THE 'OTHER'S' ENCOUNTERS WITH THE AUSTRALIAN JUDICIARY

by Alice Barter

INTRODUCTION

It is well established that First Nations Peoples are over-represented in the Australian criminal justice system. The Royal Commission into Aboriginal Deaths in Custody report stressed that the most significant contributing factor that gives rise to this over-representation is the 'disadvantaged and unequal position in which Aboriginal people find themselves in the society—socially, economically and culturally'.[1] However, this recognition falls short in addressing the construction of First Nations Peoples as the colonised 'Other'. This article will explore the relationship Aboriginal offenders have with the criminal justice system in a postcolonial context, with particular reference to interactions between the judiciary and Aboriginal offenders in sentencing proceedings. In positing that Aboriginal offenders are disadvantaged by their position as the colonised 'Other', this article will explore: the coloniser/colonised dichotomy; the construction of 'whiteness'; the limited recognition of 'Aboriginality' within Australian courts; judicial ignorance and lack of empathy in understanding the position of Aboriginal offenders; a continuing expectation of assimilation; and an analysis of specific judicial remarks.

POSTCOLONIAL THEORY AND THE COLONISER/ COLONISED DICHOTOMY

The development of postcolonial theory has hinged on the recognition that the colonial state will continue to oppress pre-colonial peoples long after the initial colonisation period. The colonial discovery and territorial acquisition of Australia was underpinned by the myth of 'terra nullius' (land belonging to no one), enabling colonial governments to disregard any concept of Indigenous law, native title or sovereignty from their inception. This was supported by Social Darwinian[2] thinking and the perception that First Nations Peoples were socially and culturally inferior. Said discusses the relationship between colonisers and the colonised in terms of binary opposites: the Eurocentric view of the West being rational, strong and masculine, juxtaposed with depictions of the Orient as an irrational, weak, feminised 'Other'. This representation of the West's 'us and them' mentality in order to conquer and control Said terms 'Orientalism'.[3] Stam and Spence argue that 'Europe constructed its self-image on the backs of its equally constructed Other'.[4] In frontier colonial Australia, Orientalism was integral in justifying the dispossession, murder and assimilation of Indigenous peoples; '[i]t privileged the "civilised" colonist over that of the "uncivilised" "black"'.[5] First Nations Peoples were considered a 'primitive people, nomadic, sexually promiscuous, illogical, superstitious, irrational, emotive, deceitful, simple minded, violent and uncivilised',[6] while the colonisers imagined themselves as the direct opposite. This thinking helped to create the Australian identity, as the colonisers imagined 'them' in order to imagine 'us'.

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THE INVISIBILITY OF 'WHITENESS'

In postcolonial Australia, 'white' Australians or members of the coloniser group are situated in a position of power and privilege. However, for many white people, whiteness is invisible. Frankenburg suggests that 'one effect of colonial discourse is the production of an unmarked, apparently autonomous white/ western self, in contrast with the marked, "Other" … within this framework for thinking about self and other, the white western self has for the most part remained unexamined and unnamed'.[7] For many white people 'whiteness has . . . been simultaneously ignored and universalised'[8] and is not perceived as a problematic or confronting issue.[9]

This is reflected by the fact that decisions made by judges seen as 'Other'—those who do not fit the white, male, Anglo-Saxon heteronormative standard of 'the judge'—are liable to attack for bias in a way that other judges are not. Graycar analysed cases where there has been a challenge to judges' impartiality on the basis of their ethnicity and/or gender and notes that there

is never a suggestion that white male decision-makers will be 'blinded' by their race or their gender. 'Whiteness or maleness are not viewed as impediments to impartiality precisely because they are not recognised as positions [at] all, but the treatment of decision-makers who are racialised as "other" … reveals a very different set of assumptions.'[10] Thus the Australian Aboriginal 'Other' can be disadvantaged in the provision of justice by literally being judged in this context and there is little recourse because the postcolonial normalised power positions are not scrutinised even where, or perhaps because, those who 'define, administer and enforce criminal justice are overwhelmingly white, whilst the "subjects" of their attention . . . are disproportionately black'.[11] While 'white' people claim a position of authority, 'they do not see their privilege because they do not see their race'.[12] Therefore, many members of the judiciary, even when well meaning, come from a place of privilege without being aware of it, and this adversely affects their view of Aboriginal litigants.

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EQUALITY BEFORE THE LAW

The Anglo-legal system is based on faith in the discretion and common sense of judicial officers, and often relies on tests based on the 'ordinary' or 'reasonable' person. Of course, this 'ordinary' or 'reasonable' person has historically been a white, heterosexual male, usually with some degree of education. Although there is some effort to recognise that equality before the law does not necessarily mean 'same treatment' and 'discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different',[13] it can be difficult for judicial officers to understand and empathise with the position of the colonised 'Other'. Law and colonialism have a symbiotic relationship, imperative to sovereignty, property rights and social order. As Moreton-Robinson argues: 'patriarchal white sovereignty in the Australian context derives from the illegal act of possession and is most acutely manifest in the state and its regulatory mechanisms such as the law.'[14] As in other settler societies, egalitarianism is an important feature of Australia's political and legal culture, with little consideration given to inequalities.[15] Justice Brennan of the High Court of Australia, in expressing what has become known as the 'substantial equality principle', stated that:

> [t]he same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account . . . all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.[16]

This point was reiterated by Justice Eames in *R v Fuller-Cust*.[17] However, colonial concepts of 'race' and power have shaped the law and its interpretation in Australian courts.

THE RECOGNITION OF 'ABORIGINALITY' IN THE SENTENCING OF ABORIGINAL AUSTRALIAN OFFENDERS

The leading case authority in relation to the specific considerations to be taken into account when sentencing Aboriginal offenders is the decision of Wood J in *R v Stanley Edward Fernando*.[18] Wood J distilled seven main principles from earlier cases in relation to the sentencing of Aboriginal offenders. The first is that '[t]he same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group'.[19] The fifth and sixth principles are:

> (E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within aboriginal communities, and the grave social difficulties faced by those communities where poor self image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.
>
> (F) That in sentencing persons of aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.[20]

This decision goes some way in recognising the unique position of Aboriginal Australians, however, it does not acknowledge the fact that most Australian judges are judging Aboriginal Australians from the position of the coloniser and with a paternalistic, Eurocentric gaze. Further, *Fernando* has been considered and limited by subsequent decisions. Simpson J resolved that: 'Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity

of the offender) precedes the commission of crime'[21] and 'it is the disadvantage associated too often with aboriginality that warrants that degree of leniency and not the fact of aboriginality, per se'.[22] This view disregards the unique experience of the colonised, first Australians and equates their postcolonial disadvantage to that of immigrants or other groups.

The legacy of colonialism is ongoing and the dominant colonial settler group continues to compare Aboriginal culture and way of life to Anglo-Australian culture. Judicial officers always come from a position of power, to the extent that they can even decide who is Aboriginal. Many judges[23] attempt to define the contemporary Aboriginal experience as well as deciding who may be entitled to rely upon Aboriginality for the purpose of sentencing:

> In effect, the judgments attempt to undercut the position of Indigenous offenders and the benefits that accrue for mitigation of sentence because of a deprived background. The nature and complexity of contemporary Indigenous identity in a post-colonial society such as Australia is ignored and, again, Indigenous identity is defined by the powerful non-Indigenous institution of law.[24]

For numerous reasons, the *Fernando* principles are not applied in every case that involves an Aboriginal offender, all of which reflect a patriarchal, colonial ideology, such as:

- the court not accepting the offender's membership of an Indigenous community;
- the degree of social disadvantage not being sufficient;
- the offender's alcohol and/or substance abuse being the reason for offending, rather than any particular disadvantage arising from the offender's Indigenous status;
- the offender having a prior criminal history and, therefore, prior contact with the criminal justice system; and
- the offender not coming from a remote community.[25]

The New South Wales Judicial Bench Book identifies some practical ways of improving communication between members of the judiciary and Indigenous offenders and witnesses. It recommends such practices as limiting legal jargon, not correcting Aboriginal English, and being careful of the person agreeing or saying 'yes' when they do not mean to agree.[26] The Bench Book also instructs judges to take into account the fact that lack of direct eye contact is a sign of politeness and respect, that vagueness about time, numbers or distances may be cultural, and that silence is a common and positively valued communication style in many Indigenous communities.[27] It also instructs: 'Do not "talk down" to the person. Do not be paternalistic.'[28] Although this is a positive step in recognising the cultural differences between members of the judiciary and First Nations Peoples, it does not change the inherent power imbalance nor address the 'us' and 'them' attitude through mutual understanding. Further, many judges and magistrates do not follow these guidelines. It can be argued that some members of the judiciary still subconsciously identify with, and therefore respect, people who reflect their cultural norms through the way they dress, speak and make eye contact. Through this neo-assimilation, people who enact 'whiteness' receive the associated privileges and those who do not conform are relegated to 'Other' status.

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The State acts in its most coercive and authoritarian manner in sentencing people who have acted in a way that society disapproves of and are therefore felt to present a threat to the fabric that binds the community.[29] Although Australian criminal law principles originate from the English common law, sentencing law is 'constantly in a state of flux and is often responsive to wider social and political developments'.[30] The purposes of sentencing are: punishment, rehabilitation, general and specific deterrence, denunciation and community protection. When sentencing an offender, judicial officers must take into account considerations such as the level of harm caused by the offence, the impact on the victim, whether the offence was premeditated or involved more than one offender, the offender's criminal history, recidivism and remorse, the maximum penalty prescribed by statute, the requirement of parity, parsimony, the age, background and physical or mental condition of the offender, whether the offender is employed and what contribution the offender makes to society.[31] However, these considerations are viewed in a postcolonial context that means Aboriginal offenders are continually disadvantaged by their interaction with the colonial legal system. For example, some Aboriginal offenders are not 'employed' within the mainstream definition but they are important and respected members of their society who are busy caring for family members, caring for country and participating in law and cultural business.

AN EXAMPLE

A young, Aboriginal man in a regional Western Australian court charged with burglary, stealing, breaching his bail and trespass, found himself before a white, male magistrate visiting from Perth. He had not complied with the reporting conditions of his order and his legal counsel explained that this was because he had been transient between different areas of his country and did not have access to a telephone to contact his Community Corrections Officer. The magistrate responded:

> He shouldn't be. He should be in school. He should be in high quality boarding school, being educated, instead of running wild about the desert . . . However, that's all by the by. If I was King, I could probably do something in this fanfare, but I can't, so back to him. What do we do?

This response worryingly demonstrates the ignorant, Western view of some magistrates. Here, the magistrate likens himself to the European notion of 'King' and expresses the colonial, paternalistic ideology of wanting to 'civilise' First Nations Peoples. Although he may have had good intentions, this sort of 'for their own good' thinking in justifying ill-informed policies can produce devastating consequences. The magistrate shows disrespect for Aboriginal culture and way of life, and devalues any non-Western form of education.

Later in the proceedings, the magistrate said to the man: 'The choice is yours entirely whether you go into prison or not. You want to go? You commit offences. You don't want to go? Don't commit offences.'

This reflects the classical view that locates the source of criminality 'within the rational, reasoning individual, and sees it as a matter of choice and intent on the part of the offender'.[32] However, this view does not take social factors such as poverty, family life, opportunities and discrimination into account. Significantly, it completely ignores the specific circumstances of Aboriginal Australians as the colonised 'Other', who are continually dismissed and oppressed by the dominant 'white' society.

CONCLUSION

Post-colonial theory can be used to critique general Aboriginal subjugation as well as specific disadvantage experienced by Aboriginal offenders who are sentenced by 'white' magistrates and judges who are members of the coloniser group. The complexities and issues of postcolonialism are 'integral to understanding "race relations" in Australia, which, overall, continue to socially, culturally and economically "other" Aboriginal peoples'.[33] The symptoms of colonisation such as poverty, alcoholism, lack of housing and lack of education are often quoted as the underlying causes of Aboriginal over-representation in the criminal justice system, but the specific coloniser/colonised, civilised/'Other' relationship, and its consequent ongoing disadvantage, is not often recognised.

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1 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, 15.

2 The concept of 'Social Darwinism' was created by Herbert Spencer, who first coined the phrase 'survival of the fittest', 15 years after *The Origin of the Species* by Charles Darwin, was published in 1859.

3 EW Said, *Orientalism*, (Vintage Books, 1979) 202–3.

4 R Stam and L Spence, 'Colonialism, Racism and Representation' (1983) 24(2) *Screen* 4.

5 RG Broadhurst, 'Crime and Indigenous People' in A Graycar and P Grabosky (eds), *Handbook of Australian Criminology* (Cambridge University Press, 2009) 256, 263.

6 A Moreton-Robinson, 'Imagining the Good, Indigenous Citizen: Race War and the Pathology of Patriarchal White Sovereignty' (2009) 15(2) *Cultural Studies Review* 61, 65.

7 R Frankenburg, *White Women, Race Matters: the Social Construction of Whiteness*, (Routledge, 1993) 17.

8 Ibid.

9 A Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism*, (University of Queensland Press, 2000) 33.

10 R Graycar, 'Gender, Race, Bias and Perspective: OR, How Otherness Colours Your Judgment' (2008) 15(1–2) *International Journal of the Legal Profession* 73, 74.

11 Goldson and Chiwada-Bailey quoted in E Elliott and R Gordon, *New Directions in Restorative Justice* (Routledge, 2013) 124.

12 J Ransley and E Marchetti, 'The Hidden Whiteness of Australian Law: A Case Study' (2001) 10(1) *Griffith Law Review* 139, 142.

13 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 402.

14 Moreton-Robinson, above n 6, 64.

15 A Moran, 'What settler Australians talk about when they talk about Aborigines: reflections on an in-depth interview study' (2009) 32(5) *Ethnic and Racial Studies* 781, 792.

16 *Neal v R* (1982) 149 CLR 305, 326.

17 *R v Fuller-Cust* [2002] VSCA 168, 180.

18 *R v Fernando* (1992) 76 A Crim R 58.

19 Ibid 62–3.

20 Ibid.

21 *Kennedy v R* [2010] NSWCCA 260.

22 *R v Powell* [2000] NSWCCA 108.

23 See *R v Ceissman* (2001) 119 A Crim R 535; *R v Newman and Simpson* (2004) 145 A Crim R 361; *R v Pitt* [2001] NSWCCA 156.

24 R Edney, 'The Retreat from Fernando and the Erasure of Indigenous Identity in Sentencing' (2006) 6(17) *Indigenous Law Bulletin* 8, 12.

25 J Manuell SC, *The Fernando Principles: the Sentencing of Indigenous Offenders in NSW* (December 2009) NSW Sentencing Council <http://www.sentencingcouncil.justice.nsw.gov.au/Documents/sentencing_indigenous_offenders_nsw.pdf>.

26 K Lumley (ed), *Equality before the Law: Bench Book*, (Judicial Commission of NSW, 2006) 2305–9.

27 Ibid.

28 Ibid.

29 R Edney and M Bagaric, *Australian Sentencing: Principles and Practice*, (Cambridge University Press, 2007) 3.

30 Ibid 4.

31 Ibid 5.

32 C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia*, 3rd ed, (Oxford University Press, 3rd ed, 2007) 28.

33 E Shaw, '(Post)Colonial Encounters: Gendered Racialisations in Australian Courtrooms' (2003) 10(4) *Gender, Place and Culture* 315, 318.