RACIAL JUSTICE CLINIC:

University of San Francisco School of Law

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PROVIDING ASSISTANCE AND PROMOTING CHANGE

I. HISTORY AND MISSION

The University of San Francisco School of Law, which opened its doors in 1912, is a Jesuit institution with a profound commitment to advancing the cause of social justice by helping those who are most oppressed, marginalized, and without access to resources.[1] The law school's clinical programs, which train students to become lawyers by litigating real-life cases, are designed with that mission in mind. The law school has a history

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[1] *Public Interest & Social Justice*, USF School of Law, https://www.usfca.edu/law/school-life-careers/public-service-social-justice (last visited Aug. 8, 2022).

of robust, semester-long clinical education programs including an Immigration and Deportation Defense Clinic, an International Human Rights Clinic, and a Criminal and Juvenile Justice Clinic (CJJC).[2]

In 2016, the law school added the Racial Justice Clinic (RJC). The RJC, which shares staffing and a class with the CJJC, has a focus that is both broader and narrower. It is broader because the RJC exists in large part to take on larger, more complex cases and advocacy both inside and outside of the courtroom; in the latter context, that work can involve policymaking, legislation implementation, and partnerships with other criminal legal system actors, most recently the San Francisco District Attorney's Office. The RJC's focus is narrower because, while the CJJC takes any client who is charged with a misdemeanor,[3] the RJC is focused on defending and advocating for those who have suffered discrimination, marginalization, and oppression based on race. In 2021, the USF RJC received the Davis Vanguard Justice Award for Advocacy in honor of its groundbreaking partnership with the San Francisco District Attorney's Office.[4]

II. FOUR DISCRETE LITIGATION PROJECTS AND CLASSROOM COMPONENT

A. INNOCENCE COMMISSION AND POST-CONVICTION SENTENCING REVIEW

Working under the direct supervision of Barnett Chair of Trial Advocacy Professor Lara Bazelon and Assistant Professors and Supervising Attorneys Charlie Nelson Keever and Yohannes Moore, students in the RJC fall into four distinct working groups — although many students will work in

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[2] *Law Clinics,* USF School of Law, https://www.usfca.edu/law/engaged-learning/law-clinics (last visited Aug. 8, 2022).

[3] In the Criminal & Juvenile Justice Clinic (CJJC), students will represent adults and juveniles charged with misdemeanors and delinquency offenses in San Francisco Superior Court. Once students obtain their Practical Training of Law Students (PTLS) certification from the California State Bar, they will handle — under the direct supervision of a professor — all aspects of the client's case, including client and witness interviews, investigations, court appearances, client counseling, motions practice, suppression hearings, and trial.

[4] *Davis Vanguard Justice Award Gala*, Davis Vanguard Awards, https://vanguardgala.com/awards/#law (last visited Aug. 9, 2022).

more than one group, either within a single semester or over the course of two semesters if they choose to return. The first group of students litigates wrongful conviction cases both in and out of the state of California. In out-of-state cases, the RJC is the legal representative of the wrongfully convicted person seeking to overturn their conviction. In-state, the RJC has a unique partnership with the San Francisco District Attorney's Office (the SFDA) to support the SFDA Innocence Commission, which is chaired by Professor Bazelon and supported by Assistant Professor Nelson Keever, who is the Commission's staff attorney and only paid member.[5] The other Commission members, who, with Professor Bazelon, serve pro bono, review potential wrongful conviction cases referred by the SFDA. At the end of that review, the staff attorney submits to the SFDA the Commission's findings and recommendations, which are given great weight although the DA retains the authority to make the ultimate decision regarding whether the applicant is entitled to relief and what legal course of action to take.[6]

From November 2020 to June 2022, the SFDA–USF RJC partnership also included having law students and a staff attorney work collaboratively with the SFDA Postconviction Review Unit to resentence eligible prisoners, pursuant to relevant sections of the California Penal Code.[7] In 2018, the resentencing statute was amended to allow the county DAs to recommend that a prisoner be resentenced upon a determination that their prison sentence is excessive or no longer serves the interest of justice.[8] Previously, only the court, the Board of Parole Hearings, or California Department of Corrections could make such a recommendation. In 2021, the Legislature enacted Section 1170.03 which stated that the court may resentence a petitioner to any lesser included offense. The court must state its reasons for a resentencing decision on the record, provide notice to the defendant, set a status conference within thirty days of the receipt of the request to recall the sentence, and appoint counsel for the defendant. Section 1170.03 also

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[5] *Press Release: District Attorney Boudin Announces Formation of Post-Conviction Unit and Innocence Commission*, San Francisco District Attorney, https://www.sfdistrictattorney.org/archive-press-release/formation-of-post-conviction-unit-and-innocence-commission (last visited Aug. 10, 2022).

[6] *Id.*

[7] Cal. Penal Code §§ 1170(d) and 1170.03; renumbered as § 1172.1, June 30, 2022.

[8] Then § 1170(d); public safety omnibus, California Assembly Bill (AB) No. 1812, 2017–2018 Regular Session.

authorized the court to grant a resentencing without a hearing, if the parties are in accord. This amendment also created a presumption favoring a defendant's petition for recall and resentencing — although there is no presumption in favor of any particular recommended sentence.[9]

The SFDA–USF RJC Postconviction Review Unit partnership, which ended with the June, 2022 recall of SFDA Chesa Boudin, resulted in the resentencing of more than forty men and women.[10] A USF RJC staff attorney would screen and evaluate Section 1170.03 cases referred by the SFDA to determine whether the applicant met Section 1170.03's criteria. The work involved reviewing and analyzing all documents relevant to a resentencing determination. A donor-funded RJC staff attorney reviewed the original files, reviewed the prison file, assessed reentry plans, contacted victims, and sometimes obtained and prepared experts to testify in support of the DA's motion seeking resentencing.[11] The RJC staff attorney also drafted petitions, appeared in court, and assisted in any briefing sought by the court to conduct a meaningful review of the case.

The service that the RJC staff attorney and students provided the DA's Office in assisting with the review and evaluation of incarcerated people seeking to be resentenced was vital to fulfilling the state legislature's intent in enacting Section 1170.03. In San Francisco alone, an estimated 600 people are potentially eligible for resentencing under the revised statute because their sentences were excessive, no longer served the interests of justice, and/or because the applicant no longer posed any risk to public safety or substantial risk of recidivating. Although the USF RJC no longer maintains this partnership with the San Francisco District Attorney's Office, the clinic is investigating opportunities to recreate that partnership with a different DA's Office assuming that funding can be obtained to hire a third assistant professor/supervising attorney.

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9 Criminal procedure: resentencing, California Assembly Bill (AB) No. 1540, 2021–2022 Regular Session, amending § 1170(d)(1) and creating new § 1170.03 (subsequently renumbered as § 1172.1, June 30, 2022).

10 In total, the SFDA under Chesa Boudin resentenced nearly seventy people, far more than any other county in California during that period of time.

11 The donor-funded staff attorney, Nicole Fuller, worked for the USF RJC from November 2020–June 2022.

B. IMPLEMENTING THE CALIFORNIA RACIAL JUSTICE ACT

The second group of students, working under the supervision of Professor Bazelon and Assistant Professor Moore with funding from the Justice Catalyst Foundation,[12] are leading on-the-ground efforts to implement California's Racial Justice Act (RJA). As discussed in section IV below, the RJA is a landmark law enacted in 2021 that prohibits bias based on race, ethnicity, or national origin in charges, convictions, and sentences.[13]

The RJC students working with Professors Bazelon and Moore provide case consultation to attorneys to evaluate potential RJA claims, assist with drafting motions, track appeals and share updates, connect attorneys in need of support with experts, and lead RJA trainings across the state.

C. TITLE IX CASES

Title IX is the federal statute that prohibits discrimination in education on the basis of sex. The U.S. Supreme Court has held that Title IX applies to claims of sexual harassment and sexual discrimination that occur on college and university campuses because gender-based violence deprives students of their equal right to obtain an education.

Unlike criminal defendants, students accused of misconduct under Title IX are not entitled to legal counsel, and the adjudicative system under Title IX lacks many of the hallmarks of due process for the accused that are protected in the criminal legal system. Students of color are more likely to lack the means to afford to hire a lawyer. The lack of representation and resources combined with an adjudication process that until recently was often devoid of basic due process protections led to unfair outcomes.

Beginning in early 2018, the USF RJC began representing college and university students of color who had been accused of violating Title IX by committing acts of sexual harassment or sexual assault. USF took on this

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12 *Justice Catalyst Fellows*, JusticeCatalyst.org, https://justicecatalyst.org/fellows (last visited Aug. 10, 2022).

13 California Racial Justice Act (RJA), California Assembly Bill (AB) 2542, 2019–2020 Regular Session; *Governor Signs Landmark Legislation Advancing Racial Justice in California*, American Friends Service Committee (Oct. 2, 2020), https://www.afsc.org/document/governor-signs-landmark-legislation-advancing-racial-justice-california.

work because of the growing evidence that racial bias can play a significant role in Title IX allegations and adjudications,[14] and because no other clinic in the country was providing legal representation to these students.[15]

D. PRETRIAL RELEASE AND BAIL REFORM WORK WITH THE SAN FRANCISCO PUBLIC DEFENDER

The fourth group of students works with veteran public defender Jacque Wilson and other trial attorneys at the San Francisco Public Defender's Office on discrete projects that are designed to confront and address the racialization of the criminal justice system. San Francisco Public Defender–based RJC projects include, but are not limited to, working in the Pretrial Release Unit.

The Pretrial Release Unit was created by the San Francisco Public Defender in October 2017 to facilitate the release of their clients.[16] Pretrial detention can have life-altering outcomes. Although presumed innocent, those held in jail pending trial stand the risk of losing their jobs, their housing, custody of their children and access to benefits, and they often plead guilty simply to get out rather than because they are in fact guilty.[17] In most cases, pretrial detention is not necessary because those detained pose no risk to public safety and will return to court as ordered.[18] The racially disproportionate effect of pretrial detention is well documented. According to a 2015 study conducted by the W. Haywood Burns Institute, while Black adults were more likely to meet the criteria for pretrial release, they were less likely than white adults to be granted pretrial release by

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[14] Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases*, The Atlantic Magazine (Sept. 11, 2017), https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361.

[15] Jeremiah Poff, *This Professor Started a Legal Clinic for Black Students Accused of Rape. She's Getting Threats*, The College Fix (Dec. 17, 2018), https://www.thecollegefix.com/this-professor-started-a-legal-clinic-for-black-students-accused-of-rape-shes-getting-threats.

[16] California Association of Pretrial Services (CAPS), PretrialServicesCA.org, http://pretrialservicesca.org/2018/07/02/public-defender (last visited Aug. 10, 2022).

[17] Alena Yarmosky, The Impact of Early Representation: An Analysis of the San Francisco Public Defender's Pre-Trial Release Unit (UC Berkeley Goldman School of Public Policy, 2018), http://public.sfpdr.com/wp-content/uploads/sites/2/2018/05/The-Impact-of-Early-Representation-PRU-Evaluation-Final-Report-5.11.18.pdf.

[18] Tiana Herring, *Releasing people pretrial doesn't harm public safety*, Prison Policy Initiative (Nov. 17, 2020), https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases.

San Francisco judges.[19] These racial disparities at the earliest stages of the criminal legal process also drive overall racial disparities in criminal case outcomes in San Francisco.[20] Similar findings were recently published in a 2022 *San Francisco Chronicle* article that reviewed data collected under California state law tracking the stopping and frisking of California residents by race.[21] Black people across the state were between 3.7 and 6 times more likely to be stopped than white people, the data showed, and consequently, far more likely to be arrested.

To reduce the number of people who are arrested, denied bail and subjected to direct and collateral consequences as a result, the San Francisco Public Defender has developed a fast-track approach focused on interviewing clients immediately upon arrest and gathering the biographical, financial, and case information necessary to put together a bail application that can be presented at the client's first court appearance.[22] USF RJC students provide vital assistance with that effort by going into the jails, conducting the initial intake interviews, and drafting the memoranda that later serve as the basis for the bail motions made by the San Francisco Public Defender's Office.

E. INSTRUCTIONAL CONTENT

1. Class Component

The USF RJC holds a weekly two-hour class together with the CJJC. The class includes a robust trial advocacy component in which a single real-life clinic case is used throughout the semester. Students are assigned prosecutor and defender roles and must give opening statements, conduct direct and cross examinations, and give closing arguments. Two classes are

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[19] Tamara Aparton, *Study: Shocking Racial Disparities in SF Courts*, San Francisco Public Defender (June 23, 2015), https://sfpublicdefender.org/news/2015/06/study-shocking-racial-disparities-in-sf-courts; W. Haywood Burns Institute, San Francisco Justice Reinvestment Initiative: Racial and Ethnic Disparities Analysis for the Reentry Council (2015), https://burnsinstitute.org/wp-content/uploads/2020/09/SF-JRI-_compressed.pdf.

[20] Yarmosky, *supra* note 17.

[21] Dustin Gardiner & Susie Neilson, *'Are the police capable of changing?': Data on racial profiling in California shows the problem is only getting worse*, San Francisco Chronicle (July 14, 2022, 4:00 AM), https://www.sfchronicle.com/projects/2022/california-racial-profiling-police-stops.

[22] Yarmosky, *supra* note 17, at 16.

focused on case theory and fact development, which allows the students to dive deeply into the facts of the case and determine what themes, theories, and arguments best support their position. Other classes include trainings on postconviction litigation, RJA implementation, and guest presentations. Outside speakers include public defenders, private defense counsel, prosecutors, judges, and community advocates, who share their expertise.

2. Zealous Partnership

Additionally, beginning in the fall of 2022, the RJC will engage in a new partnership with Zealous, a national nonprofit organization founded by former public defender Scott Hechinger. Zealous works with public defenders, community organizers, advocates, and those directly impacted by the criminal legal system to collaborate, educate, and train law students and young lawyers as well as put together media campaigns to combat misinformation.[23]

The mission of Zealous is to correct the imbalance of power, and gain voice, influence and control over criminal justice media and policy, which has historically been weighted toward police, prosecutors, and a media that is receptive to their traditionally tough-on-crime narrative slant.[24]

This work is extremely important and extremely timely in the RJC's home of San Francisco where the San Francisco Police Department spends vast sums of money to manipulate public perceptions about crime, policing, and public safety.[25] San Francisco is not unique in this, however.[26] According to journalist and former public defender Alec Karakatsanis, this so-called "copaganda" — a portmanteau of "cop" and "propaganda" describing the phenomenon in which news media and other social institutions like film and television promote sympathetic or celebratory portrayals of the police — primarily functions to impact public perceptions about crime and public safety and obstruct meaningful criminal justice reform that would lead to

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[23] Zealous, https://zealo.us/action/zealous/about (last visited Aug. 10, 2022).

[24] *Id*.

[25] Tim Redmond, *Exposing 'copaganda' as SFPD spends $1.6 million on 'strategic communications'*, 48hills.org (May 5, 2022), https://48hills.org/2022/05/exposing-copaganda-as-sfpd-spends-1-6-million-on-strategic-communications; Alec Karakatsanis, *Police Department Spend Vast Sums of Money Creating "Copaganda,"* Jacobin (July 20, 2022), https://jacobin.com/2022/07/copaganda-police-propaganda-public-relations-pr-communications.

[26] Karakatsanis, *supra* note 25.

divesting from police and prisons.[27] Copaganda and traditional crime journalism accomplish this by narrowing the public's understanding of "public safety," focusing attention on the minor crimes committed by the most marginalized people in our society (petty theft, low-level drug offenses, and so-called "quality-of-life" crimes) rather than the crimes that cause the most harm on the largest scale like wage theft by employers (which costs Americans $50 billion every year) and violations of environmental regulations (which cause hundreds of thousands of deaths every year).[28]

Copaganda and biased journalism also foment public fear by manufacturing "crime surges" that are, to put it bluntly, not based in reality. Though major "index crimes" tracked by the FBI are at nearly forty-year lows and though there has been no significant increase in retail theft, the media coverage tells a different story, and the American public consistently believes that crime rates are higher than they are.[29] A striking illustration of this phenomenon published by Bloomberg in July 2022 demonstrates that media coverage about shootings in New York this year massively outstrips the actual number of shooting incidents, and that the number of times shootings were mentioned in the media over the last two years has had almost no correlation to the number of shooting incidents at any given time.[30] The purpose of these efforts is to convince the public to continue investing in police and prisons, even though the evidence shows that police and prisons do not make us safer.[31]

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[27] Laurena Bernabo, *Copaganda and post-Floyd TVPD: Broadcast television's response to policing in 2020*, 72 J. Comm. 488 (August 2022), https://doi.org/10.1093/joc/jqac019; Karakatsanis, *supra* note 25.

[28] Karakatsanis, *supra* note 25; Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 Yale L.J. (Mar. 2019), https://www.yalelawjournal.org/forum/the-punishment-bureaucracy#_ftnref222.

[29] Maggie Koerth & Amelia Thomson-DeVeaux, *Many Americans Are Convinced Crime Is Rising in The U.S. They're Wrong.*, FiveThirtyEight.com (Aug. 3, 2020), https://fivethirtyeight.com/features/many-americans-are-convinced-crime-is-rising-in-the-u-s-theyre-wrong.

[30] Fola Akinnibi & Raeedah Wahid, *Fear of Rampant Crime is Derailing New York City's Recovery*, Bloomberg.com (Jul. 29, 2022), https://www.bloomberg.com/graphics/2022-is-nyc-safe-crime-stat-reality.

[31] Philip Bump, *Over the past 60 years, more spending on police hasn't necessarily meant less crime*, The Washington Post (Jun. 7, 2020), https://www.washingtonpost.com/politics/2020/06/07/over-past-60-years-more-spending-police-hasnt-necessarily-meant-less-crime; Alec Karakatsanis, *Why "Crime" Isn't the Question and Police Aren't*

Zealous's Hechinger agrees that this kind of "justice" reporting has serious consequences. In his view, journalism — in particular, crime reporting — is "one of the most pressing racial and social justice issues today."[32] "After serving for nearly a decade as a public defender," he wrote in *The Nation* last fall, "I know well that every cruel and irrational policy of the mass incarceration era — policies that I saw devastate predominately Black and brown people in Brooklyn criminal court every day — was propped up by harmful journalistic biases and practices just like the ones on display . . . from some of the most prominent media outlets in our nation."[33] With this in mind, the work of Zealous is deeply aligned with the RJC's mission to address systemic racism within the criminal legal system.

Working with Hechinger and other Zealous attorneys, the USF RJC will host six, two-hour Friday workshops through the fall and spring semesters.

III. INNOCENCE WORK

Wrongful convictions are a significant problem in the United States. To date, more than 3,200 people have been exonerated according to data gathered by the National Registry of Exonerations, which has tracked every known exoneration that occurred in the United States since 1989.[34] Although there is a national Innocence Project in New York and dozens of innocence project affiliates throughout the country, there are still too many wrongfully convicted people who have no one to represent them because these projects are often small, underfunded, and overwhelmed by requests for help.[35] For that reason, the USF RJC litigates select wrongful conviction cases outside of California, as described below.

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the Answer, Current Affairs (Aug. 10, 2020), https://www.currentaffairs.org/2020/08/why-crime-isnt-the-question-and-police-arent-the-answer.

[32] Scott Hechinger, *A Massive Fail on Crime Reporting by The New York Times, NPR*, The Nation (Oct. 6, 2021), https://www.thenation.com/article/society/crime-reporting-failure.

[33] *Id*.

[34] The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Aug. 10, 2022).

[35] *Op-Ed: Former Innocence Project Attorney Says that System is Overwhelmed with Wrongful Convictions*, Innocence Project (Feb. 3, 2015), https://innocenceproject.org/op-ed-former-innocence-project-attorney-says-that-system-is-overwhelmed-with-wrongful-convictions.

The USF RJC is also focused on helping the wrongfully convicted within the state of California, where the law school is located. Since the National Registry of Exonerations began tracking wrongful convictions in 1989, there have been more than 279 known wrongful convictions in California — causing innocent Californians to lose a total of 2,173 years of their lives,[36] and costing California taxpayers over $221 million (according to a 2016 study).[37] These wrongful convictions occurred as the real perpetrators of crime avoided consequences for their actions and victims were denied justice. Wrongful convictions undermine our criminal legal system and violate fundamental principles of justice and due process.[38]

A. THE INNOCENCE COMMISSION: SFDA–USF RJC PARTNERSHIP

1. Groundbreaking Model

The SFDA Innocence Commission model is a first-in-the-nation approach to efficiently and fairly investigating potential wrongful conviction cases and is a cost-effective way to effectuate the DA's duty to prevent and rectify the conviction of innocent persons. Created by SFDA Chesa Boudin in 2020, the Commission is tasked with evaluating cases where an incarcerated person alleges that they have been wrongfully convicted — either because they can establish that they are factually innocent, or because a due process violation renders their incarceration unconstitutional. If the Commission, after evaluating all of the available evidence and conducting any necessary reinvestigation, votes by a majority to vacate the conviction, the Commission prepares a Findings of Fact and Conclusions of Law memorandum that serves as the basis to seek to vacate the conviction or provide

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[36] *Exonerations by State*, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Aug. 10, 2022).

[37] The $221 million dollar figure comes from a 2016 study: Rebecca Silbert et al., *Criminal Injustice* (The Chief Justice Earl Warren Institute on Law and Social Policy), http://static1.squarespace.com/static/55f70367e4b0974cf2b82009/t/56a95c112399a3a5c87c1a7b/1453939730318/WI_Criminal_InJustice_booklet_FINAL2.pdf. The actual number is millions of dollars higher. For example, in 2019, after the study was published, the San Francisco Board of Supervisors paid out a $13.1 million judgment to Jamal Trulove, who was wrongfully convicted of murder and spent six years in prison.

[38] Berger v. United States, 295 U.S. 78 (1935).

other relief. Although the DA retains the final decision-making power on each case, great weight is afforded to the Commission's determination.

The members of the Innocence Commission — a senior prosecutor within the SFDA,[39] Judge LaDoris Cordell (Ret.), Deputy Public Defender Jacque Wilson, Dr. Michael Meade, and Professor Lara Bazelon (chair) — represent key perspectives in the criminal legal system, and bring to their work a diversity of professional experience as well as diversity across race, ethnicity, and gender.[40] The makeup of the Commission and the collective experience of its current members has been a key part of its success. The Commission is assisted by Assistant Professor/Supervising Attorney Charlie Nelson Keever, who is an employee of USF and whose salary is donor-funded.

2. SFDA–USF RJC Partnership

The SFDA Innocence Commission is supported by a unique partnership with USF School of Law Racial Justice Clinic, directed by Professor Bazelon, which provides the staff attorney and funding for that position. The work of undoing wrongful convictions is deeply aligned with the Racial Justice Clinic's mission to serve clients who have been affected by racial discrimination. Wrongful convictions harm communities of color and the Black community in particular. According to the National Registry of Exonerations, Black people constitute approximately 13 percent of the American population, but represent 49 percent of the exonerations in the United States.[41] The NRE's 2017 report revealed that Black people are seven times more likely to be wrongfully convicted of murder, and twelve times more likely to be wrongfully convicted of drug possession than white people.[42]

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[39] Following the recall, the interim DA fired the SFDA liaison Arcelia Hurtado, who had been the chief of the SFDA Conviction Review Unit. The Commission is waiting for the interim DA to appoint a replacement.

[40] *The Innocence Commission*, San Francisco District Attorney, https://www.sfdistrictattorney.org/policy/innocence-commission/ (last visited Aug. 10, 2022).

[41] *Race & Wrongful Convictions*, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/Race-and-Wrongful-Convictions.aspx (last visited Aug. 10, 2022).

[42] *Id*.

3. The CRINO Problem

Although a growing number of prosecutors' offices across the country and in California have formed Conviction Integrity Units ("CIUs") with the intention of reexamining questionable convictions, many of these units have failed to fulfill their stated purpose because they lack resources, flexibility, transparency, and independence in the review process. While some internal units are highly effective, many (if not most) are ineffective, or what the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania calls CRINOS — Conviction Review Units in Name Only.[43] Indeed, the San Francisco District Attorney's Office had such a unit before the formation of the Innocence Commission by DA Boudin in September 2020. That unit — which had been formed under the previous district attorney — had exonerated no one.[44]

The Commission's structure is designed to address the main challenges that prevent so many Conviction Integrity Units from fairly and efficiently reviewing alleged wrongful conviction cases. For instance, the assistant district attorneys assigned to typical CIUs must often undertake the unenviable task of evaluating and passing judgment on the work of colleagues and predecessors in their own offices as well as the police, with whom they must work every day. The Commission's independence from the DA's office and the composition of its membership are key features that alleviate this common problem. This feature, like the Innocence Commission's other practices and policies, is based on best practices gleaned from the innocence community, including Innocence Project cofounder Barry Scheck, and the Quattrone Center for the Fair Administration of Justice. As a result, the Commission has been able to conduct collaborative investigations that are both efficient and thorough.

4. The Exoneration of Joaquin Ciria

In April 2022, the Innocence Commission's first case resulted in an exoneration — the first collaborative exoneration in San Francisco history.

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[43] John Hollway, Conviction Review Units: A National Perspective (The Quattrone Center for the Fair Administration of Justice at University of Pennsylvania Law School, April 2016), https://www.law.upenn.edu/live/files/5522-cru-final.

[44] Lara Bazelon, *My team set an innocent man free under Chesa Boudin's guidance. Let us keep working*, San Francisco Chronicle (June 4 ,2022). https://www.sfchronicle.com/opinion/openforum/article/chesa-boudin-recall-17216520.php.

The petitioner, Joaquin Ciria, had been convicted in 1991 of the first-degree murder of his friend Felix Bastarrica. Despite his protestations of innocence, Ciria remained incarcerated for more than three decades.[45]

Although no physical or forensic evidence linked Ciria to the crime, San Francisco police inspectors zeroed in on Ciria as the shooter based on rumors on the streets and the statements of the apparent getaway driver. At trial, the jury heard three eyewitnesses identify Ciria as the shooter; two were cross-racial identifications by strangers. Most crucial was the identification by George Varela, the getaway driver, who knew Ciria and testified that he drove Ciria to and from the scene. What the jury did *not* hear was evidence of the extreme pressure put on Varela by police to identify Ciria as the shooter. The jury heard no evidence of an alternate suspect, and no evidence that Ciria had an alibi, though two alibi witnesses were available and willing to testify.[46]

The RJC reviewed and vetted all the evidence presented by Ciria and his counsel and presented that evidence to the Innocence Commission. The investigation revealed that, if Ciria's case were tried today, a jury would hear from an additional eyewitness, Roberto Socorro, who was the victim's best friend and an eyewitness to the murder. Socorro has also named another person, Candido Diaz, as the real shooter. Importantly, Socorro knew both Diaz and Ciria. Other witnesses confirm details that corroborate Socorro's account, including that Diaz's hairstyle and manner of dress at the time of the shooting more closely matched the descriptions of the shooter provided by the other eyewitnesses at trial. Today, the jury would also hear from two alibi witnesses who could account for Ciria's whereabouts at the time of the crime and have maintained his innocence for thirty years. Finally, two witnesses close to George Varela (a sister and family friend with no apparent motive to help Ciria) would testify that Varela has since admitted to them that Ciria is not the shooter, and that he testified falsely at trial due to pressure from police. As part of the investigation, the Commission also retained an

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[45] *Id.*

[46] Joshua Sharpe, *'We made it': S.F. man walks free three decades after wrongful murder conviction*, San Francisco Chronicle (April 20, 2022, 5:52 PM), https://www.sfchronicle.com/sf/article/We-made-it-S-F-man-walks-free-three-17110780.php; *Joaquin Ciria*, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6225 (last visited Aug. 9, 2022).

eyewitness identification expert to evaluate the identification procedures used in this case and to opine as to the reliability of the cross-racial, stranger identifications of Ciria.[47]

Apart from the conviction in this case, Ciria had no history of violent crimes as a juvenile or adult and was a model inmate during his lengthy prison term. Though he was eligible for parole beginning in May 2010, he was repeatedly denied, in part, because he continued to maintain his innocence.

Following the four-month investigation of the RJC and the Innocence Commission, the Commission provided its first recommendation to San Francisco District Attorney Chesa Boudin. Based on the Commission's recommendation and the DA's independent review of the case, the District Attorney's Office filed a concession in Ciria's case, agreeing that the cumulative weight of his newly discovered evidence undermined the entire prosecution case and pointed unerringly to his innocence. In April 2022, Ciria's conviction was overturned and he was released from custody.[48]

With the assistance of the RJC, the Innocence Commission completed a review and investigation of its second case and provided a recommendation to the DA in December 2021. Following the Commission's recommendation, the DA moved to resentence the applicant in that case under Penal Code Section 1172.2 (formerly 1170.03). A third case is currently under review at the time of this publication.

B. WRONGFUL CONVICTION ADVOCACY OUTSIDE OF CALIFORNIA

1. Yutico Briley

In 2019, the USF RJC took on the case of Yutico Briley, a Louisiana prisoner. In 2013, Briley was convicted of armed robbery and sentenced to serve sixty years with no possibility of parole. He was nineteen. The robbery occurred just after 2 a.m. in 2012 on a poorly lit street in New Orleans and lasted less than ninety seconds. The victim was white; Briley is Black. The victim made a cross-racial stranger identification of Briley in a show-up

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47 *Joaquin Ciria*, *supra* note 46.

48 Annie Rosenthal, *Even the District Attorney Believed Joaquin Ciria Was Innocent. Why Did It Take So Long to Set Him Free?*, Politico (Aug. 8, 2022), https://www.politico.com/news/magazine/2022/08/07/california-innocence-commission-joaquin-ciria-00037546.

identification process that is widely condemned for its suggestiveness — there was no one else to choose from — and in this case was wholly unnecessary because there was no exigency justifying it.[49]

For eighteen months, the USF RJC battled the Orleans Parish DA (OPDA) for discovery, filing motions and engaging in extensive protracted communication to enforce Briley's rights. In November 2020, a reform-minded prosecutor, Jason Williams, was elected OPDA.[50] Williams immediately created a Civil Rights Division headed up by Emily Maw, the former director of Innocence Project New Orleans (IPNO).[51]

In February 2021, the OPDA conceded that Briley had been wrongfully convicted after the USF RJC filed a lengthy petition documenting the flaws in the prosecution's case and the abysmal representation by Briley's counsel. The prosecution's case was flawed because it relied almost entirely on a cross-racial stranger show-up identification. No physical or forensic evidence tied Briley to the crime and the gun found on Briley's person could not be conclusively matched to the gun used in the robbery — both were generic pistols. Moreover, from listening to Briley's jailhouse calls, including calls with his attorneys, the prosecution was aware that Briley was insisting he had an alibi. The prosecutors did nothing to investigate that alibi.[52]

The ineffective assistance of counsel Briley received was extreme. Briley told his lawyers that he was eight miles away when the robbery occurred at a hotel in Metairie with a woman named Erin. He told him that surveillance footage would prove it and so would his cell phone records. His attorneys ordered the surveillance footage for the wrong time and by the time they realized the mistake the footage from the correct time had been taped over. They never got his cell phone records. At trial, they presented no alibi defense or any defense at all. The cross examination of the victim did not probe the inherently suggestive nature of the show-up

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49 *Yutico Briley*, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5942 (last visited Aug. 10, 2022).

50 Matt Sledge, *A man serving 60 years for armed robbery is free after Jason Williams clears the way for release*, Nola.com (Mar. 19, 2021), https://www.nola.com/news/courts/article_7b6b0fbe-8902-11eb-abf1-c3da328e2fce.html.

51 *Id.*

52 Emily Bazelon, *I Write About the Law. But Could I Really Help Free a Prisoner?*, The New York Times Magazine (June 30, 2021), https://www.nytimes.com/2021/06/30/magazine/yutico-briley.html.

identification or point out the empirical evidence documenting the inherent unreliability of cross-racial stranger identifications.[53]

In March 2021, Orleans Parish Judge Angel Harris vacated Briley's armed robbery conviction and his underlying convictions for being a felon in possession of a firearm and resisting arrest. He was released from prison several days later after more than eight years of incarceration. The chronicling of Yutico Briley's exoneration was the front-page story in the *New York Times Magazine* in July 2021.[54]

2. Leon Benson

In September of 2021, the USF RJC took on the representation of Leon Benson, an Indiana prisoner convicted in Indianapolis in 1999 of first-degree murder. Benson, who has always maintained his innocence, has been in prison for nearly a quarter of a century. Beginning in fall 2021, the USF RJC entered into a collaboration with the newly created Conviction Integrity Unit in the Marion County Prosecutor's Office, overseen by Assistant District Attorney Kelly Bauder. For the next year, the USF RJC and the MCPO worked together to investigate Benson's claim that he had been wrongfully convicted.

The crime occurred on August 8, 1998 at approximately 3:30 a.m. The victim, Kasey Schoen, was shot five times with a .380 handgun while sitting in his truck which was parked on the 1300 block of Pennsylvania Avenue in Indianapolis, Indiana.

The crime was highly unusual, according to lead investigating detective Alan Jones. Schoen was white and lived in Plainfield — a middle-class, low-crime suburb of Indianapolis. He worked as a manager for National Car Rental at the Indianapolis Airport. Schoen was gay but closeted. The shooter was Black and the crime occurred in a neighborhood that was mostly Black, low-income, and known for high rates of crime. It was also known at the time for having a number of gay bars, including The Varsity, which Schoen visited. Schoen had no criminal record and no history of using drugs. Significantly, nearly every other murder Detective Jones investigated was an intra-racial crime in which one Black person killed another. Detective Jones, who investigated more than fifty murders, could count on one hand the number involving a white victim.

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53 *Id.*

54 Bazelon, *supra* note 52.

Substantial evidence pointed to another man — a seventeen-year-old drug dealer nicknamed "Looney" for his erratic and impulsive behavior — as the shooter. That evidence included an eyewitness identification by another witness, Dakarai Fulton, who recognized Looney from the neighborhood. Both Fulton and Looney were Black (that is, the same race), knew each other, and Fulton was standing directly across the street when the shooting occurred. Another witness, Donald Brooks, also placed Looney by Schoen's truck immediately after hearing shots fired. There was also word on the street that Looney was the shooter and had bragged about it afterward and also induced people with that information not to tell the police. But after initial efforts to investigate Looney, Indianapolis Metropolitan Police Department ("IMPD") detectives switched course when a white woman named Christy Schmitt identified Leon Benson as the shooter. Schmitt, who did not know Benson, saw the crime occur at a distance of 150 feet as she stood petrified on a poorly lit street on a misty evening.

Schmitt's identification changed everything. IMPD investigators, led by Detective Alan Jones, zeroed in on Leon Benson as a suspect. They never let up or looked back even when Fulton came forward voluntarily and other evidence surfaced that did not corroborate Schmitt and instead implicated Looney. Instead, the IMPD buried that evidence deep in their files, never turning it over to the prosecution or to Benson. It remained buried for decades.

Unlike Looney, who was advised by counsel not to speak to police,[55] Benson (who was not yet represented by counsel and did not know that he was a suspect in a homicide investigation) agreed to speak to IMPD detectives. Benson told police that he had been in the nearby Priscilla Apartments (known as "Little Vietnam") at the time of the shooting. But Schmitt had already identified Leon Benson from a six-pack photo array and Jones was determined to charge him.

The case against Benson was weak. No physical or forensic evidence tied Benson to the murder. The murder weapon was never recovered. Benson's conviction turned on: (1) the cross-racial stranger identification of Christy Schmitt; (2) another alleged eyewitness, Donald Brooks, who approached police and stated that he saw "Detroit" (Benson) standing near Kasey Schoen's truck just before and just after the shooting from the second floor of an

[55] When Looney was brought in to speak to the police he was in court on another criminal charge and represented by counsel.

apartment building across the street;[56] and (3) Benson's statement to police putting himself in the Priscilla Apartments near the time of the shooting.

Benson's first trial (which took place over two days from May 24 to 25, 1999) ended in a hung jury and a mistrial.[57] A second trial took place from July 6 to 8, 1999. At the retrial, prosecution witness Donald Brooks attempted to recant his statement to police, and claimed that he could not remember the statement he made to Detective Jones implicating Benson. Without any objection by the defense, the prosecution was allowed to read Brooks's entire out-of-court statement into the record. Defense counsel asked if he could "take a nap" while the statement was read.

In addition, IMPD lead detective Jones and other law enforcement officials failed to investigate and follow up on powerful leads pointing to Looney's guilt and buried that information in their files in violation of their constitutional obligation under *Brady v. Maryland* to disclose it to the defense.

Exacerbating matters was trial counsel's deficient representation, which prejudiced Benson. Among other failings, Benson's trial counsel failed to present key evidence available at the time of trial that tended to exculpate Leon Benson and tended to implicate Looney as the shooter, including: (1) that Fulton identified Looney as the shooter and picked him out of a photo lineup; and (2) that IMPD received two Crime Stoppers reports stating that Kasey Schoen was killed by Looney with a .380 handgun.

After nearly a year of cooperative investigation that unearthed evidence proving *Brady* violations by the state, the USF RJC and MCPO also uncovered new evidence undermining Benson's conviction and pointing to his innocence. Three witnesses signed sworn affidavits stating that they had additional information implicating Looney as the shooter, but they had not come forward with that information because Looney bribed, threatened, or intimidated them.

The exculpatory *Brady* material along with the new evidence uncovered through this investigation completely undermines the State's case against Leon Benson — a case devoid of physical evidence and so thin it resulted in a hung jury the first time it was tried. There can be no question that, had Benson had the opportunity to present this evidence at trial, he would not

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[56] Donald Brooks attempted to recant his statement at both trials. On appeal, the court characterized his testimony as "relatively unimportant" in comparison to Schmitt's testimony. Benson v. State (2002) 762 N.E.2d 748, 753.

[57] Jury vote: 6 NG, 5 G, 1 undecided (Jury Note, dated May 25, 1999).

have been convicted. The USF RJC and MCPO are in the final stages of their investigation. The USF RJC is hoping to file a pleading in state court seeking to overturn Benson's conviction when the investigation is finished.

IV. CALIFORNIA RACIAL JUSTICE ACT

The California Racial Justice Act (RJA) is a landmark law enacted in 2021 that prohibits bias based on race, ethnicity, or national origin in charges, convictions, and sentences.[58] Under the RJA, a criminal defendant can challenge their charge, conviction, or sentence by demonstrating:

- An attorney, judge, law enforcement officer, expert witness, or juror involved in their case exhibited racial bias or animus towards them; or
- During trial, whether or not purposeful or directed at a defendant, there was use of racially discriminatory language; or
- There is statistical evidence that people of one race are disproportionately charged or convicted of a specific crime or enhancement; or
- There is statistical evidence that people of one race receive longer or more severe sentences, including the death penalty or life without the possibility of parole.[59]

Critically, the RJA circumvents the precedent set by the U.S. Supreme Court, which held that statistical data showing evidence of systemic racial discrimination was not a sufficient basis to overturn a death sentence, effectively insulating racial disparities in charging and sentencing from judicial review.[60] In *McCleskey v. Kemp*, the Court held that only specific evidence of racist *motivation* or *intent* on the part of the prosecution in a defendant's individual case could be used as a basis to challenge a conviction or sentence based on racial discrimination. As Governor Newsom observed when signing the RJA into law, the *McCleskey* standard was "almost

[58] California Racial Justice Act (RJA), *supra* note 13; *Governor Signs Landmark Legislation, supra* note 13.

[59] California Racial Justice Act (RJA), *supra* note 13.

[60] McCleskey v. Kemp, 481 U.S. 279 (1987); *California Legislature Confronts Racial Discrimination in New Criminal Justice Reform Package*, American Bar Association (Oct. 28, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/fall-2020/california-criminal-justice-reform-package.

impossible to meet without direct proof that the racially discriminatory behavior was conscious, deliberate and targeted."[61]

Importantly, the intent of the RJA is also to allow criminal defendants to access via discovery information in the prosecutor's control that may prove that racial bias has impacted their case. To access such discovery, they need only show "good cause," which is considered a very low evidentiary standard. That standard as applied to the RJA, however, has already been tested. In *Young v. Superior Court of Solano County*, defendant Clemon Young Jr. argued that the practice of racial profiling in traffic stops led to his arrest for possession of Ecstasy with intent to sell.[62] Young pointed to publicly available statistics showing that, statewide, Black people are more likely to be searched during the course of traffic stops than other people.[63] Using the RJA, he filed a motion seeking discovery to help him support his claim that the State had violated the RJA. In particular, Young requested the "names and case numbers of others who were charged with or could have been charged with possession of Ecstasy for sale; the same information for a broad range of related drug offenses; the police reports relating to the suspects involved and their criminal histories; and the disposition in all of these cases."[64] The trial court denied Young's motion; its "only articulated reason for the denial" was that Young's good cause showing "appeared to rest on nothing more than his race." In other words, Young failed to establish good cause for the discovery request.

The Court of Appeal sided with Young. The Court emphasized the Legislature's intent in enacting the discovery provision in the Racial Justice Act was to "ensure that defendants claiming a violation [under the act] have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions."[65] As the Court observed, "Preventing a defendant from obtaining information about charging decisions without first presenting that same evidence in a discovery motion is the type of Catch-22 the [Racial Justice] Act was designed to eliminate." Instead, the Court went on, "[t]he Legislature was focused . . . on

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61 *Governor Signs Landmark Legislation, supra* note 13.

62 Young v. Superior Court of Solano County, 79 Cal. App. 5th 138, 143 (2022).

63 *Young*, 79 Cal. App. 5th at 143–44.

64 *Id*.

65 *Id.* (internal quotations omitted); California Racial Justice Act (RJA), *supra* note 13.

creating a discovery-triggering standard that is low enough to facilitate potentially substantial claims even if it came at some cost to prosecutorial time and resources." This first appellate decision interpreting the discovery provision of the RJA signals a promising start for criminal and defendants seeking discovery to support RJA claims.

To date, only a small number of RJA claims have been filed, but each case demonstrates the importance of the RJA and the need to eradicate racial bias from the criminal legal system in California. For example, this year, a Contra Costa County judge held the first evidentiary hearings considering a claim under the RJA — specifically, to determine "whether prosecutors exhibited racial bias or prejudice towards [defendant] Gary Bryant Jr., a Black man and prolific musician, by using Bryant's rap lyrics and rap videos as evidence during his trial for the murder of 23-year-old Kenneth Cooper."[66]

Though Bryant testified at trial that he had no gang affiliation, and though no evidence was put forward proving the victim was a member of a rival gang, the prosecution proferred a so-called "gang expert" who opined that Bryant's rap lyrics demonstrated that he was involved in "gang activity." That "expert's" opinions included testimony concluding, among other things, that the phrase "lay a demo"—commonly understood to refer to recording a demo of one's music — meant "make a shooting." Based in part on this evidence, Bryant was found guilty of murder with enhancements for gang activity, and was sentenced to life in prison.[67]

Bryant challenged his conviction under the RJA, arguing that the use and interpretation of his rap lyrics tainted his trial with racial bias. In a series of hearings beginning in fall 2021 and continuing through the spring of 2022, Bryant's attorney, Public Defender Evan Kuluk, presented distinguished academics to assist the court in evaluating Bryant's RJA claim. Bryant's expert witnesses proffered testimony explaining the inherent racial bias that arises from the use of rap lyrics as evidence, the history of the use of rap lyrics as evidence, as well as the concept of implicit bias itself. At the conclusion of the hearings on Mr. Bryant's RJA motion, an independent court expert was appointed to review the case and to advise the Court. A hearing is set for late September.

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[66] Chessie Thacher, *Prosecutors Used Rap Lyrics as Evidence in a Murder Trial; that's Racial Bias*, ACLU NorCal (Sept. 28, 2021), https://www.aclunc.org/blog/prosecutors-used-rap-lyrics-evidence-murder-trial-s-racial-bias.

[67] *Id.*

Thus far, implementation of the law has been led by an ad hoc group of attorneys and advocates: no one is funded specifically to work on RJA implementation and there are no attorneys or advocates in the state who are able to devote 100 percent of their time to implementation of the law. A pending state assembly bill seeks to make the RJA retroactive so that incarcerated people with judgments rendered before January 1, 2021 can also seek reconsideration of their conviction or sentence if they can establish that racial bias played a role in obtaining the judgment against them or in imposing an excessive sentence.[68] If retroactivity is secured for the RJA, the need for outreach and advocacy to support incarcerated people and their families will increase dramatically.

Beginning in 2021, the USF RJC became part of that ad hoc group, which meets twice a month to strategize, share information, and support attorneys with promising RJA claims. In late 2021, the USF RJC was awarded a Justice Catalyst Fellowship to help implement the law and in June 2022, the USF RJC hired Assistant Professor and Supervising Attorney Yohannes Moore to be the Justice Catalyst Fellow and work full time on RJA matters. The USF RJC plans to play a key role in "The Pipeline to Freedom Strategy" conceived by leaders of the ad hoc group to work closely with partner organizations to make sure that the RJA is as widely and robustly implemented, and expertly litigated, as possible.

Part of this partnership involves working with the organization Access to Justice to identify incarcerated people who may be eligible for relief through the RJA and connect them with law students and new attorneys (including students and staff within the USF RJC) who can help them file their first petition making a formal RJA claim. The RJA provides for appointment of counsel *if* the first petition establishes a "*prima facie* showing." Thus, by supporting individuals in filing their first petition, we can increase the number of people appointed an attorney.

The USF RJC's work to implement the RJA will also include:

- Case consultation with trial and appellate attorneys evaluating potential RJA claims.
- Assistance in drafting novel motions and claims.

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[68] *Racial Justice Act for All (AB 256)*, ACLU California Action, https://aclucalaction.org/bill/ab-256 (last visited Aug. 10, 2022).

- Tracking appeals and legal developments and sharing updates with attorneys.
- Connecting attorneys in need of support with experts and pro bono assistance.
- Organizing trainings on the RJA for students, advocates, and experts.

V. TITLE IX

As noted above, Title IX is the federal statute that prohibits discrimination in education on the basis of sex. A long line of United States Supreme Court precedents makes clear that sexual harassment and sexual assault interfere with a student's right of equal access to education and because these harms are "on the basis of sex" schools have an affirmative obligation to ferret out and discipline these violations under Title IX.

In 2011, the Department of Civil Rights, which is a division within the federal Department of Education (DOE), issued a Dear Colleague Letter (DCL) setting out guidelines for schools to follow when adjudicating Title IX cases. While the letter, issued under the Obama Administration, had no binding legal authority, it nonetheless had the force of law because the DOE prosecuted violations of the DCL guidelines by initiating federal investigations and threatening to withhold federal funds.

Among other rules, the DCL required schools to use a preponderance of the evidence standard — meaning that if the factfinder was 50.01 percent convinced that a violation occurred, the student must be found responsible. The DCL also allowed for schools to use single-investigator systems. Under this model, a single person — often hired on a contract basis by the school with no particular training — was assigned the role of factfinder and decisionmaker. This investigator, therefore, is expected to serve multiple roles that in the criminal legal system are played by different people to ensure fairness. Schools that used the single-investigator model, including the California State University system which serves nearly half-a-million students, provide no hearing, no neutral decisionmaker, and no means of cross examination. The DCL also barred mediation to resolve Title IX cases and most schools interpreted this prohibition to apply to the use of restorative justice as well.

The DCL remained in place until January, 2020, when the Trump Administration rescinded it and replaced it with federal regulations. These

regulations abolished the single-investigator system, which had also been found to be unconstitutional by some state and federal courts. It allowed schools to choose a clear and convincing evidence standard and required a live hearing, cross examination, and a decision by a neutral third party.

In June 2022, the Biden Administration announced plans to rescind the Trump regulations and replace them with regulations similar to those enumerated in the DCL. Under the newly proposed standards, accused students would not have the right to a hearing where a representative can cross-examine their accuser on their behalf to probe the allegations against them. Accused students are also not guaranteed access to the evidence against them, substantially undermining their ability to prove their side of the story.[69] The change would also mean a return to the single-investigator system.[70] Together, these changes deprive the accused of due process under Title IX — a deeply troubling outcome, considering that allegations of misconduct can have many of the same serious, life-altering consequences as criminal charges.

While the Title IX legal landscape is constantly shifting in significant ways that cause confusion and disruption, one thing has remained consistent: evidence that Title IX accusations, findings of responsibility, and significant punishments including suspension and expulsion fall disproportionately upon Black students. While the Office of Civil Rights does not collect data on race in Title IX adjudications at the college and university level, a growing body of evidence — ranging from data collected from specific schools, trends that have emerged from deeply reported journalism, and anecdotes from experienced Title IX advocates — suggests that implicit and explicit bias play a role in who is accused and how they are investigated and punished.

An analysis of assault accusations at Colgate University, for example, found that while only 4.2 percent of the college's students were Black in the 2012–13 school year, 50 percent of the sexual-violation accusations reported

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69 Robby Soave, *5 Ways Biden's New Title IX Rules Will Eviscerate Due Process on Campus*, Reason.com (June 23, 2022), https://reason.com/2022/06/23/title-ix-rules-cardona-biden-sexual-misconduct-campus.

70 The "single-investigator" model was briefly retired after Education Secretary Betsy DeVos put forward new regulations in 2018 that reformed Title IX and expanded due process protections for the accused. Lara Bazelon, *I'm a Democrat and a Feminist. And I Support Betsy DeVos's Title IX Reforms*, The New York Times (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/opinion/-title-ix-devos-democrat-feminist.html.

to the school were against Black students, and Blacks made up 40 percent of the students who went through the formal disciplinary process.[71] Anecdotally, advocates involved with Title IX investigative and adjudicative processes notice the disparity and see how accusations of sexual misconduct often play out along racial lines. As Harvard law professor Janet Halley observed, "Case after . . . case that has come to my attention, including several in which I have played some advocacy or adjudication role, has involved black male respondents."

Halley also suggested that interracial assault allegations are a category warranting particular scrutiny. In her 2015 *Harvard Law Review* article, "Trading the Megaphone for the Gavel in Title IX Enforcement," she noted: "American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women," followed eventually by the revelation "that the accused men were not wrongdoers at all." She writes that "morning-after remorse can make sex that seemed like a good idea at the time look really alarming in retrospect; and the general social disadvantage that black men continue to carry in our culture can make it easier for everyone in the adjudicative process to put the blame on them."[72]

This has also been reflected in the experience of the USF RJC since the clinic began defending students accused of Title IX violations in 2018.

Consider this situation: A young Black student — "John" — attending university on a full athletic scholarship, had been found responsible for violating Title IX by raping another student at his off-campus apartment. The underlying facts were these: John's teammate's white ex-girlfriend — "Jane" — matched with John on Tinder. She came over to his apartment, had sex with him and, they both agree, returned three days later to have consensual sex. Weeks later, Jane, who had by then reconciled with her boyfriend, claimed that John raped her during the first sexual encounter. John adamantly denied her account. Jane's boyfriend said she was lying. In a string of text messages between the two, Jane went back and forth about what had actually happened with John. When her boyfriend asked pointblank if John raped her, she texted back: "I wouldn't say rape." There was no hearing, no chance for John — the accused — to ask Jane questions or probe her allegations (which he vehemently denied).

The investigator believed Jane, concluding that John committed sexual assault by finding her more credible than John under the

71 Yoffe, *supra* note 14.

72 *Id*.

preponderance-of-the-evidence standard, under which the accuser must prove there is a greater than 50 percent chance her claim is true. John was found responsible for rape. He was facing almost certain expulsion with just days to appeal. John — who was the first in his family to go to college, and had spent some of his childhood homeless and sleeping in cars — had no money and no lawyer.

When Jane's accusation became public, a group of students made posters with John's name and face and the word "RAPIST" printed underneath in block letters. They plastered them all over campus — a campus that was less than 3 percent Black in a town that was less than 2 percent Black. John hid in his apartment for three weeks. In an email to the Title IX investigator, he pleaded with her to investigate, writing, "people die be[cause of] things like this." She responded that investigating what happened to him was "not [her] job." John was afraid to set foot on campus — he was failing his classes. Then another student had come forward with a rape accusation against him, and the school, without investigating this new allegation, suspended him indefinitely.

In early 2018, the RJC agreed to represent John — our first Title IX client. We were able to get the first finding reversed and remanded for reinvestigation. Ultimately the case was resolved with no finding of responsibility against John. The single investigator found that the second accusation was not supported by the evidence. He left school as a student in good standing.

Our representation is the difference between a fair and an unfair process. Students like John are not entitled to a lawyer or to legal advice. Having a lawyer is the difference between being found not responsible and being found responsible and expelled. John's case is just one example among many. Like John, students of color accused of Title IX violations have also faced race-based retaliation on their campuses, particularly in cases involving a non-Black female accusing a Black male. In these cases, having access to trained lawyers and law students to prepare a defense has spared these students some of the unfairness that has been visited upon others.

Since John's case, the RJC students have taken on a number of other Title IX cases. Under the supervision of Professor Bazelon and outside counsel, RJC students have represented high school and university students accused of violating Title IX. In every single one of them the clinic's client was Black or Latino and facing a cross-racial accusation.

The USF RJC has also taken on a public role in the Title IX legislation process. The Clinic has twice submitted detailed letters — the second time in collaboration with professors at Harvard Law School — during the notice and comment period for the federal regulations. Assuming that the regulations are rescinded or overhauled, the USF RJC plans once again to weigh in on how the new regulations are worded.

VI. CONCLUSION

The USF RJC is unique among law school clinics in the nation in the scope and breadth of the work it does to attack racial discrimination within the criminal legal system. It operates a small internal innocence project, plays a vital role in the SFDA's Innocence Commission, is one of the key players implementing the California Racial Justice Act, is the only clinic that defends students accused of Title IX violations, and partners with the San Francisco Public Defender's Office to ensure the pretrial release of as many eligible people as possible. From fall 2020 to spring 2022, the clinic also partnered with the SFDA to successfully resentence more than forty people.

The clinic is proud to welcome a vibrant and varied group of students to undertake this work every semester. In particular, the RJC celebrates the diversity of its students in terms of their perspectives on and experience with the criminal legal system. Though many students join the clinic because they wish to become criminal defense–oriented attorneys, others dream of being criminal prosecutors or working at large civil firms but wish to have the opportunity to learn about and work within the criminal legal system. Because of the unique and varied projects that students work on in the clinic, our students leave their clinic experience not only with the practical skills and experience to excel in their chosen field (whatever that may be), but also with a richer perspective on the criminal legal system as a whole and a deeper understanding of the role that race and implicit bias play within that system.

Since 2016, the RJC has grown from a staff of one — Professor Bazelon — to a staff of three due to fundraising efforts by Professor Bazelon. Moving forward, the USF RJC is committed to continuing its fundraising efforts to ensure that these vital projects continue.

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