Chapter 1
Recognizing and Addressing Issues of Race in Criminal Cases

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.

1.2 Scope of Chapter

This chapter is intended to provide a foundation for the discussion that follows, and addresses key concepts, such as: What is bias? What are its potential sources? What factors other than bias may contribute to racial disparities in the criminal justice system? What role does a defense lawyer have with regard to raising bias and these other factors during the course of representation? Many scholarly works examine the existence and causes of racial disparities in the criminal justice system, and some of these works are in conflict. This chapter is not intended to resolve those debates, but instead to distill major principles from the scholarly work and to provide a context, working vocabulary, and framework for considering issues of race in the criminal justice system.

1.3 Potential Factors Relevant to Racial Disparities in the Criminal Justice System

This section identifies factors that may contribute to racial disparities in the criminal justice system, including structural racialization, implicit and explicit bias, crime rates, and legislation. This discussion is not intended to quantify the extent to which these factors may be the cause of racial disparities in the criminal justice system. Instead, the aim of the discussion is to introduce concepts relevant to the consideration of racial bias, provide an overview of current research into racial disparities in the justice system, and suggest steps to take in addressing these issues.

A. Structural Racialization

The term "structural racialization," also referred to as "structural racism," stands for the principle that structures, such as neighborhoods and schools, shape opportunities in racially uneven ways. One scholar explains that "the structural model helps us analyze how housing, education, employment, transportation, health care, and other systems interact to produce racialized outcomes . . . and how structures shape life chances."[6] Some scholars think that this framework helps to explain racial disparities in the criminal justice system because it accounts for factors such as poverty, culture, and history.[7]

Structural racialization does not depend on a bad actor or even a bad act, but instead describes the interrelated forces that contribute to inequality.[8] "[R]ather than understanding racism as an isolated or individual phenomenon, a structural racism approach understands it as an outcome and suggests that different societal institutions work together to distribute or limit opportunity along racial lines."[9] Unlike other formulations of racism that rely on individual acts of prejudice, "[s]tructural racism operates automatically and thus is perpetuated simply by doing nothing about it."[10]

Lawyers can use this framework to think beyond the confines of the courtroom when analyzing a case. For example, some pretrial release programs utilize electronic monitoring devices that require a telephone in the home. If a defendant is homeless or living in a home without a phone, this option is not available. Because people of color are overrepresented in impoverished communities, a policy of releasing only those people who can be monitored telephonically will have a disproportionate impact on minorities, and a lawyer may be able to challenge it on that basis.[11] A lawyer who recognizes the potential impact of structural racialization on his or her client may discover opportunities for advocacy where another lawyer would simply see insurmountable poverty issues.

Additionally, a structural analysis may help attorneys relay their clients' experiences in a more detailed—and therefore more compelling—way to prosecutors, judges, and others. For example, in plea negotiations, a lawyer could explain to a prosecutor that her client was expelled from the Wake County school system as a result of a zero-tolerance policy that was applied overwhelmingly to youth of color.[12] This framework might also be useful in explaining to a judge the influence of racial profiling on a client's criminal record. In *U.S. v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998), for example, a federal judge imposed a reduced sentence on a Black defendant based on a finding that most of his prior convictions arose out of traffic stops conducted by the Boston police, and that the unlawful practice of racial profiling may have contributed to his prior record.

An understanding of structural racialization may facilitate collaboration among actors in the criminal justice system.[13] Through this lens, criminal defense attorneys, judges, prosecutors, probation officers, law enforcement officers, and community leaders can address racial disparities without battles over causation or fault, and ask critical questions, such as: Is there a practice or policy in effect that is producing racial inequality in our jurisdiction? If so, what steps can we take to remedy the harm?

B. Overview of Bias

Unlike structural racialization, which describes a socio-cultural phenomenon, bias describes a mental state. Racial bias refers to positive or negative racial preferences, either conscious (explicit) or unconscious (implicit).[14] As one scholar observes:

> [A] typical trial courtroom setting mixes together many people, often strangers, from different social backgrounds, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of implicit and explicit biases will inevitably be at play. It is the primary responsibility of the judge and other court staff

> to manage this complex and bias-rich social situation to the end that fairness and justice be done—and be seen to be done.[15]

The possible impact of these forms of bias on the criminal justice system is discussed below.

C. Explicit Bias

Of the two broad formulations of bias, explicit bias is easier to recognize. "Explicit bias is a conscious preference (positive or negative) for a social category," and a person who expresses explicit bias does so knowingly.[16] Explicit bias may not be readily observable, however. "If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us."[17] One example of explicit bias in the criminal justice system is former Los Angeles detective Mark Fuhrman's use of over 40 racial slurs recorded on a series of audiotapes, portions of which were introduced into evidence in the O.J. Simpson murder trial.[18] In a more recent example, Justice Sotomayor criticized a prosecutor's cross-examination as racially biased and unconstitutional when the prosecutor challenged a defendant's testimony by asking, "You've got African-Americans, you've got Hispanics, you've got a bag full of money. Does that tell you—a light bulb doesn't go off in your head and say This is a drug deal?"[19]

Manifestations of explicit bias are evident in North Carolina history. For example, in the early 1800's, North Carolina laws imposed harsher punishment on Black offenders than White offenders: the rape of a white woman was a capital offense when committed by enslaved or free Blacks but not when committed by Whites.[20] After ratification of the Thirteenth Amendment officially abolishing slavery in 1865, explicit bias continued in North Carolina by means of a "Black Code" preventing freed African Americans from voting, serving on juries, bearing arms, and exercising other rights. North Carolina's Black Code was intended to replicate the controls of slavery. According to historian Laura F. Edwards, the Code's purpose was to ensure that newly free African Americans would not "be confused with citizens . . . acquir[ing] only the duties and obligations, not the rights of freedom."[21] The explicit bias in North Carolina's Black Code was followed by other manifestations of overt discrimination, such as the ban on miscegenation, and—beginning in the last quarter of the nineteenth century and persisting through much of the twentieth century—the establishment of Jim Crow laws denying African Americans access to public spaces, opportunities, and resources.

A recent example of explicit bias in the criminal justice context is illustrated by *Miller-El v. Dretke*, 545 U.S. 231 (2005), in which the court recognized that a particular prosecutor's office had intentionally excluded minorities from jury service for many years. The court observed:

> [T]he District Attorney's Office had adopted a formal policy to exclude minorities from jury service. . . . A manual entitled 'Jury

> Selection in a Criminal Case' . . . [had been] distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later[.][22]

Similarly, at a national prosecutors' training, participants were given cheat sheets identifying race-neutral peremptory strike justifications to use when responding to claims that a prosecutor's peremptory strike was based on race.[23]

Many criminal justice reforms have been enacted since the time of North Carolina's Black Code, and overt racial bias is no longer codified in North Carolina's laws. However, bias may still influence North Carolina criminal justice processes and may creep into individual cases via decision-making of individual actors. For example, in a 2002 hearing on a motion to dismiss, a North Carolina defense attorney testified that a highway trooper had justified pulling over his client in a previous case as follows: "[I]f they're Hispanic and they're driving, they're probably drunk."[24] In the case in which that testimony was offered, the N.C. Court of Appeals conducted an extensive review of evidence that the same trooper's stop of a Latino driver was racially motivated. Ultimately, the court upheld the trial judge's finding that the driver's seat belt, which the trooper had claimed was not buckled, was not actually visible to the trooper and therefore the stop was unlawful.

D. Implicit Bias

History and definition. Implicit biases are attitudes and stereotypes that people are not aware of, but that can influence their thoughts and behavior. These biases result from the brain's natural tendency to categorize stimuli into various categories or "schemas.".[25] All people rely on schemas to help sort the vast amount of information facing them each day, and schemas often involve stereotypes.[26] As scholar john powell puts it, "[w]e cannot live without schemas. Having biases and stereotypes does not make us racist, it makes us human."[27]

Research suggests that people may not be aware of their own biases. In fact, an implicit bias may conflict with a consciously held belief.[28] For example, an employer may believe in equal opportunity hiring, but pass over a Black applicant for a job based on lack of relevant experience without realizing that White applicants with similar experience levels have not been eliminated.[29] In the criminal justice context, Justice Marshall recognized that "[a] prosecutor's own [possibly] . . . unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."[30] As the examples suggest, while implicit biases may arise from our natural tendency to associate categories, they may result in disparate treatment when they go unexamined.

Researchers have been interested in the brain's tendency to link racial categories with positive or negative attributes for some time. Many will be familiar with Kenneth and Mamie Clark's famous "doll test" conducted in the 1940's, which demonstrated that Black children preferred White dolls to Black dolls and were more likely to describe Black dolls as "bad" and White dolls as "nice."[31] This study was recreated by filmmaker Kiri Davis in 2007 with similar results.[32] The "doll test" was cited by the U.S. Supreme Court when it declared school segregation unconstitutional in 1954.[33] Today, implicit bias researchers address the same types of questions with more sophisticated techniques to measure unconscious attitudes and prejudices. In one example, an implicit bias study in the criminal justice context discovered that participants held implicit associations between "Black" and "guilty" and that these associations predicted the ways in which participants evaluated ambiguous evidence.[34]

In recent years, social scientists have gained significant insights into the operation of implicit biases. The largest study of implicit bias is the Implicit Association Test (IAT), an electronically administered test that "revolutionized the way the world looked at and understood implicit bias."[35] The IAT emerged in the 1990s and has been administered over six million times.[36] In administering the IAT, researchers discovered that "the majority of tested Americans harbor negative implicit attitudes and stereotypes toward blacks [and] dark-skinned people . . . among others. . . . [P]eople consistently implicitly associate black with negative attitudes such as *bad* and *unpleasant*, and with negative stereotypes such as *aggressive* and *lazy*."[37] Scholar Jerry Kang illustrates how implicit biases may play out in the courtroom through this example: "Do we associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense?"[38]

Studies specific to the criminal justice system raise concerns about the potential impact of implicit biases. Two studies found that criminal defendants with a relatively greater degree of what one study termed "Afrocentric" and what another study termed "stereotypically Black" facial features received more severe criminal punishment in some contexts.[39] Implicit racial biases have also been detected among judges and capital defense attorneys.[40] In another study, participants with implicit stereotypes of White lawyers as better litigators judged the performance of White litigators as superior, in accordance with their stereotypes.[41]

Litigating implicit bias. Awareness of implicit bias may empower criminal defense attorneys to neutralize or mitigate it in the courtroom. Research shows that implicit biases are malleable.[42] When the subject of race is addressed explicitly, people tend to correct for their implicit biases and act in accordance with more objective standards. For example, jury studies show that when racial considerations are relevant and are explicitly brought to the attention of the jury, White jurors tend to treat Black and White defendants similarly. Thus, the act of addressing race during voir dire may counteract its influence in jury deliberations. "However, when race is present as a factor but not highlighted, White jurors tend to treat Black defendants more harshly."[43] Further, "suppressing or denying prejudiced thoughts can actually increase prejudice rather than eradicate it."[44] These studies suggest that raising relevant issues of race in criminal trials may cause implicit

biases to recede. Conversely, failing to raise issues of race may exacerbate bias or at least leave it in place.

Unexamined implicit bias may influence law enforcement practices. For example, disparities in drug arrests can result from police policies and practices in which "race shapes perceptions of who and what constitutes [the] drug problem, as well as the organizational response to that problem."[45] As a result of the police department's definition of the drug problem in Seattle, for example, police officers focused almost exclusively on crack cocaine sales.[46] Due in large part to this focus, 64.2 percent of drug arrestees were Black even though the majority of those who delivered serious drugs were White.[47] Closer to home, the Winston-Salem Police Department recently announced changes to its driver's license checkpoint policy after the North Carolina ACLU's Racial Justice Project reported the policy's disparate impact on minority drivers. While there was no evidence that the policy was designed to target people of color, "85 percent of the 244 traffic checkpoints set up by Winston-Salem police in an 11-month period were in predominantly minority areas."[48] Awareness of implicit bias research can help attorneys identify and challenge law enforcement policies and practices that have a disparate impact on minorities.

In addition, a defense attorney's awareness of his or her own implicit bias can improve client representation. Unexamined implicit biases may prevent an attorney from understanding the circumstances of a client's life or may cause the attorney to make inaccurate race-based assumptions about potential jurors or other court actors. For example, a lawyer may presume that Black people favor lenient sentencing and consequently fail to probe a prospective juror's opinions on punishment as well as experiences bearing on the case. As defense attorney Andrea Lyon argued, it is important for defense attorneys to "recognize our own biases and ensure that they do not inhibit our ability to represent our clients."[49]

Implicit bias studies may be introduced into evidence in individual cases when relevant. Consider, for example, *Brown v. Board of Education*,[50] in which the Supreme Court referred to seven different social science studies in holding that "separate but equal" violated the Equal Protection Clause.[51] More recently, courts have taken notice of the "growing body of social science recogniz[ing] the pervasiveness of unconscious racial and ethnic stereotyping and group bias," in contexts such as the alleged exclusion of certain ethnic minorities from jury service.[52] In one case, a federal judge relied in part on studies concerning implicit stereotypes of Asian Americans as passive in finding "a sizable risk that perceptions and decisions made here may have been affected by unconscious bias."[53]

Case study: A judge reflects on implicit bias. In the passage below, Judge Louis A. Trosch, Jr., District Court Judge for North Carolina District 26, reflects on the problem of implicit bias, including his own. His personal account captures, in ways that legal analyses may not fully convey, the importance of understanding and combating implicit bias in the criminal justice system.

I have been a District Court Judge for the past 13 years and have spent much of my time hearing juvenile court cases. About five years ago I found myself presiding over juvenile first appearance and detention hearings. One of the first cases that I called involved a newly filed armed robbery from a local fast food restaurant. Two young men were accused of attempting to rob the restaurant while wearing "Scream" masks and carrying handguns. They were not very accomplished robbers and were quickly apprehended.

When I called the first co-defendant's, who I'll refer to as Joe, case into the courtroom he entered from a holding cell wearing shackles and accompanied by two deputies. This was to be expected given the serious nature of the allegations and danger to the community. In addition, Joe's parents, grandparents, relatives, and pastor also came into the courtroom. I heard a short rendition of the facts and then heard from the attorneys and Juvenile Court Counselor (JCC) regarding Joe's detention status. As is typical in such serious cases, I ordered that Joe remain detained, but that the JCC investigate less restrictive alternatives, such as electronic monitoring or pre-trial supervision through our Alternatives to Detention (ATD) program. A detention review hearing was scheduled for the next week and the matter was adjourned. It was a pretty routine hearing really, except for the fact that Joe had no delinquent history of any kind. First offenders don't typically start off with such serious charges.

Thinking that a bit odd, I called in the co-defendant's, who I'll call Sam, case. The deputies didn't stir towards the holding cell. In fact, I was getting ready to remind them to retrieve the juvenile, when Sam walked into court with his family. He was dressed in khaki pants, a button down shirt and loafers rather than a jumpsuit and shackles. Like Joe, he also had a number of family members present to support him, along with his Coach. Everyone sat down and I proceeded with the first appearance. No one acknowledged the striking difference in circumstances between the two juveniles. I assumed there must be some difference between them that explained Joe being locked in detention while Sam was freed to live at home, so I began asking questions. Maybe Joe had been the one with the gun. No, they both had guns according to the police report. Maybe Joe was the mastermind or forced Sam into participating or was more threatening to the victims. Again the answer was no. As I asked more and more questions it became clear that Joe and Sam were alike in almost every way. They had been friends since childhood, they lived one street from one another, they both came from 2 parent families with tons of family support, both were average students with no history of suspensions, and both were involved in extracurricular activities, Joe in his church and Sam as a high school athlete. I couldn't come up with a significant difference in these two young men that explained their detention status, save one.

The fact that most readers of this account know implicitly what that difference was along with the race of each of these juveniles says much about how deeply race impacts all of us and the decisions we make. Just to be clear, Joe was Black and Sam was White. I do not believe that anyone explicitly decided to lock up the Black juvenile and release the White juvenile, but implicit bias powerfully influenced the decisions made by the police, the JCCs, and the attorneys in this case. After putting Sam into detention and ordering that the JCC look into alternatives to detention, I left the courtroom and sat down to think. How many times have less egregious disparities for children of color gone right by me, unnoticed and uncorrected. How many times had my own implicit biases affected my decisions. These are daunting questions for all of us who work in the justice system. The good news is that there are many, many steps that one can take to mitigate implicit bias, both individually and systemically. As a judge, it is critical that I learn as much as I can about implicit bias and take steps to overcome my own bias. It is a constant struggle, but it is essential to reach just decisions.

E. Discretionary Decision-Making and the Cumulative Nature of Disparities

Subjective decisions may be particularly vulnerable to the types of bias described in the preceding sections. One recent study of millions of school and juvenile justice records in Texas illustrates the cumulative effect of discretionary decision-making. The researchers found, for example, that students of all races were removed from school for mandatory disciplinary violations at comparable rates, but Black and Latino students were far more likely than White students to be disciplined for discretionary reasons.[54]

The exercise of discretion is an essential part of the criminal justice system. "It is neither desirable nor possible to eliminate discretion throughout the criminal justice system; professional judgment is a core component of making day-to-day operations manageable."[55] Nevertheless, criminal defense attorneys and other court actors must be alert to the risk of bias creeping in at the numerous junctures in a criminal case that involve subjective decision-making. Discretionary decisions in the criminal justice system—made by law enforcement officers, magistrates, judges, prosecutors, and defense attorneys—include:

- Where checkpoints should be set up
- Which vehicles should be stopped on a busy highway
- When a brief investigatory detention or "Terry stop" should be initiated
- Who should be asked for consent to search
- Who should be arrested
- Who should be charged and with what offense
- Whether to seek a transfer to superior court for a juvenile
- When a plea to a lesser charge should be offered
- Who should be indicted as a habitual felon
- Who should be released before trial and what conditions of pretrial release should be imposed
- Who should be advised to accept a guilty plea
- Which prospective jurors to strike peremptorily
- Who should be sentenced to active time and who should be sentenced to probation

Any one of these decisions can affect the direction and outcome of a case. For example, defendants who are denied pretrial release are less able to assist their attorneys, more likely to plead guilty, more likely to be found guilty if they go to trial, and more likely to receive a sentence of imprisonment if convicted.[56] Recent publications highlight that disparities at early stages of criminal proceedings may be compounded at successive stages and affect criminal case outcomes.[57]

Subjective decision-making may operate in tandem with other factors, such as structural racialization. One researcher concluded that outcomes in criminal cases are influenced not only by disparate treatment at certain key decision points, but also by structural

factors such as a defendant's economic resources and networks of support, which may come into play at various stages in the criminal justice process.[58]

In drug cases in particular, the cumulative effect of subjective decision-making may have a racially disparate impact. For example, racial disparities in drug convictions are more pronounced than racial disparities in drug arrests.[59] Drug cases are discussed further in subsection F., below.

F. Crime Rates

Any discussion of racial disparities in the criminal justice system must address the question of whether minority overrepresentation in the justice system is simply a reflection of racially disparate crime rates. "The primary debate has been between those who argue that there are problematic racial disparities and those who argue or imply that observed differences in rates of imprisonment are for the most part 'warranted' by differential criminal involvement by the races."[60] This brief discussion does not attempt to resolve this issue; instead, it identifies key considerations and additional resources.

In the context of drug offenses, data indicate that racially disparate arrest, conviction, and incarceration rates do not reflect actual offense rates. In 2006, African Americans represented 35% of those arrested for drug offenses and 53% of drug convictions, but that same year, according to the U.S. Department of Health and Human Services, African Americans made up only 14% of drug users.[61] In other words, although Blacks and Whites use drugs at roughly the same rates, African Americans are substantially more likely to be arrested and convicted for drug offenses. In North Carolina, Black inmates accounted for 84% of those admitted to prison for drug offenses in 1996, although only 22% of the State's population was Black.[62] Beyond the drug offense context, the data is less clear. Unlike the rate of drug use, which is tracked by health departments, crime commission rates in other contexts are generally extrapolated from other criminal justice statistics.[63]

Some criminologists have relied on arrest rate statistics as a proxy for offense rates.[64] The Uniform Crime Reports (UCR) published by the Federal Bureau of Investigation is one commonly cited source of national arrest rate data.[65] In 2006, for example, the UCR indicated that African Americans accounted for 39% of people arrested for violent crime and 31% of all people arrested for property crime.[66] These arrest statistics, however, do not necessarily reflect offense rates by African Americans. Experts increasingly recognize that arrest and offense rates cannot be equated.[67] Arrest rates are influenced by factors such as discretionary decisions by officers, distribution of police in low-income neighborhoods, and policies and priorities of various police departments. In other words, if "criminal investigations focus on African Americans, more African Americans necessarily will be arrested and convicted of crimes, thereby creating a self-fulfilling prophesy."[68] Some research suggests that minority suspects are more likely to be arrested than White suspects.[69] Additionally, arrest rates do not capture crimes that are *not* reported to the police, which account for more than half of all violent crimes and over 60% of all property crimes.[70]

Another method employed by criminologists when estimating offense rates is to use "victimization survey data in which victims identify the perceived race of their assailant," such as the National Crime Victimization Survey (NCVS).[71] Data collected by the NCVS can be viewed on the website of the U.S. Bureau of Justice Statistics.[72] However, there are some concerns about the reliability of data collected from victims about the race of offenders, as "perception bias on the part of victims with respect to offender race presents an intractable problem with NCVS race and crime data."[73] The data collected by the NCVS is also incomplete: "information about victim perceptions of perpetrators' race is available for only a few violent offenses," so "crime victimization survey data present an incomplete picture of crime commission rates by race."[74]

Racially disparate arrest and victimization rates also do not explain racial disparities in imprisonment rates. One criminologist concludes, "[a]lthough violent crime arrest rates for Blacks are higher than for Whites, the differential has long been declining. Group differences in violent crime do not explain racial disparities in prison."[75]

G. Legislation

Laws passed by local, state, and federal legislatures can significantly affect the racial composition of the population that is involved with the criminal justice system. In one of the most well-known examples of this phenomenon, the Anti-Drug Abuse Act of 1986 employed a 100:1 crack/cocaine sentencing differential in federal criminal sentencing. Thus, the Act created harsher penalties for drug offenses involving crack (disproportionately used by African American cocaine users) than for offenses involving powder cocaine (used more by White cocaine users). For example, a person convicted of possessing only 5 grams of crack cocaine was subject to the same mandatory prison sentence (5 years) as a person convicted of possessing 500 grams of powder cocaine. This sentencing scheme had a remarkably disproportionate impact on African Americans and, in the words of one court, had no "penological or scientific justification."[76]

At the time the law was passed, the media portrayed "crack-user horror stories" in which "[i]mages of young black men [involved in the drug trade] . . . saturated the screens of our televisions . . . . [and] branded onto the public mind and the minds of legislators that young black men were solely responsible for the drug crisis in America."[77] Congress considered these media accounts in concluding that crack cocaine caused violence and crack users posed a greater threat to society than cocaine users.[78] Scientific evidence, however, refuted the notion that crack was more addictive and caused users to be more violent, and showed that the effects of powder cocaine and crack cocaine on the body are essentially identical.[79]

Lawyers, scientists, the U.S. Sentencing Commission, judges and others all called for the repeal of the 100:1 crack/cocaine federal sentencing ratio. Although the ratio remained law for 24 years, in 2010 Congress modified the ratio to 18:1.[80] Data from this period shows the racially disparate impact of the crack/cocaine distinction. During the period in which the 100:1 ratio was in effect, the average time African American drug offenders served in federal prison increased by 77%, compared to an increase of 33% for Caucasian

offenders.[81] The average federal drug sentence for African Americans was 11% higher than the average federal drug sentence for Whites when the Anti-Drug Abuse Act was passed in 1986; four years later that disparity had grown to 49%.[82] In 2010, the year the law was changed, almost 80% of those sentenced under federal crack cocaine laws were African Americans, and less than 8% were White.[83] Changes in drug laws and sentencing for drug offenses have been identified as playing a role in the decreasing incarceration rate for African Americans; however, while the rate has declined over the last decade, it still exceeds the incarceration rate of Whites and Latinos.[84]

Racial disparities related to legislation can be found at the state level as well. Three strike schemes and other habitual offender laws have been adopted by many states. By the mid-1990s, "'repeat offender' laws [had been] passed in forty-one states as well as in the federal system, and twenty-four states [had] enacted 'three strikes' laws."[85] North Carolina's habitual felon law imposes a significant sentencing enhancement for a defendant who, having already been convicted of three felonies, commits a fourth.[86] This enhancement does not attach automatically on conviction of a fourth felony; rather, prosecutors have discretion whether to indict a person as a habitual felon. Statistics suggest that the law has had disparate results. The NCAJ Task Force on Racial and Ethnic Bias reports that "African Americans are 2.46 times as likely to be incarcerated as habitual felons than Caucasians" and represent "70% of all incarcerated habitual felons."[87]

Because of concerns about the potential impact of sentencing legislation, Minnesota, Iowa, Oregon, and Connecticut now require the preparation of racial impact statements during the legislative process to prevent unwarranted racial disparities in the criminal justice system.[88] In Florida, Mississippi, Wisconsin, and Arkansas, racial impact statement legislation has been introduced.[89] A racial impact statement serves as "a predictive report summarizing the effects that legislation may have on minority groups. The goal of these statements is to force lawmakers to confront the potential racial consequences of criminal sentencing policies prior to enacting new legislation."[90] North Carolina does not currently have such a procedure, but attorneys, other court actors, and community members can play a role in informing legislators about the potential racially disparate impact that may result from existing or proposed legislation.

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."[91] 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."[92]

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,[93] selective prosecution based on race,[94] discrimination in the pretrial release setting,[95] racially biased jury selection procedures,[96] racially biased grand jury foreperson selection procedures,[97] race-based use of peremptory challenges,[98] and considerations of race at sentencing.[99]

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.[100]

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."[101]

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.[102] 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.[103]

Sixth Amendment. The Sixth Amendment to the U.S. Constitution requires that trial juries be drawn from a "fair cross-section" of the community.[104] 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.[105]

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."[106] 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,[107] or in the selection of a grand jury foreperson.[108] 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.[109]

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.[110] This statute also requires the Division to collect statistics on many local law enforcement agencies.[111]

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,[112] and the right to have live identification procedures videotaped whenever practical.[113] 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.[114]

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."[115]

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."[116] 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."[117] 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).[118] 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.[119] These provisions may warrant suppression of racially discriminatory actions.[120]

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.

1.5 Overcoming Concerns About Raising Race

Addressing issues of race in the criminal justice system is no easy task.

> The one thing that is absolutely certain about the American experience is that never in our history as a people have any of us, black or white, been "neutral" on the matter of race. It has been, and remains, the great overriding issue throughout all our history, in all our law, in all our institutions.[121]

Criminal defense attorneys face considerable obstacles when raising claims of racial bias. One writer notes that "enormous systemic, financial, and other pressures . . . make it extremely difficult . . . to raise and vindicate" such claims.[122] Large caseloads and limited resources magnify these challenges. However, public defenders and appointed counsel must remain alert to the issues discussed in this manual, since racial and ethnic minorities are more likely to live in poverty and therefore more likely to be represented by assigned counsel. African Americans are nearly five times as likely as Whites to rely on appointed counsel.[123]

Criminal defense attorneys have an obligation to advocate for their clients, including raising issues of race in appropriate cases. 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."[124] The RPC state that a lawyer is "an officer of the legal system, and a public citizen having special responsibility for the quality of justice," who "should be mindful of deficiencies in the administration of justice."[125]

Why might some attorneys not raise issues of race when race may be adversely affecting a client's case? Some factors that might cause a lawyer to refrain from raising racial issues include:

- lack of awareness that race is an issue in the case,
- concern that a judge may reject the argument,
- unfamiliarity with supporting law, required factual showing, and strategies,
- reluctance to step outside of one's comfort zone,
- concern that this strategy may affect the case in unpredictable ways, and
- the existence of contrary legal precedent or the fear of creating bad precedent

This manual is intended to equip attorneys and other court actors with the information and tools they need to address issues of race effectively and overcome concerns such as those above. The chapters that follow identify ways in which racial considerations may unlawfully affect criminal cases and provide legal support and practical strategies for addressing those issues. Some concerns, such as the potential of weakening relationships with other court actors or creating bad precedent, are outweighed by the obligation an attorney owes to an individual client. In appropriate cases, the attorney has an ethical obligation to advance all arguments that would assist the client. Failing to do so may leave constitutional and other violations unaddressed, result in an incomplete record for appellate review, constitute ineffective assistance of counsel, and deprive the client of a fair trial.

Raising issues of race where appropriate in individual cases may have an aggregate positive effect even if the claims do not always succeed. Doing so may create an environment in which "race discrimination and bias issues are openly joined on the record instead of relegated to the background."[126] Everyone involved in the criminal justice system has a role in helping to stem racial discrimination, but defense attorneys have a particularly important voice. As recognized by the Equal Justice Initiative's report on racial discrimination in jury selection, "[t]he entire community—including prosecutors, judges, court administrators, civil rights and community groups, and elected officials—has a role to play in addressing this issue, but racial bias in the courtroom cannot be confronted effectively without vigilance and advocacy by defense lawyers."[127] We hope this manual helps North Carolina criminal defense attorneys recognize and raise issues of race in an informed and effective manner.

[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).

[6] john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 793 (2008); *see also* john a. powell, *How Implicit Bias and Structural Racialization Can Move Us Toward Social and Personal Healing, in* PATHWAYS TO RACIAL HEALING AND EQUITY IN THE AMERICAN SOUTH: A COMMUNITY PHILANTHROPY STRATEGY (U. of Ark. Clinton School of Public Service 2013), *available at* http://clintonschool.uasys.edu/wp-content/uploads/2013/12/Clinton-School-Compendium-2013.pdf.

[7] *See, e.g.*, William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L. J. 1 (2011); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 285–89 (2009).

[8] powell (2008), *supra* note 6, 86 N.C. L. REV. at 795–800.

[9] Kirwan Institute at Ohio State University, *Bibliographic Guide to Structural Racism, available at* http://www.scribd.com/doc/49092126/Kirwan-Institute-Structural-Racism-Bibliography.

[10] Wiecek, *supra* note 7, at 6–7 (listing eight characteristics that distinguish structural racism from more traditional formulations of racism).

[11] NELLIS ET AL., *supra* note 1, at 7.

[12] JASON LANGBERG ET AL., ADVOCATES FOR CHILDREN'S SERVICES, LAW ENFORCEMENT OFFICERS IN WAKE COUNTY SCHOOLS: THE HUMAN, EDUCATIONAL, AND FINANCIAL COSTS (2011), *available at* www.law.unc.edu/documents/faculty/sroreportv2.pdf.

[13] powell (2008), *supra* note 6, at 86 N.C. L. REV. 809 (noting the success of collaboration in other contexts).

[14] Shawn C. Marsh, *The Lens of Implicit Bias*, 18 JUVENILE AND FAMILY JUSTICE TODAY 16, 16–19 (Summer 2009), *available at* www.ncjfcj.org/sites/default/files/the%20lens%20of%20implicit%20bias.pdf.

[15] JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS 6 (National Center for State Courts 2009), *available at* www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx.

[16] Marsh, *supra* note 14, at 17.

[17] Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132 (2012).

[18] Roger C. Park, *Character Evidence Issues in the O.J. Simpson Case—Or, Rationales of the Character Evidence Ban, with Illustrations from the Simpson Case*, 67 U. COLO. L. REV. 747, 758 (1996).

[19] *Calhoun v. United States*, 568 U.S. ___, 133 S.Ct. 1136, 1136 (2013) (Sotomayor, J., concurring in denial of cert.).

[20] 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, 2046 (2010) (citing laws to this effect).

[21] Laura F. Edwards, *"The Marriage Covenant is at the Foundation of all Our Rights": The Politics of Slave Marriages in North Carolina after Emancipation*, 14 LAW & HIST. REV. 81, 96 n.30 (1996) (citing laws to this effect).

[22] *Miller-El v. Dretke*, 545 U.S. 231, 263–64 (2005) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 334–35 (2003)).

[23] *See Top Gun II Batson Justifications: Articulating Juror Negatives* in the Race Materials Bank at www.ncids.org (select "Training & Resources").

[24] *State v. Villeda*, 165 N.C. App. 431, 432 (2004) (reviewing at length evidence that trooper's stop of Latino driver was racially motivated and upholding trial court's finding that trooper was not able to observe whether driver was wearing seat belt, in spite of trooper's testimony to the contrary).

[25] john powell & Rachel Godsil, *Implicit Bias Insights as Preconditions to Structural Change*, 20 POVERTY & RACE, no. 5 (Poverty & Race Research Action Council), 2011, at 4, *available at* http://prrac.org/newsletters/sepoct2011.pdf.

[26] Kang, *supra* note 15, at 1.

[27] PowerPoint Slides of john powell, *Exploring the Unconscious: The Dynamics of Race and Reconciliation* at 22 (2011 Dinner of Reconciliation, John Hope Franklin Center for Reconciliation), *available at* www.jhfcenter.org/wp-content/uploads/2009/09/john-powell.pdf.

[28] Jerry Kang, *Implicit Bias and Pushback from the Left*, 54 ST. LOUIS L.J. 1139, 1139 (2010).

[29] Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 THE AMERICAN ECONOMIC REVIEW 991, 991–1013 (2004).

[30] *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

[31] Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, *in* READINGS IN SOCIAL PSYCHOLOGY 602, 602–11 (Eleanor E. Maccoby et al. eds., 3d ed. 1958); *see also* Film Documentary: A GIRL LIKE ME (Kiri Davis, Director, Reel Works Teen Filmmaking, 2006), (recreating the Clarks' doll experiment in 2007 with similar results), *available at* www.mediathatmattersfest.org/films/a_girl_like_me/.

[32] *See* Film Documentary: A GIRL LIKE ME, *supra* note 31.

[33] *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954).

[34] Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 207 (2010).

[35] Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 801 (2012).

[36] Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 847–49 (2012).

[37] Smith & Levinson, *supra* note 35, at 802 (emphasis in original) (citing published research).

[38] Kang, *supra* note 15, at 2.

[39] *See* Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674 (2004); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).

[40] *See* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1542 (2004); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195–96 (2009).

[41] Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010).

[42] Kang, *supra* note 15, at 4–5.

[43] powell & Godsil, *supra* note 25, at 6.

[44] powell, *supra* note 27, at 23.

[45] Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 105 (2006); *see also* KATHERINE BECKETT, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE (2008), *available at* http://faculty.washington.edu/kbeckett/Race%20and%20Drug%20Law%20Enforcement%20in%20Seattle_2008.pdf.

[46] BECKETT (2008), *supra* note 45, at 15, 59–98 (concluding that, while the racial composition of those who deliver serious drugs in Seattle, the enforcement focus on outdoor drug activity, and the enforcement focus on the downtown drug trade all contributed modestly to racial disparities in Seattle drug arrests, the focus on crack-cocaine sales constituted the largest factor contributing to disparities).

[47] BECKETT (2008), *supra* note 45, at 11.

[48] John Hinton, *Police Will Use New Methods to Set Up Traffic Checkpoints*, WINSTON-SALEM JOURNAL, Sep. 10, 2012, *available at* www.journalnow.com/news/local/police-will-use-new-methods-to-set-up-traffic-checkpoints/article_08f0139a-26e2-520e-9756-239a3f23950a.html.

[49] Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 758 (2012).

[50] 347 U.S. 483, 494 n.11 (1954).

[51] Eva Paterson, *Litigating Implicit Bias*, 20 POVERTY & RACE, no. 5 (Poverty & Race Research Action Council) 2011, at 8, *available at* http://prrac.org/newsletters/sepoct2011.pdf.

[52] *Chin v. Runnels*, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004) (citing and considering such studies in ruling on a challenge to the alleged exclusion of certain ethnic minorities from service as foreperson on indicting grand jury), *aff'd sub nom. Chin v. Carey*, 160 F. App'x 633 (9th Cir. 2005) (unpublished).

[53] *Chin*, 343 F. Supp. 2d at 905–908.

[54] TONY FABELO, ET. AL., BREAKING SCHOOLS' RULES: A STATEWIDE SURVEY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT (Council for State Gov'ts Justice Ctr. 2011), *available at* http://knowledgecenter.csg.org/kc/system/files/Breaking_School_Rules.pdf.

[55] NELLIS ET AL., *supra* note 1, at 11.

[56] Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 936–37 (2013) (citing various studies and scholarly articles to this effect).

[57] *See, e.g.*, Traci Schlesinger, *The Cumulative Effects of Racial Disparity in Criminal Processing*, THE ADVOCATE, May 2008, at 22, 27–32, *available at* http://apps.dpa.ky.gov/library/advocate/pdf/2008/adv050108.pdf; Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL'Y REV. 59, 59, 71 (2014) (noting that "[d]ecisions at the beginning of the criminal case process, such as bail decisions, can affect the entire course of the case and the ultimate punishment handed down in sentencing"; finding that "[d]efendants who were detained prior to trial received longer sentences than defendants who were released on bail").

[58] Schlesinger, *supra* note 57, at 24.

[59] NELLIS ET AL., *supra* note 1, at 6 (reporting that African Americans account for 35% of those arrested for drug offenses but 53% of drug convictions).

[60] Robert D. Crutchfield, *Warranted Disparity? Questioning the Justification of Racial Disparity in Criminal Justice Processing*, 36 COLUM. HUMAN RIGHTS L. REV. 15, 16–22 (2004). *Compare* David A. Harris, *The Reality of Racial Disparity In Criminal Justice: The Significance of Data Collection*, 66 L. & CONTEMP. PROB. 71 (2003), *with* Heather Mac Donald, *High Incarceration Rate Of Blacks Is Function Of Crime, Not Racism*, INVESTOR'S BUSINESS DAILY, Apr. 29, 2008, *available at* http://news.investors.com/042908-445638-high-incarceration-rate-of-blacks-is-function-of-crime-not-racism.htm?Ntt=incarceration&p=4.

[61] NELLIS ET AL., *supra* note 1, at 6. *See also*, Michael Tonry & Matthew Melewski, *The Malign Effects of Drugs and Crime Control Policies on Black Americans*, 37 CRIME AND JUSTICE, 1, 33–34 (2008).

[62] Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, Vol. 12, No. 2 at Table 13 (May 2000), HRW.ORG, www.hrw.org/legacy/reports/2000/usa/Table13.pdf.

[63] *See, e.g.*, Research Working Group & Task Force on Race and the Criminal Justice System, *supra* note 5, at 269 (noting that "crime commission rates cannot be known directly and can only be estimated").

[64] *See, e.g.*, Alfred Blumstein, *On the Racial Disproportionality of the U.S. States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982).

[65] *Uniform Crime Reports*, FEDERAL BUREAU OF INVESTIGATION, www.fbi.gov/about-us/cjis/ucr/ucr (last visited Apr. 7, 2014).

[66] *Crime in the United States, 2006*, FEDERAL BUREAU OF INVESTIGATION, http://www2.fbi.gov/ucr/cius2006/ (last visited Apr. 9, 2014).

[67] *See, e.g.*, Crutchfield, *supra* note 60, at 16–22.

[68] Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L. Q. 675, 684 (2000).

[69] Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 475 (2011); FRANK R. BAUMGARTNER & DEREK EPP, NORTH CAROLINA TRAFFIC STOP STATISTICS ANALYSIS 5 (2012) (North Carolina traffic stop data indicates that racial minorities are more likely to be searched and arrested following a traffic stop than White drivers who are pulled over on the same basis), *available at* https://www.ncaj.com/index.cfm?pg=NCCREDPublications.

[70] Jennifer L. Truman & Michael R. Rand, *Criminal Victimization, 2009*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SER. NO. NCJ 231327, 2010, at 9 Table 12, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf.

[71] Research Working Group & Task Force on Race and the Criminal Justice System, *supra* note 5, at 269.

[72] *See Data Collection: National Crime Victimization Survey (NCVS)*, BUREAU OF JUSTICE STATISTICS, www.bjs.gov/index.cfm?ty=dcdetail&iid=245.

[73] *See, e.g.*, Paul Knepper, *Race, Racism, and Crime Statistics*, 24 S.U. L. REV. 71, 96–98 (1996).

[74] Research Working Group & Task Force on Race and the Criminal Justice System, *supra* note 5, at 269.

[75] Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 274 (2010).

[76] *United States v. Smith*, 359 F. Supp. 2d 771, 777 (E.D. Wis. 2005).

[77] *United States v. Clary*, 846 F. Supp. 768, 783 (E.D. Mo. 1994), *rev'd* 34 F.3d 709 (8th Cir.1994).

[78] *Clary*, 846 F. Supp. at 783–84.

[79] Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine And Cocaine Hydrochloride: Are The Differences Myth Or Reality?*, 276 JOURNAL OF AM. MED. ASS'N 1580 (1996).

[80] *See* Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat. 2372 (2010).

[81] BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1994 85 Table 6.11; BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003 112 Table 7.16.

[82] BARBARA S. MEIERHOEFER, THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS: A LONGITUDINAL STUDY OF FEDERAL SENTENCES IMPOSED 20 (1992), *available at* www.fjc.gov/public/pdf.nsf/lookup/geneffmm.pdf/$file/geneffmm.pdf.

[83] U.S. Sentencing Comm'n, 2010 Sourcebook of Federal Sentencing Statistics, Table 34 (2010), UNITED STATES SENTENCING COMMISSION, www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2010/sbtoc10.htm.

[84] Erica Goode, *Incarceration Rates for Blacks Have Fallen Sharply, Report Shows*, N.Y. TIMES, Feb. 27, 2013, *available at* www.nytimes.com/2013/02/28/us/incarceration-rates-for-blacks-dropped-report-shows.html?_r=0.

[85] Craig Haney, *Politicizing Crime and Punishment: Redefining "Justice" to Fight the "War on Prisoners,"* 114 W. VA. L. REV. 373, 391–392 (2012).

[86] *See* Jeffrey B. Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, ADMINISTRATION OF JUSTICE BULLETIN NO. 2013/07 (UNC School of Government, Aug. 2013), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1307.pdf; *see also* Jamie Markham, *Changes to the Habitual Felon Law*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 10, 2011), http://nccriminallaw.sog.unc.edu/?p=3042; *see also* G.S. 14-7.25 through G.S. 14-7.31 (providing that, in the case of felony breaking and entering, the habitual status may attach upon the commission of a second breaking and entering offense).

[87] North Carolina Advocates for Justice (NCAJ) Task Force on Racial and Ethnic Bias Executive Summary, *available at* www.ncaj.com/index.cfm?pg=NCCREDPublications.

[88] Catherine London, *Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations*, 29 LAW & INEQ. 211 (2011) (discussing racial impact statement requirements in Minnesota, Iowa, and Connecticut); 2013 Or. Laws, Ch. 600, *available at* https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2013orLaw0600.pdf.

[89] *See, e.g.*, John Lyon, *Arkansas Legislature: Proposal Would Require Racial Impact Statements For Some Bills*, TIMES RECORD ONLINE EDITION, March 4, 2013, *available at* http://swtimes.com/sections/news/politics/arkansas-legislature-proposal-would-require-racial-impact-statements-some.

[90] London, *supra* note 88, at 212.

[91] *Caldwell v. Texas*, 137 U.S. 692, 697 (1891).

[92] 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).

[93] *Whren v. United States*, 517 U.S. 806 (1996).

[94] *United States v. Armstrong*, 517 U.S. 456 (1996).

[95] *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc).

[96] *Peters v. Kiff*, 407 U.S. 493 (1972).

[97] *State v. Cofield*, 320 N.C. 297 (1987).

[98] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[99] *United States v. Smart*, 518 F.3d 800, 804 n.1 (10th Cir. 2008).

[100] *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).

[101] *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).

[102] *See infra* § 2.3A, Equal Protection Claims May Strengthen Fourth Amendment Challenges.

[103] *See infra* § 2.6C, Challenging Checkpoints as Racially Discriminatory.

[104] *See Taylor v. Louisiana*, 419 U.S. 522 (1975); *State v. McNeill*, 326 N.C. 712 (1990).

[105] *See Duren v. Missouri*, 439 U.S. 357 (1979).

[106] *Eason v. Spence*, 232 N.C. 579, 584 (1950).

[107] *See State v. Wright*, 274 N.C. 380 (1968).

[108] *See State v. Cofield*, 320 N.C. 297 (1987).

[109] *McNeill*, 326 N.C. 712.

[110] *See* G.S. 114-10.01.

[111] *Id.*; *see also infra* § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims.

[112] *See* G.S. 15A-279(d); G.S. 7A-451(b)(2).

[113] *See* G.S. 15A-284.52(b)(14)

[114] 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.

[115] G.S. 15A-211(d) (effective for offenses committed on or after December 1, 2011).

[116] G.S. 20-16.3A(d).

[117] G.S. 20-16.3A(2a).

[118] G.S. 20-16.3A(a1).

[119] *See* G.S. 15A-971 through G.S. 15A-980.

[120] *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).

[121] Norman C. Amaker, *The Haunting Presence of the Opinion in* Brown v. Board of Education, 20 S. ILL. U. L.J. 3, 6–7 (1995).

[122] Robin Walker Sterling, *Raising Race,* THE CHAMPION, April 2011, at 24, 26.

[123] *See* CHRISTOPHER HARTNEY & LINH VUONG, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 14 (2009).

[124] NORTH CAROLINA RULES OF PROF'L CONDUCT R. 1.3.1 (Diligence), *available at* www.ncbar.com/rules/rpcsearch.asp.

[125] NORTH CAROLINA RULES OF PROF'L CONDUCT R. 0.1.1, 0.1.6 (Preamble).

[126] Sterling, *supra* note 122, at 26.

[127] EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010), *available at* www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf.