



Raising Issues of Race in North Carolina Criminal Cases: A New Resource for North Carolina Defenders and Other Court Actors

by Alyson Grine

Alyson Grine serves as the Defender Educator at the University of North Carolina at Chapel Hill School of Government, providing training on criminal law and procedure for North Carolina public defenders and appointed counsel. Prior to joining the School of Government in 2006, Ms. Grine worked for five years as an assistant public defender in Orange and Chatham counties. She previously served as a judicial clerk for Chief Justice Henry Frye of the NC Supreme Court in 2000 and Judge Patricia Timmons-Goodson of the NC Court of Appeals in 1999. Ms. Grine earned a B.A. with distinction from UNC-Chapel Hill, a M.A. in Spanish from the University of Virginia, and a JD with honors from UNC-Chapel Hill. Ms. Grine is co-author of the *North Carolina Juvenile Defender Manual*, *North Carolina Defender Manual, Vol. 1*, and the forthcoming manual, *Raising Issues of Race in the North Carolina Criminal Justice System*. She was honored with the School of Government's Albert and Gladys Hall Coates Teaching Excellence award for 2013–2014.

In the April edition of **Trial Briefs**, Professor James Coleman discusses racial disparities in our criminal justice system and describes the formation of the North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System (“the Commission”), tasked with discerning the causes of disparities and making recommendations for reforms and policy changes with input from all stakeholders in the court system. “The Commission intends to work to alleviate disparate treatment of racial and ethnic minorities, whatever the source,” he observes.

Faculty and staff who specialize in indigent defense education at the School of Government¹ are also examining issues of race in our criminal justice system. We are in the process of developing a legal resource specific to North Carolina: a new reference manual, *Raising Issues of Race in North Carolina Criminal Cases*. Topics will include how to proceed when it appears that race may have influenced police investigations, e.g., stops and searches; composition of jury pools and juries; pretrial release outcomes; eyewitness identifications; charging decisions; jury arguments; and sentencing. The chapters offer guidance on how to determine whether race is playing an unlawful role in a proceeding, legal analysis of the relevant authority, the evidentiary showing that an attorney would need to make to support a claim, strategies for raising and litigating a claim, and examples of collaborative efforts that court actors might engage in outside of the courtroom setting, such as changes to policies and protocols that may be contributing to racial disparities.

Also included in the manual are personal accounts by North Carolina court actors in which they share their experiences with racial disparities in criminal proceedings, what they did in response, the outcome, and reflections or advice they would like to impart to readers. For example:

- A district court judge conducting first appearances encounters similarly situated co-

defendants, one of whom is in pretrial custody while the other is not, and feels compelled to reflect on the role that their respective races played at this early stage of the case.

- An assistant public defender collects and analyzes data regarding an officer’s vehicle stops and concludes that the officer has a pattern of targeting Hispanic people who were primarily driving out-of-state cars.
- A post-conviction team is able to show that a Black client was wrongfully convicted of serious charges following a mistaken eyewitness identification by a White witness; investigating officers’ lack of familiarity with the cornrow hairstyle also played a role in the conviction.
- As jury selection is about to begin, a defense attorney observes that out of sixty prospective jurors, there are three Black women and zero Black men, numbers that are not representative of the county’s population; but the attorney is unsure of the evidence he would need to challenge the pool.

The manual will refer court actors to available tools, such as sample motions and orders, housed on the website of the NC Office of Indigent Defense Services.²

In this article, I will try to anticipate and respond to questions about the forthcoming manual.

Who Is the Intended Audience for the Manual?

Our work differs from that of the Commission in that we are creating a legal resource, primarily directed to indigent defense lawyers. Our aim is to gather, organize, and analyze the law on the intersection of race and the criminal justice system to assist defenders in identifying and raising meritorious claims of racial bias. Thus, an attorney who is concerned that race is playing an unlaw-

ful role in one or more aspects of a criminal prosecution will have a text that details the steps necessary to safeguard the client's rights. Defense attorneys owe an obligation to their clients to ensure that they have equal access to justice.³ In many instances, what may be a violation of the defendant's rights will not come to the court's attention unless defense counsel is equipped to identify and raise the issue.

We hope that the manual will also be a useful resource for other North Carolina court actors by explaining the ways in which considerations of race may improperly enter into the conduct of a criminal case. Justice is more likely to be achieved when everyone involved in the proceedings has his or her "radar up" for the unlawful influence of race or proxies for race.⁴ We hope that, like defense attorneys, other court actors will benefit from having the legal authority on these important issues compiled in one resource.

Additionally, the manual describes a number of collaborative approaches, in which various court actors have come together to consider changes to policies or practices in their districts that may disproportionately affect minorities. For example, in one North Carolina district, leaders in the local bar were concerned that jury pools were not representative of the community in terms of racial makeup. These court actors decided to undertake a study of their process to determine whether and how underrepresentation might be occurring. Examples such as this provide a framework for reforms where court actors have similar concerns in their districts. Additionally, all court actors may benefit from the final chapter of the manual, in which we set out sources of data that may be relevant in assessing claims of racial bias, including databases maintained by state and local law enforcement agencies.

Why Did We Decide to Create this Resource?

Racial disparities in criminal cases raise numerous concerns, including the possibility that race could affect particular stages within a case, the ultimate outcome of a case, and the actual or perceived fairness of the criminal justice system. We

decided that the manual would be a useful, timely resource that would aid North Carolina court actors as they work to safeguard the rights of criminal defendants and the integrity of the court system. Factors that influenced our decision include:

Our aim to gather, organize, and analyze the law on the intersection of race and the criminal justice system to assist defenders in identifying and raising meritorious claims of racial bias.

- Recent studies have brought increased attention to racial disparities in the criminal justice system around the country.⁵
- Recent studies specific to North Carolina have found racial disparities at various phases of criminal proceedings.⁶
- National organizations have undertaken efforts to address racial bias and disparities in the courts. For example, in 2010 the American Bar Association (ABA) Criminal Justice Section launched the Racial Justice Improvement Project, with support from the U.S. Department of Justice Bureau of Justice Assistance, "designed to identify and reform policies and practices that produce racial disparities in local criminal justice systems across the country."⁷ The ABA's Litigation Section created a Task Force on Implicit Bias and launched an Implicit Bias Initiative to educate lawyers, judges, and others about the "implications and effects of implicit bias."⁸ The ABA's Judicial Division formed a Task Force on Perceptions of Justice in 2013, which has assembled resources and conducted training on racial bias and disparities in the courts.⁹ The National Center for State Courts has developed a Gender and Racial Fairness Resource Guide,¹⁰ undertaken a project on implicit bias and judicial education,¹¹ and developed resources such

as a "Frequently Asked Questions" sheet to help court actors understand and address implicit bias.¹² The National Consortium on Racial and Ethnic Fairness in the Courts encourages the highest courts of each state "to create com-

missions to examine the treatment accorded minorities in their courts[,] and educates "the legal profession, the law enforcement community, and the general public concerning racial and ethnic fairness in the courts."¹³

- National leaders have brought concerns about racial disparities to the forefront. For example, U.S. Supreme Court Justice Anthony Kennedy challenged court actors to evaluate disparate sentencing rates among racial and ethnic groups in his historic keynote address during the 2003 ABA Annual Meeting, leading to formation of "The ABA Justice Kennedy Commission" to examine, among other issues, "Why more than 60 percent of our 2.1 million prison population are people of color and more than 20 percent are Hispanic."¹⁴ In a recent speech, U.S. Attorney General Eric Holder remarked on racial disparities in federal sentencing and announced a plan to address them.¹⁵
- North Carolina leaders have acknowledged the need to address racial disparities, as demonstrated by the recent formation of the Commission on Racial and Ethnic Disparities in the Criminal Justice System, and other organizations, such as the North Carolina Public Defender Committee on Racial Equity (NC PDCORE), whose mission is "to reduce and ultimately eliminate racial

disparity in the criminal justice system through education, collaboration, and litigation.”¹⁶

- Social science studies indicate that raising relevant issues of race in a criminal case may reduce the impact of implicit bias.¹⁷ This is because when the subject of race is addressed explicitly, people tend to correct for their implicit biases and act in accordance with more objective standards.¹⁸ For example, studies suggest that when racial considerations are explicitly brought to the attention of the jury, White jurors tend to treat Black and White defendants similarly; when race is present as a factor but not addressed, White jurors may treat Black defendants more harshly.¹⁹ Further, “[s]uppressing or denying prejudiced thoughts can actually increase prejudice rather than eradicate it.”²⁰ By equipping court actors to identify and address issues of race where relevant, we hope that the manual will help diminish the impact of implicit bias.
- By providing an up-to-date, centralized compendium on issues of race and criminal law in North Carolina, we hope to create efficiencies for court actors who have a sense that race may be playing a role in a criminal proceeding, but who find it daunting to sort through general reference sources, such as treatises on the Fourth Amendment, to find relevant authority, understand the pertinent issues, and propose appropriate remedies.
- Race is a sensitive and even explosive topic. Court actors and defense attorneys in particular may find it challenging to raise issues of race when they arise in a criminal case. For example, counsel may be concerned about engendering ill will with law enforcement officers by pointing out that the client has received disparate treatment at the investigatory stage; or with prosecutors or judges by raising concerns about disparate treatment during plea negotiation or at sentencing. The attorney may feel that it is safer to remain silent, especially when he or she is uncertain about

the merits of the claim. We hope that the manual will equip attorneys and other actors to address issues of race effectively by providing the legal authority and analysis to help them assess the merits of a claim and by imparting practice strategies and tools such as sample motions from experienced North Carolina practitioners.

- We hope that the manual will enhance attorney-client relationships by assisting defense attorneys in assessing their own biases and how they may affect their representation. For example, in the chapter pertaining to pretrial release, we offer suggestions for conducting a client interview that will assist counsel in moving beyond stereotypes and cultural misunderstandings to develop a sense of the client as a complex individual and the realities of his or her circumstances.
- We hope that the collaborative efforts that we describe in the manual will lead to increased dialogue between community members and actors in the criminal justice system to the benefit of their communities. For example, some local coalitions have worked with local law enforcement departments to address police practices that may result in racial profiling in their communities.
- Finally, we hope that the manual will enhance representation such that improper influences of race can be avoided and relief can be obtained when race has played an unlawful role in a case.

Who Is Involved in Creation of the Manual?

Creation of the manual would not have been possible without a grant from the Z. Smith Reynolds Foundation. Using grant funds, we hired a research attorney, Emily Coward, to assist in creating the manual.²¹ Emily works closely with me, Defender Educator Alyson Grine, in drafting the content. School of Government Professor John Rubin is a reader and provides input on each chapter of the manual. We also formed an advisory board to provide input

on the manual. Advisory board members are: Tye Hunter, former Executive Director of the Center for Death Penalty Litigation; Mary Pollard, Executive Director of North Carolina Prisoner Legal Services, Inc.; Richard Rosen, UNC School of Law Professor Emeritus; Breana Smith, Attorney with Moore & Van Allen in Charlotte and a former Assistant Public Defender in Mecklenburg County; and James E. Williams Jr., Public Defender for Orange and Chatham Counties. We benefited from the experience of many other court actors, who were willing to provide anecdotes to illustrate concepts discussed in the manual or offer input on specific topics on which they had expertise. We are grateful to the School of Government and the Office of Indigent Defense Services for their support of our efforts.

How Can I Get the Manual?

Raising Issues of Race in North Carolina Criminal Cases should be available early this summer and will augment our North Carolina Indigent Defense Manual Series.²² An electronic version will be available for free online, while those who prefer a hard copy should be able to purchase it through the School of Government’s bookstore.²³ As with other materials we produce, we welcome any questions or suggestions about the manual. ♦

1. The faculty and staff specializing in indigent defense education at the School of Government are Albert Coates Professor John Rubin, Defender Educator and Albert and Gladys Hall Coates Lecturer Alyson Grine, Program Attorney Austine Long, and Continuing Education Coordinator Brooke Bailey. In collaboration with the North Carolina Office of Indigent Defense Services, the oversight body for indigent defense in North Carolina, we provide education and related services to indigent defense attorneys throughout the state with the goal of improving the overall quality of services in North Carolina for poor people entitled to legal representation, their families, and their communities. We provide education by: (1) developing and providing in-person and online training; (2) creating print and online resources in the various indigent defense practice areas in North Carolina, including criminal law, juvenile delinquency law, parental rights, and involuntary commitment; and (3) providing consultation services. Learn more about these efforts at www.sog.unc.edu/programs/indigentdefense.

2. Sample motions and other materials will be accessible at www.ncids.org under “Training & Resources,” in an indexed “Race Materials Bank.”

3. The North Carolina State Bar Rules of Professional Conduct (RPC) provide that attorneys must “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” NORTH CAROLINA RULES OF PROF’L CONDUCT R. 1.3.1, *available at* www.nbar.com/rules/rpcsearch.asp. Further, a lawyer is “a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. . . . [A] lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. . . . A lawyer should be mindful of deficiencies in the administration of justice. . . . A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.” *Id.* at R. 0.1 (preamble).

4. *See, e.g., United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. Cal. 2000) (stating that “[t]he citing of an area as ‘high-crime’ requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity”).

5. In 2009, the National Council on Crime and Delinquency reported that, while African Americans represent 13 percent of the general population, they constitute 28 percent of all arrests and 40 percent of all inmates held in prisons and jails. CHRISTOPHER HARTNEY & LINH VUONG, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM 2 (2009), *available at* http://www.ncdglobal.org/sites/default/files/publication_pdf/created-equal.pdf. The same year, African American men were incarcerated at a rate more than six times higher than that of White men and 2.6 times higher than Hispanic men. Heather C. West, U.S. Department of Justice Bureau of Justice Statistics, *Prison Inmates at Midyear 2009—Statistical Tables*, BUREAU OF JUSTICE STATISTICS STATISTICAL TABLES, June 2010, at 2, *available at* www.bjs.gov/content/pub/pdf/pim09st.pdf. One out of every 100 adult U.S. residents is incarcerated, but among African American men between ages 20 and 34, that number is one in nine. PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 3 (2008), *available at* www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf.

6. According to a study of all North Carolina traffic stops between January 2000 and June 2011, Black people are 77 percent more likely to be searched following a traffic stop than White people. The study also reported that minorities are more likely to be arrested after a stop, while White people are more likely to receive a warning. FRANK R. BAUMGARTNER & DEREK EPP, NORTH CAROLINA TRAFFIC STOP STATISTICS ANALYSIS 5 (2012), *available at* <https://www.ncaj.com/index.cfm?pg=NCCREDPublications>.

A recent analysis of data from the North Carolina Department of Correction’s Research and Planning Division showed that, while African Americans represent 22 percent of North Carolina’s overall population, they account for 57 percent of the state’s prison population. North Carolina Advocates for Justice: Task Force on Racial and Ethnic Bias Executive Summary, *available at* <https://www.ncaj.com/index.cfm?pg=NCCREDPublications>.

Studies focused on North Carolina capital cases found racial disparities in jury selection, charging decisions, and sentencing. According to one study, from 1990 through 2009 qualified racial minority citizens were kept from serving on juries at more than twice the rate of White citizens. BARBARA O’BRIEN & CATHERINE M. GROSSO, REPORT ON JURY SELECTION STUDY (2011), *available at* <http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1330&context=facpubs>.

A second study found that from 1990 through 2007, cases with at least one White victim were 2.96 times more likely to result in the imposition of a death sentence, leading researchers to conclude that the “victim’s race remains a powerful predictor of who is and who is not sentenced to death.” Michael L. Radelet and Glenn L. Pierce, *Race and Death Sentencing in North Carolina 1980-2007*, 89 N.C. L. REV. 2119, 2145 (2011). Between 1910 and 1961, North Carolina executed 362 people, 283 of whom (or 78 percent) were African American. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2039 (2010).

7. *See* THE RACIAL JUSTICE IMPROVEMENT PROJECT, <http://racialjusticeproject.weebly.com/> (last visited March 31, 2014).

8. *See* American Bar Association Section of Litigation Task Force on Implicit Bias website, <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html> (last visited March 31, 2014). The ABA Litigation Section developed a “toolbox” of research and resources on implicit bias and strategies for “debiasing,” *available at* <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox.html>.

9. *See* American Bar Association Judicial Division Task Force on Perceptions of Justice website, http://www.americanbar.org/groups/judicial/committees/perceptions_of_justice.html (last visited March 31, 2014).

10. *See* National Center for State Courts Gender and Racial Fairness Resource Guide website, <http://www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/Resource-Guide.aspx>, (last visited March 31, 2014).

11. *See* National Center for State Courts Gender and Racial Fairness Resource Guide website, <http://www.ncsc.org/ibeducation> (last visited March 31, 2014).

12. *See* National Center for State Courts, *Helping Courts Address Implicit Bias: Frequently Asked Questions*, <http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx> (last visited March 31, 2014).

13. *See* Mission, NATIONAL CONSORTIUM ON RACIAL AND ETHNIC FAIRNESS IN THE COURTS, <http://www.national-consortium.org/About/Mission.aspx> (last visited March 31, 2014).

14. *See* Announcement of issues to be considered at the ABA Justice Kennedy Commission Hearings on November 12, 13, and 14, 2003, *available at* <http://www.americanbar.org/content/dam/aba/migrated/leadership/initiative/kennedyhearings.authcheckdam.pdf> (last visited March 31, 2014).

15. *See* Eric Holder, United States Attorney General, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

16. *See* NC PDCORE: NORTH CAROLINA PUBLIC DEFENDER COMMITTEE ON RACIAL EQUITY, <http://ncids.com/pd-core/> (last visited March 31, 2014).

17. JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS 4-5 (National Center for State Courts 2009), *available at* <http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx>.

18. *See id.* *See also* Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 834-35 (2012).

19. John Powell & Rachel Godsil, *Implicit Bias Insights as Preconditions to Structural Change*, 20 POVERTY & RACE, no. 5 (Poverty & Race Research Action Council), 2011, at 6.

20. PowerPoint slides of John Powell, *Exploring the Unconscious: The Dynamics of Race and Reconciliation* at 23 (2011 Dinner of Reconciliation, John Hope Franklin Center for Reconciliation), *available at* <http://www.jhfccenter.org/wp-content/uploads/2009/09/john-powell.pdf>.

21. Emily Coward is a Durham resident who graduated from Duke University School of Law. At Duke, she participated in the death penalty clinic, served as lead articles editor of the law journal *Law & Contemporary Problems*, and received the faculty award for outstanding achievement in criminal law and procedure. Following graduation, Emily served as a law clerk, first for the United States District Court for the District of Columbia and then for the Constitutional Court of South Africa in Johannesburg. Emily represented clients in civil and post-conviction matters in state and federal court as a staff attorney at North Carolina Prisoner Legal Services.

22. The North Carolina Indigent Defense Manual Series is available at www.sog.unc.edu/node/654, and includes the NORTH CAROLINA DEFENDER MANUAL, VOL. I (PRETRIAL) (2d. ed. 2013) and the NORTH CAROLINA DEFENDER MANUAL, VOL. II (TRIAL) (2d. ed. 2012), as well as references on civil matters for which there is a right to counsel in North Carolina.

23. To access the bookstore online, go to the UNC School of Government’s website, <http://www.sog.unc.edu/>, and choose “Publications” in the upper right.

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