasibility from the field of solutions that others have imagined, further establishing its significance.

Many scholars imagine reforms within the law enforcement apparatus—for example, by altering police trainings or encouraging the hiring of officers less prone to racist conduct.⁷⁷ Still, others locate their solutions outside of the criminal legal system entirely, advocating for new federal legislation that would reduce the powers of local police,⁷⁸ calling for increased local democratic accountability,⁷⁹ or suggesting expanded use of § 1983 litigation by state actors.⁸⁰ In contrast, the super-exclusionary rule proposed here is *external* to law enforcement control yet still *internal* to the criminal legal system—the courts are responsible for enforcing the rule, and the remedies take the form of charging or sentencing relief. Situated in this way, the rule avoids possible cooptation by bad-faith or apathetic law enforcement actors and provides direct remedies to harmed parties.

Other academic proposals align more closely with the super-exclusionary rule's logic by focusing on sentencing reductions as a mechanism to remedy racial harms. Drawing inspiration from a Canadian law that directs judges to pay

77. See, e.g., andré douglas pond cummings, *Reforming Policing*, 10 DREXEL L. REV. 573, 604-14 (2018) (advocating for reform of police hiring and trainings); Owen Doherty, Note, *A Reform to Police Department Hiring: Preventing the Tragedy of Police Misconduct*, 68 CASE W. RESV. L. REV. 1259, 1292 (2017) (endorsing stricter certification requirements for officer employment).

78. See, e.g., Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1124-29 (2020) (proposing, among other ideas, federal bans on discriminatory police practices and the use of federal funding to establish civilian-oversight commissions).

79. See, e.g., Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 803-08 (2021) (advocating for “shifting power away from the police and toward the populations who are policed” so as to counter the “antidemocratic nature of contemporary police governance”).

80. See, e.g., Smith, *supra* note 62 (manuscript at 35-36) (endorsing the use of “Section 1983 pattern-or-practice litigation: a lawsuit brought by a state, in federal court, against a constituent municipal police department” to remedy local police misconduct (emphasis omitted)).

“particular attention to the circumstances of Aboriginal offenders” in determining criminal sentences,⁸¹ Dorothy E. Roberts and MacKenzie Way each propose that the United States adopt similar legislation and direct judges to factor in race when determining criminal sentences, thereby compensating for historical racial discrimination.⁸² Zane A. Umsted argues that simply permitting judicial consideration of race and providing judges with additional context surrounding a person’s arrest and prosecution could have similar effects, while reducing potential pushback from judges leery of radical changes.⁸³

These proposals acknowledge the propriety of sentencing relief as a remedy for racism, but they would provide that relief only discretionarily by including race as one consideration in sentencing. By contrast, the super-exclusionary rule, in its strongest form, mandates relief upon demonstration of racial bias or animus without weighing other factors. The rule also permits intervention closer to the root of racial disparities in the criminal legal system by recognizing pretrial challenges; at sentencing, there is no longer any opportunity to attack the conviction itself or to adjust the charges downward and avoid statutory minimum sentences.

Other scholars have proposed approaches even more similar to the super-exclusionary rule, arguing that sentencing reductions should be used to compensate for individual instances of official misconduct. Guido Calabresi suggests that such a system could potentially replace the Fourth Amendment exclusionary rule,⁸⁴ Sonja B. Starr makes this suggestion in the context of prosecutorial misconduct,⁸⁵ and Mark D. Duda endorses the same in the context of police brutality.⁸⁶ Starr and Duda specifically identify the remedial and deterrent functions of such schemes, echoing the merits of the super-exclusionary rule laid out here.⁸⁷

81. Canada Criminal Code, R.S.C. 1985, c C-46, § 718.2(e).

82. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1303-04 (2004); MacKenzie Way, *Remedial Sentencing Legislation as a Tool for Reducing Overrepresentation in Correctional Facilities*, U. PA. J.L. & SOC. CHANGE (Jan. 6, 2020), <https://www.law.upenn.edu/live/news/9534-remedial-sentencing-legislation-as-a-tool-for/news/international-news> [<https://perma.cc/SV6P-EV9E>].

83. Zane A. Umsted, Note, *Deterring Racial Bias in Criminal Justice Through Sentencing*, 100 IOWA L. REV. 431, 449-52 (2014).

84. Calabresi, *supra* note 50, at 116.

85. Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1511 (2009).

86. Mark D. Duda, *Remedying Police Brutality Through Sentence Reduction*, 107 VA. L. REV. ONLINE 99, 103-06 (2021).

87. Starr, *supra* note 85, at 1522-48; Duda, *supra* note 86, at 106-12. Calabresi, in contrast, argues that an additional punitive mechanism would likely be needed to deter future police misconduct. Calabresi, *supra* note 50, at 116-17.

However, while both scholars note that these forms of misconduct implicate racial biases,⁸⁸ their proposed interventions are facially race neutral. By declining to center race in the same way that the super-exclusionary rule does, these approaches leave significant discursive power on the table – as the California legislature acknowledged in passing the RJA, “[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race.”⁸⁹

Most critically, the scholarly proposals presented here are untethered from any existing statutory framework. They require additional legal and policy changes for the proposals to have any effect. In contrast, the super-exclusionary rule is derived from mechanisms already provided in the California RJA. The rule is not merely theoretical – it is actually and currently available under existing law.

III. APPLYING THE SUPER-EXCLUSIONARY RULE

This Part considers the benefits that could result should practitioners and courts apply the super-exclusionary rule. Of course, courts’ willingness to recognize various forms of racism and grant meaningful relief on that basis will undoubtedly shape and temper the true scope and impact of the California RJA.⁹⁰ Still, drawing out the super-exclusionary rule’s potential to its most imaginative extreme is useful to illustrate both the full extent to which racism infects policing and the broader criminal legal system, and what a criminal legal system that is fully committed to rooting out police racism could achieve.

A. *Individual Relief from Criminal Punishments*

Most directly, the super-exclusionary rule would allow people charged with or convicted of crimes to seek and obtain relief from criminal penalties they might otherwise face. Even with a narrow reading of section 745(a)(1)’s sanctions on law enforcement who “exhibited bias or animus towards the defendant

88. See Starr, *supra* note 85, at 1551-53; Duda, *supra* note 86, at 102.

89. California Racial Justice Act, ch. 317, sec. 2(b), 2020 Cal. Stat. 3705, 3707 (quoting Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary, 572 U.S. 291, 380-81 (2014) (Sotomayor, J., dissenting)).

90. As of this writing, the California courts have not yet grappled with the provisions of the RJA most implicated here. However, in November 2021, the Supreme Court of California denied a petition for review of a lower court’s narrow interpretation of another RJA provision related to discovery, which may suggest that the court is uninterested in broad readings of the RJA. Flores v. Superior Ct., No. S270692, 2021 Cal. LEXIS 7827 (Nov. 10, 2021), *denying petition for review to* No. G060445 (Cal. Ct. App. Aug. 26, 2021).

because of the defendant's race" ("the exhibited-bias clause"), the super-exclusionary rule yields quietly revolutionary results. Take, for example, a police officer who uses a racial slur, arguably the most indisputable exhibition of racial animus,⁹¹ to describe a suspect during a witness interview. Even if the officer conducts an otherwise lawful investigation that results in an otherwise lawful arrest, indictment, trial, conviction, and sentence, the then-incarcerated person would still be entitled to some form of habeas relief under the super-exclusionary rule.

Reading the exhibited-bias clause to include implicit racial bias expands the super-exclusionary rule's potential to provide individual relief in an even greater range of cases. Implicit racial bias manifests "when a negative implicit association attached to a certain race influences an individual's behavior toward members of that race," regardless of that individual's conscious intent.⁹² Applying this understanding, the super-exclusionary rule could provide relief to people whom the police targeted as a suspect or against whom the police exercised excessive force due to implicit racial bias. For example, a Black motorist pulled over by police for a minor traffic violation due to an officer's implicit biases against Black people⁹³ could seek relief if a subsequent consent search yields probable cause to arrest and charge that motorist. A similar logic supports claims based on an officer's disproportionate use of force during the arrest of a person of color, and indeed claims in nearly any context in which an officer exercises discretion.

Taking an even broader approach to the exhibited-bias clause creates space for claims that implicate the larger racist structures and policies of policing. Could officers who conduct field tests at DUI checkpoints placed only in neighborhoods with the highest percentage of nonwhite residents be said to have "exhibited" racial bias? Could arrests made by officers deployed on the "hot-spots policing" theory be described as instances of "exhibited" racial bias, since hot-

91. In employment law, courts have held that an employer's use of a single racial slur can be sufficient to demonstrate racial animus. See *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006); *Dee v. Vintage Petroleum, Inc.*, 129 Cal. Rptr. 2d 923, 927 (Ct. App. 2003).

92. John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 693 (2014).

93. See Magnus Lofstrom, Alexandria Gumbs & Brandon Martin, *Racial Disparities in California Law Enforcement Stops*, PUB. POL'Y INST. CAL. (Dec. 3, 2020), <https://www.ppic.org/blog/racial-disparities-in-california-law-enforcement-stops> [https://perma.cc/3REB-9KHG] (finding that Black people are "notably overrepresented" in traffic stops performed by California's eight largest law enforcement agencies); see also Clemons, *supra* note 92, at 694 ("[T]he implicit association between blackness and criminality is so strong that it is bidirectional—that is, not only does blackness conjure images of criminality, but criminality also conjures images of blackness.").

spots policing is disproportionately used in communities of color?⁹⁴ While the situations and remedies contemplated explicitly in the California RJA focus on individuals, the racial bias and animus that the California RJA asserts it aims to address are necessarily group-based phenomena.⁹⁵ This tension invites a more capacious understanding of what it means for an officer charged with enforcing the laws of a given jurisdiction to “exhibit” racial bias.

Realistically, this channel of individual relief may be limited by courts’ reluctance to grant legal recognition to less explicit forms of racism or to upset the finality of criminal convictions; even so, the unlikely odds of success should not deter people from raising wide-ranging law enforcement bias claims under the California RJA alongside their other claims for relief. If litigated in sufficient numbers, these law enforcement bias claims could move from the fringe of the California RJA toward its center, compelling courts to examine police practices more thoroughly and with greater context.⁹⁶ And, more importantly, an individual claimant with favorable facts and a sympathetic judge might receive meaningful relief, a life-changing outcome that is, statistically speaking, likely to reduce the disparate incarceration of people of color in California—even if only marginally so.⁹⁷

B. Deterrence of Racist Police Conduct and Practices

Were the super-exclusionary rule to be applied with sufficient regularity, it could force significant shifts in police behaviors by making racist conduct and practices more costly. If a particular officer or practice is repeatedly the subject of

94. See Dennis P. Rosenbaum, *Critic: The Limits of Hot Spots Policing*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 314, 325-27 (David Weisburd & Anthony A. Braga eds., 2d ed. 2019) (describing racial disparities in hot-spots policing, particularly in pedestrian stops and in use of force); Brian Jordan Jefferson, *Predictable Policing: Predictive Crime Mapping and Geographies of Policing and Race*, 108 ANNALS AM. ASS’N GEOGRAPHERS 1, 2 (2018) (arguing that predictive crime mapping, which is used to guide hot-spot policing tactics, “works to further entrench and legitimize . . . racialized policing”).

95. See Kevin Durrheim, Derek Hook & Damien W. Riggs, *Race and Racism*, in CRITICAL PSYCHOLOGY: AN INTRODUCTION 197, 198-99 (Dennis Fox, Isaac Prilleltensky & Stephanie Austin eds., 2d ed. 2009) (“Racism is understood primarily as the product of particular historical relationships between groups of people in which some people have unjustly asserted claims to dominance over others.”).

96. See LAFAVE, *supra* note 56, § 1.2(b), at 43-44 (arguing that consistent litigation of the Fourth Amendment exclusionary rule forces courts to pay sufficient judicial attention such that they understand broader doctrinal problems and create more integrated doctrinal solutions).

97. See *Incarceration in Local Jails and State Prisons: Incarceration Trends in California*, VERA INST. JUST. [2] (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-california.pdf> [<https://perma.cc/G3UF-NQMH>] (finding that Black and Latinx people are significantly overrepresented in California’s jails and prisons).

successful California RJA claims, the responsible agency could reasonably be expected to strive to make personnel or policy changes. By their own messaging, law enforcement agencies in California are invested in appearing nonracist.⁹⁸ One can presume, as proponents of the Fourth Amendment exclusionary rule do, that law enforcement is also invested in producing reliable investigations that do not jeopardize the imposition of criminal penalties.⁹⁹ Further, law enforcement agencies are not immune to political pressure from their funding localities to avoid costly litigation and retrials.

Because prosecutors bear the direct costs of successful California RJA claims, further deterrence can result from the self-interested influence that prosecutors can exert on law enforcement. Prosecutors are motivated to ensure that they obtain the convictions and sentences they desire – and that those convictions and sentences are upheld.¹⁰⁰ Although they exercise no direct control over police, prosecutors are well-situated to exert pressure on any law enforcement partners

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98. See, e.g., *Community Inquiries on LAPD Training and Practice*, L.A. POLICE DEP'T (2021), <https://www.lapdonline.org/community-inquiries-on-lapd-training-and-practice> [<https://perma.cc/23XD-SKYB>] (“[LAPD] officers are challenged to recognize the diverse communities that they come from and to cultivate awareness of how they have been impacted by living in a society where access to all systems and forms of justice have not been equal.”); *Professional Conduct – Core Values*, L.A. CNTY. SHERIFF’S DEP’T, http://www.la-sheriff.org/s2/static_content/info/documents/racial_profiling.pdf [<https://perma.cc/99CK-SH3B>] (describing “[c]onduct or behavior that demonstrates a bias, prejudice, and/or intolerance” as “inconsistent with the Department’s Core Values”); *Bias-Free Policing*, S.F. POLICE DEP’T (Sept. 20, 2021, 11:58 PM), <https://www.sanfranciscopolice.org/your-sfpd/policies/bias-free-policing> [<https://perma.cc/3XT2-XMFL>] (“The SFPD is dedicated to ensuring our officers and professional staff provide unbiased, quality service to the diverse communities we work for.”).
99. See Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1374 (2008) (“A survey of law enforcement officers in Ventura County, California reported that 60 percent regarded the threat of suppression an ‘important consideration in conducting searches and seizures.’” (quoting L. Timothy Perrin, H. Mitchell Caldwell, Carol A. Chase & Ronald W. Fagan, *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Study of the Exclusionary Rule and a Call for Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 720 (1998))); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 82 (1992) (finding that court actors “uniformly believe that officers care about convictions”); see also Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017 (1987) (presenting evidence of “the exclusionary rule’s significant deterrent effects” on law enforcement). But see Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 881 (2014) (contending that officers “have no professional incentives to concern themselves with convictions”).
100. See Jonathan A. Rapping, *Who’s Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 WASHBURN L.J. 513, 555-59 (2012) (exploring how prosecutorial culture promotes conviction-seeking at almost any cost).

who repeatedly jeopardize the downstream results of investigations.¹⁰¹ Further, self-styled “progressive” prosecutors, including those currently in office in San Francisco and Los Angeles Counties,¹⁰² could capitalize on the opportunity to push for less racist policing under the political cover of conviction integrity. By internalizing the costs of police racism to the criminal legal system, the super-exclusionary rule opens a vector of interest convergence¹⁰³ between prosecutors and police reformers that is missing from other mechanisms for police accountability, which shunt assertions of police racism into civil or extralegal systems, away from any impact on prosecutors.¹⁰⁴

Those skeptical of the Fourth Amendment exclusionary rule’s power to deter police misconduct might express similar skepticism about the super-exclusionary rule.¹⁰⁵ It is obviously true that, whatever its deterrent power, the exclusionary rule does not fully deter police misconduct, since police misconduct still occurs. However, this objection does not require that one dismiss out of hand the deterrent power of exclusionary sanctions; rather, it simply points out that exclusionary sanctions will inevitably be insufficient to fully address a given social ill. That conclusion is, in this author’s view, indisputable. Still, the possibility of forcing some marginal reductions in racist policing, even if improbable, is one worth pursuing.

101. See Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 911-12 (2020) (observing that prosecutors “are not mere bystanders” to police misconduct, but rather “are likely the most powerful players in the U.S. criminal justice system” in part due to the “codependent police-prosecutor relationship”).

102. Marisa Lagos, *New Alliance of Progressive DAs to Push Criminal Justice Reform in California*, KQED (Sept. 15, 2020), <https://www.kqed.org/news/11838062/progressive-das-form-new-alliance-to-push-criminal-justice-reform-in-california> [<https://perma.cc/RJ9F-TTK9>].

103. Professor Derrick A. Bell famously theorized that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.” Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). While it is outside the scope of this Comment to analyze fully the interests of prosecutors – “progressive” or otherwise – as they relate to the super-exclusionary rule, Bell’s concept of interest convergence serves to suggest it is not implausible to think that prosecutors could be conscripted in the pursuit of racial justice, even if they are not themselves committed to such ideals.

104. See *supra* Section II.B.1.

105. See LAFAVE, *supra* note 56, § 1.2(b) (summarizing common critiques of the presumed deterrent effect of the exclusionary rule and responses to those critiques). While empirical evidence that the Fourth Amendment exclusionary rule directly deters police misconduct is admittedly modest, this is better understood as a problem of quantification than as evidence that the rule has no deterrent effect at all. See Alschuler, *supra* note 99, at 1368 (“Quantifying the behavioral effects of the exclusionary rule is . . . impossible.”).

C. *Reframing Public Conceptions of the Harms of Police Racism*

Beyond its potential to yield concrete impacts, the super-exclusionary rule provides discursive opportunities to highlight the diverse ways in which racism manifests in policing and criminal investigations. While it is commonly accepted that the enactment of a law is an expression of social values,¹⁰⁶ the way in which the law is enforced is also such an expression.¹⁰⁷ Were California courts to recognize the super-exclusionary rule as part of the California RJA and enforce it consistently, they would send a strong signal that the state's criminal legal system does not tolerate racism in its police forces in any form, even at the cost of convictions or sentences. Moreover, litigation under the super-exclusionary rule itself performs an expressive function, albeit more literally. The California RJA allows a claimant to request disclosure of relevant evidence that is in the state's possession or control and entitles a claimant to an evidentiary hearing upon a prima facie showing of a violation.¹⁰⁸ Even if a California RJA claim is unsuccessful, its litigation can unearth evidence of racial bias or animus exhibited by law enforcement that might not otherwise have been disclosed.¹⁰⁹ Such disclosures, brought to bear in open court, could in turn invite public scrutiny of police conduct that the police might otherwise have wished to avoid.

These expressive functions of the super-exclusionary rule would invite a socially beneficial expansion in popular discourse regarding racism in the criminal legal system. Although the topic is perhaps more salient than ever before, its salience seems concentrated in two frames: racialized police brutality and killings and the racial disparities that have fueled and continue to fuel mass incarceration. While deeply important, discourse on racial sentencing disparities presents only a back-end snapshot of the system's racism, leaving invisible the front-end drivers of those disparities. Similarly, the national conversation on police racism, while immensely powerful, has centered on viscerally disturbing instances of racialized police violence. By demanding that the courts enforce the super-exclusionary rule under the California RJA, litigants can highlight another frame:

106. For a foundational presentation of this concept, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

107. Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 862, 899-901 (2014).

108. CAL. PENAL CODE § 745(c)-(d) (West 2021).

109. Scott E. Sundby argues that the litigation of exclusionary-rule suppression hearings itself constitutes "a forum through which the importance and substance of the Fourth Amendment is reaffirmed on a daily basis[,] . . . instructing everyone involved both as to the Fourth Amendment's rules and why those rules are of a . . . magnitude mandating honor and respect." Scott E. Sundby, *Mapp v. Ohio's Unsung Hero: The Suppression Hearing as Morality Play*, 85 CHI.-KENT L. REV. 255, 257 (2010). Super-exclusionary-rule hearings could serve an analogous purpose, expressing the importance and substance of the California RJA's prohibitions on police racism.

how racism in everyday policing translates into disproportionate harm to people of color in the form of criminal punishments – a more banal but still tragic type of violence itself.

D. The Super-Exclusionary Rule's Imaginative Horizon

Discerning readers might observe that the super-exclusionary rule, in its broadest application, could swallow up the institution of policing itself. After all, those who call for the abolition of the police often characterize the entire policing apparatus as racist,¹¹⁰ noting its historical enmeshment with slave patrols and Black Codes, even in California.¹¹¹ They point to how policing operates as a form of social control particularly aimed at Black and brown communities¹¹² and how policing fuels racist outcomes in the form of mass incarceration and the prison-industrial complex.¹¹³ If one were to adopt the understanding that racism is in-

110. See, e.g., Jalila Jefferson-Bullock & Jelani Jefferson Exum, *That Is Enough Punishment: Situating Defunding the Police Within Antiracist Sentencing Reform*, 48 *FORDHAM URB. L.J.* 625, 631-36 (2021) (arguing that police racism can be seen in both the system's history and funding); see also Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, *N.Y. TIMES* (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/FUH7-UPAK>] (“There is not a single era in United States history in which the police were not a force of violence against black people.”).

111. See Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 *SOC. JUST.* 156, 159 (2001) (“[T]he emergence of a semi-formal, organized policing force can be traced to slavery.” (citations omitted)); Susan Anderson, *California, a “Free State” Sanctioned Slavery*, *CAL. HIST. SOC'Y* (Apr. 2, 2020), <https://californiahistoricalsociety.org/blog/california-a-free-state-sanctioned-slavery> [<https://perma.cc/EK67-BLDB>] (recounting California's compliance with fugitive-slave laws); Jill Lepore, *The Invention of the Police*, *NEW YORKER* (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police> [<https://perma.cc/9VJ9-54EL>] (“The government of slavery was not a rule of law. It was a rule of police.”).

112. See Aya Gruber, Commentary, *Policing and “Bluelining,”* 58 *HOUS. L. REV.* 867, 868 (2021) (“While policing's crime-reduction success is questionable, one obvious, tremendous success has been its control of race, space, and place.”); Rick Ruddell, Matthew O. Thomas & Ryan Patten, *Examining the Roles of the Police and Private Security Officers in Urban Social Control*, 13 *INT'L J. POLICE SCI. & MGMT.* 54, 54, 62 (2011) (finding that, controlling for crime rates, Black populations were subject to greater police presence, suggesting that this “formal social control is used to regulate Black populations”).

113. See S. Rebecca Neusteter, Ram Subramanian, Jennifer Trone, Mawia Khogali & Cindy Reed, *Gatekeepers: The Role of Police in Ending Mass Incarceration*, *VERA INST. JUST.* 2 (Aug. 2019), <https://www.vera.org/downloads/publications/gatekeepers-police-and-mass-incarceration.pdf> [<https://perma.cc/54X8RAJM>] (identifying an “urgent need to focus more deliberately on one of [mass incarceration's] primary points of origin: policing practices”); *Policing, PRISON POLY INITIATIVE*, <https://www.prisonpolicy.org/policing.html> [[https://](https://www.prisonpolicy.org/policing.html)

extricable from American policing in its current form, then the super-exclusionary rule could, indeed, theoretically expand to encompass each and every exercise of law enforcement authority. Could a full embrace of the super-exclusionary rule result in the invalidation of California's entire policing scheme?

For anyone alarmed at such a prospect, it should suffice to say that the super-exclusionary rule is fundamentally a court-operated tool; no matter how creatively an advocate litigates their claim, the rule can only expand as far as a judge will allow. This constraint means that the super-exclusionary rule's reach will be in lockstep with the outer bounds of judicial recognition of racism, which under present circumstances stops far short of condemnation of policing itself. But, for those who are looking for more radical change, the super-exclusionary rule presents an invitation to push courts to acknowledge as many manifestations of racist policing as possible, so as to take full advantage of the possibilities to which the rule gives rise.

CONCLUSION

As presented here, the super-exclusionary rule can be thought of as a type of in-kind sanction: any instance of racist inputs, in the form of police racial bias or animus, requires a reduction of racist outputs, in the form of criminal punishments that disproportionately harm people of color. If states genuinely commit themselves to combatting racism in their criminal legal systems, as California has stated that it intends to do, then this kind of systems-level calculus should increasingly find acceptance, and mechanisms that rely solely on conceptions of harm and guilt as individual, isolated phenomena should recede from popular use.

To aid that shift in perspective, all criminal legal actors committed to racial justice in California—whether defense attorneys, prosecutors, or judges—should accept the opportunity that the California RJA provides and facilitate extensive and creative litigation of claims that invoke the super-exclusionary rule, even those claims less likely to succeed under current legal conditions. And even though the California RJA was enacted on the now-fading energy of the George Floyd uprisings, advocates in other states should feel emboldened to pursue similar legislation whenever the political opportunity presents itself. Especially as its contours come into focus through litigation, the California RJA can serve as a template and inspiration for other legislation, or at least as an aspirational at-

perma.cc/M32J-6EKY] (“Many of the worst features of mass incarceration—such as racial disparities in prisons—can be traced back to policing.”).

tempt on which others may improve. After all, California is no stranger to leading the way in pioneering criminal justice policy for the nation.¹¹⁴ The super-exclusionary rule, as structured in the California RJA, may be the first of its kind, but it certainly should not be the last.

As of this writing, California's legislature is considering an amendment to the California RJA that would make it retroactive to all existing criminal convictions, dramatically increasing its scope.¹¹⁵ But even if the amendment should not come to pass, the accomplishments of the activists who took to the streets and the advocates who passed the California RJA into law should not be undervalued: the California RJA can and should result in the cumulative return of decades of people's lives, an incomplete but meaningful recompense for racist harms inflicted by police and the rest of the criminal legal system. Moreover, the California RJA and the super-exclusionary rule present an invitation to contemplate what it might look like for a state to commit fully to the cause of eliminating racist policing and what transformations of the law enforcement apparatus might occur as a result.

114. See, e.g., Joseph Rukus & Jodi Lane, *Unmet Need: A Survey of State Resources at the Moment of Reentry*, in *OFFENDER REENTRY: RETHINKING CRIMINOLOGY AND CRIMINAL JUSTICE* 155, 155 (Matthew S. Crow & John Ortiz Smykla eds., 2014) (“As a trendsetter [in passing its harsh Uniform Determinant Sentencing Law], California’s [tough-on-crime] efforts were widely copied across the country.”); Tim Arango, *In California, Criminal Justice Reform Offers a Lesson for the Nation*, N.Y. TIMES (Jan. 21, 2019), <https://www.nytimes.com/2019/01/21/us/california-incarceration-reduction-penalties.html> [<https://perma.cc/4MEG-QUNH>] (“Over the last decade, California has been at the forefront of the nation’s efforts to reduce mass incarceration . . .”).

115. A.B. 256, 2021-22 Leg., Reg. Sess. (Cal. 2021) (as amended May 24, 2021).