

1.1 Purpose of Manual

This practice manual aims to assist criminal defense attorneys and other court personnel in recognizing and addressing issues of race in criminal cases at the trial level in North Carolina. In particular, the manual seeks to help attorneys identify and respond to improper considerations of race in criminal cases in accordance with their duty of zealous advocacy and obligation to ensure that their clients get a fair and impartial trial.

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. For example, concerns about fairness may arise if the jury pool does not reflect the makeup of the community or if a defendant of one race is released on bond while a similarly situated defendant of another race remains in jail pretrial.

The following explanation of racial disparity is a useful guide:

Racial disparity in the criminal justice system exists when the proportion of a racial or ethnic group within the control of the system is greater than the proportion of such groups in the general population. . . . *Illegitimate or unwarranted* racial disparity in the criminal justice system results from the dissimilar treatment of similarly situated people based on race.¹

Racial disparities may be produced not only by intentional discrimination; seemingly race-neutral policies may result in disparities because of the influence of implicit bias or structural factors, discussed further below. Regardless of their cause, racial disparities may not only affect case outcomes but also may undermine confidence in the criminal justice system and harm communities.² The manual examines the contexts in which racial disparities may arise and the ways that defense attorneys may address those disparities and their causes.

In an effort to provide concrete tools for court actors, the bulk of the manual is comprised of legal analyses, practice tips, and tools such as sample motions. Throughout the manual, we have incorporated anecdotes in which North Carolina practitioners share their experiences in recognizing issues of race in a particular defendant's case. For example, a defense attorney may describe the procedures he or she used to raise the issue in court, the response or outcome that followed, and what the attorney might have done differently in retrospect. Where relevant, chapters include suggestions for systemic changes and provide examples of collaborations between court actors, such as defense attorneys, prosecutors, and judges, to address concerns about racial disparities in their jurisdictions.

Several issues are beyond the scope of this manual. This manual focuses primarily on noncapital cases and does not examine the role that race may play in the imposition of the death penalty. The manual also does not address possible questions of race in the appellate process, commutation, parole, and the treatment of prison inmates and jail

detainees. The manual explores the ways in which law enforcement misconduct may be challenged in criminal cases, but does not address law enforcement misconduct claims in civil cases.

We recognize that African Americans are not the only ones who may experience bias in the criminal justice system. North Carolina is a diverse state, and other racial or ethnic groups, such as Latinos, Native Americans, and Asians, may be subject to discriminatory treatment. This manual addresses bias that pertains to race, skin color, and ethnicity, such as in vehicle stops resulting from “profiling” or targeting of individuals based on their actual or perceived association with a racial or ethnic group. This manual does not cover in depth issues relating to immigration law or language access. When appropriate, this manual includes cross-references to other resources on those topics.³

Finally, we recognize that the topic of race is challenging, emotionally charged, and often controversial. The term “race” itself is complex and subject to different interpretations.⁴ This manual does not try to resolve debates about the meaning of race. We are primarily concerned with differential treatment that people may receive in the criminal justice system based on perceptions of their race. When we refer to race and ethnicity in this manual, we are referring to “groups of people loosely bound together by history, ancestry, and socially significant elements of their physical appearance”; these categories, in turn, “are given meaning by society . . . [and are] self-reinforcing processes rooted in the daily decisions we make as individuals and institutions.”⁵

While race may not be an easy subject to address, it cannot be ignored. Defense attorneys have an obligation to identify and challenge disparate treatment of their clients based on race. Doing so may help to protect clients’ rights, foster a trusting attorney-client relationship, encourage scrutiny of possible unwarranted racial disparities in the criminal process, and promote fairness in the administration of criminal justice.

¹ ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 1 (2d ed. 2008) (emphasis in original), *available at* www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf.

² Robert M.A. Johnson, *Chair’s Counsel: Racial Bias in the Criminal Justice System and Why We Should Care*, ABA CRIMINAL JUSTICE, Winter 2007 (observing that we should care about racial disparities in the criminal justice system, whatever their cause, because “lack of trust severely impacts the criminal justice system’s ability to serve and protect society”).

³ See, e.g., SEJAL ZOTA & JOHN RUBIN, IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION IN NORTH CAROLINA (UNC School of Government 2008), *available at* <http://defendermanuals.sog.unc.edu>.

⁴ See, e.g., American Anthropological Association, *AAA Statement on Race*, 100 AMERICAN ANTHROPOLOGIST 712, 712 (1998) (observing that scientists have discovered greater genetic

variation within racial groups than between them), *reproduction of statement available at www.aaanet.org/stmts/racepp.htm*; Natalie Angier, *Do Races Differ? Not Really, DNA Shows*, N.Y. TIMES, August 22, 2000 (reporting that researchers involved in sequencing human DNA declared that “there is only one race—the human race”), *available at www.nytimes.com/library/national/science/082200sci-genetics-race.html*; Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 13 (1994) (concluding that “[t]he notion that humankind can be divided along White, Black, and Yellow lines reveals the social rather than the scientific origin of race”); JACQUELINE JONES, *A DREADFUL DECEIT: THE MYTH OF RACE FROM THE COLONIAL ERA TO OBAMA’S AMERICA*, xvii (2013) (stating that “[i]n the early twenty-first century, the words ‘race,’ ‘racism,’ and ‘race relations,’ are widely used as shorthand for specific historical legacies that have nothing to do with biological determinism and everything to do with power relations”).

⁵ Research Working Group & Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington’s Criminal Justice System*, 47 GONZ. L. REV. 251, 258–59 (2012).