

JUDICIAL RACISM¹

Chris Cunneen

WHY TALK ABOUT JUDICIAL RACISM? DOESN'T THE EMPIRICAL EVIDENCE suggest that the judiciary treats Aboriginal and non-Aboriginal offenders alike? In fact, some academics and criminologists have even argued that the judiciary treats Aboriginal people favourably. Yet such a claim of equal (or indeed favourable) treatment seems contrary to Aboriginal commonsense about how the justice system works. Indeed, there is a renewed urgency to question every aspect of the operations of the criminal justice system given that Aboriginal imprisonment has continued to rise since the Royal Commission into Aboriginal Deaths in Custody. In some states like New South Wales there are actually more Aboriginal people dying in custody now than there were during the period which the Royal Commission investigated (Cunneen 1993). Many people believe (and the evidence would suggest) that the situation in some areas is worse now for Aboriginal people, vis à vis the criminal justice system, than it was prior to the Royal Commission.

There is clearly a widespread and long-running view that judicial racism is a problem. It is a view that is held by many Aboriginal people. Both Paul Coe (1980) and Pat O'Shane (1980) referred to the role of the judiciary in supporting police and as bearers of racist attitudes themselves during a conference which the Sydney University Institute of Criminology organised in 1980. Coe referred to the concern of Aboriginal people that judges and magistrates were not representative of the community and that they were completely out of touch with Aboriginal people, their way of life and their communities. One might question the extent to which the judiciary is either more representative of the community and/or educated in relation to Aboriginal issues twelve years after Paul Coe made the observation. Pat O'Shane related incidents from a trip she had made in western NSW with the then Attorney-General and the Chairperson of the Anti-Discrimination Board during 1979 to investigate complaints made by Aboriginal people about police and magistrates. It was during this period that a NSW magistrate, Mr Quin, referred to Aboriginal people in Wilcannia as constituting a "pest race".

How far have we gone from the racist stereotyping of magistrates like Quin a decade ago? Some public comments by the recently retired NSW State Coroner, Kevin Waller, suggest that such stereotyping is still in operation. Writing in the

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Sydney Morning Herald (13 March 1992, p. 11), the ex-State Coroner conducted a harangue against Aboriginal people and a former Royal Commissioner into Aboriginal Deaths in Custody, the Hon Hal Wootten. His public attack on the Royal Commission sought to minimise the dimensions and tragedy of deaths in custody. Among the more overt examples of racism, Waller finished his article with the following statement:

As a means of earning respect among non-Aboriginal people, dare I suggest that Aboriginal leaders begin making demands for better education, health and employment, and soft-pedal on the handouts (Waller 1992, p. 11).

The author suggests that this is an example of racist stereotyping for a number of reasons. Firstly, it portrays Aboriginal people as "in need of earning respect". In a single phrase this statement obliterates invasion, colonisation and genocide. It puts Aboriginal people back on the defensive as the cause of their own oppression. Secondly, to suggest that Aboriginal "leaders" should "soft-pedal on handouts" and instead make demands for better education, health and so on ignores completely the work of community organisations like the medical services, the legal services, child care agencies and educational consultative groups as well as those Aboriginal people working directly in ATSIC and state departments.

It is little wonder then that there remains concern about the issue of racism among judicial officers. During 1991 the Sydney University Institute of Criminology held another conference involving Aboriginal participants (Cunneen 1992). Two Aboriginal speakers again raised the issue of judicial racism. Bill Craigie (1992) from the National Aboriginal and Islander Legal Service Secretariat (NAILSS) noted that one of the principal failings of the Royal Commission was that it did not pay sufficient attention to the institutional racism of the criminal justice system. In particular, "the National Report failed to address the whole question of judicial bias. The question was not even raised for discussion, let alone for recommendations" (Craigie 1992). Pat O'Shane (1992) also made some pertinent and perceptive comments on racism. She noted that "police and prison officers have been the focus of most attention; but it is well to keep in mind judicial officers". O'Shane noted that there had been few, if any, follow-up research studies on the racism of judicial officers originally identified by Eggleston. Eggleston (1976) had argued that racist attitudes were common amongst magistrates and justices of the peace. She also argued that ignorance of the law, and a tendency to believe any police evidence, were important factors with magistrates and justices of the peace dealing with Aboriginal people at a summary level. O'Shane noted that while there continued to be the occasional and outrageous public example of the judiciary displaying prejudice against Aboriginal people, "there seems to be an assumption that judicial officers, by reason of their status, are not likely to be racist" (O'Shane 1992, p. 6). That assumption will be explored further in this paper.

Racism, Bias and Discrimination

Often discussions concerning the judiciary and sentencing use words like bias, discrimination and racism without defining the terms or noting the differences between such terms. It seems that we need to make some distinctions between racism and bias or discrimination, and also between direct and indirect racism. The terms bias or discrimination usually refer to unfair or unequal treatment. In relation to the judiciary, the terms have usually been taken to refer to directly observable differences in sentencing outcomes based on Aboriginality. Although the distinction between direct and indirect discrimination is prevalent in anti-discrimination legislation, such a

distinction does not appear to have been taken up when considering judicial decisions. Racism is a far broader category implying the processes through which one group of people are deemed to be essentially different and lesser from those who dominate. It is also a systematic set of both ideas and practices which explain and perpetuate racial division (Cowlishaw 1988, pp. 245-84). Racism need not be consciously articulated as a policy or personal belief—it may well be inherent in the structural and routine processes of an institution. It can be thought of in terms of direct and indirect practices. Racism is clearly one category which can be used to explain why so many Aboriginal and Torres Strait Islander people are processed by the criminal justice system.

Feminist approaches to the law can contribute to an analysis of the important conceptual differences between discrimination and racism. Carol Smart (1990) has argued that early feminist work had a major objective in empirically challenging the idea of an objective judiciary, that is in showing that women were discriminated against. The results of those empirical studies were ambivalent.

One can argue that there have been at least some similar experiences in terms of analysing race/ethnicity and the courts with various studies showing conflicting results (*See* for instance Gale, Bailey-Harris & Wundersitz 1990, pp. 9-14, for a discussion of the literature). Smart has argued that the belief that racism or sexism could be established through a few simple criteria was overly simplistic and misleading. Firstly, the focus on discrimination or bias was caught within an "equality paradigm" which maintains the centrality of the dominant. In the case of women, an equality paradigm holds men as the standard against which the other is judged. Similarly an "equality paradigm" for Aboriginal people maintains the centrality of non-Aboriginal people and a non-indigenous justice system. The standard against which Aboriginal people are being judged is the treatment of non-Aboriginal people. In other words non-Aboriginal people and the dominant justice system remain in a position of centrality which closes off the possibility that different treatment or indeed a different system is what is required. Secondly, there is the presumption that the law is itself a neutral object which is outside the actions of individuals who might apply it in a discriminatory fashion. Smart has argued that this misconstrues the nature of law and the nature of power. If law is seen as part of the relations of power, then it is appropriate to

consider it as part of the nature of oppression and part of the system which maintains race relations.

Discrimination

One attempt to look at judicial bias within a positivist framework has been the work of John Walker (1987). Walker's approach has been to statistically analyse sentencing outcomes by Aboriginality. He describes the level of Aboriginal over-representation among prisoners nationally, and argues that:

far from being the result of a blatantly biased system, the observed over-representation could actually be the result of accumulations of relatively minor disadvantageous selection processes (Walker 1987, p. 110).

Such a position is similar to that argued by Gale, Bailey-Harris and Wundersitz (1990). Walker isolates "prior record" as of importance, and cites the National Prison Census figures that 53 per cent of non-Aboriginal remandees had previously been imprisoned compared to 77 per cent of Aboriginal remandees (Walker 1987, p. 110).

Based on the 30 June 1984 Prison Census, Walker argues that the level of over-representation is not the same across offence types and that Aboriginal people are most over-represented in the categories of good order, driving offences, administrative offences, assault and other offences. They are relatively under-represented in robbery, extortion, fraud, unlawful weapons, and drug offences (Walker, 1987, p. 111).

Walker also analyses the average length of sentences and demonstrates that although 81 per cent of Aboriginal prisoners had previously been in prison compared to 57 per cent of non-Aboriginal prisoners, the average length of sentence for an Aboriginal prisoner was 42.6 months compared to 74.9 months for a non-Aboriginal prisoner. Walker argues that the shorter average prison sentences for Aboriginal people "cannot be entirely attributed to different types of offences committed by Aboriginal people", nor to "the relative youthfulness of Aboriginal offenders or to any differences in sentencing practices between States" (Walker 1987, p. 111).

He concludes:

that the courts cannot be held to blame for the high rates of Aboriginal imprisonment. On the contrary, they appear to be particularly lenient to Aboriginal offenders, especially when one considers that prior imprisonment record is regarded as a key factor in sentencing, tending towards longer sentences. In short the criminal justice system is not likely to be responsible for high Aboriginal rates of imprisonment—it may be merely responding logically and even sympathetically to the offending pattern of Aboriginals (Walker, 1987, p. 114).

Walker apparently demonstrates an absence of judicial discrimination or bias in sentencing. However, this is not the same as demonstrating that "the criminal justice system is not likely to be responsible for high Aboriginal rates of imprisonment" as he concludes. This claim, of course, ignores the role of police practices in relation to targeting, arrest, bail conditions, and so on, all

of which impact on the crucial question of why Aboriginal people appear before the courts in the first place and how they obtain criminal records. In other words there is a significant slip in Walker's argument from demonstrating the apparent lack of judicial discrimination to the assumption that rates of imprisonment reflect offending patterns. The courts, without displaying any overt bias, may simply be legitimating particular policing practices. There are also the additional questions raised earlier (by Coe & O'Shane) concerning the judicial officer's attitudes to police evidence and their own assumptions about Aboriginal people.

It is significant that other authors who adopt a similar explanation concerning discrimination in the juvenile justice system are reluctant to state that the statistical results actually indicate so much about processes which occur prior to the court stage. Gale and her colleagues argue that there is an accumulation of disadvantage in the system deriving from the original police decision to arrest (Gale et al. 1990). As the authors argue, the variations in charge patterns may indicate police discrimination at the pre-arrest stage.

To be critical of Walker's conclusions is not a rejection of empirical work per se. Indeed empirical studies on the sentencing of Aboriginal and non-Aboriginal people are fundamental. Such studies are particularly important if we remember that the vast majority of court cases are dealt with before a magistrate at local court level (over 90 per cent), and the vast majority of those cases are dealt with by guilty plea (over 80 per cent). In other words the overwhelming bulk of court work involves magistrates sentencing offenders who have pleaded guilty. The magistrates are the final legitimating point in a process of criminal justice. Their function is not to decide the outcome of a case, but rather to impose penalty which in around two-thirds of cases will be a fine. It is also worth noting that in many cases the imposition of a fine for Aboriginal people may be the equivalent of imprisonment because of the inability or refusal to pay.

An understanding of how and what the judiciary decides may be fundamentally important in the functioning of a system which is institutionally racist. At this level the processes of an indirect racism need to be analysed. Given that Aboriginal people are most over-represented in appearances for offences which are more minor, magistrates may be instrumental in a role which accepts, legitimates and enforces the basis of police intervention.

Racism

A very different approach to the question of judicial racism was that provided by McCorquodale who examined the "extent to which a general judicial ignorance of Aboriginal history, culture and customs, and a corresponding judicial acceptance of an Aboriginal stereotype, have created injustice and discrimination for the Aboriginal" (1987, p. 31). McCorquodale examined civil and criminal cases across all Australian jurisdictions. In relation to civil cases he concluded that:

With the obvious exception of land rights cases, the civil actions discussed show a judicial predisposition until very recently to accept an Aboriginal stereotype painted in negative terms, culturally, socio-economically or as enshrined in law. If legislation itself discriminated massively and specifically against Aboriginals, it would be surprising indeed were judicial officers to do otherwise (1987, p. 43).

In relation to criminal cases McCorquodale argued that:

In nearly all jurisdictions the courts seem to have accepted that there is a continuum which distinguished Aboriginals in various stages of "sophistication" from a presumably more homogeneous white or non-Aboriginal society (1987, p. 43).

McCorquodale argued that in the field of sexual mores and public behaviour "there is a pronounced judicial perception that Aboriginals are different from whites in a way that disadvantages Aboriginals" (1987, p. 43).

McCorquodale also discusses some of the historical aspects of racism in the judicial system including terra nullius, trial procedures and punishment. It is not difficult to point out the traditions of judicial racism among members of the higher courts in Australia as their decisions are reported. Such racism can be seen at the grand level of the "big lie" of terra nullius which became firmly imbedded in the nation's history.

Many historical and political accounts of the interactions between Aboriginal people and the colonising society demonstrate the way in which racism structured the decision-making processes of the judiciary. For example Markus (1990) gives an account of Judge Wells from the Northern Territory Supreme Court during the 1930s. Markus states that Wells regarded Aboriginal people as of inferior intelligence and that white standards were not generally applicable to Aboriginal people. In addition "in Wells' view there was no need for a judge dealing with Aborigines to have a detailed understanding of their society, for in the case of simple, primitive people, the motivation for actions was transparent to the intelligent white observer" (Markus, 1990, p. 115). In cases involving assaults by police on Aboriginal people, Wells found in favour of the police, even in cases where there was considerable concern by white officials about police behaviour. In relation to punishment for Aboriginal people, Wells believed that flogging was appropriate for minor offences and execution for major offences. In the case of Tuckiar, the High Court unanimously overturned the decision in a case heard by Wells after he had sentenced Tuckiar to death. Wells openly advocated that "the aboriginals [sic] are getting cheekier. . . and the only punishment aboriginals appreciate is a flogging" (Markus 1990, p. 119).

Of course such attitudes were not uncommon among white Australians. The Northern Territory was known at least until the 1940s as having a tradition of juries acquitting whites for the murder of Aboriginal people. Indeed in the Tuckiar case the High Court overturned the decision because Wells had misdirected the jury. What makes Wells' attitude to Aboriginal people important was not whether it was common or not, but rather the fact that he was a Northern Territory Supreme Court judge in a position of power to implement his ideas.

Judicial Racism Today

It is not difficult to point to cases which one might argue to be more contemporary examples of judicial racism. Queensland has provided some recent and notorious examples. In the case of David Barry, a seventeen-year-old Aboriginal youth was

sentenced to three years imprisonment at a time when his life expectancy was two years as a result of AIDS. There were a number of details about the sentence, including the failure to consider Barry's condition as a mitigating factor, which gave rise to an appeal against the severity. The Queensland Court of Criminal Appeal rejected the application and upheld the sentence. McPherson J, with Ryan and Moynihan JJ in agreement, referred to Barry's condition as "We understand that he has also been informed at the beginning of 1990 that he has the HIV condition and that he will die from it. He is a person of low intelligence". As Behrendt (1992, p. 27) has noted "the ability of McPherson J to pass judgment on David Barry's intelligence must be questioned. It would be interesting to see by what criteria such a determination was arrived at and what possible relevance it had to the issues in question". Indeed the judges' opinion on Barry's intelligence fits within a tradition of non-Aboriginal authorities assuming to be able to assess (from a position of superiority) the intelligence of Aboriginal people.

The Queensland case of Kelvin Condren also provides examples of the way in which racism may define judicial modes of thinking. Condren claimed that he was assaulted and verbally abused by police. He eventually made admissions in relation to a murder. He was sentenced to life imprisonment in 1984. The case caused considerable controversy and the conviction was finally quashed by the Court of Criminal Appeal after intervention by the High Court. However, in a previous application to the Court of Criminal Appeal evidence pointing to Condren's innocence had been rejected. The mode of reasoning in that rejection is illuminating. A socio-linguistic expert Dr Eades had presented evidence to the court that the speech patterns in the police record of interview were inconsistent with the type of speech patterns used by Aboriginal Australians. Eades' evidence was rejected by the court on a number of grounds. However, Ambrose J questioned the Aboriginality of Condren and his mother. Such an argument was used to undermine the validity of Eades' evidence by claiming that Condren was "part-Aboriginal" and therefore not within the group described by Dr Eades (*see* Caruana 1989; & Masters 1992). In this case the appeal judge assumed the fundamental right to determine *who is Aboriginal*. Ultimately the judges were also legitimating the police practices of verballing and violence.

In Western Australia, one can point back to comments by Furnell in 1974 as the Royal Commissioner into Aboriginal Affairs in that state when he claimed that a "warning to a European drinker is far more effective than a similar warning to an Aboriginal in the same condition" as a rationalisation for the arrests of Aboriginal people for drunkenness (cited in Stafford 1991, p. 41). Furnell also went on to discuss Aboriginal character including those who "having fallen into a state of idleness and indolence, the victim more often than not becomes further worthless by over indulgence in all the vices known

to man" (cited in Tatz 1979, p. 3). More recently one might consider the judgment of the Full Court of the Western Australian Supreme Court in relation to Bropho and the redevelopment of the Swan Brewery site. Churches (1992) has argued that the court has further contributed to the dismemberment of Aboriginal cultural beliefs through its inability to recognise and understand Aboriginal spiritual attachment to particular areas. Churches (1992, p. 12) describes the judgment as an example of "casual judicial ignorance".

In South Australia, Charles (1991) has reviewed a number of recent decisions involving Aboriginal people in the appellate courts. He states that:

The colonial perception of Aboriginal people as either "noble savage" or "fallen from grace on the way to cultural extinction" still underlies some of the judgments of the South Australian Supreme Court in their sentencing of Aboriginal people (Charles 1991, p. 90).

Charles argues that *Wanganeen v. Smith* (1977, 73 LSJS 139), a major reported case on sentencing Aboriginal people, has continued to influence judicial thinking. *Wanganeen v. Smith* involved an appeal against a sentence for disorderly behaviour. The court in its judgment implicitly accepted that assimilation was a desirable outcome, and indeed the law had a role in enforcing such assimilation. The judgment stated:

Where an aboriginal native has established himself in the more general community and intends to remain there and to work side by side with other members of that community, he must accept the ordinary standards of behaviour expected of his fellow citizens (cited in Charles 1991, p. 90).

The judgment can be criticised for its acceptance of assimilation and for its outmoded colonial language; however, Charles also notes that the court established a distinction between "Tribal Aboriginal Natives", "Semi-Tribal Aboriginal Natives" and "Urban Aborigines". The court maintained that only "tribal Aborigines" were entitled to special considerations. Charles maintains that the Supreme Court in a number of sentencing appeals has continued to perpetuate the distinction between "tribal" and "urban". He cites a number of South Australian Supreme Court decisions between 1986 and 1989. In *Roberts v. Young* it appears that the notion of "semi-tribal" is associated with criminality, that the supposed process of "detrribalisation" is somehow "a kind of fall from grace into criminality" (Charles 1991, p. 92). In one case, *Leech and Lovegrove v. Milera*, Prior J applied the categories of "tribal", "semi-tribal" etc to justify an increase in the original sentence on the basis of the respondent not being a tribal Aborigine (Charles 1991, p. 94).

What is Aboriginality in the Minds of the Judiciary?

The previous discussion draws attention to the fundamental issue of who defines, and what is Aboriginality. The very concept of Aboriginality held in the minds of the judiciary may be racist. Aboriginality may be conceived of as a thing, something which can be measured and evaluated; a thing which individuals can be measured against and declared to be lacking. A thing against which individuals can be declared either "true" or "false", or indeed partly true or false depending on the context. This view sees "degrees" of Aboriginality. Keefe (1992, p. 95) has argued that in such a view, "Aboriginality is compared to a body of reconstructed facts, concepts and

traditions, objectified by the label of "traditional". In such views Aboriginality is supposed by mainstream academic and legal thought to be confined to the fixed status of an object.

Keefe has argued that this notion of culture as an object is used to determine what is Aboriginality. Within this scheme, urban Aboriginal culture is found to be lacking (1992, p. 95). Such a view is profoundly conservative and racist. Most importantly the judiciary plays a fundamental role, at least in relation to the criminal justice system, in determining what constitutes Aboriginality and which individuals possess adequate amounts of it. It is a view which follows in the tradition of the earlier "protection" legislation which also legally determined which individuals were Aboriginal. Such determinations of Aboriginality are implacably opposed to notions of self-determination. They search for a western-defined authenticity of indigenous culture which is frozen in time, and which is then used within the legal system to deny Aboriginality, to deny difference and to legitimate intervention based on a spurious equality.

The Royal Commission into Aboriginal Deaths in Custody and Judicial Racism

By and large it is an accurate observation that the Royal Commission ignored judicial racism as an issue. However, there were a number of issues relating to the sentencing of Aboriginal people which were considered. Elliott Johnston noted that in certain circumstances Aboriginal people may receive longer sentences for the same offence than non-Aboriginal people (Johnston 1991, vol 1, p. 217). It was clear from evidence before the Commission that one particular circumstance affecting sentences was the use of justices of the peace in Western Australia. Commissioner Pat Dodson (1991) noted with alarm the attitudes of justices of the peace concerning Aboriginal people. At various Royal Commission-organised conferences, Aboriginal people were referred to as "primitive", "coloured people", "natives", "boys" and "girls" (Dodson 1991, vol 1, pp. 111, 116). Dodson noted that these "paternalistic attitudes and derogatory comments are indicative of a deep seated ignorance" which reflected the "deep seated and entrenched racism inherent in the social fibre of the State of Western Australia" (1991, vol 1, pp. 116-17).

Sentencing by justices was also scrutinised by Commissioner Dodson who noted that justices had little respect for the use of community service orders. Some justices stated that they sentenced Aboriginal people to seven to twenty-one days imprisonment for drunk offences to "dry them out" (Dodson 1991, vol 1, p. 125). Dodson reiterated Eggleston's concern from the mid 1970s concerning prejudice and excessive sentences. She had suggested a system of review by magistrates. Dodson noted that in 1990 this review mechanism had not been established and that magistrates became aware of sentencing incongruities on the part of justices by chance. One case which was cited by the Royal Commission referred to a justice imposing a sentence which exceeded the maximum permitted by law (Dodson 1991, vol 1, p. 134).

Commissioner Dodson noted that some justices saw their role as useful for the police. The justices relied heavily on Clerks of the Court because they purportedly had more legal knowledge. At the time of the Royal Commission in 89 courts in Western Australia the function of the clerk of the court was administered by a police officer (Dodson 1991, vol 1, p. 113). Training for justices was noted to be inadequate and voluntary. There was no special training in relation to Aboriginal issues.

The Royal Commission into Aboriginal Deaths in Custody conducted a special survey of national corrections during April 1989 to collect data on all *receptions* of prisoners during the month. The focus on receptions was to counteract the limitations implicit in census data which under-represents persons serving shorter sentences. Two points emerged from the survey which are relevant to current discussions on judicial racism. The national survey revealed that 39.5 per cent of Aboriginal prison receptions that month were for fine default. Thus almost four out of every ten Aboriginal people that entered Australian prisons in that particular month did so for failing to pay a fine. Furthermore, some 20 per cent of all prisoners received nationally that month were Aboriginal people. Such a percentage was considerably higher than the usual 14 to 15 per cent indicated by census surveys (Johnston 1991, vol 1, pp. 207-8).

The high proportion of Aboriginal people entering prison because of fine default raises serious questions in relation to the level of fines imposed by judicial officers. Commissioner Muirhead (1988) had previously recommended that legislation should be introduced which placed a "statutory duty upon sentencers to consider a defendants means to pay in assessing the appropriate monetary penalty" (Muirhead 1988, p. 24). This in fact was recommendation two of the Interim Report and followed immediately after the recommendation requiring that imprisonment be a sanction of the last resort. Certainly it is apparent from the Royal Commission's own national survey that the proportion of Aboriginal people entering gaol for fine default is twice as high as the proportion for non-Aboriginal people (Johnston 1991, vol 1, p. 207, Table 7.6).

Racism is Gendered: Aboriginal Women and the Courts

Any discussion of judicial racism must analyse the way in which such racism is also gendered in its perspective and application. We know that Aboriginal women make up a greater proportion of those in prison and police custody than do Aboriginal men. Aboriginal men comprise 14 per cent of all male prisoners. However, Aboriginal women comprise 16 per cent of all female prisoners. Similarly Aboriginal men comprise 26 per cent of all males in police custody, but Aboriginal women comprise 50 per cent of all women in police custody (Johnston 1991, vol 1, p. 194). We also know that Aboriginal women are victims of family violence and abuse. It is important then to consider how Aboriginal women are treated by the courts as both offenders

and victims, and to explore how issues of racism and sexism become intertwined.

Let us begin by looking at the issue of Aboriginal women as offenders and their over-representation in sentenced matters. If we take Western Australia as an example, Aboriginal women made up 67 per cent of all sentenced female prisoners during 1989, compared to Aboriginal men making up 49 per cent of all sentenced male prisoners (O'Dea 1991, vol 1, p. 163, *See* Table 4.9 Major Offence of Each Sentenced Prisoner Received in Western Australia Year Ending 30 June 1989). In addition to Aboriginal women being proportionately more over-represented than Aboriginal men, there were also significant differences in the reasons for imprisonment between Aboriginal women and non-Aboriginal women.

Some 20 per cent of Aboriginal women sentenced to gaol were there for offences related to public order including drunkenness, disorderly conduct and other good order offences. However less than 3.5 per cent of non-Aboriginal women were in prison for similar offences.

Aboriginal women were also more likely to be in prison for assault than non-Aboriginal women (12.2 per cent compared to 1.1 per cent). Conversely 32 per cent of non-Aboriginal women were in gaol for fraud and drug offences, compared to 2.5 per cent of Aboriginal women.

It could be argued that such figures simply represent different offending patterns of Aboriginal and non-Aboriginal women. However, one fundamental question which needs to be addressed is why are Aboriginal women being imprisoned on trivial charges? Even if we accept that Aboriginal people do not generally receive longer sentences for the same offences as non-Aboriginal offenders (Walker 1987), the question as to the extent to which Aboriginal women are brought before the courts and sentenced to imprisonment for minor offences remains. This question of course raises again the issue of the extent to which the courts simply rubber stamp the process of selective policing for particular offences.

In addition, the question is raised as to why imprisonment is being used as the sentencing option for these offences. Commissioner Johnston has noted that the level of over-representation of Aboriginal people in non-custodial corrections is lower than in custody. He suggests that this may occur because of a "belief held by judges, magistrates and parole authorities that Aboriginal offenders are either less able or less willing to comply with the requirements of non-custodial orders" (Johnston 1991, vol 1, p. 217). Other evidence suggests that it may also occur because of a paternalistic racism. Dodson noted that one justice in Western Australia stated that he sentenced Aboriginal women to terms of imprisonment to protect their welfare. "Sometimes I sentence them to imprisonment to help them . . . They get cleaned up and fed then" (Dodson 1991, vol 1, p. 136).

It has also been suggested that because Aboriginal women are the victims of domestic violence, this factor may have some bearing on the number of Aboriginal women imprisoned for offences against the person. It has also been suggested that some Aboriginal women have been convicted for killing a person who has been violent to them (Atkinson 1990). The statistics do not indicate whether the convictions for offences against the person are directly related to, or attributable as a response to domestic violence.

LaPrairie (1989) in discussing Canadian indigenous women has linked high levels of domestic violence to the disproportionate imprisonment of indigenous women for crimes against the person. She argues that there may be a strong relationship between the condition of indigenous men as a result of colonisation, male violence against

indigenous women and subsequent criminal activity by indigenous women. She suggests three ways that indigenous women's conflict with the law could be related to family violence; firstly, indigenous women might retaliate against violence by the use of violence; secondly, by escaping from violent or abusive situations there may be a resort to alcohol or drug abuse; and thirdly, the victimisation of women may itself cause abuse or neglect of others.

For Aboriginal women, physical force may be the only resistance to domestic violence available given a range of pressures which militate against the involvement of the police (Atkinson 1990; Dodson 1991, vol 1, p. 381). It has also been suggested that the forms of violence that Aboriginal women use are more akin to customary obligations (Langton 1991, p. 311).

The issue of family violence obviously raises the question of Aboriginal women as victims of physical and sexual assault and their treatment by the judiciary. Both Audrey Bolger (1991) and Sharon Payne (1992) have discussed how appeals to Aboriginal customary law have been used in a way which legitimates physical and sexual violence against Aboriginal women. Bolger writes,

Reading many court transcripts relating to cases of rape, murder and assaults on women is like reading the minutes of a male club. Judges, lawyers and witnesses act to confirm each other's prejudices—that men may be provoked into violence by women's actions, that women are inferior and that rape is not a serious offence in Aboriginal society and so on (Bolger, 1991, p. 85).

Bolger has argued that while the police response to violence against women leaves much to be desired, there has at least been some recognition of problems in that area and training programs have been put into place. The reaction of the judiciary, however, has been quite inadequate. Justice Vincent from the Victorian Supreme Court has noted that the courts have not kept up with changing community standards in relation to domestic violence, noting that the perpetrators of these violent crimes were treated with more "understanding" than other violent offenders and that pleas of provocation were generally accepted by male offenders but rejected for female offenders (Bolger 1991, p. 85). Bolger has argued that in addition to these permissive attitudes towards domestic violence, in the Northern Territory there is the additional dynamic operating concerning white preconceptions and stereotypes about Aboriginal culture and traditions.

Bolger referred to a number of Northern Territory cases which had occurred during the 1980s where it was accepted by the judge that violence and rape were in some ways acceptable within the Aboriginal community. In the case of *R v. Narjic* (1988) the defence suggested that "it is the custom... for whatever reason, that wives are assaulted by their husbands" and that the defendant was "a highly respected member of the community". Bolger notes that evidence presented to the court indicated that the man had seriously assaulted his wife on previous occasions causing injuries including ruptured spleen and two miscarriages. The judge found the defendant guilty but concluded that he was "a man of good character" and "seemed to have a good marriage" (Bolger 1991, p. 86). In the case of *R v. Lane*, the defendants were accused of the rape of a woman who subsequently died. Bolger notes that "the defence adduced evidence, all obtained from non-Aboriginal males, to show that rape was not a very serious crime in Aboriginal society and by approaching the men and asking for a cigarette the woman may have been seen as inviting the men to join her" (Bolger 1991, p. 86). The judge in his summing up is reported as saying,

There is evidence before me, which I accept, that rape is not considered as seriously in Aboriginal communities as it is in the white community . . . and indeed chastity of women is not as importantly regarded as in white communities (cited in Bolger 1991, p. 86).

Bolger noted that it is invariably the practice that those who are responsible in court for interpreting and defining Aboriginal traditions are male. The determination as to what is Aboriginal culture or tradition is derived from a male perspective.

In a similar vein Sharon Payne has noted that Aboriginal women have been subject to three types of law, "white man's law, traditional law and bullshit traditional law; the latter being used to explain a distortion of traditional law used as a justification for assault and rape of women" (Payne 1992, p. 37). According to Payne "quasi-anthropologists and all manner of experts" have been used to justify rape and sexual assault as in some way traditional. A variation on this theme was a case in Canberra during early 1991 where the defence for an attack on an Aboriginal woman "was based on the loss of lands and culture on the part of the young males involved" (Payne 1992, p. 37). Payne added caustically "apparently the young woman had no such defence although she too had lost her heritage". The judge accepted the loss of culture as a mitigating factor. Payne adds that other explanations for the assault—that the offenders were young, male and drunk—were ignored.

Through analysing the judicial reasoning used in cases referred to above we can begin to appreciate that racism and sexism are intertwined. There is of course considerable room for far greater analysis of the link between the way Aboriginal women are treated by judicial officers as a law and order problem to be sentenced to imprisonment for minor offences, and the racist conceptions of the place of Aboriginal women within Aboriginal society.

Judicial Racism and the Royal Commission Recommendations

On 10 June 1992 a thirty-eight year old Aboriginal woman was found hanging in a cell at Macquarie Fields police station in outer Sydney. She had been sentenced earlier that day by a local court magistrate to two months imprisonment for possession of a small quantity of marijuana. The victim had a history of depression and anxiety. The magistrate refused the request of the Aboriginal Legal Service for a pre-sentence report. The ALS has since claimed that at least five recommendations of the Royal Commission were breached prior to the death including that a custodial sentence was not used as a last resort; the woman had been left alone in a cell; there were no regular checks; no medical assessment was made prior to being placed in a cell; and all dangerous objects were not removed.

How might we interpret this incident in the light of an understanding of judicial racism? It seems apparent that the results of the Royal Commission place serious responsibilities on magistrates in relation to the imposition of custodial sentences on Aboriginal people. There is of course no legal responsibility for magistrates to follow, or indeed inquire into the recommendations of the Royal Commission. The judiciary, if it so chose, could remain blissfully unaware of one of the nation's most extensive reviews of the criminal justice system. The recommendations do not have the force of law, they are simply recommendations to government. However, it can be argued that the judiciary has an ethical and professional responsibility to at least be aware of the Royal Commission's recommendations, particularly as many of the Commission's recommendations impinge on sentencing practices.

Yet many Aboriginal Legal Service office managers, field staff and solicitors from a number of jurisdictions have expressed alarm at the unprofessional and contemptuous manner in which reference to the Royal Commission's recommendations have been swept aside by magistrates during hearings. How seriously did the magistrate consider the Royal Commission's recommendations in the case of Phyllis May, if the Aboriginal Legal Service were refused the opportunity to have prepared a pre-sentence report?

One of the major Royal Commission recommendations (No 96) involving judicial officers relates to their training in Aboriginal issues. The recommendation is supported by all States and Territories. Several issues flow from a concentration on training judicial officers in Aboriginal issues. Firstly the degree of support for education can be questioned. For instance, the Queensland response, while supporting the recommendation, noted that "concern exists in relation to the concept of imposing training on judicial officers in that this could be perceived as an unwarranted intrusion on the independence of the judiciary" (Commonwealth of Australia 1992, vol 1, p. 352). It should also be noted that an awareness of the need for judicial training in Aboriginal issues has been around for some time. McCorquodale concluded some five years ago, after a review of the issue of judicial racism, that there was a need for formal training of judicial officers concerning the unique or exceptional social condition of Aboriginal people. Such training should be "extra-legal and particularly sociological" (1987, p. 51).

A focus on training also raises the issue of the nature and success of training. Judging from the government responses to Recommendation 96, it seems that the focus would rely on "one-off" presentations related to Aboriginal issues (Commonwealth of Australia 1992, vol 1, pp. 349-55). Such an approach has dubious pedagogical value and its effectiveness has certainly been questioned in relation to police training both in Australia and overseas (Human Rights and Equal Opportunity Commission 1991, p. 330).

The third issue which is raised by the focus on training judicial officers is the inevitable limitations of such an approach. The assumption underlying the need for training is that the non-Aboriginal criminal justice system will remain as central in the administration of justice for Aboriginal people. Training judicial officers in Aboriginal issues in one sense confirms the centrality of non-indigenous justice systems while reasserting and maintaining the marginality of indigenous people. Aboriginal people remain on the periphery. Another approach would be to assert the principles of self-determination and the right for indigenous people to develop Aboriginal justice mechanisms as a priority over any training of judicial officers.

There should be recognition of the limitations inherent in relying on training of judicial officers to change far more fundamental processes of structural racism.

Pat O'Shane stated recently that:

In imposing penalties judicial officers are expected to take into consideration the background, personal and familial circumstances of a defendant. Usually, but not always, issues of family breakdown, ill health, lack of employment, and so on, are considered as mitigating factors. The late Mr Justice Murphy went even further in relation to Aborigines, and said, in the case of *R v. Neal*, that when dealing with Aborigines, courts should have regard to the entire history of Aboriginal-White relations since 1788, as mitigating factors. Statistics on penalties suffered by Aborigines show that Courts are not heeding Murphy's words in that case (O'Shane 1992, p. 6).

While the author respects Murphy's view that the processes of colonialism should be seen as a mitigating factor in determining sentence, we should also be aware that judicial officers are in a position to impose their interpretations of history and culture. Indeed the South Australian examples and the cases relating to rape and sexual assault in Northern Territory show how particular racist conceptions of history and culture can be used to decide quite fundamental questions in relation to what is and who is Aboriginal. The judiciary remains in a powerful position to legitimate a range of racist concepts concerning indigenous people.

Conclusion

There is little doubt that the area of judicial racism has been neglected. This paper certainly aims to open up as many questions as it might answer, and points to the need to scrutinise judicial thinking within a broader framework than simply the logic of legal rationality. Judicial decision-making also needs to be analysed within a framework that understands the functioning of the judiciary as part of a criminal justice system. This paper has largely relied on the more overt cases of direct racism in conceptualising the nature of Aboriginality. However, the more mundane and obscure functions of magistrates passing sentences on Aboriginal people on a day-to-day basis also need to be subjected to far more careful analysis than has occurred

recently. The judiciary has been largely immune from considerations of racism and this no doubt reflects partly their own positions of power within society. It also reflects the related issue that racism is often considered as the attribute of uneducated "rednecks" rather than seeing it as a systematic process which may inform the most powerful institutions in the nation.

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