
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: AB 2778 **Hearing Date:** June 14, 2022
Author: McCarty
Version: June 6, 2022
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Crimes: race-blind charging*

HISTORY

Source: Yolo County District Attorney's Office

Prior Legislation: AB 2542 (Kalra), Ch. 317, Stats. 2020
AB 1798 (Levine), held in Assm. Appropriations, 2019

Support: Cal Voices; California Attorney General Rob Bonta; California Federation of Teachers (CFT) - A Union of Educators & Classified Professionals, AFT, AFL-CIO; California Nurses Association; Initiate Justice; Kern County Criminal Justice Coalition; National Association of Social Workers – California Chapter

Opposition: San Diegans Against Crime; San Diego Deputy District Attorneys Association

Assembly Floor Vote: 72 - 0

PURPOSE

The purpose of this bill is to require the Department of Justice (DOJ), beginning on January 1, 2024, to develop and publish "Race-Blind Charging" guidelines for all prosecuting agencies, as specified, to follow in implementing a process to initially review a case for charging based on information from which all means of identifying the race of the suspect, victim, or witness have been removed or redacted.

Existing law states that all felonies shall be prosecuted by indictment or information, as specified. (Pen. Code, § 737.)

Existing law states that all misdemeanors and infractions be prosecuted by written complaint under oath. (Pen. Code, § 740.)

Existing law prohibits the state from seeking or obtaining a criminal conviction or sentence on the basis of race, ethnicity, or national origin. (Pen. Code, § 745.)

Existing law provides that a defendant may establish such violation if any of the following occurred:

- The court, an attorney, a law enforcement officer, an expert witness, or a juror involved in the case exhibited bias or animus due to the defendant’s race, ethnicity or national origin;
- The defendant was charged or convicted of a more serious offense than defendants of other races who committed the same or similar acts, and evidence exists that demonstrates that the prosecution has a pattern of charging or convicting more serious offenses against people who share the defendant’s race or ethnicity; and,
- A more severe sentence was imposed on the defendant than was imposed on other similarly situated defendants of different races, ethnicities, or national origins. (Pen. Code, § 745.)

Existing law authorizes the court, upon a defendant proving racial bias has occurred in a case, to remedy the situation:

- Declaring a mistrial, if requested by the defendant;
- Empaneling a new jury;
- Reducing one or more charges, dismissing an enhancement or special allegation;
- Vacating a conviction or sentence and ordering new proceedings; or,
- Modifying a sentence. (Pen. Code, § 745, subd. (e).)

This bill requires, commencing January 1, 2024, DOJ to develop and publish guidelines for a process called “Race-Blind Charging” which must be adhered to by agencies prosecuting misdemeanors or felonies.

This bill requires any initial review of a case for charging, be based on documents from which all means of identifying the race of the suspect, victim, or witness has been redacted.

This bill requires prosecution agencies, following DOJ’s guidelines, to independently develop and execute versions of this redaction and review process with the following general criteria:

- Beginning January 1, 2025, cases received from law enforcement agencies and suspect criminal history documentation shall be redacted in order to be used for a race-blind initial charging evaluation, which shall precede the ordinary charging evaluation. This redaction may occur in a separate version of the documents and may be done mechanically, by hand performed by personnel not associated with the charging of the case, or by automation with the use of computer programming, so long as the method used reasonably ensures correct redaction. The redaction may be applied to the entire report or to only the “narrative” portion of the report so long as the portion submitted for initial review is sufficient to perform that review and the unredacted portions are not part of the initial charging evaluation;
- The initial charging evaluation based on redacted information, including redacted reports, criminal histories, and narratives, shall determine whether the case should be charged or not be charged. Individual charges shall not be determined at this initial charging evaluation stage. Other evidence may be considered as part of this initial charging evaluation so long as

the other evidence does not reveal redacted facts. The initial charging evaluation shall be performed by a prosecutor who does not have knowledge of the redacted facts for that case;

- After completion of a race-blind initial charging evaluation, the case shall proceed to a second, complete review for charging using unredacted reports and all available evidence in which the most applicable individual charges and enhancements may be considered and charged in a criminal complaint, or the case may be submitted to a grand jury;
- Each of the following circumstances shall be documented as part of the case record:
 - The initial charging evaluation determined that the case not be charged and the second review determined that a charge shall be filed.
 - The initial charging evaluation determined that the case shall be charged and the second review determined that no charge be filed.
 - The explanation for the charging decision change shall be documented as part of the case record.
- The explanation for the charging decision change shall be documented as part of the case record;
- The documented change between the result of the initial charging evaluation and the second review, as well as the explanation for the change, may be released or disclosed, upon request, after sentencing in the case or dismissal of all charges comprising the case, subject to protections of privileged materials as specified or any other applicable law;
- If a prosecution agency was unable to put a case through a race-blind initial charging evaluation, the reason for that inability shall be documented and retained by the agency. This documentation shall be made available by the agency upon request; and,
- The county shall collect the data resulting from the race-blind initial charging evaluation process and make the data available for research purposes.

This bill authorizes each prosecution agency to remove or exclude certain classes of crimes or factual circumstances from a race-blind initial charging evaluation and states that this list of exclusions and the reasons for exclusion shall be available upon request to DOJ and members of the public.

This bill specifies that due to increased reliance on victim or witness credibility, the availability of additional defenses, the increased reliance on forensics for the charging decision, or the relevance of racial animus to the charging decision, each of the following crimes may be excluded from a race-blind initial charging evaluation process:

- Homicides;
- Hate crimes;

- Charging arising from a physical confrontation where that confrontation is captured in video as evidence;
- Domestic violence and sex crimes;
- Gang Crimes;
- Cases alleging either sexual assault or physical abuse or neglect where the charging decision relies upon either a forensic interview of a child or interviews of multiple victims or multiple defendants;
- Cases involving financial crimes, including, but not limited to, violations of elder and dependent adult abuse and embezzlement and other crimes sounding in fraud consisting of voluminous documentation where the redaction of such documentation is not practicable or is cost-prohibitive due to the volume of redactions;
- Cases involving public integrity, including, but not limited to, conflict of interest crimes as specified;
- Cases in which the prosecution agency itself investigated the alleged crime or participated in the precharging investigation of the crime by law enforcement, including, but not limited to, the review of search warrants or advising law enforcement in the course of the investigation; and,
- Cases in which the prosecution agency initiated the charging and filing of the case by way of a grand jury indictment or where the charges arose from a grand jury investigation.

This bill contains the following legislative findings and declarations:

- In recent years, the increasing availability of data regarding criminal justice has raised legitimate questions regarding racial disparities in how cases are investigated, charged, and prosecuted. In particular, studies suggest that unknowing or “unconscious” bias may infect many decisions within the criminal justice system, despite what may be the best intentions of the actors involved. (Baughman et al., *Blinding Prosecutors to Defendants’ Race: A Policy Proposal to Reduce Unconscious Bias in the Criminal Justice System* (Dec. 2015) Behavioral Science & Policy, 70.)
- One method to address bias is to “acknowledge its existence and create institutional procedures to prevent bias from influencing important decisions.” (*id.* 71) In other contexts, such as science, employment, or academia, the “blinding” of evaluators assists in dispelling concerns of discrimination or bias in decision-making. (*id.* 71-72)
- In an effort to increase community confidence in the charging process, and to reduce the potential for unconscious bias, some district attorney offices employ a method whereby reports received from the police are stripped of all data from which the race of the suspect may be determined so that at least the initial charging assessment of the case is done “race blind.” The Yolo County District Attorney in partnership with the Stanford Computational

Policy Lab in 2021 created and implemented a race-blind charging system built into its case management system for most cases.

COMMENTS

1. Need for This Bill

According to the author of this bill:

In recent years, the increasing availability of data regarding criminal justice has revealed that racial bias impacts decisions on every level in the criminal justice system- in policing, prosecuting, imprisonment, judgment, and sentencing. One method to address bias is to “acknowledge its existence and create institutional procedures to prevent bias from influencing important decisions.”

Recent studies have also displayed evidence that suggests there can be racial bias in the investigation, charging, and prosecution of cases. Particularly, racial disparities between Black and White defendants often begin in the initial charging decision by the prosecutor, as revealed in a study from 2014. This bias results in a disproportionate population of African-Americans being charged and in jail. This 2014 study examined 36,659 individuals in the federal criminal justice system from the initial arrest to final sentencing. The authors found that the primary driver for sentencing disparities between Black and White defendants stem from differences in the initial charging decision of the prosecutor, specifically for charges with statutory mandatory minimum sentences (Sonja B Starr and M. Marit Rehavi. 2014).

The Department of Justice determined in 2016 that San Francisco disproportionately prosecutes African-Americans at a higher rate. The city of San Francisco published that between 2008 and 2014, African-Americans made up 6% of the city population, but consisted of 41% of those arrested, 43% of those in jail, and 38% of cases filed by prosecutors in San Francisco. It's evident that cities within California engage in racial bias regarding criminal cases.

The impact that race and other physical characteristics has on the criminal justice process is a violation of the Equal Protection Clause in the Fourteenth Amendment. Additionally, the California Racial Justice Act of 2020 makes it illegal for actors in the criminal justice system to impose a sentence on the basis of race, ethnicity, or national origin. However, by implementing a race blind charging system that prohibits prosecutors from seeing indicators of race and ethnicity, this could eliminate racial bias earlier in the process.

AB 2778 reduces the potential for racial bias and increases community confidence in the charging process by having the Department of Justice develop and issue “Race Blind Charging” guidelines. These guidelines would require prosecutors to implement a process where information related to the race of the suspect, victim or witness is redacted within police reports at the initial charging assessment of the case.

2. Racial Bias in the Criminal Justice System

A fundamental right that is guaranteed in both the United States Constitution and our state's constitution is equal protection under the law (U.S. Const., 14th Amend.; Cal. Const., art. I, sec. 7), yet evidence suggests that persons are not treated equally in the criminal justice system. A person's race appears to have a disparate impact from encounters with police, pretrial detention, charges, trial evidence, dismissal and sentencing. Racial disparities in who ends up involved in the criminal justice system stem from factors such as who tends to be arrested in the first place.

According to a recent study by the Public Policy Institute of California (PPIC), in 2016, Latinos made up 41% of arrests in the state, 36% were white and 16% were African Americans, despite black people making up just 6% of the population. Nearly all counties see a large disparity between African Americans and whites: of the 49 counties examined, the African American arrest rate is at least double the white arrest rate in 45 counties, at least three times greater in 33 counties, at least four times greater in 21 counties, and at least five times greater in 13 counties (PPIC, *New Insights into California Arrests: Trends, Disparities, and County Differences* (Dec. 2018) < <https://www.ppic.org/publication/new-insights-into-california-arrests-trends-disparities-and-county-difference/> > [as of June 3, 2022].) By removing race as a consideration in prosecutorial charges, the goal is to avoid exacerbating racial bias that may have played a role in the arrest of the suspect.

This bill attempts to address potential racial bias in prosecutorial charging decisions by requiring, starting January 1, 2024, DOJ to develop and publish "Race-Blind Charging" guidelines, as specified, for all prosecution agencies to follow when developing and executing race-blind charging procedures consistent with this bill. Starting January 1, 2025, any cases received from law enforcement agencies and suspect criminal history information shall have any race-related information of the suspect and of any victims or witnesses redacted for the initial evaluation. The initial evaluation is to determine whether the case should be charged or not; individual charges are not to be determined at this stage. After completion of a race-blind initial charging evaluation, the case shall proceed to a second, complete review for charging using unredacted reports and all available evidence in which the most applicable individual charges and enhancements may be considered and charged in a criminal complaint, or the case may be submitted to a grand jury.

This bill requires that determinations made at each stage be documented as well as an explanation of any documented change between the result of the initial charging evaluation and the second review. This information may be released or disclosed upon request, unless the documents are privileged or work product. This bill also requires the county to collect data resulting from the race-blind initial charging evaluation process and make the data available for research purposes. This blind-charging procedure would not be required for certain offenses such as homicide, hate crimes, gang crimes, among others.

3. Race-Blind Charging Pilot Programs

In 2019, the San Francisco District Attorney's Office announced it was going to launch a new "blind-charging" tool that removes racial information from police reports when prosecutors are deciding whether to criminally charge suspects. The Stanford Computational Policy Lab was

asked to build the technology which already had many of the tools available to create the program. The idea was to create a model for other prosecuting agencies to use and Stanford agreed to publicly release the technology at no cost. The technology uses pattern recognition and Natural English Processing to identify which words in a police report should be redacted and fills them in with a general description (<https://www.sfchronicle.com/crime/article/SF-DA-Gasc-n-launching-tool-to-remove-race-when-13971721.php> [as of June 3, 2022].)

An example of how the algorithm redacts race-related information is shown below:

<u>Original narrative</u>	<u>Automatically redacted narrative</u>
Lucy Johnson reported that a Black male with brown hair wearing a black jacket assaulted her in Midtown, next to Johnson's home. She reported the incident to Officer Lee.	[Victim 1] reported that a [race] male with [hair color] wearing a black jacket assaulted her in [neighborhood], next to [Victim 1]'s home. She reported the incident to [Officer 1].

Figure 1: Automated redactions from a fictional narrative excerpt. Mentions of race, physical descriptors, names, and locations are all identified and re-labeled to preserve readability. Additionally, person labels are enumerated to track each person's role across a case. Non-race-related descriptions (like "black jacket") are preserved.

The program identifies and obscures five types of information: (1) explicit mentions of race, (2) select physical descriptors such as eye color, (3) individuals' names or nicknames, (4) incident location information, and (5) officer's names, given that prosecutors may remember where officers are stationed is shown below (Alex Chohlas-Wood, et al., (Nov. 2020) *Blind Justice: Algorithmically Masking Race in Charging Decisions*, Stanford University <<https://law.stanford.edu/publications/blind-justice-algorithmically-masking-race-in-charging-decisions/>> [as of Apr. 14, 2022], pp. 3-4.):

Stanford's report on the implementation of the race-blind charging algorithm in the San Francisco District Attorney's office found that the tool was successful in masking race-related information, making it difficult for a human reviewer to guess the race of a suspect. However, there was little evidence of disparate treatment in charging decisions in this particular jurisdiction prior to deployment of the tool. Thus, as expected, the tool did not substantially alter charging rates. The report notes that their study was limited in geography and biases in prosecutorial charging decisions may be a more significant problem in other districts. (*Id.* at pp. 1-2.)

In 2021, Yolo County District Attorney's office also announced that the office would work with Stanford Computational Policy Lab to implement a race-blind charging algorithm. (<https://sacramento.cbslocal.com/2021/09/16/yolo-county-launches-race-blind-charging-program-to-remove-biases-from-criminal-justice-system/> [as of June 3, 2022].)

4. Argument in Support

According to the Yolo County District Attorney's Office, the sponsor of this bill:

In recent years, the increasing availability of data regarding criminal justice has raised legitimate questions regarding racial disparities in how cases are investigated, charged, and prosecuted. In particular, studies suggest that unknowing or "unconscious" bias may infect many decisions within the criminal justice system, despite what may be the best intentions of the actors involved. (Baughman et al. *Blinding Prosecutors to Defendants' Race: A Policy Proposal to Reduce Unconscious Bias in the Criminal Justice System* (Dec. 2015) Behavioral Science & Policy, 70.) One method to address bias is to "acknowledge its existence and create institutional procedures to prevent bias from influencing important decisions." (*id.* 71) In other contexts, such as science, employment, or academia, the "blinding" of evaluators assists in dispelling concerns of discrimination or bias in decision making. (*id.* 71-72)

In 2021, our office partnered with the Stanford Computational Policy lab to develop a program to find and redact race data from police reports in order that an initial charging determination could be performed "race blind." We became the first office in the state to incorporate this process into our case management system, which uses the same initial (redacted) and secondary (unredacted) processes to charge our cases, with a few exceptions, e.g., hate crimes. While the road to race blind charging had its challenges, we feel we have now "paved the way" and removed operational obstacles for other offices to do the same.

AB 2778 would help decrease the specter of racial bias in one of its most prominent places in the criminal justice system - the initial charging assessment. By stripping police reports of all race-related data of the suspect, victim, or witness, it reduces the potential for unconscious bias and increases community confidence in the charging process by having the initial charging assessment done "race-blind."

5. Argument in Opposition

According to San Diego Deputy District Attorneys Association:

The entire State of California should not be a guinea pig for this pilot-test. Doing so will be costly, as the Assembly Appropriations Committee expects that this bill will cost well over \$3,000,000 annually. Moreover, it's not clear that there even exists a problem of unconscious bias influencing prosecutorial charging decisions in this state. When the San Francisco District Attorney's Office pilot-tested a race-blind charging program very similar to the one proposed in this bill, then compared issuing rates of cases against cases that did use race-blind charging, they found "no clear evidence for racial biases in prosecutorial charging decisions." (Alex Chohlas-Wood, et al., (2021) *Blind Justice: Algorithmically Masking Race in Charging Decisions*, pg. 9.)

Even if unconscious bias in prosecutorial charging decisions does exist, it is unlikely this bill will do anything to ameliorate the problem. For instance, this bill grants an exception to 10 different charging categories where race-blind charging would not be required. These exceptions are so numerous that they practically swallow the rule and greatly reduce any impact this bill would have on its stated purpose. But these exceptions are a necessary acknowledgement by the bill's authors of the many logistical issues created when redacting all information identifying a person's race. Spending well over \$3,000,000 annually to ineffectively solve a problem that might not even exist is unsound fiscal policy.

-- END --