

## 1.4 Sources of Law

Below is a brief summary of the sources of law for addressing racial disparities in North Carolina criminal cases. These sources are discussed in greater detail in the applicable chapters of this manual.

**Equal Protection.** As long ago as 1891, the U.S. Supreme Court recognized that under the Fourteenth Amendment, “no state can deprive particular persons or classes of persons of equal and impartial justice under the law.”<sup>91</sup> The Equal Protection Clause has been the subject of numerous interpretations in the intervening years. As one scholar observed, however, it was “[n]ot until the last decade of the Warren Court,” when heightened scrutiny became law, “[that] the equal protection clause evolve[d] from a largely moribund constitutional provision to a potent egalitarian instrument.”<sup>92</sup>

Today, the Equal Protection Clause of the Fourteenth Amendment is an important source of rights for defendants challenging unequal treatment in the criminal justice system. It may be relied on by defendants challenging practices such as selective policing based on race,<sup>93</sup> selective prosecution based on race,<sup>94</sup> discrimination in the pretrial release setting,<sup>95</sup> racially biased jury selection procedures,<sup>96</sup> racially biased grand jury foreperson selection procedures,<sup>97</sup> race-based use of peremptory challenges,<sup>98</sup> and considerations of race at sentencing.<sup>99</sup>

**Due Process.** The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prevents states from depriving “any person of life, liberty, or property without due process of law.” This right includes protections against racial bias in criminal cases. For example, the Due Process Clause is an important source of rights for defendants challenging an unreliably suggestive cross-racial identification.<sup>100</sup>

**Fourth Amendment.** The Fourth Amendment to the U.S. Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Generally, evidence of a law enforcement officer’s racially-motivated purpose cannot be considered in a Fourth Amendment challenge to a pedestrian or traffic stop. This is because “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”<sup>101</sup>

However, a Fourth Amendment claim may succeed where reasonable suspicion is lacking or evidence of racially biased intent undermines the credibility of the officer’s stated reason for a stop.<sup>102</sup> Additionally, a defendant may challenge as pretextual a license or other checkpoint where the real purpose of the stop was impermissible under the Fourth Amendment.<sup>103</sup>

**Sixth Amendment.** The Sixth Amendment to the U.S. Constitution requires that trial juries be drawn from a “fair cross-section” of the community.<sup>104</sup> Unlike an equal protection challenge, in which a defendant must show intentional discrimination in the

composition of the jury venire, a fair cross-section challenge requires a defendant to demonstrate that the exclusion of a distinctive class of people was “systematic” or an inevitable result of the selection procedure.<sup>105</sup>

**North Carolina Constitution.** The North Carolina Constitution is a significant and sometimes overlooked source of protections against racial bias in criminal cases. Article I, section 19 provides:

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

The Equal Protection and Law of the Land Clauses in this section of the state constitution provide protections analogous to those in the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution. The North Carolina Supreme Court has held generally that “[t]he law of the land and due process of law are interchangeable terms.”<sup>106</sup> In general, “law of the land” and state equal protection challenges should be raised whenever parallel federal challenges, such as federal due process violations, are raised.

The North Carolina Constitution is a particularly important source of rights in the jury context. Article I, section 26 prohibits exclusion “from jury service on account of sex, race, color, religion, or national origin.” This section, along with the “law of the land” clause in article I, section 19, may be relied on to challenge discrimination in the selection of a grand jury,<sup>107</sup> or in the selection of a grand jury foreperson.<sup>108</sup> Article I, section 24 of the N.C. Constitution guarantees the right to a trial by jury, providing that “[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.” Defendants raising fair cross-section challenges may rely on this section as well as on article 1, section 26 of the N.C. Constitution.<sup>109</sup>

Outside of the jury context, article 1, section 27 of the North Carolina Constitution contains a provision prohibiting excessive bail, which may be useful to defendants raising challenges in the pretrial release context. It states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”

**North Carolina statutes.** Last, North Carolina statutes are a source of rights for criminal defendants challenging racial bias in a criminal case. Several statutes address law enforcement investigations.

To help address potential racial profiling, North Carolina law requires the Division of Criminal Information of the Department of Justice to collect statistics on traffic stops by

state troopers and other state law enforcement officers.<sup>110</sup> This statute also requires the Division to collect statistics on many local law enforcement agencies.<sup>111</sup>

North Carolina statutes also provide rights relating to interrogation and eyewitness identification, such as the right to have counsel present during a nontestimonial identification procedure,<sup>112</sup> and the right to have live identification procedures videotaped whenever practical.<sup>113</sup> Such rights may be important in ensuring that race does not play an improper role in criminal cases. Nationwide, in over one third of wrongful convictions overturned by DNA testing, cross-racial eyewitness identification was used as evidence to convict the defendant.<sup>114</sup>

In the context of police interrogations, protections against coerced statements may be important for populations that are potentially susceptible to improper law-enforcement pressure. Recently enacted legislation expands interrogation recording requirements to include all custodial interrogations of juveniles conducted at a place of detention, along with all custodial interrogations conducted at a place of detention related to a “Class A, B1, or B2 felony, and any Class C felony of rape, sex offense, or assault with a deadly weapon with intent to kill inflicting serious injury.”<sup>115</sup>

Requirements for motor vehicle checkpoints are also addressed by North Carolina law. Under G.S. 20-16.3A(d), the “placement of checkpoints should be random or statistically indicated, and agencies shall avoid placing checkpoints repeatedly in the same location or proximity.”<sup>116</sup> Under G.S. 20-16.3A(2a), “no individual officer may be given discretion as to which vehicle is stopped or, of the vehicles stopped, which driver is requested to produce drivers license, registration, or insurance information.”<sup>117</sup> Under G.S. 20-16.3A(a1), the pattern designated for stopping vehicles “shall not be based on a particular vehicle type” (other than commercial vehicles).<sup>118</sup> These statutes limit potential discrimination in checkpoint operations.

North Carolina statutes set forth procedures for invoking the exclusionary rule and suppressing evidence for a violation of a suspect’s constitutional or statutory rights.<sup>119</sup> These provisions may warrant suppression of racially discriminatory actions.<sup>120</sup>

North Carolina statutes bearing on the trial and other aspects of a criminal case—such as G.S. 15A-1214(a), which provides that the selection of jurors from the jury pool for questioning must be random—are discussed where applicable in this manual.

---

<sup>91</sup> *Caldwell v. Texas*, 137 U.S. 692, 697 (1891).

<sup>92</sup> J. Harvey Wilkinson, III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 945 (1975).

<sup>93</sup> *Whren v. United States*, 517 U.S. 806 (1996).

<sup>94</sup> *United States v. Armstrong*, 517 U.S. 456 (1996).

<sup>95</sup> *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc).

<sup>96</sup> *Peters v. Kiff*, 407 U.S. 493 (1972).

<sup>97</sup> *State v. Cofield*, 320 N.C. 297 (1987).

<sup>98</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>99</sup> *United States v. Smart*, 518 F.3d 800, 804 n.1 (10th Cir. 2008).

<sup>100</sup> See *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *State v. Harris*, 308 N.C. 159 (1983).

<sup>101</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996); see also *State v. McClendon*, 350 N.C. 630 (1999) (adopting *Whren* under state constitution).

<sup>102</sup> See *infra* § 2.3A, Equal Protection Claims May Strengthen Fourth Amendment Challenges.

<sup>103</sup> See *infra* § 2.6C, Challenging Checkpoints as Racially Discriminatory.

<sup>104</sup> See *Taylor v. Louisiana*, 419 U.S. 522 (1975); *State v. McNeill*, 326 N.C. 712 (1990).

<sup>105</sup> See *Duren v. Missouri*, 439 U.S. 357 (1979).

<sup>106</sup> *Eason v. Spence*, 232 N.C. 579, 584 (1950).

<sup>107</sup> See *State v. Wright*, 274 N.C. 380 (1968).

<sup>108</sup> See *State v. Cofield*, 320 N.C. 297 (1987).

<sup>109</sup> *McNeill*, 326 N.C. 712.

<sup>110</sup> See G.S. 114-10.01.

<sup>111</sup> *Id.*; see also *infra* § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims.

<sup>112</sup> See G.S. 15A-279(d); G.S. 7A-451(b)(2).

<sup>113</sup> See G.S. 15A-284.52(b)(14)

<sup>114</sup> The Innocence Project, *The Role of Race in Misidentification*, INNOCENCE BLOG (Aug. 11, 2008), [www.innocenceproject.org/Content/The\\_role\\_of\\_race\\_in\\_misidentification.php](http://www.innocenceproject.org/Content/The_role_of_race_in_misidentification.php).

<sup>115</sup> G.S. 15A-211(d) (effective for offenses committed on or after December 1, 2011).

<sup>116</sup> G.S. 20-16.3A(d).

<sup>117</sup> G.S. 20-16.3A(2a).

<sup>118</sup> G.S. 20-16.3A(a1).

<sup>119</sup> See G.S. 15A-971 through G.S. 15A-980.

<sup>120</sup> See, e.g., *State v. Cooper*, 186 N.C. App. 100 (2007) (evidence from warrantless search should have been suppressed where officer's knowledge that a Black male had committed armed robbery did not, without more, constitute reasonable suspicion of criminal activity justifying a "Terry" stop).