

A Case for Movement Lawyering in Racial Justice Act Implementation

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INTRODUCTION

The California Racial Justice Act (RJA) primarily serves criminal defendants seeking relief through the court’s criminal procedure.¹ While defendants’ attorneys advocate specifically for their individual clients’ interests, the legislative intent behind the RJA is systemic change—the eradication of racial disparities in all criminal prosecutions. While the diligent efforts of defense attorneys are commendable and indispensable, additional measures are necessary to fulfill the RJA’s full promise.

To date, the most notable efforts aimed at realizing the objectives of the RJA beyond individual case representation or legislative advocacy

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¹ See CAL. PENAL CODE § 745.

have been led by the Office of the State Public Defender; a few law school institutions, including Loyola and Berkeley; a number of scholarly institutions, like Paper Prisons; and some community lawyering or community-based organizations, including the Ella Baker Center, Impact Justice, the ACLU, and the Peace and Justice Law Center. Despite these organizations' progress, more could be accomplished if these groups' actions were coordinated through a unified state-wide strategy. Alone, each group's capacity for contributing to the RJA's implementation falls short of the substantial work needed to effect systemic change as envisioned by the RJA. Furthermore, funding dedicated to bolstering these groups' efforts is paltry. Recent legislative grants for RJA implementation have been exclusively allocated to public defender offices. Philanthropic and foundation support remains minimal.

No studies have been conducted on the effectiveness of the RJA in addressing racial disparities. However, the RJA's current impact on statewide racial disparities appears underwhelming. This lack of impact is primarily due to the sluggish pace at which the legal process operates, with only a few appellate decisions issued thus far, mainly concerning preliminary matters.² But without substantial efforts focused on effecting systemic change at both the county and state levels, Californians will likely find themselves only marginally closer to eradicating racial disparities in the criminal legal system.

In light of these considerations, I present this reflective article to urge stakeholders concerned with RJA implementation to adopt a coordinated strategy to maximize the Act's impact. Additionally, I advocate for including a robust community lawyering component in this strategy, recognizing its potential to enhance the effectiveness and reach of RJA initiatives.

THE MOVEMENT LAWYERING APPROACH

UCLA Law Professor Scott Cummings aptly defines movement lawyering as “the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to

² See, e.g., *Finley v. Super. Ct.*, 95 Cal. App. 5th 12 (2023) (ruling that a prima facie showing of racial bias requires a Racial Justice Act hearing); *People v. Lashon*, 98 Cal. App. 5th 804 (2024) (ruling that Racial Justice Act issues must be raised at trial to be appealable); *Mosby v. Super. Ct.*, 99 Cal. App. 5th 106 (2024) (ruling that statistical evidence and examples of disparate treatment meet the burden to require a Racial Justice Act hearing).

produce and sustain democratic social change goals that they define.”³ My organization, the Peace and Justice Law Center (PJLC), puts movement lawyering into practice by focusing on two fundamental components: a commitment to grassroots movements and a bottom-up approach. We forge close partnerships with community-based organizations, individuals impacted by systemic injustices, and their informal networks. We then build strategic campaigns rooted in our partners’ experiences. These efforts play out in courtrooms, newspaper articles, administrative offices, legislative hearings, white papers, or wherever there is an opportunity to shape the legal landscape.

The PJLC’s approach complements the endeavors of traditional criminal defense and civil rights organizations, which often find themselves bound by institutional constraints. By embracing movement lawyering, we adopt fresh perspectives, reframe legal matters as political challenges, build communities’ capacity for collective action, engage with both normative and positive law, and foster leadership development among those affected by systemic injustices. In the context of the RJA, we aim to (1) galvanize movement actors, thereby fostering political momentum for ongoing amendments to the RJA; (2) make racially equitable prosecutions the normative expectation for legal actors, lawmakers, and voters; (3) ensure that those without appointed counsel receive the full benefits of the law; and (4) conduct macro-level analyses to evaluate the effectiveness of the RJA in achieving its objectives. Through a movement lawyering approach, we seek to catalyze systemic and lasting change.

ORANGE COUNTY: A CASE STUDY IN RJA IMPLEMENTATION

In early 2022, when the PJLC decided to prioritize the implementation of the RJA in Orange County, our first course of action was to engage in one-on-one discussions with leaders in the criminal legal system reform and abolition movements. At the time, we found that few in our local movement were aware that the RJA had passed, much less that its stated goals—eradicating racial disparities in all criminal prosecutions—were so ambitious. I recall reaching out to Professor Tinto at UC Irvine Law School to ask about the potential of “(a)(3)” and “(a)(4)” claims.⁴ She said the law was new to her, but that it seemed to say just

³ Scott L. Cummings, *Movement Lawyering*, 2017 UNIV. ILL. L. REV. 1645, 1690 (2017).

⁴ An “(a)(3)” claim may apply when a defendant was “charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated,” and evidence shows that the

what I thought it said. Similarly, I called Adam Vining at the Orange County Public Defender's office, who acknowledged the law's broad scope and potential but also told me there would only be one or two RJA cases from their office at that time, with no clear pathway toward systemic change. We all seemed to share a cognitive dissonance as we tried to think through both the RJA's potential and the efforts it would take to fulfill that potential.

To bridge this gap in understanding, our next step was to convene meetings with movement leaders to delve into the nuances of the law, its potential impacts, and the stark disparity between our current situation and the RJA's transformative potential. These discussions gave our partners a valuable platform to evaluate their commitment to prioritizing RJA implementation while considering the implications of reallocating resources from existing campaigns. Subsequently, we organized collective meetings, inviting movement partners to assess our collective capacity and kickstart strategic planning efforts. The PJLC pledged to provide staff support for coalition organizing, while pivotal partners such as Chicanxs Unidxs, the ACLU, Underground Grit, and CLUE demonstrated early-stage engagement. Conversely, other partners offered support but could not divert significant resources from their ongoing initiatives.

During this phase, the coalition learned a general sense of the Orange County Public Defender's progress by meeting with their attorneys. We also learned a general sense of other counties' progress through updates and legal discussions within the Office of the State Public Defender's email list. We learned that the most immediate local roadblock to RJA implementation was the Orange County District Attorney's successful attempts to block access to racial disparity data. We also identified the first long-term roadblock as a lack of investment in RJA implementation by the Orange County government.

Concurrently, we began laying the groundwork to use the RJA to build the movement in the future. We held a teach-in for activists and movement organizers. There, the dialogue turned first toward advocating

prosecution sought or obtained such charges or convictions more frequently against defendants sharing that race, ethnicity, or national origin in that county. CAL. PENAL CODE § 745(a)(3). An "(a)(4)" claim may apply when a defendant received a "longer or more severe sentence" than "other similarly situated individuals convicted of the same offense" or than in "cases with victims of [another] race, ethnicity, or national origin," and evidence shows that such sentences were more frequently imposed on defendants or victims (respectively) sharing that race, ethnicity, or national origin in that county. *Id.* § 745(a)(4).

for incarcerated individuals and their families and participatory defense. Community organizer and advocate Raj Jayadev defines participatory defense as “a community organizing model for people facing charges, their families, and their communities to impact the outcome of cases and transform the landscape of power in the court system.”⁵ Together, we committed to championing participatory defense as a critical objective of our RJA-related initiatives. Next, we delved into strategies to reframe racial disparities in prosecutions as violations of the law rather than the inevitable results of social inequality. Opponents of criminal legal system reform try to cast themselves as defenders of law and order, but the RJA has the potential to recast them as extremists willing to break the law to defend racial inequality—more Bull Connor than Joe Friday.

Based on these ongoing strategy discussions, we embarked on two campaigns: one to ensure the transparency of prosecutorial data and the other to urge Orange County to invest in RJA implementation. Our primary strategic objective, advocating for the transparency of prosecutorial data, took the form of a Public Records Act (PRA) lawsuit against the District Attorney, with local organizations serving as plaintiffs. Allies told us of the ACLU of Northern California and BraunHagey & Borden’s efforts to compile prosecutorial data from various regions across the state. Though we were initially informed that Orange County was not their top priority, our decision to independently pursue a PRA lawsuit prompted the ACLU to reassess Orange County’s significance, ultimately leading to our co-counseling. The lawsuit was successful both in securing the public release of the data and framing the RJA in the local media, which normalizes an expectation that prosecutions will be free from racial disparities.⁶

Along the way, we engaged with local county budget activists who had separately concluded that reallocating county funds from carceral and punitive measures to more effective solutions to social ills was imperative. They were open to incorporating a demand for a budget item specific to RJA implementation into their framework. However, our meetings with them and the public defender also highlighted the common perception that the county budget is a zero-sum game, cautioning against the potential unintended consequences of well-intentioned budget

⁵ Raj Jayadev, *The Origin Story of Participatory Defense*, PARTICIPATORY DEF. (Apr. 3, 2024, 11:05 PM), <https://www.participatorydefense.org/about/>.

⁶ See, e.g., Audrey Sawyer, *Court Rules Orange County District Attorney Produce Prosecutorial Data Under Racial Justice Act*, DAVIS VANGUARD (Sept. 1, 2023), <https://www.davisvanguard.org/2023/09/court-rules-orange-county-district-attorney-produce-prosecutorial-data-under-racial-justice-act/>.

advocacy. Given these considerations, we refrained from launching a full-fledged public campaign. Nonetheless, one county supervisor took the initiative and implemented our budget request independently. While it cannot be directly attributed to our coalition's efforts, our organizing work certainly contributed to this budget victory.

Two years have passed since our efforts in Orange County began. We can now begin assessing our achievements. While we successfully met both campaign objectives—ensuring the transparency of prosecutorial data and urging the county to invest in RJA implementation—it is evident that our coalition cannot claim a direct impact in terms of reducing sentences or securing the release of individuals from incarceration. Furthermore, as the PRA case remains in litigation over non-data documents, there has been no attorney fee award nor any new interest from philanthropists or foundations in funding our work. Still, we remain optimistic about the progress we can achieve in the next two years if we secure continued funding for our efforts.

NEXT STEPS

Our plan now is to pursue test cases and launch a more extensive communications campaign. We are still focused on supporting participatory defense and pro per retroactive claims. At the same time, we are mindful of each case's immense work and our limited capacity. We also want to stay focused on "(a)(3)" and "(a)(4)" claims that have the potential for the most significant impact. We are analyzing the data won from the PRA lawsuit to identify the most extreme and common racial disparities. In other words, we are working to determine which disparities, if resolved, would result in the largest reduction of time served. Once identified, we intend to take a test case for that disparity and work through the statistical analysis to produce an expert report that can be shared and used by other defendants sentenced under the same criminal code. Then, we hope to begin helping defendants and their families in more significant numbers.

Our plans for a communications campaign begin with an Orange County-specific website that tracks racial disparities. The Paper Prisons website serves as a fantastic model, as does the Commons website created by Measures for Justice.⁷ The main difference is that our website will highlight metrics that measure racial disparity gaps in Orange County

⁷ See Bill Sundstrom et al., *Racial Justice Act Demo Tool*, PAPER PRISONS (last visited Apr. 3, 2024) <https://paperprisons.org/RJA>; *Commons*, MEASURES FOR JUSTICE (last visited Apr. 3, 2024) <https://measuresforjustice.org/what-we-do/solutions/commons/>.

over time, demonstrating whether the gaps are closing. As a result, we will frame racial justice in Orange County's public discourse as a measurable objective instead of an issue of public safety versus civil rights. Through press releases and social media when the website launches and is updated, and through grassroots outreach, we hope to make this a vital part of all future public discussions about prosecutions and district attorney politics in Orange County.

REFLECTIONS

The PJLC has committed to this work, but we frequently feel siloed and underfunded despite the support of our local movement partners. We monitor the RJA work of the criminal defense bar locally and statewide. Still, this work is client-focused and not movement-based, even when defense bar members work collaboratively. The Ella Baker Center and Initiate Justice are also working on the issue, but the RJA's requirement that each county do its own statistical analysis makes their work seem distant to us in Orange County. The Paper Prisons website is exciting because it gives us a model to look at and a team to whom we can reach out to analyze the same data and questions. We hope this is an early indicator that we will find more overlap as our work progresses. We are also grateful for and inspired by Berkeley Law's Racial Justice Act Symposium organized by the Berkeley Criminal Law and Justice Center and *Berkeley Journal of Criminal Law*, an essential step towards building a more unified movement.

At the Symposium, I felt like part of a statewide RJA movement for the first time. The symposium put the need for more strategic collaboration across sectors in sharp relief. Moving forward, we must foster deeper cooperation and organization. A leadership committee comprised of defense attorneys, legislative staffers, scholars, community-based organizations representing system-impacted individuals, and movement lawyers could provide the necessary framework for strategic coordination. Such a committee would facilitate the sharing of resources and expertise to ensure that RJA implementation efforts are aligned and mutually reinforcing. The committee could also be created by legislation or executive order of the Governor, similar to the Committee for Revision of the Penal Code or the Gang Database Technical Advisory Committee, with instruction to work with the judicial council. Of course, it could be less formal as well.

In addition, this reflection underscores the critical need for sustained funding and institutional support for movement lawyering efforts. While our coalition remains committed and resilient, the difficult

reality of operating within resource constraints is undeniable. Philanthropic and foundation interest in funding strategies to achieve the RJA's systemic change goals needs to expand. Securing consistent funding streams for ongoing work is essential for maintaining momentum and expanding the reach of our efforts. It is incumbent upon us to continue advocating for more significant investment in movements dedicated to dismantling racial disparities in the criminal legal system.

As the RJA's implementation expands across California, stakeholders must adopt a coordinated strategy that maximizes its impact. A movement lawyering approach that centers on grassroots movements and collective action is critical to realizing the RJA's transformative potential. By working closely with community-based organizations, individuals impacted by systemic injustices, and their informal networks, movement lawyers can bridge impacted communities and the legal community. Accordingly, we can build the power of politically marginalized constituencies to produce and sustain social change. That kind of collaboration is necessary if the RJA is going to catalyze lasting systemic change in our criminal legal system.