

# Juvenile Training Immersion Program:

## Lesson 8a – Raising Race

# ANNOTATED BIBLIOGRAPHY

## RACE AND THE DEFENDER

### DEFENDERS RAISING RACIAL JUSTICE ARGUMENTS

Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AMER. U. L. REV. (forthcoming 2018).

- In 2011, the Supreme Court announced a major shift in criminal justice jurisprudence when it held in *J.D.B. v. North Carolina* that the test for determining whether a child was in “custody” for purposes of *Miranda v. Arizona* must be evaluated through the lens of a “reasonable child” rather than a reasonable adult. Since then, several scholars have called for the extension of the reasonable child standard to other aspects of criminal law and procedure, including the Fourth Amendment. These shifts provide a critically important advance in criminal procedure, but may not go far enough to protect the rights of black youth who are disproportionately overrepresented in the juvenile justice system.
- In this Article, Henning seeks to reduce racial disparities in the juvenile and criminal justice systems by urging courts to consider four contexts in which the unique interplay between race and adolescence should alter current Fourth Amendment analysis – seizure, the consent-to-search doctrine, the officer’s recitation of facts to support reasonable articulable suspicion for a stop, and the court’s assignment of meaning to those facts.
- Drawing upon recent advances in cognitive science and developmental research, this Article attempts to bring the search and seizure doctrine into line with what we now know about normal adolescent development, implicit racial bias, and contemporary relationships between black youth and the police. This Article explores

Alyson A. Grine & Emily Coward, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES (2014)

<https://www.sog.unc.edu/publications/books/raising-issues-race-nc-criminal-cases>

- This is a resource for public defenders and appointed counsel who represent poor people accused of crimes.
- The book describes the ways in which considerations of race may improperly enter into the conduct of a criminal case, and gathers, organizes, and analyzes the law on the intersection of race and the criminal justice system.
- Ten chapters cover a variety of topics, such as:
  - stops, searches, and arrests;
  - eyewitness identification;
  - pretrial release;

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- selective prosecution;
- composition of grand and trial juries;
- trial issues; and
- sentencing

TANYA E. COKE, *CRIMINAL JUSTICE IN THE 21<sup>ST</sup> CENTURY: ELIMINATING RACIAL AND ETHNIC DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM* (2013).

- This is a conference report outlining discussions that took place at a conference attended by criminal justice system stakeholders on overcoming racial disparities in the criminal justice system, including the role of the defender in doing so.

Robin Walker Sterling, *Raising Race*, 04/2011 *The Champion* 24 (2011).

- Walker Sterling outlines the issue of DMC and the ways defense attorneys can challenge DMC at various stages throughout a case including through motions practice, jury instruction, and the use of cultural experts.

*Justice for All: Litigating Race Issues to Protect Equal Justice in Kentucky*, 30 *THE ADVOCATE* 1 (2008).

- This is a series of essays on how lawyers can raise the issue of race throughout a case, specifically in the context of Kentucky.
- Although this article frames the issue under Kentucky law, the ideas are applicable to other jurisdictions.

### **LAW REVIEW ARTICLES ON IMPLICIT RACIAL BIAS (Note: See Annotated Bibliography on Implicit Racial Bias for Empirical Studies)**

Kristin Henning, *Race, Paternalism and the Right to Counsel*, 54 *AMER. CRIM. L. REV.* 649 (2017)

- Highlights the importance of race, class, ethnicity, and culture in developing and maintaining a client-directed, ethical defense practice as required by the Rules of Professional Conduct, including ABA MRPR 1.14 (requiring lawyers to maintain a normal attorney-client relationship even when representing minors or other clients of diminished capacity).
- Argues that defenders must pay special attention to the ways in which implicit racial bias further complicates the tension between zealous client-directed advocacy and the best interests of the child.
- Contends that while paternalistic advocacy is often driven by majority-dominated attitudes and norms, a culturally competent and ethical advocate

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must identify and respect the diverging worldviews and life experiences that shape the client's stated interest. It is the lawyer's responsibility to avoid misconstruing racial, economic, and cultural differences as evidence of a "diminished capacity" that would allow the lawyer to abrogate his ethical obligations to the child. A client-centered defense recognizes that children are often better equipped than the lawyer to make the personal and legal decisions that best suit their cultural, familial and religious outlook.

Robin Walker Sterling, *Defense Attorney Resistance*, 99 Iowa L. Rev. 2245 (2014).

- Argues that because of their access to defendants and their ethical mandate to represent their clients' expressed interests, defense attorneys are uniquely positioned to be a weapon in the fight against invidious race bias in the criminal justice system.
- Identifies barriers defender's face in challenging racial discrimination in the criminal justice system, including judicial resistance to zealous defense advocacy.
- Suggests strategies defenders can use to raise racial bias in individual criminal cases.

Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 Yale L.J. 2236 (2013).

- Argues that better lawyers will not help the system become less racially disproportionate and that the right-to-counsel movement may have made things worse for racial minorities
- He argues the problem is not good lawyers but rather what is criminalized and how the laws are enforced
- "Ironically, the wide availability of counsel may make racial disproportionality worse. Because whites are relatively more affluent than people of other races, and because they experience less intergenerational poverty and economic segregation, defense counsel may be able to get white defendants and their families to do things that encourage favorable exercises of discretion in the processing and disposition of criminal cases. In contrast, African-American defendants often lack family or community resources or demographic characteristics that engender sympathy from judges and prosecutors and which can be employed by energetic counsel. As a result, more widely available, high-quality counsel may exacerbate existing racial discrimination and disadvantage by operationalizing them in court."

Jonathan Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. Legis. & Pub. Pol'y 999 (2013).

- Rapping spends the article talking about IRB, how each actor in the system is affected by IRB (even defenders), and discusses steps that defenders can take to combat IRB, including:
  - o Raising IRB in motions practice (using the Fourth Amendment as an example);

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- Educating jurors on IRB during voir dire (he goes into a lot of detail about how to do this and how to use the information to pick jurors receptive to addressing their own IRB);
- Educating jurors during trial;
- Educating judges of their own susceptibility through sentencing memoranda on IRB and sentencing data for their particular jurisdiction.
- Encourages defenders to not be discouraged
- Discusses the defender’s role as “cause lawyer”

L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626 (2013).

- Points out that PDs are also affected by IRB
- Goes through each part of defender triage to discuss how IRB might affect the defender’s decision at each juncture:
  - Evaluating evidence: may cause defenders to interpret evidence as more probative of guilt and assume guilt when the client’s features align with stereotypes and the charge;
  - Determining the credibility of the client in deciding whether to pursue investigation;
  - Interpreting the client’s behavior and subconsciously influencing the attorney’s behavior when interacting with the client; and
  - Accepting higher sentencing recommendations without advocating or investigating because of the dehumanization of black clients.
- They recommend:
  - Changing office culture by rewarding a commitment to fighting IRB, values-based hiring and hiring a diverse group of defenders;
  - Developing objective triage standards which do *not* emphasize perception of factual innocence and are based on objective measurables (custody status or speedy trial date);
  - Adopting accountability mechanisms (such as checklists) and collecting data on defender decisions;
  - Educating defenders on IRB; and
  - Encouraging defenders to develop “intentional goals” that have been shown to help fight IRB (such as “if when I receive my discovery packet my client is black, I will think of my client as innocent.”)

Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012).

- A team of legal academics, scientists, researchers, and a sitting federal judge wrote an article about what to do about IRB in the courtroom
- Covers research on implicit bias, and follows the trajectory of a criminal defendant to outline places where IRB might influence decision-making; point out that defense attorneys have similar implicit biases (pointing to the Eisenberg & Johnson article)
- They recommend:

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- Fighting IRB itself by:
  - Putting up positive images in the courthouse;
  - Educating judges about their own susceptibility to IRB, encouraging them to take their time when making decisions and encouraging them to collect data on their own decisions; and
  - Jury selection and education (including encouraging them to actually talk about race instead of pretending to be color blind).

Andrea Lyon, *Racial Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 Seattle U. L. Rev. 755 (2012).

- This article argues that all people have racial biases, including defense attorneys
- She argues that defense attorneys' biases can impede their ability to communicate with and respect their clients (using pretty blatant examples of lawyers disrespecting their clients) as well as can lead defense lawyers to pick jurors just based on their race

Vanessa Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 Law & Hum. Behav. 413 (2011).

- Empirical research that measured the plea recommendations defense attorneys encouraged their clients to accept, especially since pleas are how most people end up resolving their cases
- Findings indicated that the pleas attorneys felt they could obtain with a minority client contained higher sentences with a white client and were significantly more likely to include some jail time. Reasons for the disparate recommendations were not due to increased perceptions of guilt with the minority client, nor to perceptions that the minority client would fare worse at trial.
  - Found that Florida attorneys felt that an African American client would fare poorly at trial, which informed their plea decisions.

Lorenzo Bowman et al., *The Exclusion of Race from Mandated Continuing Legal Education Requirements: A Critical Race Theory Analysis*, 8 Seattle J. for Soc. Just. 229 (2009).

- Points out that CLE requirements in most states do not require education on bias and especially racial bias.
- Argues that this is a tacit acceptance of the great racial disparity in our criminal justice system using a Critical Race Theory lens.
- Recommends:
  - Each bar undergo a needs assessment on the nature of the bias in their jurisdiction;
  - CLE requirements should require 3 hours per reporting period on race; and

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- States should establish a task force to track the impact of anti-bias training.

Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev. 1539 (2004).

- Had capital defense attorneys take the race IAT, and they displayed similar levels of implicit bias as the rest of the population.

Eva Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 Geo. J. Legal Ethics 1 (1994).

- Unlike the other articles, this article predates most IRB research.
- Points out the moral conflict of utilizing stereotypes and biases to further a client's case (arguing a woman's unreliability in a domestic violence case, playing up a client's race (when white) or background to a prosecutor to elicit a better plea deal) and the harm perpetuating stereotypes causes.
- Also discusses the dilemma in the context of ethics rules, as well as how a clinician should deal with the issue with students.

### CRITICAL RACE THEORY AND LAWYERING IDENTITY

Anthony Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Lawyering*, 114 Yale L.J. 1459 (2005).

- Critiques classic liberal lawyering and traditional clinical legal education for ignoring identity politics occurring between the client and lawyer and at the expense of the client.
- "Historical stereotypes of caste and color situate the racial status of the accused and the accuser in law, culture, and society. Defenders cull such stereotypes to mount color-coded defenses in their pretrial tactics (venue transfer) and trial strategies (jury selection). Normative degradation circulates throughout the defender discourses of constitutional, statutory, and common law innocence and excuse. Directly and inferentially, those discourses naturalize color-coded stereotypes of racial inferiority."
- "Antisubordination principles offer remedial regulation of racialized criminal defense practices. Advancing beyond Ely-derived norms of political access and minority equality, these principles suggest a race-conscious, community-regarding ethic of political empowerment and minority collaboration."

Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 Tex. L. Rev. 1585 (1999).

- "Alfieri wants to completely transform criminal defense lawyers from defenders of individuals accused of crime, a difficult enough enterprise, to protectors of the community.<sup>34</sup> He wants to transform the relationship of the defense lawyer to client from one of unmitigated devotion to a sort of

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tempered fondness, provided this fondness does not get in the way of Alfieri’s formulation of racially sensitive lawyering.”

### SPECIFICALLY ON REPRESENTING CHILDREN

Annette Ruth Appell, *Representing Children, Representing What?: Critical Reflections on Lawyering for Children*, 39 Colum. Hum. Rts. L. Rev. 573 (2008).

- Includes a brief section on “Disparities Between Children’s Attorneys and the Clients they Serve” referring to attorneys in both the welfare and delinquency systems, noting that “an attorney’s lack of familiarity with a child’s culture and social systems may, in turn, lead the attorney to discount the child’s clearly stated preferences. Thus, attorneys may not understand the consequences of the various available outcomes or decisions they may make. For example, the attorney may not be aware that a counseling center to which a child is referred is in rival gang territory. Similarly, children’s attorneys may not see or understand factors contributing to or even causing other legal problems relating to housing, employment, immigration, or other family issues.”
- “Both the juvenile justice system and child welfare system view families of color, particularly African-American families, more negatively than White families, thus further transplanting state norms for family norms. “The system that results stubbornly reflects, and then acts on, race-based conceptions of deviance and gender-based perceptions of appropriate behavior that all too often reinforce racial, economic, and social hierarchies.” Whether children’s attorneys challenge this hegemony depends on the attorney’s self-awareness, knowledge of these forces, and recognition that this punitive, ungenerous system itself is the product of well-intentioned advocates who sincerely seek to help children. If attorneys do not carry this knowledge and are unable to navigate the precarious balance among identifying, over-identifying, and failing to identify with the client, then even well-meaning children’s attorneys are likely to promote state norms over those of their child client and his or her family and community.”

*Report of the Working Group on the Role of Race, Ethnicity and Class*, 6 Nev. L.J. 634 (2006).

- “This Working Group considered the role of race, ethnicity, and class (hereinafter “REC”) in the attorney-client relationship. Participants recognize that, in American society, children in the child welfare and juvenile justice systems are disproportionately poor and of color while the lawyers for those children and the decision makers are overwhelmingly white and middle class. This racial disparity may affect attorney client communication, perpetuate stereotypes, foster distrust of the legal system and contribute to bad outcomes for the affected children and families. Issues related to REC, which often are ignored both in the attorney client relationship and more

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- generally in the administration of justice, must be identified, confronted, and resolved.”
- Recommends for example:
    - The rules of professional responsibility should be revised to create model rules that (1) attorneys shall consider the REC of the client in the attorney client relationship and representation and (2) to require a finding on the record that the court has considered the child’s REC and environment prior to imposing any conditions on that child.
    - There should be a mandatory CLE requirement for all lawyers involved in children’s advocacy and justice to identify and eliminate REC bias in the legal profession.
    - Children’s advocates should engage in coalition building, utilize research on demographics and discrimination, community organize, and advocate for legislative changes.
    - Children’s attorneys should dedicate time to get to know their client, should visit their clients in their own environments; should interview significant people in their school and community and become familiar with the client’s cultural environment.
    - Further study should be done on “how the lack of basic common cultural and social cornerstones affects the quality of representation for poor youth and youth of color.”

Judith Cox & Derrick Bell, *Addressing Disproportionate Representation of Youth of Color in the Juvenile Justice System*, 3 J. of the Cent’r for Fam., Child. & the Courts 31 (2001).

- Suggests the defense bar can affect DMC by:
  - Providing bilingual and bicultural services;
  - Tracking cases by ethnicity, and
  - Ensuring adequate staffing levels of attorneys and investigators to allow for thorough preparation of cases.
  - Defense firms can go beyond legal advocacy by employing “defense advocates” or social workers who work along with attorneys and actively develop pre- and post-adjudication programs and release plans..
  - The defense must understand the risk-based detention scale and actively review the initial scoring of the instrument by probation.
  - Defense advocates ensure that family members are present at hearings and that they understand their role in supervising their children.
  - Defenders should track family contacts, plea agreements, and other service indicators by ethnicity.
  - Defense counsel can actively participate in the establishment of risk-based detention criteria and a continuum of administrative sanctions for probation violations.

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### “CULTURALLY COMPETENT” LAWYERING

Carolyn Copps Hartley & Carrie J. Pertrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work & the Law*, 14 Wash. U. J.L. & Pol’y 133 (2004).

- “Therapeutic jurisprudence is an interdisciplinary approach to law that asks how the law itself might serve as a therapeutic agent without displacing due process.”
- This article includes a nice description of Tom Tyler’s work and the relevance of cultural competence on theories of procedural justice.