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Strangers in our midst: the construction of difference through cultural appeals in criminal justice litigation

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'[T]here is no doubt that the kind of immigrants whom we get from the Asian community in Kenya are the kind who will be much easier to deal with. They are used to living in a British society. They are reasonably educated. Some of them have a considerable amount of money. They are not the kind of unskilled people whom we bring in from India, Pakistan, the West Indies or some other countries' (David Steel MP, Parliamentary debate on the Commonwealth Immigrants Bill 1968, Hansard, House of Commons, 27 February 1968, col 1291).

'[I]t is not unreasonable for us to wish to have in this country good quality new people from around the world who want to be British citizens, people who speak English and make an economic contribution to our society' (Stewart Jackson MP, Parliamentary debate on the Immigration Bill 2014, Hansard, House of Commons, 22 October 2013, col 202).

Introduction

Historically, in Britain, policies and debates on immigration have been preoccupied with identifying the features of the 'good' and the 'bad' migrant – those who deserved to be welcome, and others who should not be allowed in or be pushed out. The desirability of individuals and national groups has been predominantly assessed against the perceived and idealised (and racialized) qualities of the natives. 'Being like us' in terms of language, ethnicity and cultural background is considered a virtue on its own right and important for social integration and cohesion. Then British Home Secretary, RA Butler, when he introduced new restrictions on citizens from the Commonwealth to enter the country in 1961, tried to appease his fellow parliamentarians by arguing that one of the purposes of the new law would be to exempt from controls 'persons who in common parlance belong to the United Kingdom' because of their ancestry (Hansard, HC Deb, 16 November 1961, col 695). Considering the question of belonging in past and contemporary public debates on migration reveals uncharted dimensions of Britain's own perception as an 'imagined community' and the social hierarchies that transpire from it (Waters, 1997). It can also help us understand the production of racial difference, and how this is reflected in the law.

In what Sanchez and Romero (2010: 782) have called the 'social construction of racialized citizenship', foreignness as an individual quality spells difference and inferiority, unifying citizens and non-citizens in their treatment as racialized minorities. They argue that by conceiving citizens and non-citizens as distinct

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groups, separated by their legal status, we might fail to notice how different groups are racialized as a whole and ignore the role of race in shaping immigration laws (Romero, 2008, Sanchez and Romero, 2010, also Armenta, 2016). ‘Citizenship status’ Romero (2008: 28) bluntly stated ‘is inscribed on the body’.

Other scholars draw attention to the ways racialized categories and the articulation of racism follow not just bodily traits but also less visible and more subtle markers of difference, such as language, accent, national origin, and cultural and religious difference. Indeed, the black/brown-white binary is insufficient to capture the extent of contemporary racisms as some groups have been stripped off their whiteness and cast as ‘others’ by dint of their class, cultural background and national origin (Webster, 2008, Garner, 2009, Fox et al., 2012). As Coretta Phillips and Colin Webster (2013: 7) noted, expressions of racialized difference are more ‘indirect, subtle and “cultural”’. Despite attempts to deny racism, appeals to ‘culture’ bely such claims (Back, 1993) (Palmar this volume). Cultural difference as an aspect of racial difference is crucial for understanding what Ahmed (2012: 2) called the contemporary ‘politics of stranger making’. An example of the continuities in the treatment of different minorities, in Britain ‘culture’ features prominently in racialized stereotypes of deviance and crime by ethnic minorities and foreigners in public discourse amid anti-Muslim sentiments and hostilities towards immigrants (Parmar, 2011, 2014, Fox et al., 2012) (Bhui this volume). As documented by criminologists, mundane articulations of ‘cultural racism’ have seeped into the criminal justice system (Hudson and Bramhall, 2005, Phillips, 2008, Weenink, 2009, Loftus, 2009: 141, Millings, 2013).

This chapter explores appeals to culture and cultural difference in criminal litigation by drawing on interviews with court staff¹ and reported Court of Appeal decisions.² It documents the instrumental use of culture in criminal proceedings. Cultural difference is not a neutral marker to separate out social groups in the courtroom. It is often deployed to explain behavior in relation to specific groups, and is loaded with prejudices and stereotypical representations of racialized minorities. Ascribing bad behavior to culture, I argue, conveniently conceals the role of structural social inequalities, racism and discrimination, and of the law in perpetuating the subordination of these groups. Further, these appeals work to mark out undesirable behavior from the terrain of the British nation while helping to craft an idealized image of a unified nation governed by democratic, liberal and civilized values and rules.

Identifying strangers inside the courtroom: culture, immigration status

¹ Interviews were conducted in the context of a project to investigate the relevance of immigration status and citizenship in criminal justice decision-making entitled ‘Foreign Nationals before the Criminal Courts: Immigration Status, Deportability and Punishment’, funded by the British Academy (SG140235). ‘Culture’ emerged as an important theme in these interviews and alerted me as to its relevance for understanding court operators’ assumptions, categorisations and ideas of citizenship and national identity.

² Reported judgements by the Court of Appeal, Criminal Division, were searched using key terms (such as ‘culture’, ‘cultural defence’, ‘cultural background’). The search included decisions from 1996 to 2016, and resulted in around 50 matches.

and power

In Britain, as in other European countries, criminal courts are confronted daily with the challenge of apportioning punishment to a highly diverse population and to accommodate difference in the courtroom. In an attempt to render the court's clientele intelligible, lawyers and court operators appeal to various tropes to single out groups within the courtroom. Attesting to the difficulties in sorting out human beings by their citizenship status (Bosworth, 2012: 132), 'immigrants' and 'foreign nationals' are often identified by their non-English sounding names, accent, and language (Aliverti, 2016, Aliverti and Seoighe, 2016). In referring to this rather elastic and vague group, lawyers tend to classify their clients by crime types: 'Romanians' are pick-pocketers, 'Poles' tend to be caught in alcohol-related crimes, 'Vietnamese' are marihuana growers, 'Asians' are brought in for domestic and sexual violence, and so on.

In aiding this classificatory work, court operators often resort to longstanding racial and gender stereotypes about non-western others. In a case reported in the national media involving a defendant charged with harassment against a woman, the deputy district judge in alluding to the complainant's availability to attend a hearing remarked: 'She can't be doing anything important'. When prompted by the prosecutor to explain what he meant, he was more explicit: 'With a name like Patel she can only be working in a corner shop or off licence'. In another case involving three men convicted of conspiracy to defraud, the crown court judge prefaced his sentencing remarks thus: 'I do not shy away from the fact that this court is experiencing an explosion of these identity theft fraud cases, involving [...] in many cases, Nigerians or people linked with them.'³ The assumed prevalence of this crime among 'Nigerians' justified in his view the imposition of deterrent sentences against them, to discourage others – presumably, Nigerians- from engaging in similar conducts.

These remarks were rightly condemned and in the first case, it caused Justice Hollingworth his job,⁴ while in the second one, the Court of Appeal allowed the appeal against sentence. Yet, subtler expressions of racism and sexism in court cases are far more common and often go unchallenged. These surfaced in interviews I conducted with judges, lawyers and court staff at Birmingham's criminal courts.

Alluding to the 'cultural issues' that may have a bearing on the decision of a case involving 'foreign nationals', a crown court judge explained:

[P]art of the background to a lot of matrimonial violence and sexual offending can be very different cultural attitudes towards relationships between men and women... they form part of the background because of expectations that are created, the nature of the relationship which is not what I might describe as love marriages but also may

³ As reported in *R v Ayodele Odewale, Moses Awofadeju, Kazeem Oshungbure* [2004] EWCA Crim 145 [at 3].

⁴ Mirror, 'Top judge quits after racist slur in court made against Asian harassment victim', 14 December 2014, available at: <http://www.mirror.co.uk/news/uk-news/top-judge-quits-after-racist-4762640>.

well involve dowries and therefore there is an element of commerciality about marriages. And so those are issues which sometimes need to be explained or explored with the jury during the course of a trial because people may not understand them.

More forthrightly, a magistrate asserted:

[D]omestic violence is increasingly common in the courts and you often get cases where in the Asian culture particularly, on the day of the trial, the lady who's the victim wants to withdraw. A sort of pressure from the family and that kind of community environment that they live in.

In the first quote the judge highlights the features of marriage in the 'Asian' culture as characterized by commerciality, rather than 'true' love. In turn, the magistrate suggested that gender subordination, patriarchal rule and isolation from the wider society are prevalent in Asian communities. In both instances violence is predicated as a product of the assumed values and norms of certain groups, which in turn are set against those ascribed to the British nation.

These appeals to culture allow a simple, uncontextualized story that glosses over the complexities of the case, while reifying the image of certain national groups as inferior and uncivilized (Phillips, 2003, Chiu, 1994, Volpp, 2000). In particular, as Volpp (1996, 2011) noted, explaining behaviour by culture overlooks power and neglects the political dimensions of marginality, racism and poverty. It implies that violence is circumscribed to certain communities, and absolves the wider society and the state from creating the conditions for oppression and violence (Volpp, 1994: 94). The concealment of power in appeals to culture is particularly evident in the assertion that migrant women's isolation and reluctance to denounce domestic maltreatment is the product of an oppressive, patriarchal and misogynist community environment, while broader conditions of gender and racial subordination which block access to work and create dependence particularly as a result of immigration status are left unexamined.

In *R v MM*,⁵ the applicant and complainant – a married couple – were Pakistani nationals. When the applicant obtained a highly skilled visa, they settled in the UK. His wife and their two children had no independent immigration status. The complainant filed a claim against her husband for rape and indecent assault. In trying to assert her credibility as witness, she justified her late reporting and lack of resistance to her husband sexual violence because 'it was culturally unacceptable' to ventilate these marital matters and because 'her culture required her to submit'.⁶ To attest to this aspect of the prosecution case, a police inspector named Asrar Ul-Haq testified about 'Asian culture and practice' and 'Islamic teaching on sexual practices'. Casting doubts over the allegations, the

⁵ [2011] EWCA Crim 937; see also *R v Shafqat Ali* [2006] EWCA Crim 2235.

⁶ Cultural information can be important for assessing the credibility of the complainant as well as for sentencing purposes. According to sentencing guidelines on domestic violence, an aggravated feature of these cases is the vulnerability of the victim because of 'cultural, religious, language, financial or any other reasons' (Sentencing Council, *Overarching Principles: Domestic Violence*, Guideline ii, 3.7). Available at: https://www.sentencingcouncil.org.uk/wp-content/uploads/web_domestic_violence.pdf.

applicant argued that her motivation for pursuing him criminally was to gain immigration status, which she lost when she left the family home. Similarly, in another case of domestic violence, *R v R*,⁷ involving a couple from Bangladesh, the complainant claimed that her husband raped and assaulted her. The trial judge admitted evidence to the effect of proving that '[t]he [Bangladeshi] Muslim community is one that is founded upon a patriarchal system. In that regard women often find that they are subordinate in their position and role... Members of the community may find it difficult to disclose and/or report [divorce, sexual relations, marital disagreement and domestic violence] allegations'. This was agreed by both parties. No mention was made in the decision to the couple's immigration status.

Much in same way that the defendant's background information is often admitted to inform decision-making, the introduction of cultural evidence in criminal litigation can be relevant and important for understanding one's reasons for action and avoiding injustice as a result of subjecting disadvantaged minorities to the standards and expectations of the dominant group (Volpp, 1994, Phillips, 2007: 83, Dundes Renteln, 2004: 15). Yet, as the cases cited above showed, the construction of 'cultural difference' in court can be highly problematic. In these cases, counsel on both sides abused stereotypes in the portrayal of the Pakistani and Bangladeshi cultures and implied that their clients were determined by cultural norms, while conveniently isolating factors related to the experience of these couples as migrants in the UK in the presentation of evidence. In particular, they did not factor in the way in which migration policies reinforce gender inequality. As scholars (Wray, 2015, Anderson, 2007) have shown, migration policies assume the status of women as dependent and place women in a family role as carers, in contrast to men who are deemed independent and providers. When they are able to access the labor market, migrant women generally occupy positions which extend such domestic role, are poorly rewarded and attract less social prestige than those available to men. So too, for some men, the migration process can entail a change in their social and economic status. Violence stemming from an attempt to reassert their sense of self and masculinity may be a response of some men to their subordinated status (Bosworth and Slade, 2014).

To prevent the abuse of racial prejudices and stereotypes, and trivialise violence, Maguigan (1995: 55) argued, the solution is not to limit the admissibility of this information but rather to subject to stricter scrutiny the definition of culture, the voices who purport to speak for a culture, the characteristics of the culture which merit recognition, and the degree of cultural immersion needed to be covered by any potential defence or sentencing advantage. Courts should not receive this information uncritically, and prosecutors should be able to contextualize it so that juries and judges do not accept damaging stereotypes and caricaturised versions of some cultures. Whether and how to use this cultural information in the courtroom should be guided by the objective of ensuring equal justice and addressing the sources behind the socially subordinated status of certain groups, rather than perpetuating racial prejudice and discrimination.

⁷ [2013] EWCA Crim 1271.

According to Woodman (2009: 16), in contrast to other legal branches, English criminal law has been historically reluctant to accommodate cultural diversity and to admit expert witnesses to attest on this aspect of a case. Yet, the adverse attitude towards recognizing cultural difference as a valid consideration in criminal justice decision-making does not mean that the courts remain impermeable to it. Cultural information is often fed into the court process by probation officers and lawyers who are unfamiliar with the native culture of the witness and are likely to fall into the shortcomings noted above. Further, as Hannah-Moffat and Marutto (2010) argued in relation to the Canadian system, pre-sentence reports often lack the level of contextualization necessary to appreciate how the defendant's experience of racial discrimination and poverty may have influenced offending, and can help to prevent recidivism. In other cases, such as in *R v MM*, pseudo-experts purport to speak on behalf of a particular culture with the same disturbing outcomes. As anthropologist Anthony Good observed, '[l]awyers and judges, when making such classifications, are inevitably constituting their own culture in opposition to that of the litigant... This othering process is almost bound to lead to reification, especially when the lawyers' own culture remains, unexamined, in the background' (Good, 2008: 54, also D'hondt, 2010).

Recreating an imagined community through cultural difference: nation, race and gender

The appeal to culture is not random. Cultural difference is brought up in court in relation to certain individuals and groups. Usually it is considered relevant only to those perceived to be different from the dominant majority; those 'outsiders', who are not 'our people', by dint of their national origin, ethnicity, or ancestry. It is also more frequently pondered in cases involving intimate matters. This selectivity reveals the highly contingent nature of national identity and belonging (Back, 1993). Historically, the racialization of Irish people in England relied on stereotypes of them as drunk and uncivilized. Similar labels are now applied to Eastern Europeans. As Waters noted, many of the attributes of today's racialized groups were once ascribed to the vernacular working class, including primitiveness, violence, and hyper-sexuality (Waters, 1997: 227).

In exploring the role of emotions in nation building, Sara Ahmed (2014) explains how the nation is imagined and idealized in terms of likeness, thus including some and excluding others. '[T]he nation –she writes- is a concrete effect of how some bodies have moved towards and away from other bodies, a movement that works to create boundaries and borders' (Ahmed, 2014: 133). In a multicultural nation like the British, the idealized image of the nation is one of tolerance to and celebration of difference. The notion of whiteness, she argues, is confirmed by the capacity of the nation to incorporate the coloured. Yet, '[w]hilst some differences are taken in, other differences get constructed as violating the ideals posited by multicultural[ism]' (Ahmed, 2014: 137). 'Cultural others' represent an existential threat to the nation, to its values and 'way of life'. 'Migrants' are thus required to embrace these values, to become 'British'. Segregation and insularity –and the uncivilized behavior that comes with it- is a failure to live up to the collective ideal of inclusiveness and tolerance, the imperative to mix and to love difference. In other words, it is a failure to be thankful.

The law and its operation play a crucial role in reproducing the idealized image of the nation as guided by progressive, civilized and feminist values, and neutralizing the cultural threat embodied by racialized groups. The content of appeals to culture in criminal litigation construct racial difference by implying that some undesirable behavior is a product of certain norms and values, and that these are exclusive to particular groups and are in stark opposition to those of the mainstream culture. The 'extra-territorialization' of bad behavior, and attendant racialization of certain groups as carriers of foreign cultures, is implicit in the operation of the 'cultural defence' in English criminal law. This is generally not available to those who have been living in Britain for some time.⁸ Since a long time spent in the country should result in 'acculturation' and assimilation, the defence is unlikely to succeed either because the defendant is lying about the bearing of her culture on the alleged crime or she is to blame for not mixing up.

While, as anthropologists remind us, the dichotomy between a uniform dominant culture and a monolithic and opposing 'foreign' one rarely exists (Baumann, 1996: 30, Good, 2008: 53), it often appear in pre-sentence reports which weigh heavily on sentencing decisions. They highlight the contraposition of 'western values' to those held by the defendant,⁹ and conceive wrongdoing as a reflection of those values.¹⁰ In one of them involving a man convicted for sexual assault against a woman, the author of the report noted that '[this man's] attitude towards English girls appeared to have resulted in a sense of entitlement to act as he did... He did not understand English culture, despite having lived here for a number of years' and suggested that there was a 'racial element' to the offence.¹¹ The appeal court agreed with that assessment, yet substituted a custodial sentence recommended by probation for a community order to address his 'deep seated, anti social attitudes'. In another case involving a man accused of assaulting his wife and daughter, the probation officer wrote: '[The appellant's] offending is linked to holding power and control within his family and to inappropriate, unacceptable views developed from his own experience growing up in Sri Lanka...'.¹²

As other cases reveal, criminal courts tend to highlight certain arguably shared values among particular groups as determining defendants' behavior while juxtaposing them to British or English values. In *R v Matloob Ahmed*,¹³ the applicant, a man from Pakistan who entered an arranged marriage in Pakistan with a British woman and then settled with her in the UK, was convicted of six counts of rape and an assault occasioning actual bodily harm against his wife.

⁸ See for example *R v A(N); Attorney General's Reference No1 of 2011* (2011) Times, 11 April where the Court of Appeal ruled that since the offender had lived in Britain for some years his cultural background to explain his culpability was not relevant as a mitigating circumstance.

⁹ *R v Awad* [2007] EWCA Crim 159.

¹⁰ *R v Fazli* [2009] EWCA Crim 939.

¹¹ As reported in *R v Juned Ahmed* [2011] EWCA Crim 775. Although the judgment made no explicit reference to the ethnicity and/or national origin of the applicant and complainant, it suggests that the man is non-white, Muslim and presumably non-British, and the woman is white British.

¹² As quoted in *R v Selvatharai* [2011] EWCA Crim 250 [at par 9].

¹³ [2012] EWCA Crim 1646.

The defence appealed the sentence imposed arguing that the trial judge “could have treated [him] slightly differently from a man who had been brought up in the United Kingdom”... [which would] reflect that his offending was based on his belief that he had a right to rape his wife, and so his offending was not aggravated by a deliberate disregard of what is culturally acceptable or by the norms in this country’.¹⁴ The Court of Appeal rejected this submission categorically: ‘No man, whatever his background, whatever his race, whatever his creed, has the right to rape his wife’. Such downright statement of the law obscures the shameful fact that no long ago marital rape was not regarded as a crime in English law. In the nineteenth century decision in *R v Clarence*,¹⁵ the Queen’s Bench accepted that sexual intercourse was part of the wife’s marital duty and she cannot withdraw her consent to it. This position was only changed in 1991 following the decision of the House of Lords in *R v R*.¹⁶ Further, sexual violence in the domestic context continued to be vastly under reported and criminalized, for some a sign of social tolerance towards domestic abuse and of gender inequality. As research has found, domestic violence is not circumscribed to specific groups but occurs across all social and economic levels (Menjívar and Salcido, 2002).

An analogous paradox is apparent in relation to cases of child maltreatment. In *R v SM*,¹⁷ a man originally from Zimbabwe was convicted of cruelty against his stepson. He caused several injuries to the child in his attempt to discipline him. Concurring with the trial judge’s considerations that the applicant was influenced by his upbringing in Zimbabwe where beating a kid is ‘culturally acceptable’, the Court of Appeal ruled nonetheless that he ‘was old enough and had been in the country long enough to know that what he was doing, at any rate by the standards of 21st century Britain, was very wrong’. Thus it denied any extenuating advantage. In contrast, in *R v RL*, the sentencing judge regarded the cultural background of the offender –a mother of three convicted of cruelty against them- along with other aspects which highlighted her attributes as a caring and conscientious mother as mitigating circumstances.¹⁸ The Court of Appeal agreed. Although the cultural background of the carers weighted differently, in both cases it underscored the foreignness of their ideas about children chastisement.

A similar distancing approach was adopted in the 1960s case of *R v Derridiere*¹⁹ where the Court deemed the ‘standards of parental correction [as] different in the West Indies from those which are acceptable in this country’ admitting that ‘immigrants coming to this country may find initially that our ideas are different from those upon which they have been brought up in regard to the methods and manner in which children are to be disciplined’. In ruling as excessive and outside the remits of reasonable chastisement acceptable in Britain, these decisions portrayed an image of a liberal and egalitarian society where child

¹⁴ As reported in *R v Matloob Ahmed* (above).

¹⁵ *R v Clarence* (1888) 22 QBD 23.

¹⁶ *R v R* [1992] 1 AC 599.

¹⁷ [2014] EWCA Crim 702.

¹⁸ As quoted in *R v RL* [2015] EWCA Crim 1215 [at par 23].

¹⁹ (1969) 53 Cr. App. R. 637

cruelty is not tolerated. Yet, they conveniently glossed over the fact that the law of corporal punishment of children in England and Wales has been criticized by human rights bodies and ruled in breach of the European Convention on Human Rights by the European Court for not providing adequate protection to children against cruel, inhuman and degrading treatment.²⁰ The law was only changed in 2004 to limit the use of the defence of reasonable chastisement to offences resulting in minor or no bodily injuries.²¹

The construction of culture for explaining behavior is also gendered. As Anne Phillips (2003, 2007: 85) observed, in identifying the characteristics of the foreign culture that get picked up by court operators, gender stereotypes play an important role. In the case of men, culture works to exacerbate and condone their violent, hyper-masculine and sexual behaviour. For women, their cultural background is brought up to explain their passivity, lack of agency and propensity to be manipulated by male relatives. References to culture thus mirror the dominant culture's perception of appropriate gender roles (Chiu, 1994: 1119) and are in sync with broader stereotypes about certain groups. The appellant in *R v Mirzabegi*²² was a middle-aged woman and a single mother of two. She was convicted for assisting her former husband in depositing money obtained through fraud in her bank account and for obtaining services by deception, and sentenced to a two-year custody term. In allowing her appeal against sentence, the Court of Appeal remarked the fact that she was of previous good character and started to work full-time, and thus at low risk of reoffending. It also noted that 'she was subject to a certain amount of influence from her husband, not only because of the natural influence of a husband (albeit an estranged one), but because he was Iranian, from a traditional family, which gave rise to certain cultural pressures'. In *R v Asha Khan*,²³ the appellant was described by her lawyer as naive and of limited intelligence, despite holding a law degree and being trained as a solicitor. Coming from a strict Muslim family, she was likely to be influenced by male members of her family. Asha was indicted for lying about the identity of the driver of her car, who was caught speeding. The driver was her father, who held a provisional driving licence and prior driving convictions. On appeal, she argued that she was told by her brother and father to give false information. In refusing her appeal, the Court did not argue against these considerations; rather it stated that they had been already included by the trial judge in his directions. In both cases, the courts accepted the parties' strategic depiction of the applicants as both submissive and victimised by their own family which connects to gender and racial stereotypes of Asian communities as controlling, insular and patriarchal (Hudson and Bramhall, 2005: 736, Parmar, 2014: 347).

These cases illustrate the tendency to attribute certain groups undesirable and discreditable conducts and values thus contributing to their racialization, while failing to draw continuities with those prevalent, albeit buried, in the indigenous

²⁰ See, eg, UN Committee on the Rights of the Child, Concluding Observations on the UK, October 2002; ECHR, *A v UK* (1999) 27 EHRR 611.

²¹ Children Act 2004, s 58.

²² [2009] EWCA Crim 1292.

²³ [2014] EWCA Crim 2440.

society. Even apparently neutral assertions based on mistake or ignorance of the law often contain similar orientalizing undertones. Commenting on his experience of pursuing Eastern Europeans for wildlife crimes, a Crown prosecutor reckoned: 'Because of cultural issues, they are used to do this [kill animals to eat] and they don't know that that's a crime in this country'.²⁴ A magistrate reflected on the propensity of foreigners to be brought to court for certain crimes: 'for them to come to the UK, it's a lack of understanding and appreciation that maybe carrying a knife for example – quite normal wherever they came from– it's illegal in this country to carry a weapon'. Not only do they pigeonhole individuals into exaggerated and stigmatizing versions of non-western cultures. These assertions partake in the construction of difference and a unifying image of the nation (Gilroy, 1990: 75). As Volpp (1996: 1602) nicely put it, '[e]xaggerating cultural difference from a supposed mainstream culture allows the notion of race and nation to fuse, so that culture of certain groups is considered to fall outside the borders of "our society"'.

Concluding remarks: culturalizing crime and its sequels

Against concerns by some scholars that a formal recognition of the so-called 'cultural defence' may underplay and condone violence and reinforce gender inequalities (Chiu, 1994, Coleman, 1996), English criminal courts have been generally reluctant to assign any exculpating or mitigating weight to cultural factors (Poulter, 1989, Woodman, 2009). Sentencing studies have found that judges are not indifferent to broader social stereotypes about certain groups, and these can heighten the defendant's culpability and enhance punishment. Research on sentencing of domestic violence cases involving Indigenous and non-Indigenous offenders in Australia found that while convictions for domestic violence significantly reduce the likelihood of imprisonment for non-Indigenous offenders this effect is not as marked in cases involving Indigenous offenders. This finding suggests that while domestic violence is generally conceived as a private issue and less blameworthy than other forms of violence, domestic violence among Indigenous men is taken more seriously and considered a public problem which demands a stiffer, more deterrent criminal justice response (Bond and Jeffries, 2014, Jeffries and Bond, 2015).

The difference in treatment of domestic violence offenders goes back to the interaction of gender, sexuality and race in stereotypical assumptions about wife and children beaters. Risk assessments and sentencing choices may be influenced by the premise that crime and violence for some is 'engrained' in their culture –or as one solicitor I talked to put it, it is 'their way of life'- and thus they are less amenable to change. A lawyer who counted among his clientele 'foreign nationals' commented about the difficulties he encounters when defending Romanian people due to negative perceptions about them among judges and suggested that differential treatment of defendant from certain nationalities maybe explained by the operation of negative stereotypes:

I have had the "all you Romanians want when you come over here is to nick people's

²⁴ This comment needs to be read in the context of the perception, largely propelled by the British tabloid media, of Eastern European as 'swan eaters': see (Fox et al., 2012: 9).

handbags” – it’s not put quite as crudely as that but there is an undercurrent, I feel. And sometimes it is quite difficult to counter that argument... We make a joke about it... An aggravating factor is: you are Romanian... But other white east European – Polish, Lithuanian, Latvian defendants –... tend to get treated as if they were more British citizens.

While the impact of racial stereotypes on the outcome of cases is difficult to tell, the resort to culture in criminal litigation shows how difference is manufactured through criminal justice practices.

This chapter was less interested in partaking in the normative discussion of whether the cultural background of the defendant should be taken into account in assessing liability or calibrating punishment which has been the subject of much scholarly debate. Rather it was concerned with exploring the content of what is passed and accepted as ‘cultural evidence’ in court, and the impact of this litigation strategy not just for the immediate case but more broadly, for reinforcing racial stereotypes and helping to forge the borders of British identity. As legal scholars noted in criticizing the standard of the ‘reasonable person’ in various common law jurisdictions (Sing, 1999, Dundes Renteln, 2004: 32, Power, 2006, Woodman, 2009, Lacey, 2014), the law constructs difference and hierarchies. By establishing whose standards should count to assess individual liability, the law upholds the validity of standards of ‘normality’ and privileges the outlook of a particular individual –that of a white middle class man. According to them, the law is not ‘accultured’, neutral and universal but rather deeply embedded in the dominant culture. As Woodman (2009: 33) explains, ‘the frequent reference to “English values” [in English criminal law] suggest that there is still a widespread belief in the desirability, and perhaps in the inevitability of the assimilation of minorities into the dominant culture’.

The law and its operation then serves to reinforce the link between race and nation, national identity and belonging, and upholds the image of Britain as a one, white nation (Gilroy, 1990). Attesting to the constitutive and strategic character of national identity, certain traits are identified as alien, while others blend in. As Garner (2009: 794) noted, white British identity requires the ‘performance of values and norms that are reflexively juxtaposed against competing and inferior ones’ and are strongly rooted in Britain’s colonial past. In a multi-ethnic, multi-cultural society, he concluded, values serve to delimit the borders of identity. The circulation of images of ‘cultural otherness’ ascribed to certain groups in court cases resonates with broader stereotypes and often goes unquestioned. In reifying difference, they work to deny the fluid and hybrid nature of cultural identity in contemporary Britain.

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