The Language of Racism and the Criminal Justice System

Raymond Anthony Koen

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Supervisor: Professor Christina Murray

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A Summary

Although the racism which infused the Apartheid laws was never formally imposed upon the criminal justice system, it has long been a popular perception that the system is a site of bias against people of colour and - because of the overlap of class and colour - working-class people.

The tenacity of this popular perception has ensured that the debate on the neutrality of the criminal justice system in respect of colour and class has occupied an important position in South African legal, political and sociological analysis.

The thesis is a contribution to the debate, on the side which holds that the criminal justice system is indeed a site of bias. It focuses on the language of bias, that is, the way in which white judicial officers talk to or about people of colour who appear in their courts. This focus derives from the now accepted notion of language not merely as a means of communication but also as a repository of a speaker's worldview and a fundamental means of structuring human relations.

The language of traditional red-neck racism is marked by blatant references to the perceived negative characteristics of people of colour. This thesis is

concerned primarily with the discourse of the "new racism". The "new racism" is an anodized racism which has emerged recently and which is characterized by subtle modes of degradation rather than the overt racist insult.

The source materials used are mainly the transcripts of a number of criminal cases heard in the Cape Town Magistrates' Court between December 1992 and March 1993, and which went on automatic review before a Supreme Court judge. Some use is also made of the results of interview research involving Cape Town lawyers who appear regularly in the Magistrates' Court as defence counsel.

Chapter 1 contains a brief discussion of the concept of "race". The concept has an obvious everyday popularity in South Africa. It features in the discourse of both the racist and the anti-racist projects. It is submitted, however, that "race" is not a valid analytical or scientific concept, and it is argued that it should be abandoned. The basic argument for discarding the concept is premised upon the understanding that racism, both in its traditional and new forms, is, in the first instance, entailed in "race"-thinking, that is, the kind of thinking which takes for granted the existence of different (and, perforce, hierarchically ordered) human "races".

Chapter 2 explores the question of racism. The central argument is that racism must be analyzed in terms of the relations of power and the structure of

the socio-economic privileges which it defends. Such an approach implies a concern with historical conjuncture and social milieu, rather than a search for "essential" transhistorical features.

Further, racism should be defined also in relation to other forms of oppression such as sexism and classism. The boundaries between the different forms of oppression are fluid, and the experience of racism cannot be separated from the totality of oppression and exploitation.

On the basis of the aforegoing, racism is defined as the set of social practices which are rooted in "race"-thinking and which have the effect, in articulation with other forms of bias, of justifying and reproducing the relations of oppression and exploitation which exist between those South Africans historically categorized as white and those historically categorized as black.

This definition is amplified in relation to the following additional factors:

(a) The racism in the criminal justice system is an informal racism, and not an aspect of official policy;

(b) It is probably largely unintended or unconscious. However, intention is not a necessary criterion in the classification of an utterance or action as racist;

(c) The "new racism" is a racism which is increasingly subtle or covert. It relies upon refracted racist imagery rather than patent insult.

It is this latter aspect, especially, which makes contemporary racism more difficult to track than the older, more overt form.

Chapter 3 considers, briefly, the relationship between "race" and class in South Africa and posits that:

(a) "Race" and class are connected in a relationship of reciprocal determination;

(b) Racism protects powers and privileges which derive largely from the class structure of society;

(c) "race" and class combine in the phenomenon of class racism, marked by upper class contempt for the working class, which is perceived as a separate "race", self-evidently different from and naturally inferior to the upper class. The coextensiveness of class and colour in South Africa means that white racism can simultaneously be class racism.

Chapter 4 discusses methodological issues and argues that the traditional positivist techniques are inadequate to comprehend the subtleties of the "new racism". Instead, the thesis adopts a broadly qualitative approach to its research topic. The notion of competitive plausibility is invoked and it is submitted that the analysis offered is more plausible than would be possible using conventional positivist methods.

Chapter 5 applies the theoretical and methodological tools developed in the first four chapters to an excerpt from one of the cases. The purpose of the chapter is to introduce and illustrate my approach to mapping the language of racism, especially the "new racism", and thereby to link the preceding discussion to the case studies comprising chapters 6 and 7.

Chapter 6 contains six case studies in which are analyzed in detail various discursive means by which magistrates import or allow racial and class prejudices into their courtrooms. The case studies include analyses of how some traditional stereotypical conceptions of black people (as barbarians, as criminals or as being born unto manual and menial labour) are presented in the discourse of the "new racism". They also contain an example of the racist technique of dehumanizing people of colour by referring to them by number (instead of name), and an example of a racist and classist conception of the persons comprising the category youth. There is also an analysis of a case of passive racism on the part of a magistrate who tolerates the racist utterances of a witness in her courtroom.

Chapter 7 discusses magisterial constructions of the community whose interests our courts are enjoined to take into account when deciding upon sentence. Three such constructions are identified and analyzed, namely:

(a) the inclusive community: the community comprises all members of society, including the accused;

(b) the divided community: there are two separate communities, namely, the community of property owners and the community of criminals;

(c) the exclusive community: the community is the community of property owners exclusively.

It is concluded that all three constructions (including, in this instance, the formally inclusive one) in fact parochialize the community, to only a (small) section of the population, from which the accused is conceptually ejected. Such sectional conceptions involve classist and racist assumptions about the composition of the community which has to be protected, and can lead the magistrate easily to opt for custodial sentences, thereby physically ejecting the accused, instead of giving serious consideration to a sentence aimed at the (eventual) reintegration of the accused into the community.

R.A.KOEN

Abstract

The question of racial bias in the criminal justice system has long been a controversial one in South African legal, sociological and political discussion. This thesis is an intervention in the discussion, in favour of the argument that the criminal justice system is a site of racial and other forms of bias. Whereas the conventional emphasis has been on the structures of bias, the focus here is upon the language of bias in the criminal justice system, that is, upon the way in which white judicial officers speak to or about working-class people of colour. Traditionally, the analysis of biased language has been concerned with the patent racist utterance or opinion, identified according to the positivist techniques of content analysis. However, of late an important shift has taken place in the language of racism, to a discourse formally free of blatant racist insults. The analysis of the language of this "new racism" in the criminal justice system is the central focus of this thesis.

Contents

Preface

> "As we enter the last decade of the twentieth century, it is intolerable and unacceptable that the cancer of racism is still eating away at the fabric of societies in different parts of our planet.
>
> It remains one of the most important global issues confronting all humanity, black and white. It is a struggle that must involve people of all walks of life. It is a struggle that must involve people of different colors, religions, and creeds....
>
> We, all of us, black and white, should spare no effort in our struggle against all forms and manifestations of racism, wherever and whenever it rears its ugly head."
>
> (Nelson Mandela, Speech in Harlem, New York, 21 June 1990)

During a period of social and political transformation analyses which are presented today may well be overtaken by events and become casualties of history tomorrow. This thesis presents an analysis of a particular form racism in the criminal justice system and makes use of data collected and research conducted prior to the formal demise of Apartheid.[1] The question thus arises as to whether the analysis presented here is valid in relation to criminal justice in the "new" South Africa.

Certainly, no claim can be made for total validity. The analysis of the justice system of a racist state cannot

be mechanistically transposed to that of a formally non-racial democracy. However, the South African transformation is far from complete. Despite the political changeover, the majority of institutions of the old order, together with their personnel and practices, survive. It is not unreasonable to conclude that the biases, institutional and otherwise, of the old order survive as well.[2] These have to be identified, analyzed and combatted if the transformation is to be completed. The thorough deracialization of our society depends crucially upon racism in all its forms being systematically confronted and defeated. Indeed, it is arguable that a properly "new" South Africa cannot be won without an appreciation and eradication of the "new racism" which this thesis attempts to analyze, and which appears to have surfaced in the criminal justice system during the last years of the Apartheid state.

I trust, therefore, that the reader, especially the one who worries that the justice system remains beset by a crisis of legitimacy, will not find my research focus on the past wholly irrelevant for the present and future.

The thesis is divided into two parts. Part 1, comprising the first 5 chapters, elucidates the theory and method informing the more empirical Part 2. It includes commentary on the concept of "race", the definition of racism and the identification of the "new racism", and the

relationship between "race" and class. It also considers some of the methodological problems involved in proving the existence of racism in the justice system. Part 2, comprising chapters 6 and 7, attempts to prove, by way of a number of case studies, that the justice system is indeed a site of racial and class bias.

Part 1

Introduction

No aspect of life in South Africa has escaped the oppressive reach of "race" and racism. Social relations have been systematically racialized,[3] with the assistance of all the ideological apparatuses and under the aegis of the repressive apparatus of the Apartheid state.

The complicity of Apartheid law in the process of racialization is notorious. South African law lost its "innocence" when it became implicated in this process, thereby jettisoning a basic premise of liberal legality, namely, that law is incompatible with racism.[4] However, that "innocence" has now been reclaimed, with the restructuring of the state and the formal deracialization of the law.[5]

The installation of the "new" South African constitutional dispensation comprises a macrolegal transformation of historic significance. However, hitherto little attention has been paid to the microlegal or everyday aspects of the transformation. The long-term legitimacy of a legal system is ultimately dependent upon public confidence in it. In turn, public confidence derives from the way in which members of the public are treated when they

encounter the law in general and the justice system in particular. Indeed, it is arguable that ordinary people are concerned less with the formal protection of basic rights enshrined in statutes than with the actual quality of justice dispensed in terms of such statutes. In the end, the laws emanating from a macrolegal transformation will stand or fall according to the brand of justice they deliver on the level of day-to-day interaction between the public and the justice system. Legitimacy is only accorded a system which is seen to be doing justice.

The criminal justice system is particularly important in this regard. For it is this system which is likely to be the litmus test for the legitimacy of law in a "new" South Africa. It is through the criminal justice system that most South Africans pass if or when they have to deal with the law. Furthermore, the criminal justice system does not, even now, share the reputation for impartiality hitherto enjoyed by South African private law.[6] Instead, it has been popularly (and persistently) perceived as biased, especially against people of colour.[7]

A number of legal academics have attempted to demonstrate the existence of racial bias in relation to various aspects of the criminal justice system, especially sentencing.[8] It appears also that a fair number of practitioners share the perception that the criminal justice

system is not "race"-neutral.[9] However, the allegation of racism has been rejected not only by the judiciary[10] but also by certain legal academics who have come out in defence of the neutrality of the justice system and the impartiality of judicial officers.[11] Hitherto, neither the critics nor the defenders of the criminal justice system have been able to prove their case convincingly.

Despite the impasse, the debate has settled one thing, namely, that the question of racial bias in the criminal justice system is an important one. This thesis is a contribution to the debate, on the side which contends that the criminal justice system has not been neutral in relation to colour (and class). It considers the issue by way of a critical review of a number of cases heard in the criminal division of the Cape Town Magistrates' Court in the recent past. It also relies to some extent on the results of interview research involving Cape Town lawyers who appear regularly in the Magistrates' Court as defence counsel.[12]

Given the history of racism and the colour composition of, on the one hand, the judiciary and, on the other hand, the population of accused persons in this country, it is virtually inevitable that the justice system should be perceived to be biased. An important aim of this study is to explore whether this perception is valid or not.

Traditionally, perception and reality are counterpoised to each other, as the subjective is to the objective. However, perceptions are real. The notion of perception refers to sensory awareness and the apprehension of objects and events.[13] Perceptions do not exist only in the minds of the holders; they are derived from experience. Further, reality is not simply an objective given, separate from or independent of the perceptions of human agents. Reality is constructed and transformed on the basis of our perceptions of it. The adage that perception is reality and reality perception survives because it captures the gist of the relationship between the two.

The point is simply that perceptions have to be taken seriously. Hence the formal divide between perception and reality which dominates the conventional approach to the issue of bias in the criminal justice system is untenable. For an acknowledgment that the system is perceived to be biased can far too easily be compatible with the assertion that it is not "really" biased. Such an assertion needs to be questioned because it devalues perceptions which, right or wrong, are real and help the holders make sense of their interaction with the justice system. "Justice must not only be done, it must also be seen to be done." People's perceptions of the justice system are perhaps important enough to suggest a gloss to this famous aphorism, to the effect that justice must be seen <u>and perceived</u> to be done.[14]

There are, needless to say, many different factors which ought to be considered when the question of racial bias in the criminal justice system is discussed. Two broad categories of such factors are discernible. On the one hand, there are the structures of bias: the way in which the system is organized (procedurally and physically) and the way in which policy is implemented are undoubtedly of great importance to the "colour" of the justice it dispenses.[15] On the other hand, there is the language of bias: the way in which judicial officers and other court personnel talk to or about people of colour is an important index of bias. Hitherto the structures of bias have received far more analytical attention than the language of bias. However, language is so crucial to social interaction and human relations as to merit greater prominence in the analysis of racism. Martin has commented as follows in relation to the analysis of sexism:

> "[The] basic assumption should be that language is the tip of the iceberg of a person's world view. Language is a primary means by which we communicate and if it cannot be relied upon to show attitudes or explain behaviour, there is very little left to make the case of gender bias in the law and the legal system."[16]

These remarks are fully applicable to the question of racial bias in the criminal justice system. However, Martin probably underestimates the creative role of language as a social practice. Language is not only a primary means of

communication. It is the mode of existence of thought. It is also a basic element in the social construction of reality and a fundamental means of structuring human relationships. As such it is an important repository of a speaker's worldview. Values, ideological assumptions and prejudices are all communicated via and revealed in language. We always say -- or are told -- who and what we are. We are created and revealed in language. White people who harbour negative feelings about people of colour, even if they do not consciously act upon them, invariably communicate some of these feelings in their language. Language can thus be a window, arguably the most important one, onto the world of bias.

In this thesis I am concerned with the language of bias. I attempt to analyze racial bias -- and ethnocentrism -- as it is manifested in the language of magistrates. The conventional focus on the structures of bias tends to downplay the element of human agency involved in the commission and reproduction of racial bias. Whereas the structures of bias are crucial to a comprehensive understanding of bias, "the system" cannot be blamed for all that is wrong with the justice it produces.[17] My focus upon the language of magistrates is thus an attempt to deal with racism which, whatever its structural underpinnings, is committed -- and tolerated -- by people. For it is people

who must eradicate racism and the structures which spawn and sustain it.

An absolutely impartial system is probably unattainable. However, justice demands that this ideal be constantly and actively pursued. In a speech to the Natal Law Society in 1980 Judge Milne said:

> "We all have prejudices which we can so easily dress up in the clothes of virtue.... What is important is that the judge should know what his prejudices are, and discard them as completely as he would inadmissible evidence. He can do this, once he recognizes them as prejudices, because he has been trained over the years to do so.... One of the best ways to learn to avoid prejudiced thinking is by being publicly demonstrated to have been guilty of it."[18]

These remarks provide a fitting backdrop for the kind of investigation undertaken here. It is a truism that ideologies persist beyond the demise of the material and political conditions out of which they developed. The new constitutional injunction against discrimination cannot guarantee that racism has or will be expunged from fabric of South African society or even from the body of its legal order. The achievement of a truly non-racial society requires, at the least, that as many South Africans as possible be committed to consciously anti-racist programmes and practices. Whereas this thesis does, therefore, intend to expose some of the racial (and other) biases which white judicial officers have mobilized in their dealings with

people of colour, it does not intend to vilify the judiciary nor to impugn the integrity of the justice system. The search for a non-racial justice system requires that the problem of prejudiced thinking in the administration of justice be identified and confronted and, if necessary, for members of the judiciary to become involved in education programmes designed to sensitize them to the problem of bias and the need to focus upon the requirements of justice in all cases which come before them.

Chapter 1

The Concept of "Race"[19]

> "Race as a biological and a scientific entity does not exist. And yet it has been used as a basis of discriminating against people or having prejudicial views of what people should or shouldn't be like.... [Difference] does not mean that we belong to different races. We belong to one race, which is the human race."
>
> (Mamphele Ramphele, Agenda, TV1, 1995)

"Race" and its accompanying discourse dominates the sociological analysis of racism in South Africa. Legal analysts have generally followed the lead of the social sciences. Thus, for example, Girvin concludes his discussion of the concept of "race" as follows:

> "It is clearly possible to believe in the notion of distinctive races without subscribing to the belief that some races are inherently superior to others physically or mentally. This latter belief may be termed racism and lies at the foundation of the legal order in South Africa."[20]

Girvin is here positing that "race" categories are neutral, objective, even benign. He seeks to separate "race" from racism.[21] In terms of such a separation, it would be acceptable to indulge in "race"-thinking, that is, to take for granted the existence of different human "races";[22] but

racist thinking is unacceptable, that is, one ought not to believe that the "races" are hierarchically ordered.

Girvin's position belies the history of "race" and racism. The concept of "race" is inseparable from the attribution of differential capacities to the different "races". And whereas racism may entail the belief in the superiority of one "race" over another, it proceeds from the acceptance of the existence of different "races". "Race"-thinking implies racist thinking and neither is benign.

As an analytical concept "race" takes for granted that which requires explanation.[23] Any claim which the concept of "race" had to scientific validity has long ago been exploded.[24] Bovenkerk sums up the latest scientific investigations into its validity as a means of classifying the human beings:

> "Modern-day physical anthropology has shown that since the phenotypical variation of people who belong to one and the same race is always greater than the differences between the "races", in point of fact human races do not exist. The classification into biological races hitherto viewed as natural has been relegated to the oblivion of academic error, and in itself now constitutes a subject of research as an ideological construction of eighteenth and nineteenth-century reality."[25]

"Races" continue to exist purely as a deliberate social and political constructs. Thus, Geschwender has remarked as follows:

> "Races are socially defined units. They come into existence when differences are recognized and are interpreted as being biological in origin."[26]

Fryer takes the point further:

> "'Race', expunged from the vocabulary of scientists, persists in everyday speech as a political category -- a category that helps determine who has power over whom. The ascription of individuals to racial groups is a political act. Racial labels are in fact political weapons by means of which a dominant group can retain a subject group in subjection."[27]

Even Adolf Hitler, the archetypal racist bogeyman of modern times, understood this fully:

> "I know very well that in a scientific sense there is no such thing as race. As a politician, however, I need a concept that makes it possible to destroy the historical bases that have existed hitherto and to put in their place a completely new and antihistoric 'order' and to give this new order an intellectual basis."[28]

"Race" and racism figure large in the history of colonialism and capitalism in South Africa. The school of radical historiography has demonstrated, decisively, the facilitative role played by racism -- and hence "race" -- in the imposition and reproduction of capitalist relations of production in South Africa.[29] "Race", and its accompanying discourse of hierarchical difference, was, naturally, the basic justificatory tool relied upon by the theoreticians and ideologues of Segregation and Apartheid in South Africa.[30]

One of the supreme ironies of the South African political and theoretical landscape is that by far the majority of the opponents of racism have always employed "race" as an analytical concept. The concept figures as a core one in both racist and anti-racist discourse.[31] Opponents of Apartheid have objected less to the classification of people into "races" than to the differential attribution of capacities and the unequal distribution of resources to the different "races". The point, however, is that racism proceeds theoretically and practically from the concept of "race". Racism requires that people be hierarchically classified on the basis of putative natural differences, with the classifiers located at the top of the hierarchy, naturally.

Clearly, any anti-racist project should not embrace the discourse of "race". Anti-racists will surely one and all object if it were suggested that the aim of their struggle was (and is) to ensure that people of colour are not treated differentially merely because they are members of a naturally inferior "race". Yet this is precisely what the hierarchical aspect of the discourse of "race" must imply.

The fact that "race" has a social and political presence, that it has a reality which intrudes into the structure of social relations does not justify ascribing

analytical validity to the concept of "race" or embracing the discourse of "race". Alexander makes the point cogently:

> "There is no logical reason whatsoever to argue for the existence of entities called 'races' ... simply from the fact of racial prejudice or ethnic awareness of whatever kind. It is anti-scientific to conclude that because a very large number of people in the world believe in the existence of ghosts and hence behave as though ghosts really do exist by, for example, avoiding cemeteries after dark or whistling loudly when they are alone in a strange house at night therefore a category called ghosts has to be invented. Hundreds and even thousands of millions of people believe in the existence of an omnipotent god and a large proportion of our planet's day-to-day economic, political and cultural activities are still determined by the reality of this belief and of the needs and actions that flow from it but I have never yet been told that this is a sufficient reason for anyone to accept the reality of such a deity. This 'argument' has been canonised by some of the most illustrious names in the pantheon of the social sciences but ... we can quite confidently pull a red line through it."[32]

The critique of "race"-thinking is especially important nowadays, when racism no longer relies as heavily upon overt biological arguments as previously, when it has undergone "ethnic cleansing", and when so much of racism consists in taking for granted the reality and significance of "race" categories. Non-racialism has to mean the unconditional rejection of the concept and the discourse of "race". The argument for discarding "race" and its discourse in social analysis is not merely a pedantic one. The concept has been used over too long a period by the opponents of equality and justice to rationalize the subjugation of large sections of

humankind. Montagu has described the concept as our "most dangerous myth" and suggested that the word be deleted from the human lexicon.[33] One cannot but agree. Conceptual clarity and terminological accuracy are indispensable to the correct analysis of and hence the successful struggle against racism or any other form of oppression.

Chapter 2

On Racism and its Definition[34]

Racism ...
Sometimes it whispers
Sometimes it shouts
but
It always hurts
and
It's always wrong!

(What's New, CCV Television, 1994)

> "I think racism today has gone underground. It's more covert. We don't have restrictive covenants and things like that today. But it's still there, harder to detect."
>
> (Bill Hohri, fifty three year old Japanese-American, quoted in Race by Studs Terkel)

The conventional South African notion of racism is one which embraces, firstly, the range of prejudices which underlie negative attitudes of white people towards people of colour and, secondly, the range of practices and/or policies which discriminate against people because of their putative racial origins. Girvin's conception of racism as the belief that "some races are inherently superior to others physically or mentally"[35] represents the prejudice component of the standard notion of racism. A typical example of the practical arm of this notion is Dean's

definition of racial discrimination as involving the "differential treatment of individuals solely on the basis of their race or the colour of their skin".[36] These kinds of definitions are satisfactory insofar as they do comprehend the ontology of racism: gradation (and degradation) as a function of "race".[37] However, they are inadequate[38] to understand the relations of power[39] which underpin the gamut of racist practices which people of colour encounter and endure every day of their lives.[40] Nor do they provide insight into the structure of the socio-economic privileges which racism protects.[41] In order better to approximate the reality of racism, its definition needs to be extended beyond the ontological, to a consideration also of social milieu and historical conjuncture.

A further significant consideration which needs to be factored into the analysis of racism is its continuous internal variation according to the material and political conditions in which it subsists. In other words, instead of the analysis of racism proceeding in terms of a search for ahistorical constants, it should proceed in terms of racism's historical specificity.[42]

Historical specificity implies variability and inconstancy and thereby problematizes the definition of racism. Cashmore and Troyna pose the problem of definition in the following terms:

> "A protean concept at the best of times, racism has virtually challenged analysts to redefine it in the light of changing events or leave it behind in the mists of history."[43]

The resolution of the problem reduces to a choice between "definitional rigour" and "definitional slipperiness". The proponents of definitional rigour insist upon "guidelines on how to recognize racisms in all their forms".[44] They presume that "there must be some transhistorical features which identify the different racisms as instances of a specific ideology".[45]

The supporters of definitional slipperiness, by contrast, are equally insistent that attempts to identify and define a single ahistorical racism are likely to lead into an analytical cul-de-sac. Racism's most general condition is its fluidity -- a condition which renders it resistant to general definition.

Like Wetherell and Potter, I "sympathize with definitional slipperiness".[46] The fundamental problem with a general definition is that it is invariably an a priori one, to which the analysis of racism will have to be adapted. To insist upon a numerus clausus of fundamental criteria of identification imposes upon the analyst a sort of definitional determinism which is unlikely to contribute much to the rigorous analysis of racism at a particular

historical conjuncture. Definitional rigour reduces to an attempt to undo racism's protean nature, to freeze a phenomenon which is "inherently" fluid. Needless to say, such an approach is analytically effete and likely to mystify instead of clarify.

However, those who lean towards definitional slipperiness have to respond to two charges, one important, the other trumped up. The first charge relates to what Miles calls conceptual inflation.[47] He is referring to an analytical tendency to expand the ambit of the concept of racism by including in it practices, policies and utterances which make no explicit reference to "race". Miles identifies a double movement in this process of expansion:

> "On the one hand a number of writers have continued to confine the use of the term to refer to specific discourses, but have inflated its meaning to include ideas and arguments which would not be included by those who initially formulated and used it.... On the other hand, other writers have inflated the analytical meaning of the concept so as to refer largely to individual and institutionalized practices which have as their outcome the determination and/or reproduction of 'black' disadvantage, regardless of intention and legitimating ideology."[48]

One of the consequences of such conceptual inflation, according to Miles, is a tendency to conflate racism with such phenomena as sexism, nationalism and classism. The definition of racism should be rigorous enough to retain its

conceptual independence. And such rigour will be achieved only if the essential core of racism is discerned.

Miles's argument is significant but porous. Firstly, a definition which cannot tolerate parametric expansion beyond its original discursive ambit hardly merits its status as such. For it would have lost any worth it had as a definition almost as soon as it was formulated. Secondly, the argument for not expanding the analytical ambit of a definition can be countenanced in relation to static phenomena only. It has already been submitted that racism's most general condition is its fluidity. It is further submitted that it is only by not slavishly adhering to either the original discursive or analytical ambit of its definition that the analyst will not leave racism "behind in the mists of history". The following additional points are worth noting in this regard:

1. Whereas definitional rigour may be desirable, it ought not to be fetishized. In this connection it is worth noting that Frantz Fanon, whose work Miles considers to lack definitional rigour, produced some of the most rigorous analyses of racism in colonial Africa ever.

2. The search for a general definition of racism in terms of its essential lowest common denominators displays a metaphysical concern to fix the nature of racism once

and for all, to divine its ultimate properties. Metaphysics is the enemy of analytical rigour, which seeks to comprehend phenomena in terms of the changing and contradictory conditions of their existence.

3. The definitions of racism proffered by the advocates of rigour themselves tend to get caught up in precisely the problems they are designed to overcome. Thus, for example, Miles declares that racism operates by

> "attributing meanings to certain phenotypical and/or genetic characteristics of human beings in such a way as to create a system of categorization, and by attributing additional (negatively evaluated) characteristics to the people sorted into these categories."[49]

Cashmore and Troyna define racism as the

> "doctrine that the world's population is divisible into categories based on physical differences which can be transmitted genetically. Invariably this leads to the conception that the categories are ordered hierarchically so that some elements of the world's population are superior to others."[50]

A moment's reflection upon these definitions will reveal that conceptual inflation looms large in both of them. Both can be easily read to include forms of the other -isms which they aim to exclude. Thus Wetherell and Potter say of Miles's definition that it "does not solve the problem and could be applied equally well to

some sexist claims as to some racist claims".[51] Much the same can be said of the definition constructed by Cashmore and Troyna.

The second charge to be answered by the proponents of definitional slipperiness goes to the ambit of the anti-racist struggle. More specifically, the charge is designed to reduce that ambit or to prevent its extension to the experiences of people of colour which are not comprehended by the rigorous definition of racism. Thus Cambridge and Feuchtwang argue that clarity as to the contents of racism "helps to define what can be identified as racism rather than leaving anything or everything to be understood by the condemnation 'racist'".[52] Cashmore and Troyna make a similar point, more graphically and in terms resonant with the morality of the tale of the boy who cried wolf:

> "To scream 'racism' at every instance of injustice and inequity involving ethnic minorities may reap practical rewards in the short-term. It may also take away the concept's incisiveness and luminosity over a longer period."[53]

These kinds of utterances amount to demands that the anti-racist struggle should abide by the rules of definitional rigour. The opponents of racism must be able to fit an issue or problem which they classify as racist into an a priori definition of racism -- or leave it be. It is, of course, extremely problematic to expect a person of colour

who experiences an "instance of injustice and inequity" at the hands of a white person to classify such instance other than as racist. The fact that the experience might not fit into the rigorous definition of racism does not render it a non-racist experience. Furthermore, unless one considers the perspective of the Others to be analytically irrelevant, there appears to be no good reason why an interaction which is experienced as racist should not be submitted to analysis as such.

It is, of course, possible for a black person deliberately and maliciously to construe as racist an interaction with a white person, even if such interaction has nothing to do with the "injustice and inequity" referred to earlier. It may be accepted that a concern with this kind of possibility motivates, at least in part, the charge under discussion. Needless to say, spurious accusations of racism must be exposed and resisted. However, it must also be accepted that such accusations are individual and episodic, and do not comprise a constituent element of the theoretical and practical resources of the anti-racist movement. They can be properly dealt with, and vigorously, as and when they arise. However, any suggestion that they are so widespread as to operate to the detriment of the anti-racist cause is unwarranted. And the conclusion that racism needs to be defined rigorously is unjustified. The

"Boy" who screams "racism" cannot be equated with the boy who cries wolf.

The cynicism which underlies much of this second charge finds full expression in the rise of anti-anti-racism amongst the new right in Europe, the USA and Canada. Anti-racists are cast in the role of troublemakers; anti-racism becomes a mania. This kind of backlash, not unlike the one against feminism, is always imminent in the argument for definitional rigour.

The charge that blacks scream "racism" at every turn has not yet become an integral part of the discourse of "race" in South Africa. There are two reasons. On the one hand, it has not been necessary: at the macro level of the Apartheid state accusations of racism had been incontrovertible. On the other hand, it has not been possible: at the micro level of everyday racism,[54] black people could hitherto not, without jeopardizing health or livelihood, afford to scream "racism". If in the "new" South Africa, everyday racism does not dissipate rapidly, black people's objections thereto are likely to be increasingly, and vociferously, voiced. In this event we may well witness the counter-accusation taking a prominent position in the South African discourse of "race".

The definition of racism should also take into account the other forms of oppression which combine with it to create a totality of oppression.[55] Oppressive practices are invariably so intertwined as to make their distillation into discrete forms impossible. Hence the analysis of racism must pay attention to the fact that the boundaries between the different forms of oppression are, at best, fuzzy and fluid. The now commonplace insight that certain people of colour suffer double and triple oppression attempts to comprehend the reality of the black experience. But it should not be construed in arithmetic or linear terms: black workers do not suffer class prejudice in addition to racism; black women are not the objects of sexism plus racism. The world of oppression is not merely a sum of different forms; it is the outcome of an interpenetration of the different forms. Black women suffer gendered racism, that is, an oppression structured by the racist construction of gender; black workers suffer class racism, that is, an oppression structured by the racist construction of the working class. The triple oppression which black female workers experience is the hybrid phenomenon produced by the articulation of class prejudice, sexism and racism.

Attempts to approximate this complex reality analytically have nothing to do with conceptual inflation or category conflation. And the analysis of racism is likely to remain impoverished if analysts do not endeavour to

understand why a person of colour condemns as "racist" -- and thereby confounds the purists -- an experience which could theoretically be classified as sexist or classist. The point is simple and singular: oppression, like freedom, is indivisible.

In light of the above, racism in contemporary South Africa may be defined as the set of social practices which are rooted in "race"-thinking and which have the effect, in articulation with other forms of bias, of justifying and reproducing the relations of oppression and exploitation which exist between those South Africans historically categorized as black and those historically categorized as white.[56]

This definition has to be understood in relation to the following three related considerations. First, the racism which this thesis attempts to analyze is an informal racism. It is a racism which did not exist as an official aspect of the Apartheid justice system[57] and which is certainly not formally part of the policy of the "new" Department of Justice. Lynch and Patterson expand upon the nature of informal racism in relation to the Rodney King incident:

> "King's treatment by LAPD officers and many other forms of racial bias encountered in the criminal justice system are informal forms of racial bias; that is, they are not officially sanctioned, and are not formal police policy. No one admits to them; no one writes them down as policy; and no

> one records their occurrence. Usually, there are no statistical records for researchers to investigate. For example, without the videotape, the King incident would not have become evidence for scholars who examine racial or ethnic bias in the criminal justice system."[58]

Much the same can be said of the racial bias to be found in the criminal justice system in South Africa. It, too, is unofficial and off the record. What is more, racism is not supposed to exist as a problem in the justice system because its existence is "contrary to the core values of the legal system itself -- concepts like equality, fairness, impartiality and objectivity ".[59] However, as Lynch and Patterson note, racism comes "in a variety of packages, some of which we might never entertain as biased practice until we confront them face to face" (emphasis in the original).[60] In this thesis I attempt to identify a few of forms in which racism in our criminal justice system is packaged.

Second, much of the racism which we see in the criminal justice system may well be unintended, in the sense that it is not consciously perpetrated.[61] However, absence of intention to be racist does not render one's act or utterance innocent, nor does it render the experience of it by the victim a nonracist one. In the classification of a practice as discriminatory or biased, outcome overrides intention: if its effect is racist, it is racist.[62] Racism has deep roots in South African culture and may assert itself despite the best intentions of its purveyors. Such

unintended or unconscious racism "happens" even though public morality may condemn it because, according to Essed:

> "The concepts of White superiority and the rejection of Blacks will already have established themselves to such an extent that instead of being exceptional, they become 'normal'."[63]

It is thus "normal" for white people to think of people of colour as "people who either have problems or cause problems" (emphasis in the original).[64] This conception encourages actions which are racist and which manifest themselves in slips of the tongue[65] and slips of mind.[66] Dlamini classifies some of the racism he perceives to be present in the South African justice system as unconscious. Thus he ends his discussion of a series of racist judicial pronouncements with the following remark:

> "Many of these apparently discriminatory comments and attitudes are not based on conscious prejudice, but on unconscious racial attitudes which judicial officers have picked up during the formative years of their lives. Indeed few openly racist utterances emanate from the bench today. In many cases the discrimination is more subtle and unconscious, and this may account for the denial that race is a factor in the administration of justice."[67]

He cites the case of S v Magwaza as an example.[68] His comments on the case are worthy of full quotation. He says:

> "The judges both in the court a quo and on appeal referred to a middle-aged white woman, who was one of the witnesses as 'Mrs Momple' while the black witnesses were referred to by their first names

> irrespective of their age. There is no doubt that these differentiations were made along racial lines. They may be perceived as racially motivated, as evidence of the fact that white judges associate with blacks mainly on a master-servant level and therefore treat black persons in court in a similar fashion. This might be regarded as petty discrimination, but the thoughtless use of language in this manner by the courts has a negative effect upon the black community's perception of the courts and of the law."[69]

I observed the following instance of the thoughtless dispensing of courtesy in the Cape Town Magistrates' Court. The case involved a civil claim for damages arising out of a collision between two minibus taxis. The white defendant, owner of one of the taxis, was invited by the magistrate to give his evidence while seated in the box. None of the usual factors such as the witness's age, infirmity, illness, or injury was visibly present or offered to motivate the invitation. The other witnesses, three black taxi-drivers, testified in the usual upright position. In terms of Dlamini's analysis of Magwaza this incident can also easily be perceived as racially motivated.

Last, and most importantly, contemporary racism has a significant covert aspect. Analysts are generally agreed that racism is nowadays characterized much more by "subtle racial imagery"[70] and "inferred racial meanings"[71] than by the blatant assertions of the natural inferiority of the "coloured races". The days of scientific racism, based on supposed biological/genetic differences between the "races"

are, for the most part, gone.[72] In their stead we have seen the emergence of a "racism without race" employing discursive strategies which avoid direct references to "race" and which couch racist positions in terms of other "natural" differences between whites and people of colour, between the Self and the Other. Gilroy refers to new terminological codes which

> "enable people to speak about race without mentioning the word. The frequent absence of any overt reference to 'race' or hierarchy is an important aspect of the new types of racism with which we have to deal."[73]

However, the sanitized version of racism, developed in response to the success of anti-racist movements in turning public morality against racism, remains as firmly rooted in "race"-thinking as its red-neck predecessor.[74] Essed sums up well the present position as regards the identification of racism:

> "Those who believe that racism consists in explicitly saying or writing, 'Black people are inferior,' are likely to conclude that there is little racism in the world. Yet the message that Blacks are less bright, less civilized, less sensitive, and less human, and that they may be treated in a less friendly and less humane manner than Whites, is communicated in numerous, often invisible ways."[75]

Even the traditionally most common racist practice of stereotyping[76] has undergone this process of "deracialization". Previously the stereotypical utterances

of South African judicial officers tended to be stark and unmitigated. When they used a stereotype in relation to people of colour they would do so in no uncertain terms: blacks were liars; blacks were violent; they were inclined to criminality; they were constitutionally suited to imprisonment.[77] Nowadays the language in which the stereotype is expressed is much more oblique. It is seldom accompanied by a direct reference to the supposed characteristics of people of colour as a group. Instead the stereotype might be invoked via a refracted reference to "people like the accused" or "people like you".[78] Alternatively, it might contain no reference at all, direct or refracted, to people of colour as a group but will be mobilized because[79] the accused is a person of colour perceived by the magistrate, on the strength of racist mythology, to possess one or other of the stereotypical traits of his or her "race".[80] These changes in the discursive modes of racist stereotyping accord with the retreat of scientific racism and the rise of the "new racism". Some of my examples will attempt to trace the kind of circumlocution which marks present-day racist stereotyping.

In the research interview which I conducted with criminal lawyers I attempted to canvas the covert or subtle aspect of contemporary racism by way of a closed question. Participants (all bar one of whom had earlier opined that

the criminal justice system was tainted with racial bias to a greater or lesser extent) were asked to comment as to whether they perceived this bias to be

(a) overt and easy to detect;

(b) subtle and hard to detect;

(c) combination of (a) and (b).

One of the 23 interviewees refrained from making a choice. Of the remaining 22 interviewees, 11 chose option (b) and 11 chose option (c). None chose option (a). The overall interview trend was that contemporary racism has an important subtle dimension. And interestingly, a number of interviewees qualified their choice of option (c) with the comment that the subtle form of racism was not hard to detect.[81]

The features of contemporary racism which I have discussed above -- informal, unconscious, covert -- combine to make its identification all the more difficult.[82] "It takes extra attentiveness"[83] to detect its presence in texts or talk which may generally appear inoffensive. The analyst has to do "extra work in reading beyond what is printed"[84] or said in order to expose a racism "concealed inside apparently innocent language".[85] However, these same features also mean that judicial neutrality in respect of "race" can no longer simply be assumed or asserted. For, as Lynch and Patterson have remarked:

> "When race or ethnic bias occurs, it may not be consciously engineered; it may simply occur because those involved fail to consciously design out racially or ethnically biased practices (emphasis in the original)."[86]

Today, therefore, judicial impartiality in respect of "race" has to be deliberately accomplished, on the basis of self-consciously anti-racist practice on the part of our judges and magistrates. The overthrow of Apartheid is in itself not sufficient to guarantee a justice system free of the pernicious influence of racism.

Chapter 3

"Race" and Class

In his study of discrimination in sentencing in the USA, Austin remarks that:

> "Even in courts where racial bias does not exist, black people may find themselves at a disadvantage because of the disproportionate representation of blacks at lower levels of the class structure."[87]

Although firmly located in the notion of double or triple oppression referred to earlier, this remark is a forceful reminder that no analysis of racism can ignore its relationship to the notion of class as the fundamental axis of social stratification in contemporary society.[88] The generally subaltern position, both nationally and internationally, of most people of colour in the structure of production as well as their permanently precarious access to the basic necessities of life imposes upon the researcher the duty to consider the analytical links between "race" and class. Although a comprehensive discussion of the subject is beyond the scope of this thesis a few comments are necessary to supplement my previous analysis of racism.

First, class and "race" are connected in a relationship of reciprocal determination. Each plays a crucial role in the structuration of the other.[89] Historically, "race" has

been a crucial element in class formation in South Africa. Today, despite the recent steady growth of a black middle class, there remains a virtual identity between the working class and people of colour. The analysis of racism cannot therefore proceed simply in terms of "race". The class dimensions of being black in South Africa must be accorded due relevance when dealing with racism.[90]

Second, the powers and privileges in defence of which racism is espoused and practised are more often than not powers and privileges which derive from class. It remains a fact of life in South Africa, despite a recent visible increase in the number of white people who are unemployed, that most white people are not working-class. They are located primarily at the middle and upper layers of the class structure, a position which affords them, at least, a relatively comfortable and want-free lifestyle. The discourse of difference which is so prominent in the racist project is also a major factor in the class project to protect the material foundations of middle- and upper-class existence in South Africa.[91]

Third, attention should also be given to an important but hitherto neglected form of the reciprocity between "race" and class, namely, the phenomenon of class racism.[92] Racism is a modern problem. Snowden states that "nothing comparable to the virulent color prejudice of modern times

existed in the ancient world".[93] A number of other analysts have argued persuasively that modern racism has its origins not in the antagonism of white people to people of colour but in the contempt of the upper classes for working people, for the labouring classes. The upper classes of nineteenth-century Europe viewed the (white) working class in their own countries as an inferior "race", naturally suited to manual and menial labour.[94] Racism becomes "ethnicized" and chooses as its objects people of colour during the age of imperialism, when capitalism expands from its European home to remake the rest of the world in its own image.[95] The successful imposition of generalized commodity production in the colonies required that the indigenous population be transformed into a pool of cheap labour-power. This was achieved via a process of racialization, in terms of which the white colonizers were allocated a position naturally superior to the black colonized both in the hierarchy of the "races" and in socio-economic terms.[96] The central thesis here is that white racism has deep roots in the class racism which came with capitalism.[97]

An important element in class racism is upper-class fears of the perceived dangers posed by the "race" of workers to social stability. To the upper classes of the nineteenth century this barbaric Other Nation, this primitive labouring class was also a dangerous class. The poor and working masses were supposedly given to crime and

other anti-social behaviour. They had no respect for the sanctity of extant social and proprietary arrangements. Their goings-on threatened the bourgeois social order.[98] We shall see later how this element of class racism still manifests itself amongst some of the magistrates in the cases which I analyze.

The notion of class racism is particularly useful to the analysis of bias in a country like South Africa where there is so huge an intersection between class and colour. There is increasing evidence that racism is, so to speak, going back to its roots.[99] The South African brand of "new racism" is not simply a racism which has cleaned up its language and switched to a non-racial code. It is also a racism which links up with the basic division of society into classes. It is a racism which perceives class differences in racial terms: the working class is naturally a different and inferior "race" to the middle and upper classes.[100] It is a racism which is articulated through a discourse of disapproval and disdain for the behaviour of a subaltern population. And since the vast majority of accused who appear in our Magistrates' Courts are members of the black working class, it is arguable that a large part of the bias they suffer is class racist.

The intersection between "race" and class at the level of social reality, combined with the public condemnation of

(overt) racism, has important implications for any attempt to identify the language of racism. Increasingly, it is no longer possible easily to say simply that a particular text is racist. Nowadays one is faced with texts which contain a "subordinated racism [articulated] through a dominant but non-racist ideology of competitive individualism" (emphasis in the original).[101] Although such texts may be aimed at a particular out-group, they contain a general discourse of bias applicable to most other out-groups.[102] Thus, for example, often the same range of stereotypes is mobilized in respect of both people of colour and working-class people.[103] Both these groups are perceived to be dirty, rude, ungrateful, won't-works, too demanding, criminal, dangerous, and the like. Both are seen as problems because they indulge in all sorts of "unacceptable" activities. This all-purpose nature of contemporary discourses of bias means, firstly, that context is crucial to the interpretation of any text, and, secondly, that a text can be biased in a more ways than one, depending on the social markers of the out-group it targets. The analyst concerned with the identification of racist texts has to proceed with these considerations constantly in mind. Whereas the linguistic analysis of a text may indicate bias, contextual and historical analysis will probably be required to identify the type or types of bias it contains.

Needless to say, these few comments by no means traverse all the contours of the relationship between "race" and class. This relationship is problematic and needs to be probed continuously. It should be clear, however, that whereas class and "race" are analytically distinct, class prejudice must always be factored into the analysis of racism in contemporary society. There is no pure racism at the level of social reality: invariably it is "contaminated" by class. If black workers are nowadays spared the more pernicious aspects of colour racism in the courtroom, they are often the victims of class prejudice or of class racism.

Chapter 4

Methodological Issues

The task of proving the presence of racial bias in the administration of justice is an unenviable one for any researcher. Even in a country like South Africa where racism has for so long had so large a legal presence, research into the possibility of its intrusion into the justice system has hitherto involved breaking the taboo on "mentioning the unmentionable". Thus, whereas the majority of South Africans takes it for granted that a justice system created and staffed by people perceived to be the functionaries of a racist state is obviously racist,[104] those few analysts who have attempted to deal with the issue methodically have had also to deal with the disapproval of the judiciary. Dlamini sums up the position well:

> "The sensitive nature of this subject and the negative reaction of the bench tends to discourage research. If anyone avers that race plays a role in the administration of justice in South Africa, he is likely to find himself unpopular, to be told that his allegations are unfounded and to be called upon to prove them with factual evidence.... And even where supporting evidence of racial influence upon the administration of justice can be supplied, its authenticity will always be doubted."[105]

The hitherto disbelieving mindset of the majority of the judiciary towards averments of racial bias is perhaps

understandable. Judges and magistrates who are charged with dispensing justice "without fear, favour or prejudice" can hardly be expected easily to believe that the system which they administer is tainted with racism. It is hoped, however, that the analysis presented in this thesis will convince at least a part of the judiciary that the averment of racial bias in the criminal justice system is not a specious one and that it ought to be taken seriously.

Positivism and its reliance upon proof by way of various statistical/empirical methods have long been dominant in both law and the social sciences. This thesis departs from the positivist mainstream and adopts a broadly qualitative or interpretive approach -- as opposed to the quantitative approach usually associated with positivism -- to its research topic.[106] I have chosen to use it primarily because it is especially appropriate to the analysis of my object of investigation, namely, the language of the "new racism". Traditionally, the techniques of content analysis, which rely upon fairly blatant indices of racial prejudice, have been employed to identify and measure racism. Researchers would construct an objectionable adjective checklist against which to identify attitudes of white people towards people of colour, and then subject the results to statistical analysis, with a view to quantifying the racism espoused by the sample in question.[107]

However, the traditional techniques are unable to comprehend the protean nature of racism. They were developed in relation to the overt, confident form of racism which was dominant in the past. Content analysis of contemporary racist texts could easily lead the researcher to conclude that there is no racism anymore, or at least that racism has diminished significantly, because white people no longer resort to the usual adjectives or pronouns of disdain when talking to or about people of colour. Probably all the case extracts which are analyzed later in this thesis could be construed as not being racially biased in terms of the conventional measurements of racism. They contain none of the blatant equations of blacks with negative characteristics. Two possibilities arise: either the judicial pronouncements analyzed are not racially biased; or they are racially biased, but in a way which conventional content analysis cannot reveal or appreciate. It is a basic argument of this thesis that contemporary racism has undergone a process of "deracialization". It follows that the measuring techniques used to quantify the patent form of racism cannot automatically be applied to the analysis of the subtle form of racism.

Further, my aim is to identify the existence of racism in the criminal justice system -- via an analysis of the language in which it is expressed -- not to quantify it. Certainly the openness of the qualitative approach is more

appropriate than the formalized categories of the positivist methods to the critical reading of judicial pronouncements and the evaluation of discursive strategies adopted by white judicial officers in their dealings with people of colour. Indeed, the structured nature of the positivist methods can operate to divert attention away from issues which may require comment. This is a particularly important consideration when one is dealing with so complex a phenomenon as bias -- and the language in which it is expressed. The qualitative approach with its emphasis on interpretation is well suited to illuminating the discursive milieu of contemporary racism.

Hitherto (as is apparent from Dlamini's comments above) the positivist approach has not had much success in proving racism to those who matter, namely, the judiciary.[108] Indeed, it is arguable that the qualitative approach, in terms of which the obviously racist utterances or actions of judges and magistrates are exposed for what they are,[109] has, from the point of view of "proof", probably been as successful as the quantitative approach, despite the apparently more rigorous methodology of the latter. The likely reason is that whereas the second approach can be countered by subjecting the material to different statistical -- or ideological -- analysis, the judicial utterances relied upon in the first approach are generally incontestable.[110] As Martin says of this approach: "In many

respects it is difficult to think of a form of better or more obvious proof."[111] Thompson is categorical: "Racism cannot be fought by playing the numbers game."[112]

Of course, no serious analyst, including the most committed positivist, would suggest that the qualitative approach is not a valid research methodology.[113] However, qualitative studies which challenge the established positivist position in a particular field are often perceived as being unwelcome work and hence impugned as being methodologically unsound.[114] A few comments about the positivist standard of proof are thus appropriate here. Invariably, the positivist critique of unwelcome work focuses on the question of what constitutes an acceptable standard of proof. And the problem of proof usually comes down to the question of the "control" used by the researcher. Usually, the "control" is deemed adequate only if it demonstrates certainly that people of colour are treated unfavourably or unfairly as compared to white people in the same situation and that such differential treatment occurs on racial grounds only. The stringency of the control criterion has led Sykes to conclude that:

> "In fact, the only valid estimates of the incidence of discrimination in Britain have been achieved through specially constructed situation tests approximating experiments."[115]

But, as Sykes further points out, even proof of such "scientific" stature may still not convince a person who holds a philosophical or ideological position different to the researcher's: every South African is fully aware that one person's "freedom fighter" is another's "terrorist". Ideological variation between researcher and audience may thus scuttle the efficacy of even laboratory-grown proof.

It is readily admitted that the qualitative approach which I adopt cannot prove -- according to the positivist standards -- the existence of racial bias in the criminal justice system. It cannot be said with certainty that the magistrates in the cases which I analyze treated black people unfairly as compared to white people.[116] Further, the blatant racist/sexist comment can be trivialized as a slip of the tongue or as an exception/aberration which is torn out of context and unfairly highlighted; and cases of racist sentencing can be rationalized on the basis of the truism regarding the highly individualized nature of the sentencing process.

Bernal argues that certainty in fields other than the natural sciences is "out of the question: all one can hope to find is more or less plausibility". He submits, further, that "debates in these areas should not be judged on the basis of proof, but merely on competitive plausibility" (emphasis in the original).[117] My categorization of

magisterial language as discriminatory will rely upon proof by way of "reasoned argument".[118] I shall attempt to show why the examples chosen for analysis can, in the context of the history of South African racism and without overinterpretation, be read as discriminatory against people of colour, particularly those from lower-class backgrounds.

My purpose is merely to provide an analysis of the language of contemporary racism in the criminal justice system which is plausible. As already intimated, my argument is that the qualitative mode is particularly well suited to identifying the subtleties and nuanced character of contemporary racism because it allows one to delve deeper, to unearth the values and ideological assumptions which white people mobilize in their interactions with people of colour. Again, it is readily admitted that some, perhaps all, of my interpretations will be debatable. That, however, is the spirit in which they are offered.

Chapter 5

Analyzing the Language of Racism: an Example

In this chapter I analyze a piece of text taken from one of the cases in my sample to illustrate, firstly, my approach to the study of language[119] and, secondly, my understanding of the characteristics of the language of racism in contemporary South Africa.

The purpose of this example is to illustrate and clarify the relationship between the earlier theoretical/methodological discussion and the later case studies. The following aspects are relevant in this regard:

1. My analysis of the chosen text is based upon the "slippery" definition of racism contained in Chapter 2. The extract contains nothing which can readily be classified as biased in terms of the rigorous definition of racism. I attempt to show, however, that it is rooted in "race"-thinking and its attendant stereotypes, and also that it evinces some of the prejudices which characterize class relations in South Africa.

2. Ahistorical concerns with the perceived essence of racism are unhelpful in the endeavour to comprehend the

workings of contemporary racism. The retreat of scientific racism and the emergence of the "new racism" derives from the protean character of the phenomenon. My analysis of the extract proceeds in terms of the characteristics of the "new racism", especially its subtle or nuanced aspect, and to some extent its unconscious aspect.

3. I analyze the extract in terms of a qualitative or interpretive approach, with due regard to the socio-economic context and historical conjuncture in which was produced. Standard content analysis of the extract in the positivist tradition will yield results which are, at best, inconclusive. It is submitted that the qualitative approach leads to conclusions which are, at least, plausible.

The excerpt is taken from the case of S v Eliza.[120] In this and subsequent examples, I quote from the transcripts verbatim, as far as possible. Errors or omissions in the transcripts are thus reproduced here. The majority of excerpts are in Afrikaans. English translations are provided in notes.

> S v Eliza: "Die Hof wil nou nie geregtelike kennisname daarvan neem nie, maar hier is daagliks [aanrandings sake] van Kensington en Factreton van Lugmaglaan, Venturastraat en al hierdie lane voor die Hof. Dit is vir my opvallend dat in al hierdie aanrandings daar geen of baie weinig sake voor hierdie Hof plaasvind

> waar daar met vuiste en/of skoppe aanranding gepleeg word. Dit is gewoonlik een of ander wapen wat gebruik word. Hetsy 'n baksteen, hetsy pale, hetsy messe, hetsy bottelkoppe, ens.
> Of dit die manier is waarop julle julle probleme daar probeer uitsorteer dit weet die Hof nie. Die Hof kan egter nie daaruit die afleiding regverdig dat die bree gemeenskap in Factreton en/of Kensington hierdie tipe optrede met blote gelatenheid aanvaar nie. Daarom moet die Hof ook die belange van die wetsgehoorsame burgers daar in ag neem. Die Hof moet die atmosfeer vir hulle skep waarin hulle behoorlik hulle bestaan as landsburgers kan uitvoer sonder om alewig in twis met iemand anders betrokke te wees."[121]

This piece of discourse contains much of what is characteristic of racism today. There is, for example, not a single reference to "race" in the excerpt. This reflects the process of "sanitary coding"[122] which racism has undergone, largely under pressure from anti-racist forces. However, as already intimated, the "new racism" remains as saturated in "race"-thinking as scientific racism. The extract above is no exception. In it the magistrate represents the accused as a member of a population which resorts to violence naturally to resolve disputes. What is more, the violence is invariably perpetrated with a dangerous weapon when fists and feet would have sufficed. Earlier on in his judgment the magistrate described the assault of which the accused was convicted as the kind which one expects only from barbarians (I shall deal with this description in more detail later). Clearly, he perceives the population to which the accused belongs, namely, working-class and lower middle-class people of colour, and hence the accused herself, as self-evidently different from

and naturally inferior to the population to which he belongs.

The most remarkable thing about this representation of the Other is the subtlety with which it is achieved. Firstly, it is enclosed in negative formulations or disclaimers. Thus, for example, the magistrate decides not to take judicial notice of the violent propensities of the accused and her ilk, he does not know whether they resolve conflicts violently,[123] and he cannot conclude that the broad population of Factreton and Kensington accepts violent behaviour with resignation. Secondly, the decision not to take judicial notice of a "fact" which he obviously considers to be notorious enough not to require proof distances the representation from the history of South African case law which is littered with examples of judicial officers taking such notice of "facts established only in racial mythology".[124] This kind of move is typical of contemporary racist discourse: formally to disown an old racist technique while supporting precisely the conclusion which such a technique delivers. Thirdly, at the end of the piece, as already intimated, the magistrate is at pains to dilute his earlier remarks or to limit their ambit by redefining the "julle" ("you people") who solve problems violently in such a way as to exclude "wetsgehoorsame burgers" ("law-abiding citizens"). In light of the strength of the central image he has already constructed, such a move

can have only one objective: to repulse a possible charge that his representation of the population to which the accused belongs is a racist one.

"Race"-thinking endows the different "races" with peculiar natural traits such as selfishness, rhythm, discipline, aloofness, aggression, laziness and the like. In Eliza the accused and her neighbours are perceived to be possessed of violent propensities. It is a perception which is presented matter-of-factly, by the use of adverbs of degree ("baie weinig" and "gewoonlik") and the passive voice of present continuous forms ("gepleeg word" and "gebruik word").[125] Even the stereotype of violent criminality is presented in the same dispassionate tone, as a means of "sorting out problems". The effect of such linguistic devices is to infuse the magistrate's version of the problem with the quality of factual correctness, free of any assumptions or value choices. That this is the magistrate's own view of his version is evidenced by the fact that he prefaces his presentation of it with the possibility that he could, if he so wished, take judicial notice of it. The discursive imposition of the magistrate's stereotypical perception upon the problem of assault in Factreton and Kensington is "authorized" by the coercive competence of the law (and the state). The magistrate has named and interpreted the problem of assault in Kensington and Factreton in a particular way. His naming of the problem as

one which derives from the supposed nature of the population of the area entails a solution[126] which proceeds from a perception of the accused as a member of the problematic Other. This "authorized" version of life and culture in Factreton and Kensington is concerned to control, and punish, the innately violent and/or criminal tendencies of the offender and excludes all other versions, including those which would engage the social roots of the problem at hand.[127] Thereby it operates to reinforce the social relations which trap the whole population in question in conditions of inequality and brutality.

I conclude my analysis of the extract from Eliza with three general comments. Firstly, my classification of it as racially biased is closely linked to its context. We see a white magistrate making offensive remarks (albeit not in obviously racist terms), on the record, about the supposed violent propensities of a section of the black population. In South Africa, even at this point in its history, it is extremely difficult to avoid the conclusion that these remarks have racist connotations. Secondly, the extract also displays class bias. The area from which the accused hails is known to be a working-class and lower middle-class residential area. One can safely assume that the magistrate is located at a higher level of the class structure. His remarks evince some of the disdain for the "dangerous" activities of the lower classes which is an element of class

racism. Thirdly, it is likely that the magistrate in question could honestly deny any racist intentions on his part. Such denial is legitimate, however, only if intention is a necessary element of the classification of discourse as racist. Albeit probably unconsciously, the magistrate's remarks about the accused and her "race" display all the attributes of "race"-thinking.

The sort of analysis which I have applied to this excerpt from Eliza emphasizes language use in relation to the production of meaning in a particular context. Clearly, analyzing discourse in this sense cannot be a primarily linguistic exercise. Grammar, vocabulary, style and other properties of language provide the organizational grid for discourse and obviously influence the meaning it generates, and hence cannot simply be ignored. However, my analytic aim is to understand discursive practices in relation to the social construction of reality. Linguistic devices will therefore receive attention only insofar as they contribute to this understanding.

Part 2

In this part of the thesis I extend the kind of analysis applied to the excerpt from Eliza to a number of other cases from my sample.[128] I attempt, in Chapter 6, by way of 7 examples, to identify and analyze some of the discursive means by which magistrates can import or allow racial and class prejudices into their courtrooms.[129] Chapter 7 seeks to demonstrate how these prejudices are entailed in some magisterial conceptions of the community whose interests comprise one of the elements of the triad of Zinn.[130]

Chapter 6

Communicating Bias: Stereotypes and other Shenanigans

Example 1: They are Barbarians

The creation of a hierarchical typology of "races" was premised upon the creators' belief that the "coloured races" are uncivilized and have not yet evolved beyond the stage of barbarism. The notion of a "Dark Africa" populated by black savages who indulge in all sorts of barbaric practices used

to be the stuff not only of popular belief but also of scholarly expositions on the "inferior races".[131] It has receded somewhat, in line with the retreat of scientific racism. But it remains a core premise in "race"-thinking and is occasionally re-asserted in relation to the behaviour of the victims of racism. Thus, for example, in Eliza referred to above the magistrate declares as follows:

> "U optrede daar was totaal onnodig. Dit was totaal ongehoord en dit is optrede wat 'n mens slegs van barbare verwag. Ek sê dit met respek. Ek het geen ander woord as (sic) om dit [te] beskryf nie."[132]

In this case the accused, a 34-year-old black woman from a working- and lower middle-class neighbourhood, had been found guilty of assault with intent to do grievous bodily harm. She had stabbed the complainant, a woman from the same area, in the left arm and hand with a broken bottle-neck. For the magistrate this is no ordinary crime: it is a crime one expects barbarians to commit. The accused's conduct is not only "totally unnecessary" and "totally beyond the pale";[133] it is the act of a barbarian. No other word will suffice to express his feelings about the assault and towards the accused. He resorts to the barbarian image reluctantly, "with respect", but necessarily: to stab somebody with a broken bottle can only be an act of barbarism.

It may be that the magistrate's use of the barbarian image is not a mobilization of a racist stereotype but a legitimate response to an act which induces a sense of shock and outrage in any person. In other words, it is possible that the colour (or class) of the accused has nothing to do with the magistrate's response to her action. In this regard it can be readily accepted that the magistrate did not intend to make a racist remark. However, "intentionality is not a necessary component of racism".[134] What is more, racism can easily be read into the remark because it links a person of colour to a lower stage of human development without regard for what, in the context of the history of "race relations" in South Africa, such a link implies. I shall attempt to show later, by comparison with another case from my sample, that the colour of the accused is indeed crucial to the magistrate's conception of her. At this point I wish to make the following two observations. Firstly, despite the frequent reference to her action (by the use of the noun "optrede" and the pronoun "dit"), the syntactic structure of the magistrate's image shows that his focus is in fact on the accused, not her action -- and one of the primary defining characteristics of the accused is her colour.[135] Instead of describing the assault as "barbaric", he resorts to a lengthy adjectival clause to describe it as an assault "which one expects only from barbarians". The choice of adjectival clause over adjective has the effect of emphasizing the "nature" of the accused

rather than the nature of the assault. The accused acted as a barbarian would; the conclusion that she is a barbarian follows ineluctably.

Secondly, the notion of barbarism is not a neutral one. It refers to a stage in the historical development of humanity which is the antithesis of civilization. And in the mythology of racism, civilization has been and remains the preserve of the white "race".[136] It is the persistent strength of this mythology which deprives the magistrate's image of the innocence of shock and outrage and imbues it with racism. The point can be clarified further by way of example. An ANC member has been reported as describing the violent occupation of the World Trade Centre during the multi-party negotiations by members of the Afrikaner far right as barbaric. The difference between this description and the magistrate's image lies in the fact that hitherto the majority of black people in South Africa has been systematically excluded from the civilization which the invaders of the World Trade Centre hold dear. And to mobilize the barbarian image in relation to right wing violence is to impugn the claims to civilization of the social system which spawns this phenomenon. But to mobilize it in relation to the criminal behaviour of a black person, however shocking that behaviour might be, is to condemn that person to a lower stage of human development. Such an image, even if used in response to a repulsive criminal act,

cannot easily, when directed at a black accused, be separated from a racist conception of that accused.

The racism involved in Eliza is highlighted by a comparison.[137] In S v Scharnick,[138] the same magistrate was faced with a white accused who had assaulted his wife, breaking nine of her ribs. She had spent five days in hospital. He had done the damage with his fists and feet. The magistrate had the following to say about his actions:

> "Mr Scharnick, I am not here to pass a lecture as to the wrongfulness of your conduct, sir. There is certain authority that regards wife beating and/or wife bashing as merely trivial, sir, as a right which a husband possesses over his wife and that it is merely a domestic problem. Be that as it may, sir, that is their view. We are living in a modern society, sir, we are not in the dark ages anymore. Women are equal and have the same rights as men. You cannot abuse their rights, sir.
>
> I've also taken into account that there seemed to have been an argument which advanced in a bar. So I take it that liquor also played a part in this vicious assault. I call it a vicious assault although no medical evidence was placed before me, sir, but your wife was hospitalized."

Despite the fact that the accused in this case did not use a weapon, the assault was evidently as "barbaric" as the one in Eliza. Yet it is described in comparatively less loaded and more neutral terms as "vicious". And the syntactic focus is on the act ("this vicious assault" and "a vicious assault"), not the accused. These differences require explanation. One reason for the differences may be

that the accused in Eliza used a broken bottle whereas the accused in this case used his fists and feet. This fact is important to the magistrate as his earlier comment about judicial notice indicates.[139] However, there is really no good reason why an assault with a broken bottle should be categorized as "barbaric" while an assault with fists and feet should be "vicious". The woman in Scharnick was clearly seriously injured by her husband's attack upon her. Depending on the length and the intensity/ferocity of an assault, a foot can be as dangerous a weapon as a broken bottle and a fist can do as much damage as a brick. Mrs Scharnick knows this all too well. Whereas, therefore, the magistrate's concern with the problem of assault with dangerous weapons in the Kensington/Factreton area is not misplaced, he does appear to underestimate the seriousness of the bodily harm which can be inflicted without a weapon.

Another reason for the magistrate's lexical choices and syntactic focus in the two cases may lie in the fact that the accused in Eliza is a woman while the accused in Scharnick is a man. Traditionally, female crime has been explained in terms of the individual woman's failure to adhere to her specific gender role. Consequently, "criminal women have always been presented as being 'Other'".[140] In the patriarchal perspective a woman is not supposed to stab somebody with a broken bottle. Such out-of-character and unfeminine behaviour must be castigated and harshly so.

Whereas this kind of sexism may have been a factor in the magistrate's resort to the barbarian image, it is unlikely that it was his only or primary motivation. For in S v Baadjies,[141] the same magistrate said the following of a male accused from the same area as the accused in Eliza and also charged with a very similar kind of assault:

> "U optrede daar meneer het ek nie woorde om te beskryf nie meneer, ek kan net daarna verwys meneer dit is barbaars."[142]

The syntactic focus of the image here is on the act, not the accused as in Eliza. This shift may be due to the different genders of the two accused. However, the image remains intact: both men and women of colour who commit assaults with dangerous weapons are included in the barbarian image.

A third reason for the difference may lie in the fact that Scharnick involves a "domestic problem", which the justice system and its personnel are apparently inclined not to take as seriously as "public problems".[143] However, in Scharnick the magistrate himself seeks to deny this possibility with his argument that domestic violence against women should not be trivialised. I take him at his word.

I suggest that a clue to the differences between the two cases lies in the manner in which the magistrate constructs his "lecture"[144] against "wife bashing". His

presentation is couched in terms of disapproval of the practices of Other cultures and "their view" on the issue. "They" are in the "dark ages"; "we" live in a "modern society". As a member of "modern" (civilized) society, the accused ought not to have beaten his wife. He needs to understand that with "us", "women are equal to men and have the same rights". "We" do not "abuse their rights". The magistrate in effect gives Mr. Scharnick, one of "Us", a lesson in the "anthropology of Otherness"[145] and hence in the error of his ways.

In Scharnick the conclusion that the accused's act was the kind which "one expects only from barbarians" should follow logically and easily[146] from the magistrate's discussion of the problem of domestic violence against women in terms of an opposition between the values of "modern society" and those of Other societies, still trapped in the ignorance of the "dark ages". Mr Scharnick failed to conduct himself according to the mores of "modern society" and should therefore have earned the opprobrium of the barbarian image. However, the manner in which the magistrate presents his argument appears to be designed to avoid precisely this conclusion. His discursive strategy is to distance the accused and his crime from the "barbaric" practices of Other cultures. Thus, except for the oblique reference in the first sentence, the extract does not present the accused as actually doing anything. The

wrongfulness of his conduct is not an issue for the magistrate. The assault is presented as something which simply happened. And even the important fact that the complainant had to spend five days in hospital, a fact on which the magistrate bases his description of the assault as "vicious", is referred to in the passive voice. The overall effect is to separate the accused from his action and hence from the "uncivilized" cultures which condone such actions. The only direct castigation which the magistrate aims at the accused is the restrained "You cannot abuse their rights". Respect for another's rights is one of the hallmarks of western civilization. And by linking the crime to an abuse of rights the magistrate effectively "debarbarizes" it.

It is submitted that the magistrate's treatment of the crime in Scharnick is motivated by the fact that the accused is white and male, a combination which, in the mythology of racism, exemplifies homo sapiens and western civilization. In the same way that the patriarchal perspective posits that women are not violent, so the perspective of western civilization teaches that white people are not barbaric. They might on occasion become vicious, but such viciousness is not to be associated with a relapse into barbarism. By contrast, black people who commit assault with dangerous weapons easily evoke all the connotations of the primitive and the savage which had for so long been a perceived characteristic of their "race".

Again, I have to make it clear that it is unlikely that the magistrate intended his treatment of the accused in Eliza to be racist, or that he consciously adopted an ethnocentric approach to the accused in Scharnick. Equally, however, I wish to stress that nowadays the racism in the criminal justice system is not only and always of the stark and conscious kind. Often it is of the kind which takes the existence of a hierarchy of "races" for granted and which therefore takes certain offensive attitudes towards or utterances about people of colour as quite reasonable, even natural.[147] Eliza and Scharnick are, in this regard, instructive examples of the racist and ethnocentric traps of which our magistrates need to be consciously and constantly aware.

Example 2: They are criminals

The stereotype that black people and working-class people have innate criminal and/or violent propensities is perhaps the most active one amongst the forces of law and order in this country. I shall attempt to demonstrate the ways in which some magistrates mobilize this stereotype through an analysis of excerpts from five cases in my sample. All of the accused in these cases are members of

the black working class. None had any previous convictions.[148] Four were sentenced to direct imprisonment by the magistrate hearing the case. In only one of these four cases was the sentence altered on review.

2.1 S v Baadjies:

> "[U] gaan vir u enorme probleme in die toekoms om die hals haal meneer indien u voortgaan om mense links en regs te steek."[149]
>
> (sentence: 9 months suspended for 3 years)

In this case the accused is warned not to "continue stabbing people left and right". The accused is a first offender. There is, therefore, no basis for the magistrate to suggest that he has stabbed anybody else before or that he will do so in the future. There is also no basis to suggest that he has or will do so wantonly. The magistrate's warning is thus unwarranted. The fact that he does issue it may be an indication of his outrage at the nature of the assault committed by the accused: he had stabbed a woman in the face with a broken bottle-neck. This possibility is supported by the fact that the magistrate had, it will be recalled, started his judgment by characterizing the assault as "barbaric". Certainly, magisterial outrage is appropriate, even necessary, in relation to this kind of assault. But it is also necessary that such outrage not be expressed in

exaggerated terms which suggest an unfair link between the accused and criminality/violence. I think that a crucial factor in explaining why the magistrate does chastise the accused in these terms is his perception of the accused. While the elements comprising this perception cannot be precisely identified from the magistrate's words, it is not unreasonable to say that he sees the accused as a member of a criminal population, "naturally" given to acts of violence, to stabbing others under the impetus of Rumpff CJ's notorious "steeklus".[150] In other words, the magistrate's warning can, in the context in which it is issued, legitimately be read as being informed by the criminal/violent stereotype. The question of whether his resort to the stereotype derives from the colour or class of the accused is extremely difficult to answer. These two components are, as already intimated, inextricably intertwined. And, as argued earlier, it is nowadays not easy to distinguish the language of racism from that of class bias. The magistrate's perception is probably best described as class racist, derived from interaction between the colour and class of the accused.

2.2 S v Vuyisile:

> "Die inwoners van die stad het die reg om elke straat te gebruik sonder om gemolesteer te word. Die getuienis is hier dat u het 'n dame van 64 jaar gemolesteer en haar handsak gegryp. Ek kan

nie enige gepaste straf vir so 'n laakbare daad vind behalwe gevangenisstraf nie."[151]

(sentence: 12 months)

The magistrate claims that the "the evidence here is that you molested a 64-year-old lady and snatched her handbag". The claim is manifestly untrue, at least insofar as the "molestation" is concerned. The magistrate's use of the notion of molestation conjures up the image of some kind of sustained physical, even sexual, assault upon the complainant, separate from the bag-snatching. The evidence shows nothing more than that the accused approached the complainant from behind, snatched her bag from her shoulder (the strap, which she described as weak, broke) and ran away. It is worthwhile noting, in this connection, that the accused had been charged with robbery, but that he had been found guilty of theft. In other words, the magistrate found that the state had been unable to prove that the crime involved an element of violence. Yet in motivating his sentence, the magistrate imported a sense of violence by his invocation of the image of molestation. Here we see a magistrate, faced with a black working-class first offender (and a white middle-class complainant), indulging, as did the magistrate in Baadjies above, in serious exaggeration of the crime. Again, it is easy to read into his moves a stereotypical perception of the accused as a member of a criminal population, preying, in this case, upon defenceless white women. The review judge had asked whether a long

suspended sentence would not be more appropriate, but upheld the 12 months direct imprisonment anyway.

2.3 S v Mongunto:

> "Wat ook van groot belang is, is die feit dat die middestad van Kaapstad ontaard het in 'n onplesierige en onveilige plek. Dit is seker een van die redes waarom hierdie pragtige middestad van ons so onderbenut word, omdat dit so onveilig is, en as gevolg van die optrede van persone soos die beskuldigde.
> Die Hof het 'n plig teenoor die gemeenskap om te sorg dat wanneer persone soos die beskuldigde skuldig bevind word aan hierdie tipe onaanvaarbare optrede, dat so 'n persoon sodanig gevonnis word dat nie net die beskuldigde sal besef watter ernstige oortreding dit is nie, maar ook dat die beskuldigde in die toekoms afgeskrik sal word om weer so op te tree."[152]
>
> (sentence: 12 months of which 6 months suspended for 3 years)

Here the magistrate lays the blame for the degeneration of the centre of Cape Town squarely on the shoulders of "people like the accused"[153] and sends the accused before him to jail for 6 months. The accused, a 28-year-old black unemployed worker, had been found guilty of robbery: he had snatched the purse of the complainant in Adderley Street. Now few Capetonians will disagree that the centre of Cape Town has indeed become an unpleasant and unsafe place, especially at night. However, for the magistrate to blame this state of affairs upon "people like the accused" is

extremely problematic in that it suggests a racist and/or classist conception of the problem of crime in central Cape Town. It is, of course, entirely possible, even likely, that the majority of crimes are indeed committed by a category of "people like the accused". However, the question is: who are the members of this category?

The obvious answer may be that they are those people who commit crimes of the type of which the accused has been convicted. In other words, the magistrate is blaming the degeneration of central Cape Town upon "criminals like the accused". However, it is submitted that the obvious answer is not the complete answer. For the linear equation of "people like the accused" and "criminals like the accused" implies that certain "types" of people commit crimes. "People like the accused" constitute a criminal category, possessed, as a "type", of an inborn propensity to criminality. In other words, the formulation operates to link the people it refers to to criminality.

Let us now attempt to identify the criminal "type" more precisely. Clearly, the catchphrase "people like the accused" is not an instance of direct same-saying: it does not refer simply to all 28-year-old black unemployed working-class men who snatch women's purses in Adderley Street. But neither does it refer simply to people in general, or even to criminals in general. For it is a fact

that the vast majority of "people/criminals like the accused" is black and hence, as a result of the coextensiveness of "race" and class in South Africa, also poor. We can, therefore, safely exclude the majority of white people and well-off people from the ambit of the criminal "type". We are left, then, with a category of "people/criminals like the accused" comprised largely of people who share the accused's class background and colour. In the South African context, therefore, the formulation operates to link lower-class people of colour to criminality.

What is more, "people like the accused" is not merely a formulation designed to describe or identify a particular category of people. Very often such a formulation connotes[154] disapproval of the perceived characteristics and castigation of the behaviour or demands of the targeted category. This connotation is most clearly conveyed by variations such as "people like you" or "you people".[155] The people referred to are usually not perceived as ordinary (if disaffected) members of society but as deviants who are burdensome to or pose a threat to society. In other words the formulation is semantically biased against the category of people to whom it is applied.

The "people like the accused" formulation is a fairly popular one amongst our judicial officers. It is a way of

knowing and of naming. As I have argued, however, it is premised on acceptance of the existence of a criminal "type", linked to colour and social status. Crime in Cape Town (and elsewhere) is a serious problem which requires urgent attention. However, the way in which the magistrate names the problem, as the result of the nefarious activities of "people like the accused", suggests that he is relying upon a stereotypical notion of criminality. Even if it is true that crime in Cape Town is committed primarily by black people from proletarian backgrounds, and even if the judicial officer wants to send out a message that the courts will deal decisively with those people/criminals responsible for the degeneration of the city centre, there is no good reason to have recourse to the criminal "type" entailed in "people/criminals like the accused". Such a naming of the problem implies the kind of solution which is concerned to control or remove the "type" rather than to comprehend the conditions out of which it emerged.[156] Instead, criminality ought to be viewed "as a product of life in a social setting and not of characteristics thought to be inherent in the category of people who commit crimes".[157] If nothing else, such an approach encourages a different and, it is submitted, a more comprehensive way of knowing and of naming the problem at hand.

2.4 S v Van Wyk:

> "Huisbraak met die opset om te steel is 'n baie ernstige misdaad. Dit neem daagliks toe. Dit maak nie saak hoe swaar die Howe strawwe oplê nie. Die gemeenskap moet beskerm word teen mense soos u."[158]
>
> (sentence: 12 months)

In this case the accused, a 48-year-old black man, was convicted of housebreaking with intent to steal and theft. He broke into a house in Camps Bay and stole various items, including purses, clothes, radio/sound equipment and perfume. In the excerpt, the magistrate uses a discursive strategy similar to that used by the magistrate in Mongunto. My analysis of the formulation "people like the accused" in that case therefore applies equally to the formulation "people like you" in this case.[159] An important difference between the two cases is the way in which the magistrate in this case sets up the category of "people like the accused" against the "community" of landed property owners. The criminal activities of the former are represented as a threat to the security of the latter. I deal with the class racism involved in this conception in detail in Chapter 7.

I included this excerpt from Van Wyk in the research interview which I conducted, but as a hypothetical upon which interviewees were asked to comment. Insofar as the

excerpt may be classified as racist, the crucial sentence is the last one, the crucial words the last three: "The community must be protected against people like you." Six of the 23 interviewees referred to the last sentence of their own accord. Four of these six, all black, understood it to evince racial bias. One of them expressed himself in the following terms:

> "[T]raditionally the houses that have been broken into are the houses of whites. It's maybe of very recent times that non-whites are breaking into the houses of non-whites and I think it is seen as so much more serious because it is whites that are being violated, the privacy of whites that is being violated and some magistrates have said this. So I think it is a half truth to say that it is a serious offence and therefore must be sentenced severely. You will find that people who steal 40, 50 thousand rand from somebody deliberately, with planning and premeditation, they often get treated far more leniently than somebody who breaks into your house and takes things. I have never been able to understand the difference between somebody breaking into your house and stealing something worth R1000,00 as opposed to somebody walking into a shop and taking R1000,00 worth of goods. Theft is theft. But here they see it as being audacious that you actually opened somebody's house and get in there. I can assure you that if there were equal instances of blacks breaking into blacks' houses it would not be seen as so serious. It started off as being seen as very serious because it revealed, it was seen as infiltration of blacks into white areas and that is why they started making examples of these people and giving them harsh, difficult sentences."

I prompted eleven other interviewees to comment on the last sentence and/or the last three words of the excerpt. Of these, four felt that the comment referred to the crime and/or the criminal, not to his colour, that is, the comment could not be construed as racist. The remaining seven

thought that there was a link between the "race" of the accused and the language of the magistrate. A black woman attorney felt that:

> "The courts tend to regard white people's rights as more important than black people's. They are more in need of protection than anyone else. Their rights are sacred and if you infringe on them then you must be severely punished no matter what other mitigating factors there are you must be punished so that you'll never go and break in there again."

A male black attorney expressed his perception as follows:

> "'The community must be protected against people like you'? Again that is indicative of the 'them' and the 'us'. The community, and they can bloody say what they like, but when they talk about the community they talk about the decent white man in the street and when they talk about 'people like you' it's a collective of the black."

Other interviewees more or less echoed these sentiments, equating 'people like you' with "criminals like you blacks" and referring to the phrase as a "distancing" mechanism by means of which the magistrate identified with the Camps Bay community against "the 'people like you' who come from outside".

Altogether, a total of seventeen interviewees responded to the last sentence and/or the last three words of the excerpt, either spontaneously or after prompting. Of these, eleven construed the comment as racist. Some readers may find it problematic that some interviewees were prompted to

consider the last sentence and/or last three words in their response to the excerpt. I can do no better than to refer them to the following episode reported by Terkel:

> "Several years ago, an old friend and I were in a car. He was regarded with great affection by his black colleagues. They knew his track record. He had been in the middle of civil-rights battles in the early days when very few whites participated. Anti-Jim Crow, that was the phrase. A black teen-ager rode by on a bike. 'I wonder if he stole that,' murmured my friend. To my stunned silence, he responded, 'He's poorly dressed. I'd have said the same thing about a poorly dressed white kid.' I wonder. About myself as well."[160]

2.5 S v Eliza:

> "U is 'n eerste oortreder, maar die Hof is bewus daarvan dat 'n eerste oortreder nie noodwendig iemand is wat nog nie misdrywe gepleeg het nie, maar slegs iemand wat nog nie voor 'n Hof geplaas was en skuldig bevind was nie."[161]
>
> (sentence: 5 months plus 7 months suspended for 4 years; changed on review to 12 months suspended for 4 years)

This extract is a classic example of the kind of thinking which invests people of colour/working-class people with criminality. Contrary to the whole edifice of criminal procedure, the magistrate refuses to accept that an accused against whom no previous convictions are proved is a first offender. She has the legal status of a first offender only because she has not been caught, tried and convicted for the crimes which she has committed before this one. It is

difficult not to conclude that she receives this kind of treatment because of who or, rather, what she is: a person of colour from a proletarian background to whom, the magistrate must believe, criminal behaviour comes, so to speak, naturally. I have not been able to think of any other explanation for the magistrate's quite radical departure from the standard practice of accepting the accused's lack of a criminal record as sufficient proof that she is a first offender. His position is strongly reminiscent of the white American juror who expressed his view on the supposed link between colour and crime as follows:

> "Niggers have to be taught to behave. I felt that if he hadn't done [what he was accused of], he'd done something else probably even worse and that he should be put out of the way for a good long while."[162]

The South African magistrate's statement is less bigoted than and not as obviously focussed upon "race" as the American juror's. The difference, however, is merely one of degree. Both rely upon the stereotype that certain types of people are criminals. In both cases the accused committed a crime because she or he is a criminal!

Example 3: Colour by Numbers

S v Xolile and Hobanie:

> "In hierdie saak verskyn die 2 beskuldiges, volwasse mans voor die Hof. Mr Xolile en Mnr Hobanie. Aanvanklik het mnr Xolile skuldig gepleit aan die hoofklagte, maar na ondervraging is 'n pleit van onskuldig aangeteken. Nommer 2 het reg van die begin af onskuldig gepleit. Hy het gesê hy weet niks van die hele storie nie, hy is net gearresteer waar hy oorkant die pad gestaan het.
> Die Staat bring die getuies van die polisie-optreder en die sersant van die SA Nakotika Buro. Uit die getuienis is dit duidelik dat die optreder Patrick 5 stoppe dagga vir R50,00 van beskuldigde nr 1 gekoop het. Die geld is by nommer 1 se beursie ook gekry wat later deur die polisie teruggevind is en die optreder sê nommer 2 het absoluut niks met die hele transaksie te doen gehad nie. Hy het nie eens gesien nommer 1 praat met hom nie. Al wat hy gesien het hy staan oorkant die pad. Nommer 2 is later gearresteer deur die polisie nadat nommer 1 'n rapport aan die polisie gemaak het."[163]

Easily the most tenacious form of racism in the justice system is the manner in which court personnel address black accused in particular and black people in general. Apartheid and the master-servant relations it defended encouraged disregard amongst white people for the humanness and individuality of people of colour. Our courts have not been immune to the insidious influence of this kind of thinking. I have already referred to the case of Magwaza and Dlamini's comments on it. A variation occurred in the reported case of S v Gwebu: during the trial the magistrate

repeatedly addressed the accused directly as "beskuldigde" instead of "Mr. Gwebu" or even the non-specific "Sir/Meneer". On appeal Judge Goldstone remarked as follows:

> "It is perhaps as well to say something about the habit which a number of magistrates, and some prosecutors in the magistrate's courts, have developed in recent years, of addressing accused persons by the appellation 'accused' or 'beskuldigde'. And one sees, too, in many records that some magistrates refer to witnesses as 'witness' or 'getuie'.
> This depersonalising of people is disrespectful and degrading. It is no cause for difficulty for people to be called by their proper names. I can find no reason for the appellant, in this case, when addressed directly by the magistrate, not being called 'Mr Gwebu'. Members of the public who appear in our courts, whether as accused or as witnesses, are entitled to be treated courteously and in a manner in keeping with the dignity of the courts."[164]

A year later, Judge Kroon had occasion to lament that:

> "Unhappily, the habit to which Goldstone J adverted is one which is fast becoming firmly established in the magistrates' courts of this Division as well. It is a practice which requires firmly to be discouraged. In this regard I align myself fully with the sentiments expressed by Goldstone J."[165]

There is, of course, an important difference between the situation referred to by Judges Goldstone and Kroon and the excerpt from Xolile and Hobanie quoted above. The judges were complaining about the way in which magistrates' court officials address black people during the evidentiary stage

of trial. The excerpt from Xolile and Hobanie is part of the judgment[166] delivered by the magistrate: it is acceptable that he use terms such as "the accused" or "the witness" when delivering judgment. Thus, for example, in Gwebu Judge Goldstone speaks of "the appellant". Further, if there are more than one accused, it is established practice, during judgment, to speak of "accused no.1", "accused no.2" and so forth. Thus, for example, Judge Kroon in Abrahams refers to "Accused no.2". However, Xolile and Hobanie breaks with the established practice relating to the identification of parties to a case during judgment in a very significant way: the magistrate consistently refers to the two accused simply as "no.1" and "no.2". The difference between "accused no.1" and "no.1" is not merely one of form. Firstly, it takes the depersonalization about which the judges were complaining into the judgment stage. Semantically, the description "accused no.1" clearly refers to a person, whereas "no.1" does not. "No.1" and "no.2" is the kind of language usually associated with inanimate or abstract objects. Its frequent use (six times)[167] in relation to people has a dehumanizing effect: humans are transformed into things, identified by number.

Secondly, the magistrate's lexical choices are not merely discourteous, disrespectful or even degrading. It is also an example of class racism, in the sense that it betrays a contempt for the "race" of black workers in South

Africa. Its use in respect of two black working-class men is reminiscent of one of the core concepts of "race"-thinking: that the "inferior races" are less than human. They are not real people: they are abstract bodies,[168] destined for a particular station in life and in the labour-market. They are repositories of labour-power,[169] not the stuff of which complex and complicated human subjects are made. They need not be named, only numbered.

A remarkable aspect of the excerpt is the fact that the magistrate does initially refer to the accused by name and clearly without any serious pronunciation problems.[170] In fact, he refers to Mr Xolile by name a second time. But then he immediately switches to "no.1" and "no.2". The explanation for this discursive zigzag probably lies in what analysts have identified as a central tension in contemporary racism: the contradiction between a person's subjective consciousness (and acceptance) of the wrongfulness of racism and the objective persistence of an unconscious racism in that person's dealings with people of colour.[171] The easiest (and most innocent) choice for the magistrate would have been to use the traditional and neutral "accused no.1" and "accused no.2" when referring to the accused in his judgment. Nobody could have classified this description as racist or discriminatory. Instead he becomes the victim of the ambivalence referred to above: he does the right thing by referring to the accused by name;

but then he undoes this by resorting to identification solely by numbers, a discursive manoeuvre which typifies the process of dehumanization, and into which racism can readily be read.[172]

This way in which black people are named, or rather, not named by white people is not new: it goes back to the days of red-neck racism in South Africa when adult, and often old, men and women were addressed as "Boy" or "Girl". This kind of degradation is, however, not merely a result of extreme colour racism. It is also a result of the depersonalizing impact of class racism. The analysis of this manifestation of racism is thus enhanced if it is made, as I have attempted, against the backdrop of the co-determinative relationship between colour and class racism.

The macrolegal transformation which has occurred in South Africa, although necessary, will not be sufficient to ensure that the justice system is freed from the racist and classist perversions of Apartheid. Important changes on the micro level of everyday interaction between court personnel and the public are equally necessary. And, arguably, the issue requiring the most urgent attention in this regard is that of naming people, especially people of colour from working-class backgrounds. For too long this category of people has been defaced, depersonalized and rendered invisible. Their humanity and very being have to be

restored. Naming them when they appear in our courts is an important way of recognizing them as individual human beings.[173] Numbering them merely reinforces a situation which ought never to have existed, let alone continue after the demise of the system which is to blame.

Example 5: The Proverbial South African Youth

Youth is a generalized sociological category. It includes, at least, all legal minors regardless of their "race", gender, religion, nationality, class and so forth. However, in my discussion of S v Mashiso[174] we shall see how a magistrate's parochialization of the category youth entails a bias against youthful offenders who are thereby excluded. The magistrate in Mashiso had the following to say about the accused before him:

> "U persoonlike omstandighede blyk soos volg te wees: u is 19 jaar oud, u het std 4 op skool geslaag en doen deeltydse werk hier in Tafelbaai hawe. U is die enigste broodwinner volgens u mededeling aan die Hof. Die feit dat u 19 jaar oud is beteken nie dat dit u vrywaar van gevangenisstraf nie. U is nie die spreekwoordelike 19 jarige in die spreekwoordige sin van die woord nie, m.a.w. 'n persoon wat nog skool gaan en nog verder studeer, wie se ouers nog vir hom sorg nie. U is al 'n geruime tyd in die arbeidsmark en u voer 'n volwasse bestaan."[175]

South African common law prescribes 21 years as the age of majority. In the criminal justice system accused below

the age of 21 are considered youthful offenders;[176] and youth is a factor which can be pleaded in mitigation of sentence.[177] So, too, is being a breadwinner. In this case, however, the magistrate constructs the category youth in a very specific way. A youth is not simply any legal minor. A youth is a legal minor who also goes to school or university, is dependent on or cared for by his or her parents and does not work for a living. These, for the magistrate, are the characteristics of the "proverbial 19-year-old". The accused does not possess them and he is therefore not entitled to the benefits of being a youthful offender.[178]

There are, of course, cases in which the youthful offender can or ought to be deprived of these benefits. But such cases have to be seen as exceptional[179] and therefore need to be properly motivated by the judicial officer. In Mashiso the declared reason for the magistrate's departure from the norm of defining youth in terms of biological age is that the accused is not "the proverbial 19-year-old". There is no attempt to rely upon such legally valid reasons as the accused's obvious maturity belying his age, or his supposedly "inherent wickedness".[180] The magistrate bases his entire rationale for treating the accused as an adult on the fact that he is a worker and has been one for some time.

The magistrate's "proverbial 19-year-old" is in fact the middle- or upper-class student who is, in South Africa, for the most part, white. Whereas this category of young people does include a small percentage of people of colour, it certainly excludes the vast majority of black working-class youths. For it is a notorious fact (one of which our judicial corps may well take judicial notice) that most of the sons and daughters of workers have themselves to become workers at quite tender ages. They have to enter the labour-market while still young and seldom enjoy the luxury of being cared for, financially and otherwise, by their parents. In this case the magistrate knows that the accused left school in std 4 (at which time he was probably 11 or 12 years old), that he does casual labour, that he is a breadwinner.[181] Yet he does not appear to appreciate what this catalogue of misfortune implies, namely, that a child, under force of the material conditions of his existence, had to forego being the "proverbial child" and could therefore never become the "proverbial 19-year-old".

It is submitted that the magistrate's interpretation of the category youthful offender in this case is a class racist one. A black youth is an adult because he is a worker.[182] The magistrate's "proverbial 19-year-old" can be dealt with as a youthful offender, possessed of all the insouciance usually associated with youth. The accused belongs to the category "Other 19-year-old": its members

have problems or cause problems; they are dangerous; they show disrespect for the social order and the proprietary scheme of things.[183] The "Other 19-year-old" can be dealt with and sentenced as an adult.

The class racism is exacerbated by the relentless way in which the magistrate rules out all other forms of punishment except direct imprisonment. Thus he declares at a later stage:

> "U is ook 'n eerste oortreder, maar dit is nie 'n neergelegde rëel dat elke eerste oortreder bloot geregtig is op 'n opgeskorte vonnis en op 'n boetestraf nie. Dit sal met respek teen die openbare belang en beleid wees om in die geval van ernstige misdrywe 'n beskuldigde al is hy 'n eerste oortreder 'n boete en nog 'n opgeskorte vonnis op te lê."[184]

and

> "Die Hof oorweeg nie eers 'n boetestraf nie. Die Hof het oorweging daaraan geskenk om vir u lyfstraf op te lê, maar soos reeds gesê is u nie die spreekwoordelike 19 jarige nie. Die Hof in die omstandighede voel dat 'n totale opgeskorte vonnis nie van pas is nie weens die redes genoem."[185]

The accused had been convicted of a crime for which he deserved to be fittingly punished. But punishment must also fit the criminal.[186] In this case the criminal is a 19-year-old first offender: these two facts alone put the question of leniency or mercy on the agenda. Add to them the accused's position as breadwinner and we have, it is

submitted, a set of circumstances which calls for compassion. Despite all of this the magistrate sends the accused to jail. The only mitigating factor which he takes into consideration is the fact that the accused spent some time in jail between his arrest and the trial. He is sent to jail for a further seven months.[187] It appears that the seriousness of the crime lies not in the value of the goods stolen but in the challenge which it represents to our proprietary regime. "People like the accused" consistently show disrespect for other people's property and thereby undermine the social order built around private property. It is this, it is submitted, which motivates the magistrate's discursive "emancipation" of the accused so that he can the easier be sent to jail.

Example 6: She's only pregnant

This judicial concern to check working-class disrespect for the way in which our society is arranged is sometimes carried to unthinkingly cruel limits. In S v Coetzee[188] the accused had been found guilty of attempted theft and malicious damage to property. In sentencing him to 9 months imprisonment on each count, the magistrate said:

> "Al wat van u gevra word, is om u hande van ander mense se eiendom af te hou. Dit is nie veel gevra nie. U het 'n vrou en kind waarvoor u moet sorg, maar u moes daaraan gedink het. U vrou blyk nie

> ongeskik te wees vir werk nie en daar is maniere waarop sy te werk kan gaan om in u afwesigheid vir die kinders te sorg. U moes aan hulle belange gedink het."[189]

As with Mashiso, the accused had no previous convictions and, as appears from the excerpt above, the magistrate obviously had a good knowledge of his personal circumstances. He even displayed an appreciation of some of the structural factors underlying crime:

> "Die Hof is bewus dat die ekonomiese toestand daar buitekant nie so rooskleurig is as wat dit kan wees nie, maar diefstalle is nie die oplossing nie."[190]

But, again, he ruled out any other punishment: the accused had to go to jail.

The additionally remarkable and particularly callous aspect about this case is the way in which the magistrate speaks about the accused's family: his wife is not "ongeskik" ("unfit"/"unsuited") for work; and she will find ways of caring for the children during his absence. These remarks display a total disregard for the hardships of a proletarian existence in South Africa. Earlier on the accused's wife had testified as follows:

> "Ek kan die werk terugkry maar hulle weet nou ek is swanger en as ons swanger is dan mag ons nie meer verder werk nie en ek moet elke keer nou uit die werk uit gebly het vir die saak wat elke keer voorkom."[191]

Clearly, the woman's work situation is precarious. The magistrate, however, does not respond to her concerns at all. For him the vagaries of the market for female labour-power is not an issue. Instead he is concerned to make the point that she is not "ongeskik" for work. The point is, however, an ambiguous one. It may mean that she is not unfit for work, in the physical sense. It may also mean that she is not unsuitable for work, in the constitutional sense. Both possible meanings are deeply insulting. To say that she is fit for work while her husband is in jail is to say that her pregnancy and all that it implies are irrelevant. It is to say that the birth of working-class children ought not to affect their parents' capacity to carry on working. To declare that she is suited to work is to allot to her membership of the "race" of workers born unto manual labour. On either count, she must work. The magistrate's additional remarks about the care of the children (one of whom will be a new-born infant) add injury to insult. In his discussion of the triad of Zinn, Hiemstra says that the interests of the community include "the effect on the family of putting him [the accused] away".[192] It is all too easy, on the basis of his comments about the accused's family, to conclude that the magistrate believes that this kind of consideration does not apply to black working-class families.

Example 7: Racist by Default

> "[If] you have been an observer you have been racist; if you have stood by idly, you are racist."
> (Whitney Young Exceptional Children 1970)

> "We must always take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented."
> (Elie Wiesel upon receiving the 1986 Nobel Peace Prize)

Earlier on I referred to the distinction between active and passive racism.[193] In this example I focus on the latter, that is, upon the racism which derives from complicity with someone else's racism. The typical example of this in everyday life is the racist joke: each member of the audience who enjoys the joke -- for its wit -- and hence does not object to it is guilty of passive racism.[194] Sometimes our judicial officers implicate themselves in racist talk by similarly tolerating it in their courtrooms. For example, in S v Njana[195] the accused, a black woman, was charged with the theft of a pair of jeans from the factory at which she worked as a char. During his evidence-in-chief the white foreman at the factory made the following remarks:

> Witness: "At first I just wanted really to get rid of her. I didn't have any intention of calling the police etc but she was extremely violent and did -- she said that she wanted the

police to come to tell them that we planted it on her and she's heard stories that maids don't last long here etc. So I said fine."

Prosecutor: "What Stories?"

Witness: "We've had a few maids over the last 6 months, maybe 3 or 4. And she said she's heard stories that they don't last long here. So I basically told her the reason why they don't last long is because they all steal and they get caught."

For the witness "maids" are thieves: "they all steal". Now it is a fact that in South Africa the notion of a "maid" does not refer merely to a person who is employed to work in a domestic setting. The "maid" in South Africa is, for the most part, a black working-class woman tied to a "madam" or "master" in a relationship which is often characterized by a near feudal type of servitude. "Maids", in this context, refers to a category of people born unto manual and menial labour, whose entire existence often depends upon their obeying every command and satisfying every whim of the "madam" or "master". When, therefore, the witness in Njana declares that "maids" are thieves, he is espousing a racism, as well as a class prejudice, which links a very large proportion of the black working class to criminality. Yet his declaration evoked no response from the magistrate, not at the time when he made the remarks nor during her judgment.

It may be that the magistrate did not regard the remarks as worthy of comment, that is, that they did not offend her sensibilities. If this is the explanation for her silence then one has to conclude that she shares the witness's stereotypical perception of black "maids" as thieves and that she actively aligned herself with his racism. It may be, however, that the magistrate did hear the comments for what they are but that she did not think it her duty to respond to them publicly: the magisterial function is to pass judgment upon legal issues not upon the social ones such as the racism or class prejudices of witnesses.[196] However, this position is indefensible. First, racism's universality imposes upon everybody the moral duty to oppose it whenever and wherever it arises. "Discrimination is a pervasive phenomenon which will flourish unless it is positively curbed."[197] Arguably, the duty is even more urgent in the courtrooms of our land, where justice must be seen and perceived to be free of any bias.

Second, the magisterial oath contained in section 9 of the Magistrates' Courts Act includes an undertaking to "administer justice to all persons alike without fear, favour or prejudice". What guarantee do we have that this aspect of the oath is being upheld when a magistrate acquiesces in (class) racist remarks by a state witness (in

this case the only state witness) about the accused and the "class" to which she belongs? How do we know that such acquiescence does not signify agreement with the sentiments expressed by the witness?

Judicial officers must bear responsibility not only for their own prejudiced talk or behaviour but also for that of people who, for whatever reason, make an appearance in their courtrooms. Fortunately, this responsibility comes with the power to determine the "colour" and quality of courtroom interactions. This writer has seen magistrates eject members of the public from their courtrooms for misbehaving, scolding people for cooking up ridiculous stories, castigating prosecutors for delays in getting cases to trial, and so forth. In other words, magistrates have full control over courtroom interactions: things happen or not according to whether they will allow them. In Njana the magistrate, by virtue of her inaction in relation to the witness's prejudice, made herself guilty of passive racism. A simple intervention by the magistrate to point out to the witness why his comments were racist or prejudiced and why she would not tolerate them in her courtroom would have made a major coup for the integrity of the criminal justice system. Such anti-racist magisterial activism will go far towards removing the perception that our criminal justice system is tainted with racism.

Chapter 7

Constructing the Community: Right of Admission Reserved

As one of the elements of the triad of Zinn, the interests of the community[198] feature in every sentencing decision handed down by our magistrates. How a magistrate conceptualizes the community is therefore crucial to the way in which he or she will seek to protect its interests. Theoretically, the application of the triad is supposed to be informed by the notion of balance. As Snyman says:

> "There ought to be a healthy balance between these three factors. A court should not emphasise any of them at the expense of the others."[199]

In practice it is usual for the nature of the crime to be negatively evaluated and the personal circumstances of the accused positively. The interests of the community may therefore be decisive in the sense that it holds the balance between the other two elements;[200] and if so, how the community is constructed in relation to the accused can have a significant effect upon the sentence he or she receives.

Thus, for example, in S v Philander[201] the magistrate summed up his own appreciation of the interaction of the elements of the triad as follows:

> "Ek is van oordeel dat die belange van die gemeenskap, gesien teen die agtergrond van die erns van hierdie misdaad swaarder vandag moet weeg as u persoonlike omstandighede.
> Ek voel dat u 'n geneigdheid getoon het oor die jare om geen respek vir ander mense se besittings te hê nie en ek voel dat in die spesifieke omstandighede van hierdie saak die gemeenskap verdien om beskerm te word."[202]

Clearly, the magistrate's appreciation of the perceived needs of the community tipped the scales. The accused was sent to jail for a year.

The relative weight which a judicial officer accords the interests of the community when pronouncing sentence is derived from the way in which he or she constructs the community in relation to the accused. I have identified the following three constructions of the community element of the triad:

Construction 1: the community comprises all members of society, including the accused;

Construction 2: there are two separate communities, namely, the community of property owners and the community of criminals;

Construction 3: the community is the community of property owners exclusively.

As is evident the notion of property figures prominently in the composition of the community in Constructions 2 and 3. However, as will emerge later, property can also play an important role in Construction 1. This foregrounding of property is partly due to the fact that the constructions I have identified are drawn exclusively from cases in my sample which deal with crimes against property.[203] Invariably these crimes elicit judicial discussion of the protection of property rights.[204] It is suggested, however, that the magistrates' concern with property rights also derives partly from their social position and political persuasion. The legal realist arguments of Professor John Dugard in this regard are well-known and need not be repeated here. Suffice it to say that his central point that every judicial officer brings to the bench and imports into judgments his or her own value system and life experience is well-made and ought to be well-taken. Griffith has gone even further and argued categorically that an important aspect of British judges' conception of "the public interest" (the interests of society) is the protection of property rights.[205] There is evidence, as will emerge below, that at least some South African magistrates share this conception.[206] I now deal with the constructions individually.

Construction 1: The Inclusive Community

An example of this construction is contained in S v Feni:[207]

> "[The] Court represents the community and reflects the interest of the community. The Court is the institution to which the community turns when it is aggrieved by the criminal activities of certain of its members. And society expects from the Court to uphold the standards which are part of ordinary community life. And one of these standards is that we will not steal from one another. Everything that an individual possesses, all his possessions are reflections of the work that he has done, money that he has earned and that therefore nobody except him has any right to those possessions. If you worked and earned a salary and used that salary to buy things, to buy furniture or a car or something concrete, those possessions would represent the work that you have done. And you will not expect other people to remove those possessions from your control. And so other people expect the same from you. So that when the Court comes to sentencing people who cannot keep their hands to themselves, this is a real consideration that the Court must take into account."

This excerpt is particularly interesting for the discursive shifts it contains. It starts off magnanimously, with a "we are all in this together" tone. Criminals are not outcasts; they are members of the community, albeit deviant ones. This inclusiveness reaches its climax with the presentation of the injunction against theft as a consensual standard that "we will not steal from one another". Then comes a major shift, to the philosophy of possessive individualism

and the Protestant work ethic. The right to undisturbed enjoyment of the proprietary rewards of salaried employment takes centre stage. And the accused gets the lead role by means of the if-construction. He is transformed discursively into a salaried property owner, the better for him to understand the nature and implications of his crime against property. By now the early identity between community and criminal has fractured completely. The piece ends with a hostile description of the accused as one of those "people who cannot keep their hands to themselves".

A particularly interesting aspect of this excerpt is the huge contradiction between the if-construction (and the expectations which follow) and the facts of the accused's existence. The accused in this case is a black wage labourer who had been convicted on one count of possession of stolen goods and two counts of theft. The goods involved included hessian bags (streepsakke and mieliesakke) and nylon bags.[208] The accused was sentenced to five months imprisonment on each count. The realities of his life are graphically illustrated in the following exchanges which took place between the accused and the magistrate during the trial:

Magistrate: Mr. Feni, why did you do this?"

Accused: "Your worship the reason is your worship, in August my house burnt down. The reason why, your worship, I took those bags, I was going to use it to build another house."

and

Magistrate: "Mr Feni you have been in trouble before for stealing.... Do you have a problem to stop yourself from stealing?"

Accused: "Your worship I don't earn enough money your worship."[209]

Clearly Mr Feni does not qualify as a member of the community of hardworking salaried individuals who are entitled to undisturbed enjoyment of their deserved possessions. In fact, his actions pose a threat to the peace of mind of this community. Not even the vital imperative to provide shelter for himself and his family can justify his actions. In the end he is ejected from the community, first conceptually, then physically.

Construction 2: The Divided Community

The two-community idea of this construction is found in S v Lewis.[210] The charge against the accused was one of

housebreaking with intent to steal and theft. The magistrate constructs his first community in the following terms:

> "Vandag kan 'n mens nie rook waar jy wil nie, jy kan nie loop waar jy wil nie, jy kan ook nie sit waar jy wil nie. Jy word onderworp aan 'n klomp reëls. Jy moet optree volgens reëls wat deur ander mense neergelê word.
> Maar daar is een plek waar jy die reëls bepaal en dit is jou huis.... Dit is die een klein hoekie van veiligheid wat jy in die lewe het is jou huis. En dit is waarom dit as 'n groot skok kom vir enige persoon as jy die dag jou deur oopmaak en jy besef dat 'n vreemdeling jou woning betree het. 'n Vreemdeling het in jou persoonlike goed rond gekrap. En ewe skielik is daardie klein veilige plekkie wat jy in die wêreld het nie meer so veilig nie.
> Ewe skielik besef jy dat enige persoon wat bereid is om sekere risikos te loop kan toegang kry tot jou woning en rond krap in jou veilige plekkie. En dit is waarom die gemeenskap verlang dat wanneer persone hul skuldig maak aan hierdie tipe misdryf dat die Howe dit in 'n baie ernstige lig moet beskou en op 'n effektiewe wyse vonnis oplê."[211]

He constructs his second community later, when he is discussing the purposes of the sentence, one of which is that

> "die Hof 'n duidelike boodskap stuur aan die gemeenskap. En die gemeenskap is nie net die mense vandag hier in die Hof nie maar ook u familielede, u vriende, die mense wat wil hoor wat het met Priscilla Lewis gebeur, dat hulle ook sal verstaan as gevolg van die vonnis wat ek vandag oplê, dat om in te breek en te steel is jy besig om met vuur te speel."[212]

We see here the construction of a segmented community: on the one side there is the community of property owners whose

existential well-being is dependent upon absolute proprietary security; on the "Other" side there is the community of thieves and housebreakers who would "rob" the propertied of their lifeline to contentment. These two communities are in opposition and represent contrary values. The magistrate is quite clear about the side in whose favour the conflict ought to be resolved. In sentencing the accused to one year direct imprisonment he declares:

> "U vind dit baie moelik om in te val by die standaarde en norme wat vir ons almal neergelê word. Alle ordentlike mense moet onder sekere norme en standaarde lewe en dat u die heeltyd dwars is."[213]

The "ons almal" ("all of us") comprising the universe of "alle ordentlike mense" ("all decent people") are clearly the community of property owners. We see here the workings of the ideological trick of presenting the "standards and norms" of a section of society as those of the entire society.

Construction 3: The Exclusive Community

Whereas in the two previous constructions the black working-class accused who had committed crimes against private property were included, albeit grudgingly, in the community or were at least acknowledged as a community, if

somewhat different and threatening, in this construction they are simply deleted.

A typical example of this approach is contained in S v Manuel[214] in which the magistrate says the following to an accused found guilty of theft:

> "Daar word deur die gemeenskap van die Howe verwag om streng op te tree teen persone wat nie bereid is om enige respek te toon vir ander mense se besittings nie.
> Ek het al op baie geleenthede genoem dat die gewone man in die straat het gewoonlik twee waardevolle besittings naamlik sy woning en sy voertuig. Dit is 'n bron van groot frustrasie en die onstaan van woede wanneer ander persone, vreemdelinge inbreuk doen of maak op die reg wat elke persoon het om sy eiendom te geniet."[215]

The determination with which the working class is excluded from the community of property is evidenced in the discursive transformation of the "ordinary man in the street" into a middle-class man in a house or a car. The unpropertied proletarian criminals are "other persons, strangers", not only in the literal sense but also in the sense of the unknown and dangerous Other infiltrating and violating the boundaries of "our community".

Another example of the same construction is to be found in S v Coetzee and Barends.[216] This case was heard by the same magistrate who heard Lewis referred to in Construction 2. The charge is also housebreaking with intent to steal

and theft. The magistrate repeats almost verbatim his notion of a house as a safe haven in a sea of trouble and the role of the law in protecting its integrity against invasion by housebreakers. But this time he constructs the community differently.[217] He now describes the community in the following terms:

> "Ewe skielik is daardie plek wat nog altyd deur jou beskou word as 'n veilige plek waar jy beskerm word teen die hele wêreld, ewe skielik is daardie plek nie meer so veilig nie, en dit is waarom die gemeenskap, en dit is ons almal, dit sluit u in, as u 'n woning besit, dit sluit u in, dit is waarom die gemeenskap verlang dat wanneer persone hulle skuldig maak aan hierdie tipe misdryf, dan moet daar streng teen hulle opgetree word, ongeag wie die slagoffer is."[218]

This is a classic example of what is known in political discourse as doublespeak. The two accused are offered membership of the community, but on condition that they own fixed property. One accused is a hawker, the other is an unskilled municipal worker. The chances of either of them being "men of property" are remote indeed. The condition prescribed for their inclusion into the community results in their summary exclusion. The syntactic structure of the magistrate's utterance, especially the underlined portion, is therefore deceptive. This portion of his statement is lexically heavily weighted in favour of their inclusion. The conditional clause operating to exclude them is, literally, stuck away between two identical clauses by which they are included. But it is the crucial clause. In a

stroke the community is reduced to a tiny fraction of the population: the property owners. Again the sectional interests of a particular class are imposed upon the entire society.

My critical approach to the way in which the magistrates in my sample construct the community whose interests enter into the sentencing process must not be understood as motivated by "maudlin sympathy" for the offenders involved. The extremely controversial nature of property rights in South Africa notwithstanding, crimes against property constitute a significant proportion of our too-high national crime rate. Like all other criminals, people who commit crimes against property have to be punished. And appropriate punishment will at times mean incarceration, even of youthful and first offenders. However, it must be stressed that a balanced application of the triad of Zinn, while it may eventuate in the "interests of the community" operating against the accused, must never exclude the accused from the community conceptually.[219] The interests of the community might dictate that an offender be imprisoned; but such physical ejectment from the community must always be informed by continued conceptual inclusion, with a view to eventual physical reintegration. It is, however, extremely problematic and, it is submitted, an unbalanced application of the elements of the triad conceptually to eject an offender from the community because

that person does not fulfil certain proprietary criteria. What is more, physical ejectment follows so much more easily once the mental decision has been made. In other words, an accused who is deemed part of the community is more likely to be treated as a reintegrable member by the magistrate, as representative of the community, than an accused who is conceptually ejected from the community.

Most South Africans do not own private property in land.[220] Many South Africans reject any constitutional protection for property rights. This means that property and legal rights thereto cannot be taken as the fundamental compositional features of the community which forms an element of the triad of Zinn. Yet, in all three of the constructions I have discussed the community turns out to be a community of property.[221] And in all three constructions the accused are conceptually ejected from the community because they do not meet the proprietary requirements to qualify for membership.[222] As non-members they are different, they constitute the dangerous Other, threatening always to undermine the proprietary regime and hence the social order. But as non-members they may also be treated in whatever way necessary to render them harmless.

Our courts of law are institutions of immense power and persuasion. Judicial activities and curial processes affect

or impinge upon the lives of every member of society, directly or vicariously:

> "In a secular society, the courts play a major role as interpreters and arbiters of a culture's moral, ethical, and philosophical underpinnings. The courts also are a critical part of the machinery through which government, in pursuit of defending those underpinnings, is empowered to carry out the most dramatic interventions into people's lives that are imaginable -- the power to take a person's property; a person's children; a person's liberty."[223]

Few will disagree, however, that these kinds of curial competencies come with the duty that they be exercised justly and on the basis of equality before the law. The achievement of the ideal of justice for all is especially problematic when the underpinnings of a culture are contested or when a true national culture does not yet exist. In such cases, the courts have to be particularly alive to the undesirability of equating the interests of society with the interests of a section of society. Du Toit sees the courts as functioning in society, for society and in the interests of society.[224] Both my foregoing analysis and the general crisis of legitimacy besetting our justice system suggest that our courts do not yet function in terms of Du Toit's formulation. However, our courts have the power and our judiciary the ability to conceive of the community and of the interests of society generally, not sectionally. It is submitted that this conceptual

transition is necessary to the practical achievement of the ideal of justice for all.

Conclusion

I conclude this thesis by way of a discussion of a series of remarks made by Judge Goldstone in summing up a conference on sentencing held in Bloemfontein in 1985:

> "Corbett J.A. [as he then was] and Professor Dugard both stressed the importance of free access to, and confidence in the courts. Both speakers referred to the difficulty, in the latter context, which flows from the fact that all the judges and the great majority of magistrates are appointed from members of only one racial group.
>
> Prof. Dugard took this topic further and referred to the perceptions of members of the Black community to our criminal justice system -- he referred to "racial bias" in sentencing.
>
> This is a sensitive issue in South Africa. And that is no reason for reticence in raising it as a topic for serious discussion. Indeed, the excuse offered by Prof. Dugard for the lack of academic research, i.e. the prosecution in 1969 of Professor Barend van Niekerk seems to me to be without foundation. That prosecution may have been unfortunate and it should be remembered that the prosecution failed. I can find no justification for unsubstantiated factual statements being made concerning the administration of justice in this country. There is no substitute for serious and scholarly research.
>
> Judges in South Africa are in an unusually good position to observe the administration of justice in the lower courts. The systems of automatic review and application for judges' certificates occupy many hours per week of the time of judges of our Supreme Court. In six years of judicial experience I have come across no evidence at all of conscious racial bias on the part of South African judicial officers.
>
> In my opinion the problem lies not in bias but in the unequal treatment of convicted persons which is a consequence of a language and cultural gap between judicial officers and the people who appear before them. This important factor, and the ease with which

> perceptions of bias can arise, should be ever-present in the minds of South African judicial officers. A lack of sensitivity can result in unfortunate remarks which, through publicity in the media, can have unfortunate consequences. Such cases occur with unfortunate regularity.
>
> .
> .
> .
>
> The contribution made by Black participants at the Conference was helpful in the support they gave to the general approach of Prof. Dugard as to the perception of the criminal justice system amongst members of the black community.
>
> It also pointed to the desirability for this type of issue to be discussed and for a heightened awareness of the views of all sections of the community."[225]

I have quoted these remarks at length not only because they were made by one of South Africa's most prominent judges, but also because they raise, in one way or another, virtually every issue that has been dealt with in this thesis. Although formally restricted to sentencing and pronounced with characteristic judicial restraint, Judge Goldstone's remarks are a reliable index of the judiciary's attitude to the question of racial bias in the criminal justice system as a whole.

What is immediately clear is that the judiciary is acutely aware of the problem, real or perceived, of racial bias and its history. Refreshingly, and despite the sensitivity of the issue, there appears to exist a judicial willingness to take it seriously. Judge Goldstone's mild

castigation of Professor Dugard and his colleagues for not doing so can only be welcomed wholeheartedly. However, lurking in this openness is the standard judicial challenge to critics to "prove it". Thus the Judge warns against "unsubstantiated factual statements being made concerning the administration of justice in this country"; and he frowns at the way in which "unfortunate remarks" lead to "unfortunate consequences" through publicity in the media. If the neutrality of the justice system is to be questioned it must be grounded in fact. The point is valid. Averments of bias have to be substantiated. I have attempted in this thesis to argue the case on the basis of the facts. My approach to the facts has not followed the traditional positivist route. I believe, however, that it has been analytically rigorous enough to qualify as the "serious and scholarly research" referred to by Judge Goldstone. And I believe that my treatment of the material has yielded results which are more plausible than could have been obtained via positivist methods.

I now turn to the central point of the Judge's comments, namely, that he has "come across no evidence at all of conscious racial bias on the part of South African judicial officers". I shall not here deal with the absoluteness of the judge's averment. I focus instead upon the kind of racial bias which is allegedly absent, that is, conscious racial bias. An important argument of this thesis

is that the racial bias which taints the criminal justice system is, increasingly, a racism of the unconscious or unintended kind. It is this feature (as well as the others identified in the thesis) of contemporary racism which, it is submitted, has to become the focus of judicial concern with the problem of racial bias in the administration of justice. Implicit in Judge Goldstone's denial of the existence of conscious racial bias is the possibility that other forms of racial bias do exist. I have tried to show that this is indeed so.

This aspect of Judge Goldstone's remarks was included in the research interview referred to earlier.[226] Two interviewees found the statement acceptable, both highlighting the judge's reference to "conscious racial bias", which they understood to mean overt racism. One was non-committal and the remaining 20 found the judge's statement unacceptable, to varying degrees.[227] Interestingly, a number of black practitioners felt that his reference to "conscious racial bias" was not significant and even questioned the existence of a clear divide between conscious and unconscious racism.[228] They were reluctant to concede that the racism which they perceived in the criminal justice system could be unconscious on the part of the perpetrators. In fact, one detected a sense of shock and disappointment amongst interviewees that a person as eminent as Judge Goldstone should in 1985 have declared the justice

system to be free of "conscious racial bias", when such declaration obviously belied their experiences of the system.[229] Their stance accords with Essed's: unconscious racism is as active as conscious racism.[230]

The following comment made by the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System captures the gist of the issue:

> "The search for bias in the justice system of this state has been a complex matter. Only some of the bias encountered fits the narrowest definition of prejudice evidenced by repulsive comments or disrespectful displays by people who seek to harm others because of their race or ethnicity. The fact that bias is often hard to detect makes it no less treacherous or devastating. It is the part of an iceberg that is completely hidden from view beneath the waves that destroys the ship (emphasis in the original)."[231]

It is submitted that our judiciary can no longer rely upon narrow conceptions structured around patency and intent, as entailed in the rigorous definition of racism. The alleged absence of overt racism cannot continue to be the basis of a judicial assertion that the criminal justice system is free of racial bias. My argument, premised upon a slippery definition of racism (which takes account of social context and historical conjuncture) and employing a non-positivist methodology, confirms that the criminal justice system is infected with racial and class bias.

Judge Goldstone does acknowledge "unequal treatment" of offenders, but ascribes this to a "language and cultural gap" between offender and judicial officer. This is, with respect, the most problematic proposition in the Judge's comments. The problem resides in the extreme difficulty any analyst will have not to read racial bias into unequal treatment of offenders of different colour. It is one thing to explain racial bias in terms of language and cultural gaps. It is another thing altogether to deny racial bias and substitute it with a less loaded notion of unequal treatment. The latter smacks too much of sidestepping. What is more, the proposition raises important questions about the kind of treatment that constitutes racial bias. Should a black offender be subjected to the brutalities of red-neck racism by a judicial officer before "unequal treatment" is racist? Must a person of colour be called a "kaffir" or a "hotnot" or a "coolie" before an "unfortunate remark" is classified as racist? I have been at pains to point out the ways in which contemporary racism has been anodised. In fact, the notions of culture and cultural difference have become perhaps the most important struts in the justificatory platforms of the "new racism".[232] The problem of racial bias in the justice system can therefore not be resolved by recasting it in precisely the terms which provide ideological sustenance to contemporary racism. Its lasting resolution depends crucially upon it being properly understood, thoroughly tracked down and fearlessly resisted.

I have dealt exclusively with magistrates and some of the modes of prejudiced thinking found in their judgements. However, the fact that all the cases which I have cited were automatically reviewable has the effect of widening the ambit of my analysis to include judges. Recall Judge Goldstone's comment that judges "are in an unusually good position to observe the administration of justice in the lower courts". Unfortunately, judges are also thereby implicated in the biased practices of magistrates in the same way, as I have argued, magistrates become implicated in the prejudices of witnesses: by not objecting to it. Every case in my sample went on review before a Supreme Court judge. In no case did any review judge take exception to the way in which the trial magistrate had treated or spoken to or about people of colour.

According to Hiemstra, "[m]any thousands of automatic reviews are dealt with by the judges in their chambers"[233] and it is arguable that the sheer volume of cases does not afford the review judge the opportunity of reading the judgments for bias also. However, it is submitted that is in incumbent upon any review judge who is alive to the crisis of legitimacy besetting the criminal justice system to do precisely this. The automatic review is not a true review, restricted to the identification and remedying of procedural irregularities.[234] A review judge who does not

take advantage of the special status of the automatic review to confront bias forgoes an excellent opportunity to contribute to the resolution of the crisis of legitimacy.

It is, of course, also possible that the wholesale judicial acceptance of the magisterial pronouncements in my examples occurred because they contain nothing that is racist. I, naturally, demur, and would argue that regardless of the intention of the trial magistrate or of the perception of the review judge, the cases which I have analyzed do contain material into which racism and other forms of bias can, without undue manipulation, be read. It is true that the racist content of these cases was often not patent and had to be "flushed out". However, such is the physiognomy of contemporary racism. Indeed, one of the disheartening aspects of this research has been the ease with which, despite the advent of sanitary coding, racism and other forms of bias could be read into the discursive practices of the magistrates involved in those cases which I have analyzed.

Racial bias in the justice system should no longer be referred to in terms of the perceptions of people of colour, as Judge Goldstone does. I have already made some comments on the relationship between perception and reality. At this point I want only to recapitulate that the issue of racial bias is a real problem, in the sense that it does not exist

merely in the minds of certain people. It is a real problem which has to be taken and tackled seriously. It is a problem which is not of the judiciary's making, but in which it is implicated and with which it will continue to be burdened for some time to come. The quality of criminal justice in a "new" South Africa will depend crucially upon the approach of the judiciary to the problem.

There are, needless to say, a large number of reasons for the existence of racism in our criminal justice system. And, certainly, structural factors are crucial to any comprehensive explanation. However, and in keeping with my emphasis upon the factor of human agency in the communication of bias and the reproduction of racism in the justice system, I highlight here the issue of judicial ignorance of the Other.[235] The issue is aptly introduced by The (Canadian) Royal Commission on the Donald Marshall, Jr., Prosecution:

> "Clearly, the personnel of the criminal justice system are basically different than most of the defendants who are caught up in the system. For example, Hogarth (1979) points out that judges, lawyers, and other court personnel tend to come from middle or upper middle class backgrounds and appear to have little understanding of the circumstances of many of their clients, particularly Blacks. This situation leads to serious misjudgments of the needs of the individual and of the community the system is attempting to protect.... Offenders are products of the economic, social, political and cultural environments in which they grow up. At least to some extent, society bears some responsibility for the actions of its products. Apparently the courts do not yet accept this important fact."[236]

I need hardly add that these remarks apply with even greater force to South Africa upon whose population social segmentation along colour lines has for so long been forcibly imposed. Certainly, the question of judicial ignorance of or insensitivity to the lives of people of colour from working-class backgrounds emerged as a major concern amongst most of the criminal law practitioners who participated in the research interview.[237]

The solution to the problem of judicial knowledge (or lack of knowledge) of the life circumstances and economic tribulations of the majority of the people who appear in our courts as accused or defendants is not an easy one. It involves investigating the structural causes of the distance between judicial officer and offender. It implies that our judicial officers should evaluate critically their own socialization and the value system underlying it. It means judicial comprehension of the fact that acts defined as crimes are often instances of self-help in the search for social control.[238] And it requires that the justice system be reconceptualized in truly social terms and reorientated towards the provision of a justice which is really for all.

It will be no easy task to rehabilitate the criminal justice system in the eyes of the majority of South Africans. Legislation, policy changes and institutional

restructuring and reorganization will certainly help. In the end, however, the task falls squarely upon the shoulders of the people who staff and administer the system. It is they who must see to it that justice is seen and perceived to be done. It is they who must lead the way to understanding, identifying and eradicating the problem of racial and other forms of bias in the system. It is they who must, in a very real sense, prove that the perception of the criminal justice system held by the majority of South Africans is wrong.

The problem is complex. However, complexity has never been a good reason for not pursuing a solution.

Endnotes

1. All the research materials I use go back no further than the last 18 months of the Apartheid regime.

2. Mamphele Ramphele opined recently on the television programme Agenda that: "The elimination of racist laws has not led to the elimination of racism. And it shows you that in fact we have to go beyond just simple legislation."

3. Miles (1989: 75) uses the concept of racialization "to refer to those instances where social relations between people have been structured by the signification of human biological characteristics in such a way as to define and construct differentiated social collectivities."

4. For a full discussion of the non-racial claims of liberal legality see Fitzpatrick (1990).

5. Henceforward, any links between law and racism in South Africa are, theoretically, aberrant and exceptional.

6. See Dlamini (1988: 38-9).

7. I use the terms "black", "black people" and "people of colour" to refer to all South Africans historically categorized as not white.

8. Examples of works by legal academics which deal with the issue include Van Niekerk (1979), Fernandez (1982) Dugard (1985), McCleod and Kaganas (1985), Dlamini (1988), and Institute of Criminology (1991) and the contributions of Salmom, Kotze and Knobel in Olmesdahl and Steytler (1983). Although not rare, the number of studies is certainly not as large as one would have expected, given the racism which our law had for so long condoned. Ironically, this latter fact may be one of the reasons for the relative scarcity of studies: racial bias in the justice system may be seen by many academics and other legal professionals in the same way as it is generally perceived by people of colour, namely, as self-evident. Two other reasons should, however, also be taken into account. Firstly, the hitherto persistently negative attitude of the bench towards such studies, as exemplified in the Barend van

Niekerk prosecution for scandalization contempt, means, literally, that they have had to be undertaken under the shadow of the long arm of the law. However, see Van Blerk (1986) who argues that the dire consequences of the prosecution foreseen, for example, by the Council of the Society of University Teachers of Law, have "been considerably exaggerated". Secondly, and more importantly, the problem of proof or, rather, the kind of proof needed to convince a sceptical bench, has certainly discouraged many a researcher. One doubts whether even the sophisticated multiple regression analysis used by the contributors to Olmesdahl and Steytler (1983) has actually convinced the bench that there is a problem of bias in its ranks. I say more about this problem later.

9. I conducted a research interview with 23 practising lawyers (14 black, 9 white) regarding their perceptions of racial bias in the criminal justice system. None of the interviewees perceived the justice system to be free of racism (one chose not to choose any of the options available in the interview); 13 thought that racial bias exists but only in a few areas and with certain individuals; 9 thought that racial bias is widespread in our courts. In other words, 22 of the 23 subjects thought that racism exists, to a greater or lesser extent, in the criminal justice system.

10. I include magistrates in the term "judiciary". See the comments by Judge Goldstone quoted in the Conclusion as a typical example of the judiciary's approach to the problem of racism.

11. See Naude (1990: 9): "Compared to American research findings it would appear that the South African judiciary act impartially in the case of the death sentence as far as could be ascertained. It is therefore rather unfortunate that the judiciary is often made suspect on the basis of incorrect and scientifically unsubstantiated assumptions or by highlighting a particular case without cognisance being taken of all the factors that do play a role in the sentencing procedure. It should be borne in mind that sentencing is highly individualised and it is incumbent on the courts to consider aspects such as personal factors concerning the offender, factors pertaining to the crime itself, and the interests of society (emphasis in the original)."
See also Van Blerk (1986: 87): "Inter alia the judiciary have been charged with penalizing a man for the race to which he belongs, of being influenced by the White climate of current opinion, of an inability

to understand or become versed in the realities and needs of the Black section of society, of being elitist in thinking. Often, as has been seen, the allegations are unsubstantiated or assumptive, the conclusions not unimpeachable."

12. I read the transcripts of 69 criminal cases which were heard in the Cape Town Magistrates' Court between November 1992 and April 1993 and which went on automatic review before a judge of the Cape Town Supreme Court. The research interview referred to in note 9 above was conducted between November 1993 and January 1994.

13. Sparkes (1991: 132).

14. I am indebted to Debbie Budlender for this insight.

15. Structural factors such as the adversarial nature of the legal process, the colour composition of the system's personnel, access to legal representation, the location of courthouses, the quality of the interpretation services, courtroom ritual and dress codes, and even the physical arrangement of furniture in the courtroom can all contribute to a racist orientation in the system. See Suttner (1988) for a useful analysis of some of these structural factors.

16. Martin (no date: 21).

17. See Razack (1991: 8) who remarks as follows in her review of Philomena Essed's work: "Frequently, analysts of systemic discrimination begin to sound as though systems oppress but people don't. For example, Black women encounter career difficulties that are evidenced by their absence in top positions. There are clearly systemic barriers. But who put them there? How do they operate and how are they sustained? Who benefits? In conceptualizing racism as a process, Essed wants to ensure that individuals don't manage to disappear in explanations of the institutional."

18. See Milne (1980: 454-5). Some of Judge Milne's concerns were echoed by Judge Leon (1983: 2), whose opening remarks to a conference on discretion in the criminal justice system included the following comment: "Finally, there is the problem, if one may use that word, of the judicial officer himself. I am sure that every judge consciously tries to do justice in accordance with his oath of office -- without fear,

without favour and without prejudice. I am sure that this applies equally to any other judicial officer. Judicial officers, however, have no training in penology, no training in sentencing, and their background and experience when they ascend the bench in this particular field is extremely limited. Furthermore, as one of the great American writers once pointed out, deep below the judicial consciousness other subconscious forces are at work: their likes and their dislikes, their prejudices and their predilections -- the whole complex of views and emotions which make up the judicial officer. That is why counsel always wants to know 'Who is sitting today?'"

19. In this thesis the term race is enclosed in inverted commas because, despite its obvious social and political reality and everyday popularity in South Africa, I argue in this chapter that it is not a valid analytical concept.

20. Girvin (1987: 2).

21. For a trenchant critique of this separation see Condor (1988).

22. Following Condor (1988: 72-3), I define "race"-thinking as those modes of thought which take for granted the existence and significance of and hence the hierarchical ordering of distinct human races. Fanon (1973: 77) captures, with epigrammatic brilliance, the ambit of "race"-thinking in the opening line of his Chapter entitled 'The Fact of Blackness': "'Dirty nigger!' Or simply, 'Look, a Negro!'"

23. Montagu (1967: 17).

24. See, for example, Montagu (1974) and Gould (1981).

25. Bovenkerk (1993: 272).
See also Fryer (1993: 61): "The concept of 'race' is pre-scientific and pseudo-scientific. It belongs to the prehistory of the biological sciences. For the past 30 or 40 years geneticists and anthropologists, when discussing the variations in human physical characteristics, have tended to void this concept. They have discarded it as 'artificial' and 'meaningless', 'obsolete' and 'almost mystical', 'out-of-date, if not irrational', 'a particularly virulent term', 'a facet of the folklore of Western civilization that is inadequate to account for the facts of human biological variation'."

26. Geschwender (1977: 6).

27. Fryer (1993: 62).

28. Quoted in Feuchtwang (1990: 18-19).

29. See, for example, Johnstone (1976), Legassick (1974), Wolpe (1972) and Williams (1975).

30. See, inter alia, Goldin (1987), O'Meara (1983) and Davies and Kaplan (1979).

31. See Goldberg (1990: 312).

32. Alexander (1987: 141-142).

33. Montagu (1974: 127).

34. There are many racisms. This thesis deals primarily with white (anti-black) racism, and to a lesser extent with class racism.

35. Girvin (1987: 2).

36. Dean (1976: 162). See also Ferguson-Brown (1991: 214): "A policy of racism denies people their fundamental right not to be discriminated against on the grounds of race."

37. See Goldberg (1990: 303). The ontology of racism is rooted in the reduction of social relations to a basic Us-Them category of difference and hierarchy. "We" have a history and culture which is constantly being threatened with contamination by "Them" and "Their" strange ways. The foreign Other is "waiting at the gates" to invade "Our" civilization, dilute "Our" cultural or national identity and take what rightfully belongs to "Us". This fear of the Other is often connected with images and representations which identify people of colour with such characteristics as dirt, promiscuity, crime, bestiality and the like. The inferior Other and all It stands for have to be kept at bay, sometimes purged, if "Our" way of life is to survive.

38. It has been said that the only real definition of anything is the development of the thing itself -- which is then no longer a definition. In this sense no definition is ever adequate, as it is a mere

approximation of the thing defined. Methodologically, however, definition is necessary and the closer the approximation the more adequate the definition.

39. See St. Lewis (no date: 1) on racism in Canada: "The issue of racism is fundamentally about power: the power of the mass and the shared belief system; the power to shape reality in accordance with one's values; the power to give voice to or to silence the diversity of others; the power to rewrite history and to develop legislation which meets the socio-economic imperatives of the majority."
See also Van Dijk (1987: 11): "[Ethnic] attitudes, their formulation in discourse, their persuasive diffusion, as well as their uses as the cognitive basis for action, are all essentially social. They characterize groups and intergroup relations and exhibit sociocultural, historical, political and economic dependencies. They embody and signal dominance and power."

40. The numerous racist encounters which people of colour have to put up with on a daily basis is seldom appreciated. See, for example, Essed (1991: 36): "To understand the impact of racism in the everyday lives of Black women, one needs to go beyond issues of career problems to include racial experiences in all other spheres of life, which comprise personal experiences with racism in shops, in the street, at the university or in the workplace as well as racism through friends and family, racist practices in children's schools, and other confrontations with racism such as in literature or the media."

41. See Wellman (1977: 35-6): "Racism is a structural relationship based on the subordination of one racial group by another. Given this perspective, the determining feature of race relations is not prejudice towards blacks, but rather the superior position of whites and the institutions -- ideological as well as structural -- which maintain it."

42. Hall, quoted in Gilroy (1990: 265), takes the point further: "Racism is always historically specific. Though it may draw on the cultural traces deposited by previous historical phases, it always takes on specific forms. It arises out of present -- not past -- conditions. Its effects are specific to the present organization of society, to the present unfolding of

its dynamic political and cultural processes -- not simply to its repressed past."

43. Cashmore and Troyna (1990: 18).

44. Cashmore and Troyna (1990: 19).

45. Miles (1989: 64).

46. Wetherell and Potter (1992: 70).

47. Miles (1989: chapter 2).

48. Miles (1989: 66).

49. Miles (1989: 3).

50. Cashmore and Troyna (1990: 46).

51. Wetherell and Potter (1992: 70).

52. Cambridge and Feuchtwang (1990: 19).

53. Cashmore and Troyna (1990: 19).

54. See Essed (1991) for an excellent study of the structure of everyday racism.

55. I refer here primarily to the complex web of subjugation and inequality emanating from the interaction of class, colour and gender. Only the black bourgeois male is ever likely to experience racism as a discrete form of oppression. See Razack (1991: 1) who, in response to the questions "Can you separate gender bias from other forms of bias? Can you study gender bias solely in relation to women?", says "My answer to both questions is a resounding no."

56. This definition owes much to that developed by Wetherell and Potter (1992: 70) for racism in contemporary New Zealand.

57. It was, of course, structured and reinforced by the mechanisms of formal Apartheid.

58. Lynch and Patterson (1991: 2).

59. Martin (no date: 11).

60. Lynch and Patterson (1991: 2-3).

61. See Lawrence (1987: 330): "Racism is in large part a product of the unconscious." It is, however, important not to portray this unconscious racism as devoid of human agency. It is useful, in this regard, to locate it in relation to the distinction between active and passive racism. Essed (1992: 17-18) defines the former as referring to "all acts that -- consciously or unconsciously -- emerge directly from the motivation to exclude or to inferiorize Blacks." She defines the latter as "complicity with someone else's racism." The unconscious racism I am referring to is of the active kind. I deal with passive racism elsewhere in this thesis.

62. See, for example, Essed (1991: 45): "Racial discrimination includes all acts -- verbal, nonverbal and paraverbal -- with intended or unintended negative or unfavourable consequences for racially or ethnically dominated groups. It is important to see that intentionality is not a necessary component of racism." See also Sykes (1985: 100) and Condor (1988: 86).

63. Essed (1992: 26).

64. Essed (1992: 10).

65. See Lawrence (1987: 329): "Common sense tells us that we all act unwittingly on occasion. We have experienced slips of the tongue and said things we fully intended not to say.... "

66. See Lawrence (1987: 341): "Another manifestation of unconscious racism is akin to the slip of the tongue. One might call it a slip of the mind: While one says what one intends, one fails to grasp the racist implications of one's benignly motivated words or behaviour."

67. Dlamini (1988: 46).

68. S v Magwaza 1985 (3) SA 29 (A). See also van den Berg's (1986: 554) comments on Magwaza.

69. Dlamini (1988: 46).
My sample also yielded a Magwaza-type incident. In S v Eliza (5 February 1993, Cape Town Magistrates' Court, Criminal Case Number 26/1447/92, unreported) the magistrate says: "Cynthia maak die pap teen u dik aan. Cynthia sê nie u het haar twee, drie keer gesteek nie. Sy het drie wonde opgedoen ja, maar Cynthia sê vir die

hof dat u het na haar slegs een keer gesteek. Dit was 'n eenlopende aksie." The "Cynthia" referred to here is the complainant. The magistrate has chosen not to refer to her as "the complainant/die klaagster". Instead he chooses to refer to her by name, to boot by her first name only. Her name is Cynthia Newman. Her surname will roll off the tongue of any white person. Why then does the magistrate refer to her by her first name only, as one would a child? This has to be a decision which he takes: even a black complainant does not merit the common courtesies which are given as a rule to white accused. The fact that the complainant is a woman is particularly telling. Here we have an instance of gendered racism: black women are not adults; they are minors and can be addressed as such.

70. Condor (1988: 71).

71. Gilroy (1977: 53).

72. A typical feature of the scientific endeavour to justify racism in terms of biology was the "science" of craniometry or measuring heads. Its proponents expended huge amounts of time and money and intellectual effort in their attempts to prove that the supposed intellectual deficiency of people of colour was directly linked to their smaller brains. Paul Broca, one of leading nineteenth-century craniometrists had the following to say (quoted in Gould, 1981: 83-84):

> "In general, the brain is larger in mature adults than in the elderly, in men than in women, in eminent men than in men of mediocre talent, in superior races than in inferior races."

and

> "A prognathus face, more or less black color of the skin, woolly hair and intellectual and social inferiority are often associated, while more or less white skin, straight hair and an orthognathous face are the ordinary equipment of the highest groups in the human species.... A group with black skin, woolly hair and a prognathous face has never been able to raise itself spontaneously to civilization."

See Gould (1981: chapter 3) for an excellent critique of the history of this craniometric crassness.

73. Gilroy (1992: 53).

74. Of course, this does not mean that overt racism is dead. Its violence continues to be inflicted daily upon people of colour all over the world. See van Dijk (1987: 15): "[Both] blatant and very subtle racism permeates all social and personal levels of our society: from the decisions, actions and discourses of the government or legislative bodies, through those of the various institutions, such as education, research, the media, health, the police, the courts, and social agencies, all the way down to everyday interaction, thought and talk (emphasis in the original)."

75. Essed (1992: 5). See also the following comment by Whitney Young, quoted in Katz (1989: 9-10): "Most Americans get awfully uptight about the charge of racism, since most people are not conscious of what racism really is. Racism is not a desire to wake up every morning and lynch a black man from a tall tree. It is not engaging in vulgar epithets. These kinds of people are just fools. It is the day to day indignities, the subtle humiliations, that are so devastating. Racism is the assumption of superiority of one group over another, with all the gross arrogance that goes along with it."

76. Stereotypes operate to legitimate the position of the group in respect of which they are mobilized. According to Perkins (1979: 137), they are ideological phenomena and, as such, they have a "[remarkable] capacity to make what is false become true". They achieve this by selectively attributing traits (usually negative) to particular social groups and then "validating" such attribution with supposedly hard evidence of the reality of these traits. Stereotypes bypass the structural sources of a group's alleged innate traits. They focus upon a particular (problematic) result of a group's socialization and exaggerate it into a natural propensity of the group.

Perkins (1979: 153-4) illustrates the point in a discussion of the stereotype that there exists a peculiar female logic which manifests itself as flightiness and scattiness. The stereotype is analyzed in terms of the nature of the housewife's job:

> "[The] work situation of the housewife is such that she develops the capacity to cope with several things at once and learns not to concentrate on one thing so hard that she is not aware of what else is going on and cannot switch skills instantaneously.... Most other

> jobs demand concentration on a single issue and the application of one skill at a time; the capacity to keep shifting attention back and forth, and changing skills, is characteristic of a housewife's job. What the stereotype does is to identify this feature of the woman's job situation, place a negative evaluation on it, and then establish it as an innate female characteristic, thus inverting its status so that it becomes a cause rather than an effect."

A similar argument can be made in respect of the stereotype that people of colour are criminals. The fact that in South Africa most crimes are committed by black people is an effect of the material conditions of their existence. The stereotype inverts effect into cause. A large part of racist discourse in the legal process relies upon this kind of inversion. Racist stereotypes of this sort are inscribed in the discourse of "race". The notion that black people possess a host of negative innate qualities is entailed in the belief that they comprise a distinctive and inferior "race". And the fact that magistrates do mobilize racist stereotypes undermines the truth of assertions that the criminal justice system is neutral and supports averments that it is infected with bias against people of colour.

77. See, for example:

Rowe v Asst Magistrate Pretoria 1925 TPD 361 at 367: "But the most that Court can say is that, generally speaking, a judicial officer, just as a juror, can make use of any general information which he has, either of his knowledge of his affairs or of the manner in which persons act under certain circumstances, as in cases of danger, or if he knows that natives would not act exactly in the same way under certain circumstances as would a European, who would generally act according to the recognized standard of civilization."

R v A 1952 (3) SA 212 (A) at 216G: "Now you gentleman [of the jury] with the experience of this court know that it often happens when a complainant in a case is a native woman, that as soon as she is seized she gives in. Why they do it I do not know."

S v Augustine 1980 (1) SA 503 (A) at 506 A-B: "Blykbaar het die advokaat vir die verdediging en die Verhoorhof

nog nie die ondervinding opgedoen nie dat inderdaad Kleurlinge en Swartmans soms mense steek sonder enige rede, behalwe oënskynlike steeklus."

Mcunu v R 1938 NPD 229 at 237 in which the judge, in one of the rare early instances of judicial anti-racist activism, evaluated the magistrate's handling of alibi evidence as follows: "I regret that I cannot regard these comments [made by the magistrate] as disposing in a satisfactory manner of this alibi evidence, or as showing that the magistrate gave it due consideration. They indicate that the magistrate's attitude was: 'I have frequently found that Native witnesses who give evidence in support of an alibi are liars, and in view of that experience, and the nature of the Crown evidence, I am not prepared to regard the alibi evidence given in this case as worthy of serious attention.' In other words the magistrate rejected this evidence on a priori grounds, and did not consider it on its merits."

78. I explain in detail later why formulations like these can be construed as racist. At this point I want only to draw the reader's attention to what Van Dijk (1987: 104-105) calls the pronouns of ethnic distance and prejudice. He says: "Typically, ethnic groups such as Turks, Moroccans, or Surinamese are often not called by their name, or by the term foreigners, but denoted by pronouns such as they and them. Indeed, the pronominal contrast between us and them has even become stereotypical in its own right.
Similarly, we find the equally 'distanced' expression, those people. Naming taboos are well known: We avoid naming people we do not like. We say 'that man' or 'that woman' or simply use 'she' or 'he'.
The same thing happens with ethnic groups.... [They] are referred to by expressions that imply that they form another group and, as such, they are systematically differentiated from 'us' (emphasis in the original)."

79. I use "because" cautiously. I am not saying that the causal link it suggests between colour and invocation of stereotype is a conscious one which is consciously re-routed to avoid the charge of racism. I am, however, saying that, unless the temptations of "race"-thinking are consciously resisted, a white magistrate can easily (and unthinkingly) have recourse to the falsities of racist mythology if the offender to be judged is a person of colour.

80. The following incidents are quoted by Henry, Mattis and Tator at (1993: 9) as examples of what minority lawyers in Canada see as racist comments by the bench:

> "In one case a lawyer asked for a conditional discharge for a youth of 19 whose case had all the elements for a compassionate hearing. The presiding judge said: 'I am not accepting that. People like him need to be sent to prison.'"
>
> and
>
> "In another case a lawyer related an incident in which a judge, while sentencing a tall, heavily built Black man convicted of trafficking a small amount of cocaine stated: 'I am afraid of you, I'm going to give you a year in prison.'"

Clearly, neither comment contains any overtly racist terminology. What is more, neither judge may have intended to make a racist comment. However, two facts suggest racism. The first is that both accused are black and both judges white. The second is that the comments contain stereotypical assumptions about black people as liars and criminals, as members of a threatening population from whom society has to be protected. This argument, it is acknowledged, may not satisfy the proof requirements of those schooled in the tradition of positivism which continues to dominate law and the legal profession. An easy alternative explanation for the judges' comments could be that they were merely reactions to the accused as criminals and that the lawyers who cried racism did so spitefully, because their clients had been convicted. Such cynicism can, of course, exonerate the judges, in their own eyes. However, sooner or later it will have to be acknowledged that the justice system may well, like most other institutions, also be a site of racial prejudice and discrimination.

81. A white female interviewee had the following to say regarding her choice of option (c): "In some cases overt and easy to detect, in most subtle and -- I won't say hard to detect. It's always easy to detect, but hard to prove.... I'd say 10% overt and easy to detect, and 90% subtle and -- not hard to detect but definitely hard to prove."
A black male interviewee opined as follows: "It's not hard to detect. It's subtle but not hard to detect at all and you don't have to be paranoid to detect it."

82. The difficulty is compounded by the nature of legal discourse. It is a highly specialized discourse. It is usually formal and structured. It is closed and unitary. And it employs a number of lexical, syntactical and stylistic forms peculiar to itself. See Goodrich (1987: 175). These characteristics of legal discourse have an 'exclusionary' effect: the spontaneous configurations of everyday talk are largely filtered out of legal discourse. Even the mostly ex tempore judgments of magistrates are sufficiently 'closed' and steeped in the traditions of legal discourse to avoid the 'traps' of everyday talk.

83. Essed (1992: 8).

84. Sykes (1985: 93).

85. Barker quoted in Condor (1988: 72).

86. Lynch and Patterson (1991: 3).

87. Austin (1984: 186).

88. Classically, the concept of class is defined in terms of ownership/non-ownership of the means of production. In this thesis I use a broad notion of class which links a person's position in the class structure to access (or lack thereof) to the means of life and to social and economic advantage.

89. The notion of reciprocal determination is employed here to illuminate the connections which exist between the sets of relations comprising "race" and class. It ought not to be understood as implying that "race" and class are analytically equal: in class society the concept of class must take analytical primacy, with others such as "race" and gender being relied upon to enhance the explanatory powers of class. However, the primacy of class ought not to operate to obfuscate the nature of racism and sexism. Oppression is not all a question of class. It is also a question of colour and gender. It is in this sense, of non-class factors being essential to the analysis of bias, that the notion of reciprocal determination is here employed.

90. The following discussion by O'Meara (1983: 13), although somewhat dated, illustrates well the need to factor class into the analysis of racism:

"A black man waiting to travel from the outskirts of any city to its centre would have to wait for the arrival of a bus reserved for blacks. Even if five empty buses for whites passed him by, he would not be allowed to board them. At the everyday level he would experience this as yet another instance of white racism. It would confirm his probable interpretation of South Africa as a pervasively racist society, structured by white power and privilege. Now at the level of direct everyday experience, such racial categories of explanation adequately correspond to every black person's daily experience and provide a framework within which they can formulate courses of action to survive. However, such a common daily experience of intense racial discrimination is not the same as, and does not necessarily simultaneously evoke, an experience of the full ensemble of conditions which make such an experience both possible and common -- that is, inter alia, the consolidation of capitalist production in a period of monopoly, the monopolisation of the means of production in the hands of white capitalists, the dispossession of African producers, etc."

91. See Van der Merwe (1980: 83): "Race conflict in South Africa is in large measure a class conflict and interpretations of racial inequality often reflect class biases resulting from contacts which emphasise difference, reinforced by ideological propaganda. The bulk of the white population in South Africa meet blacks only at work. Very selected presentations by the mass media further contribute towards their biased views of the black man."

92. See Balibar (1991: 207): "Several historians of racism have laid emphasis upon the fact that the modern notion of race, in so far as it is invested in a discourse of contempt and discrimination and serves to split up humanity into a 'super-humanity' and a 'sub-humanity', did not initially have a national (or ethnic), but a class signification or rather (since the point is to represent the inequality of social classes as inequalities of nature) a caste signification."

93. Snowden (1983: 63).

94. Smith (1980: 34) provides a graphic example of 19th-century class racism in action when she records how the Victorian novelist
"Wilkie Collins, confined by illness to a second floor front bedroom in 'Smeary Street' in London observed the

three unfortunate maids-of-all-work hired successively by Mrs Glutch, his landlady, during the three weeks of his stay. She treated them not as dogs but cats: 'Mrs. Glutch screams at them all indiscriminately by the name Mary, just as she would scream at a succession of cats by the name Puss.' 'Number One' is astonished to find that he regards her as a human being."
According to Smith (1980: 33), the contempt which members of the Victorian Nation felt for manual labour and those who performed it went so deep that they "simply did not see" the members of the Other Nation, no matter how physically close the two might be.
Chevalier (1973: 359-360) adds that in 19th-century France, the workers' condition and behaviour were regularly likened to that of barbarians and savages. They were different from the upper classes because of "biological traits and physical characteristics", in other words, the "differences which were believed to be racial".
See also De Rooy (1990: 30-31):
"An arresting example of this approach to the proletariat is to be found in a remarkable book by Italian author Alfredo Niceforo, Anthropologie der nichtbesitzenden Klassen, published in 1910.... This book, which runs to over 500 pages, seeks to demonstrate that members of the poor classes differ from the bourgeoisie in virtually every respect: in bodily length, weight, lung capacity, brain size, facial expression, degree of balding, deformation, reproduction, marital behaviour, death rate, intelligence and attitude. A repeated conclusion is that proles look less like non-proletarian western Europeans than they resemble children and negroes. Invariably, whenever one looks at profiles of workers' faces, or considers their physical or moral sensibility, their capacity for abstract reasoning or their imagination, the conclusion must be: they are children, barbarians, wanderers in civilization. If one descends into this proletarian world it seems as if one moves from one country to another, or rather, as if one goes back in time."

95. See Thompson (1988: chapter 3).

96. Miles (1989: 104-105).

97. See Breman (1990: 2): "Discrimination against fellow beings of another race was a variant of the attitude of superiority shown towards the lower classes. Although it did not originate as a typically middle-class ideology, racism in nineteenth-century Europe was strongly interwoven with the notion of progresss which

had elevated the bourgeoisie to its dominant and rightful position. A large part of the white race had been excluded from that progress, namely, the proletariat whose physical features and mental traits caused it to be ranked close to the primitive segment of mankind."

98. See Chevalier (1973: 361). Balibar (1991: 209) sums up the genesis of class racism in the following terms: "The industrial revolution, at the same time as it creates specifically capitalist relations of production, gives rise to the new racism of the bourgeois era: the one which has as its target the proletariat in its dual status as exploited population and politically threatening population."
See also Lynch and Groves (1989: 117): "By imprisoning certain types of people (especially lower class persons, blacks and the young), capitalist forms of punishment create the belief that there is a 'class of criminals' who should be feared because they might exhibit criminal behaviour. In this way, crime is associated with a group of people who are generally from the lower classes -- what earlier criminologists referred to as the dangerous classes."

99. See Adam and Moodley (1986: 17): "Technocratic reformers now aim at deracializing White domination as far as possible, by substituting class for race as the main criterion of stratification. But if income inequality and educational inequality continue to overlap to a large extent, deracialization will be only nominal. Formal class privileges in reality continue to be racial advantages. Illegitimate racial distinctions are continued, although they are masked by the allegedly color-blind material markers."

100. This aspect of class racism is "epitomised in Lord Milner's famous remark (on seeing some soldiers bathing in a river) that 'he never knew the working classes had such white skins'"(Quoted in Cohen, 1988: 32).

101. Cohen (1992: 93). See also Wellman (1977: 236): "The subordinate position of black people is justified and the advantaged position of whites is maintained even though nonracial terms are invoked in the reasoning. Racism, then, need not be distinct, in its content or emotional loading, from the more routine forms of competitive behavior white people engage in with other whites. A distinctive content or kind of emotional loading is not what makes certain sentiments 'racist'. A position is racist when it defends, protects or enhances social organization based on racial advantage.

Racism is determined by the consequences of a sentiment, not its surface qualities. Sometimes it is expressed in crude terms but ... often it is not. Racism is what white people do to protect the special benefits they gain by virtue of their skin color."

102. See Sykes (1985: 100): "Examples of this type of [overtly racist] discourse are, however, relatively rare in Europe today except in the literature of neofascist groups. For the most part, racial minorities are simply vulnerable to the same range of unfavourable linguistic treatments accorded to other social minorities or out-groups such as women, welfare clients, and strikers. They may be presented as irrational, unreasonable, passive, overdependent, vicious without provocation, depending on the circumstance and ideology of the speaker, and like all out-groups they are vulnerable to stereotyping and homogenizing treatment."

103. This can be explained on the basis of the physical overlap between the two populations. This explanation will have to be amended if, as may be expected, more and more white people are thrust into the working class and are subjected to the same linguistic treatment as their black counterparts.

104. This conclusion has also been reached by analysts of formally non-racial state forms. Thus, for example, Henry, Mattis and Tator (1993: 2) say the following about the Canadian justice system: "The existence of racism in Canadian society is well documented.... Today racism pervades the institutional structure of society and is as well manifested in the attitudes of individual Canadians.... While there is little objective research to prove racism in the justice system, it is unlikely that it is different from other institutions in Canadian society."
See also Wright (1984: 210) on the justice system in the USA: "If we live in an atmosphere heavy with inbuilt discrimination and historical insults, there is little reason to believe that the justice system, which selects most of its judges and district attorneys from the whites who live with the tradition of white supremacy, should be any different on the bench from what they are in private life."
It is, of course, even easier to come to a similar conclusion in South Africa. Kovel (1984: ix-x) argues that racism is not merely present in but that "racism is a category of Western civilization", that is, racism is "the tendency of a society to degrade and do

violence to people on the basis of race". If Kovel's thesis is correct (and I think it is) then it is not merely likely that the justice system is racist, it is certain that it is racist.

105. Dlamini (1988: 41).

106. Mouton and Marais (1990: 155-6) define the qualitative/quantitative approaches to research in the following terms: "[The] quantitative approach may be described in general terms as that approach to research in the social sciences that is more highly formalized as well as more explicitly controlled, with a range that is more exactly defined, and which, in terms of the methods used, is relatively close to the physical sciences. In contradistinction, qualitative approaches are those approaches in which the procedures are not as strictly formalized, while the scope is more likely to be undefined, and a more philosophical mode of operation is adopted (emphasis in the original)." See Brown (no date) for an instructive discussion of pros and cons of the qualitative method in relation to demonstrating gender bias. Many of her comments are applicable to the study of racial bias.

107. See Condor (1988: 74) and Dovidio (1986: 4). See Sumner (1979) for a critique of content analysis.

108. Thus, Judge Leon (1983: 3) included the following warning in his opening remarks to a conference on sentencing where a number of delegates made use of sophisticated statistical techniques: "There are infinite gradations of fact in any and every crime. In these circumstances, statistics that claim to show some kind of general prejudice may be misleading. Although it may be suggested that the figures or percentages speak for themselves, what also requires to be examined, and this is most important, are the precise details of the crime which has been committed in every case. There are, for example, rapes and rapes, and close examination of death sentences passed in these cases may show that they have usually been imposed only in cases of extreme brutality (emphasis added)."

109. See, for example, Newman (1987), Dlamini (1988), McCleod and Kaganas (1985) and Institute of Criminology (1991).

110. A variant of this approach is to focus on "obviously racially inspired" sentences handed down by our courts.

Invariably this is done very "selectively" and can easily be dismissed as "unscientific". It is, however, extremely persuasive and virtually as incontestable as the overtly racist utterance.

111. Martin (no date: 20).

112. Thompson (1988: 159).

113. Mouton and Marais (1990: 167) say: "There can be no doubt whatsoever that the qualitative investigation can be classified as scientific research." Brown (no date: 9) suggests that "the qualitative approach might be more valid than the quantitative approach" for proving the existence of bias in the justice system.

114. See Bernal (1987: 8).

115. See Sykes (1985: 83-4).

116. The absence of a "control" may invite the argument that some, or all, of my examples are invalid because the language I classify as discriminatory could well have been used in respect of white accused charged with the same offence. In other words, it was the nature of the crime, not the "nature" of the accused which prompted the magistrate in question to use the language that he or she did. I trust that the arguments I present in my examples are persuasive enough to exclude this possibility. However, I do also want to make a more general comment in this regard: the "fact" that a magistrate could have talked in the same way to or about a white person is not really the issue. The fact that the magistrate does talk that way to or about a person of colour is. It is this fact that my examples seek to explain. Although my sample contains none, I am sure that examples of offensive language towards white accused exist. However, they too require explanation (class racism may figure prominently here) and cannot simply be held up as "proof" that the system is "neutral" in its offensiveness.

117. Bernal (1987: 8).

118. Sykes (1985: 85). See also Sykes (1985: 88): "[The] fact of ideological variation means that, strictly, discourse analysis can demonstrate only that a particular type of treatment has occurred, and the question of whether it is discriminatory or not may need to be debated."

119. According to Kress (1985: 27) there are two basic and conflicting approaches to the study language: on the one side there is the linguistic approach, which focuses upon the "materiality, form and structure of language"; on the other side is the sociological approach, which emphasizes the "content, function and social significance of language". This thesis is located squarely on the sociological side of the divide.

120. 5 February 1993, Cape Town Magistrates' Court, Criminal Case Number 26/1447/92, unreported.

121. Translation: "The Court does not want to take judicial notice thereof, but there are daily [assault cases] from Kensington and Factreton from Lugmag Avenue, Ventura Street and all these other avenues before the Court. I notice that in all these assaults there are never or very seldom cases before this court in which assault is committed with fists and/or kicks. Usually some or other weapon is used. Either a brick, or poles, either knives, or bottle-necks, etc.
The court does not know if that is the manner in which you people attempt to sort out your problems there. The Court cannot therefrom justify the conclusion that the broad community in Factreton and/or Kensington accepts this type of behaviour with mere resignation. That is why the Court must also take into account the interests of the law-abiding citizens there. The Court must create the atmosphere for them in which they can properly/decently live their lives as citizens without always being in conflict with someone else."

122. Wetherell and Potter (1992: 71).

123. This particular formulation ("Of dit die manier is waarop julle julle probleme daar probeer uitsorteer dit weet die Hof nie.") is more than just a disclaimer. It has the effect of creating a distance between the court and the community: the court is ignorant of the kinds of solutions which the community devises to the problems it faces. The magistrate's use of the personal (and possessive) pronoun "julle", which is usually connected with familiarity, in this case indicates a foreignness.

124. Hoffmann and Zeffert (1988: 418).

125. These devices import a statistical and clinical feel into the presentation.

126. See Merry (1990: 111): "Each naming points to a solution. If the family problem is interpreted as caused by a mean and vengeful father, the solution is different than if it is caused by a father afflicted with the disease of alcoholism, under whose influence the man becomes hostile."

127. It is often argued that the law courts can only deliver a legal solution to the problem before it. Its naming of the problem is therefore, inevitably, legal, to the exclusion of other possibilities. One has to concede that the courts can indeed not confront the socio-economic roots of the problem of, for example, violent assault. However, the judicial task of dealing with an offender can only be properly achieved if the judicial officer understands these socio-economic roots.

128. I have been able to use only about a quarter of the 69 cases which I read to make my argument. This fact points to contradictory but reconcilable conclusions: on the one hand it suggests that the criminal justice system in the Cape Town Magistrates' Court is not thoroughly infused with racial bias; on the other hand, it also suggests that racial bias is not an aberration but a problem which requires serious attention. Three research assistants and I also spent a 3-week period monitoring cases in the Cape Town, Wynberg, Athlone and Mitchells Plain Magistrates' Courts. This exercise did not yield data which could be used in this thesis. But it did provide valuable insights into the dynamics of racist talk and behaviour in the courtroom setting which cannot be obtained from merely reading transcripts.

129. A caution needs to be sounded about the cases I use. They were all heard in the same city court, and cannot therefore be relied upon as being representative of the orientation of other courts, especially those in the small-town and rural areas. A number of practitioners whom I interviewed remarked that racial bias in these latter courts occurs more frequently and is more overt than my study suggests. Also, the fact that all the cases that I read went on automatic review may partly explain the relative absence of overt bias. A magistrate who knows that his or her judgment is going to be transcribed and studied by a judge is likely consciously to avoid the temptations of red-neck

racism. This thesis must therefore be read as a study of the workings of the "new racism" in an urban courtroom setting, as manifested in a series of automatically reviewable judgments. Evidence of blatant racism may well be abundant in other courts and in non-reviewable judgments.

130. S v Zinn 1969 (2) SA 537 (A) is the locus classicus on sentencing practice in South Africa. At 540G Rumpff JA (as he then was) identifies the three fundamental elements to be taken into account during sentencing: "What has to be considered is the triad consisting of the crime, the offender and the interests of society." These elements have become known in criminal law and procedure as the triad of Zinn.

131. See note 72.

132. Translation: "Your conduct there was totally unnecessary. It was totally beyond the pale and it is conduct that one expects only from barbarians. I say this with respect. I have no other word to describe it."

133. The magistrate's use of this formulation is particularly interesting for its "stepping-stone" function between the objective issue of the necessity of the assault and the value-laden barbarian image to come.

134. Essed (1991: 45).

135. Another is the fact that she is a woman. I say more about this later.

136. It is also worth noting that etymologically "barbarism" and its associated forms are linked to notions of foreignness and representations of the Other.

137. The discussion which follows is the only useful comparison which I was able to derive from my sample.

138. 23 February 1993, Cape Town Magistrates' Court, Criminal Case Number 26/1161/92, unreported.

139. See the excerpt from Eliza in Chapter 5.

140. Carlen (1985: 1).

141. 18 March 1993, Cape Town Magistrates' Court, Criminal Case Number 26/222/93, unreported.

142. Translation: "Sir, I do not have words to describe your conduct, sir, I can only refer to it, sir, as barbaric."

143. See, for example, Waits (1993: 197-199) and Dominelli (1991: 13-18).

144. Whereas his classification of the crime in Eliza as one which is to be expected from a barbarian is quite summary and decisive, in Scharnick the magistrate is at pains to argue and explain his position. He lectures despite declaring his intention not to do so.

145. Sardar, Nandy and Davies (1993: 67).

146. I am not suggesting that the magistrate should actually have described the crime in this way. One can never demand or expect this kind of lexical sameness. However, one can explain different lexical choices in terms of different perceptions which a magistrate may have of different accused.

147. See Kotze (1980: 59): "[Many] white South Africans will without batting an eye perform acts of discrimination, e.g. refusing membership of a club or organization, or failing to promote a trusted employee just because he is black. In personal relations they will also perform acts of discrimination that will be subject to social sanction in most other societies -- e.g. excluding a valued colleague from house parties, or refusing to address blacks formally with 'Sir' or 'Madam' in English and the formal 'u' in Afrikaans, or even ridiculing 'pap en wors' when eaten by Afrikaners, but not when eaten by blacks."

148. I have deliberately excluded the numerous cases, involving accused with previous convictions, in which the magistrate blatantly concluded that the accused was endowed with criminal/violent tendencies -- because it could be argued that such a conclusion is justifiable.

149. 18 March 1993, Cape Town Magistrates' Court, Criminal Case Number 26/222/93, unreported.
Translation: "[You] are going to cause yourself enormous problems in the future, sir, if you continue stabbing people left and right."

150. See note 77. "Steeklus" translates literally as a "lust for stabbing" or a "desire to stab".

151. 19 January 1993, Cape Town Magistrates' Court, Criminal Case Number 13/922/92, unreported.
Translation: "The inhabitants of the city have the right to use every street without being molested. The evidence here is that you molested a 64-year-old lady and snatched her handbag. I can find no appropriate sentence for such a cowardly deed other than imprisonment."

152. 18 March 1993, Cape Town Magistrates' Court, Criminal Case Number 13/217/93, unreported.
Translation: "The fact that the centre of Cape Town has degenerated into an unpleasant and unsafe place is also of great importance. It is probably one of the reasons why this beautiful city centre of ours is so underused, because it is so unsafe, and as a result of the behaviour of people like the accused.
The Court has a duty to the community to ensure that when people like the accused are convicted of this type of unacceptable conduct, that such a person is sentenced in such a way that the accused not only realizes the gravity of the offence but also that the accused will be deterred from behaving in the same way in future."

153. He uses this formulation twice in the extract.

154. It is arguable that disapproval and castigation is part of the denotative ambit of the formulation. In the same way as "wheel-chair" denotes "a chair with wheels for people who cannot walk" and "getting him into a corner" denotes "getting him into a corner so that he cannot escape", so "people like the accused" may denote "people like the accused who represent a threat to the established order of things". See Leech (1974: 226-228).

155. The Monty Pythonesque "It's people like you what cause unrest" illustrates the point pithily.

156. The judiciary's power to name is an awesome one. To argue for a different naming is therefore not merely an argument for "political correctness". It is, more importantly, an argument for a judicial concern with "solution correctness".

157. Bovenkerk (1993: 272).

158. 23 March 1993, Cape Town Magistrates' Court, Criminal Case Number 14/232/93, unreported.
Translation: "Housebreaking with intent to steal is a very serious crime. It is increasing daily. It does not matter that the Courts hand down heavy sentences. The community must be protected against people like you."

159. I do not think that the substitution of "like the accused" (Mongunto) with "like you" (Van Wyk) is significant, except, as already pointed out, that "people like you" is perhaps more clearly semantically biased than "people like the accused".

160. Terkel (1992: 6).

161. 5 February 1993, Cape Town Magistrates' Court, Criminal Case Number 26/1447/92, unreported.
Translation: "You are a first offender, but the Court is aware that a first offender is not necessarily someone who has not yet committed crimes, but merely someone who has not yet been brought before a Court and found guilty."

162. Quoted in Wright (1984: 214).

163. 27 November 1992, Cape Town Magistrates' Court, Criminal Case Number 24/373/92, unreported.
Translation: "In this case there are 2 accused, adult men before the Court. Mr. Xolile and Mr. Hobanie. Initially Mr. Xolile pleaded guilty to the main charge, but following questioning a plea of not guilty was noted. Number 2 pleaded not guilty right from the outset. He had said he knows nothing about the whole story, he was simply arrested as he stood on the opposite side of the street. The State led the evidence of the police operative and the sergeant of the SA Narcotics Bureau. It is clear from the evidence that the operative Patrick bought 5 sticks of dagga for R50,00 from accused no.1. The money was also found in number 1's purse which was later recovered by the police and the operative says number 2 had absolutely nothing to do with the entire transaction. He did not even see number 1 talking to him. All that he saw was him standing on the other side of the road. Number 2 was later arrested by the police after number 1 had made a report to the police."

164. S v Gwebu 1988 (4) SA 155 (W) at 158 F-G.

165. S v Abrahams 1989 (2) SA 668 (E) at 669G.

166. It has been said that judgment is less an address to the accused than an address about the accused to a superior court.

167. The magistrate uses the acceptable "beskuldigde nr.1" only once throughout the excerpt.

168. See Balibar (1991: 211) who remarks how the racialization of manual labour "modifies the status of the human body: it creates body-men, men whose body is a machine-body, that is fragmented and dominated, and used to perform one isolable function or gesture, being both destroyed in its integrity and fetishized, atrophied and hypertrophied in its 'useful' organs" (emphasis in the original).
See also Goldberg (1990: 305) who sees the notion of body-men as the theoretical basis of racist discourse: "Racist discourse has for the most part dominated the definition of otherness, and furnished the material power for the forceful exclusion of the different. To succeed so long in doing this, racist discourse has to be grounded in the relations of bodies to each other, and in ways of seeing (other) bodies. Voyages of discovery and imperialist drives may have prompted the presumption of general differences among conquering populations and conquered; yet the rise of racist discourse was rendered theoretically possible only by a change in paradigm from the seventeenth century onward of viewing human subjects. The new philosophical assumption that bodies are but machines naturally divorceable from minds promoted novel developments in technologies of physical power and bodily discipline (emphasis in the original)."

169. See St. Lewis (1992: 2): "The values and perspectives of Aboriginal peoples, many racial minority communities, and women are absent. Further, political and legal decision-makers have viewed these individuals as powerless. Their principal value historically was in service as units of economic exchange to facilitate the consolidation of the decision-makers' power."

170. The standard response to objections to the practice of not referring to black people by name is that black people have names which are extremely difficult for a white person to pronounce. This is, of course, a non-argument: it is an excuse for and a defence of a

decidedly racist practice -- a practice which contributes to the commodification and hence oppression of millions of human beings who are systematically deindividualized by a system geared towards their exploitation as units of labour-power.

171. See Gaertner and Dovidio (1986: 62): "In our view aversive racism represents a particular type of ambivalence in which the conflict is between feelings and beliefs associated with a sincerely egalitarian value system and unacknowledged negative feelings and beliefs about blacks."
See also Katz, Wackenhut and Hass (1986: 41-2): "Apparently, blacks tend to be seen as both disadvantaged (by the system) and deviant (in the sense of having psychological qualities that go counter to the main society's values and norms). We believe that this dual perspective engenders in the white perceiver an uneasy equation of conflicting sentiments, consisting of friendliness and sympathy on one side and disdain and aversion on the other (emphasis in the original)."

172. See Condor (1988: 86): "What matters ultimately is not whether [people] mean to make racist statements, but that it is all too easy to read racism into their accounts (emphasis in the original)."

173. It is not unreasonable to expect a magistrate, during evidence, to follow strictly the procedure suggested by Judge Goldstone and endorsed by Judge Kroon: to refer to or address all adult accused and witnesses as adults, that is, as Mr/Mrs/Miss/Ms followed by the person's surname. Pronunciation difficulties ought not to be an acceptable excuse not to do so. If a magistrate does have difficulty with pronouncing an accused's or witness's surname, he or she should say so. In such a case the non-specific "Sir/Madam" will surely be acceptable. At the same time the magistrate should make every effort to learn how to pronounce the name. I am sure that the accused/witness will be of invaluable help here. As already intimated, during judgment, use of the traditional forms such as "the accused", "the witness" and "accused no.2" is perfectly acceptable.

174. 15 February 1993, Cape Town Magistrates' Court, Criminal Case Number 26/5/93, unreported.

175. Translation: "Your personal circumstances appear to be as follows: you are 19 years old, you passed std 4 at school and you do casual work here in Table Bay harbour. According to you, you are the only breadwinner. The fact that you are 19 years old does not mean that you are exempt from imprisonment. You are not the proverbial 19-year-old in the proverbial sense of the word, in other words, a person that still attends school and studies further, whose parents still provide for him. You have been in the labour market for some time already and you lead an adult existence."

176. The category of youthful offenders is divided into two sub-categories: those below the age of 18 and those above 18 but below 21. Section 290 of the Criminal Procedure Act spells out the different ways in which judicial officers may treat the different youthful offenders.

177. See, for example, Du Toit (1981: 55): "Dit lê voor die hand dat die ouderdom van die beskuldigde 'n besonder belangrike versagtende faktor kan wees."
See also Thomas (1980: 195): "Youth is one of the most effective mitigating factors.... Youth continues to have some value as a mitigating factor throughout the early twenties, and the age of the offender may be mentioned as a matter of concern as late as 30, although its effect declines progressively."

178. The fact that the accused is 19 years old and hence an "older" youth may have played a role in the magistrate's approach. However, in S v Petersen and 3 others (Cape Town Magistrates' Court, Criminal Case Number 19/1010/92, unreported) the same magistrate says much the same to two 17-year-old "younger" youths: "Beskuldigdes nr.1 en 2 is beide jeugdiges, 17 jaar oud. Maar u is nie 'n normale 17-jarige persone waarmee 'n persoon alledaags te doen kry nie, met ander woorde wat skoolgaan en wie nog vir hulle gesorg word nie. Dit blyk die teendeel te wees, beide van u is persone wat werk en wat bydraes tot die huishouding neem. So julle is nie "jeugdiges" in die ware sin van die woord nie. Daarom gaan die Hof u ook nie as jeugdiges behandel nie."

179. See Du Toit (1981: 56): "Jeugdigheid word in die algemeen nie op gelyke voet met volwassenheid behandel nie, en die jeugdigde beskuldigde sal derhalwe nie met dieselfde maat gemeet word as die volwasse beskuldigde nie.... Juis omdat jeugdigheid normaalweg onvolwassenheid en derhalwe mindere morele

verwytbaarheid aandui, behoort elke hof ten volle op die hoogte te kom van die algemene agtergrond van die jeugdige beskuldigde, asook van die rol wat sy onvolwassenheid, onrypheid of gebrek aan lewenservaring gespeel het ten tyde van die pleging van die misdryf." See also S v Lehnberg 1975 (4) SA 553 (A) at 561 A-B per Rumpff CJ: "Wat die probleem van versagting betref, behoort na my mening tienderjariges in die algemeen as onvolwasse beskou te word, en derhalwe geregtig op versagting, tensy die omstandighede van die saak van so 'n aard is dat 'n Hof homself genoop voel om die doodvonnis op te lê. Vanselfsprekend is daar grade van volwassenheid by tienderjariges, maar uiteraard het geen tienderjarige die rypheid van 'n volwassene nie. Jeugdigheid is onvolwassenheid, gebrek aan lewenservaring, onbesoonenheid en veral 'n geestestoestand van vatbaarheid vir beinvloeding, veral deur volwassenes. En 'n persoon van 18 of 19 jaar is, volgens my mening, onvolwasse of hy nog op skool of universiteit is, en of hy reeds 'n paar jaar of wat gewerk het (emphasis added)."

180. The magistrate does at one point refer to the seriousness of the crime, in the following terms: "Die Hof kan nie oorbeklemtoon die ernstigheid van hierdie tipe misdryf nie. Daagliks is hier sake op hierdie hofrol en op die ander hofrolle vir diefstalle van motorvoertuie, diefstalle vanaf motorvoertuie, diefstalle uit motorvoertuie. Hierdie tipe misdryf word op gereelde grondslag gepleeg hier in die distrik van hierdie hof. Dit lei daartoe dat versekeringspremies die hoogte inskiet en dat die eienaar verder belas word met ekonomiese verpligtinge deur optrede van persone soos u en ander."
The accused had been convicted of stealing a radiotape valued at about R500,00 out of a motorcar. The magistrates concerns regarding thefts involving cars are obviously legitimate. One has to question, however, whether the crime was really so serious as to warrant jailing a 19-year-old first offender.

181. There appears to be some doubt in the magistrate's mind as to the accused's status as breadwinner.

182. The construction would also be class racist if the accused were a white working-class youth who has undergone a similar life pattern. Similarly, it would not apply to a middle- or upper-class black youth. These are, however, exceptions to the essential class and colour configuration of South African society,

namely, that most people of colour are workers, and that most white people are not workers. The class racism I am concerned with relates to this essential configuration: black workers are perceived to be different and treated differentially on the basis of this perception.

183. Sardar, Nandy and Davies (1993: 28) point out that communism -- and the notion of communal property which it entails -- has long been perceived as "the ultimate in Otherness".

184. Translation: "You are also a first offender, but it is not a prescribed rule that every first offender is automatically entitled to a suspended sentence and a fine. It will, with respect, be contrary to the public interest and policy, in the case of serious offences, to hand down to an accused a fine or even a suspended sentence, even though the accused is a first offender."

185. Translation: "The Court is not even considering a fine. The Court did consider sentencing you to a whipping, but as already intimated, you are not the proverbial 19-year-old. In the circumstances, The Court feels that a full suspended sentence is inappropriate for the reasons given."

186. See S v Rabie 1975 (4) SA 855 (A) per Holder JA at 862G: "Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances."

187. Sentence: 12 months of which 5 months suspended for 4 years.

188. 5 February 1993, Cape Town Magistrates' Court, Criminal Case Number 26/1/93, unreported.

189. Translation: "All that is asked of you is that you keep your hands off other people's property. That is not asking much. You have a wife and a child for whom you have to provide, but you should have thought about that. Your wife does not appear to be unfit for work and there are ways in which she can provide for the children in your absence. You should have thought about their interests."

190. Translation: "The Court is aware that the economic situation out there is not as rosy as it can be, but theft is not the solution."

191. Translation: "I can get the job back but they now know that I am pregnant and if we are pregnant we may not continue to work and I have had to absent myself from work every time the case is heard."

192. Hiemstra (1985: 89). See also Du Toit (1981: 54-55): "Dit is belangrik op daarop te let dat die belange van die gemeenskap nie slegs verswarend op die vonnis inwerk nie. In gepaste gevalle kan die belange van die gemeenskap ook strafversagtend werk.... Daar is dikwels gevalle waar die belange van die gemeenskap juis ten beste gedien word deur 'n ligter of sagter vonnis: waar die beskuldigde sy werk en gesinsbande kan behou; waar 'n swaarder vonnis juis teen die belange van gemeenskap sal inwerk. In hierdie gevalle speel die belange van die gemeenskap duidelik 'n strafversagtende rol."

193. See note 61.

194. See Essed (1992: 18): "Laughing at a humiliating joke about 'how many Blacks does it take ...' (but it's such a good one) and 'not hearing' others racist comments are passively racist acts (emphasis in the original)." See also Carroll (1986:43): "Traditionally, jokes reveal the relationship between the teller and the target. Of course nobody actually believes that the Irish are inferior; that would be taking it too far. People cracking jokes never would, never could prove their case through jokes, but they certainly can universalize their tone. (Tone is the soft wrapping round the brick you're throwing.) (emphasis in the original)."

195. 4 January 1993, Cape Town Magistrates' Court, Criminal Case Number 26/1233/92, unreported.

196. This viewpoint is part of the larger argument that our courts can devise only legal solutions to the problems upon which they have to adjudicate and that those who demand that these solutions should be linked to social reform are seeking to expand the judicial function beyond its purpose. As already intimated, it is accepted that the courts cannot resolve deep socio-economic problems. But it can be expected that the legal solutions offered by and the work of judging undertaken by our courts be informed by an appreciation of the social and political milieu of the problem at

hand. Judicial blindness to context has prompted Wright (1984: 206) to complain: "There have always been some indications not only that punishment was without pity, but that the entire criminal justice system was without any compassionate understanding of cause and dealt rather impatiently with effect."
See also Wikler (no date: 2) regarding gender bias: "While judges and the judiciary cannot rectify power imbalances between men and women in society, equitable judging depends upon understanding what these power imbalances are and how they enter the courtroom in ways obvious and not so obvious."

197. Kotze (1980: 58-9).

198. In Zinn Rumpff CJ had referred to "the interests of society". This translates into Afrikaans as "die belange van die samelewing". However, Afrikaans speakers tend to use the phrase "die belange van die gemeenskap", that is, "the interests of the community". Semantically, "community" is a narrower concept than "society". It appears, however, that they are used interchangeably in legal circles. Thus, for example, Du Toit (1981: 92) says: "'Gemeenskapsbelang' is 'n wye begrip en die versamelnaam vir daardie faktore wat slaan op die welsyn van die betrokke samelewing in die geheel."
Burchell and Hunt (1983: 67) say the following about the purposes of punishment: "The essential conflict here, as in deciding what behaviour to punish, is one between the interests of the individual and those of the community generally. A balance has to be struck between the protection of society and the welfare of the offender."
Of course, in certain cases it is important to uphold the distinction between "community" and "society" as, for example, when the exists a close relationship between offender/crime and a clearly identifiable community (neighbourhood, township, city, etc). Generally, however, it is not an issue.

199. Snyman (1984: 21). See also Du Toit (1981: 116): "Dit behoort reeds duidelik te wees dat balans tydens die oorwegingsproses by vonnisoplegging van die grootste belang is. 'Balans' beteken dat die verhoorhof op ewewigtige wyse alle relevante feite, faktore en omstandighede sal oorweeg, dat die verhoorhof op ewewigtige wyse alle erkende strafoogmerke sal nastreef (emphasis in the original)."

200. Especially since the Appellate Division in S v Roux 1975 (3) SA 190 (A) at 198 per Rumpff CJ emphasized that 'mercy' was not a separate fourth element to be taken into account in addition to the established triad.

201. 10 March 1993, Cape Town Magistrates' Court, Criminal Case Number 13/1435/91, unreported.

202. Translation: "I am of the opinion that the interests of the community, viewed against the background of the gravity of the offence, should weigh more heavily today than your personal circumstances.
I feel that over the years you have displayed a tendency not to respect other people's possessions and I feel that in the specific circumstances of this case the community deserves to be protected."

203. I include under this rubric crimes such as theft, robbery, housebreaking, receipt and possession of stolen goods and malicious damage to property.

204. It should be noted, however, that my focus here upon cases dealing with crimes against property is derived from the fact that such crimes dominate my sample numerically. Of a total of 88 charges, 25 were for theft, 10 for robbery, 13 for housebreaking with intent to steal and theft, 3 for malicious damage to property, 7 for possession of suspected stolen goods, and 1 each for attempted theft, attempted robbery, and receiving stolen goods. Charges relating to non-property crimes (assault, drug offences and reckless/negligent driving) totalled 26. Whereas the category of the interests of the community obviously features in non-property crimes also, it tends to be very prominent in the property crimes.

205. See Griffith (1985: 198-207). He identifies two other elements in the judicial conception of the public interest, namely, the interest of the State and the promotion of conservative political views. Kovel (1984: 16) argues that the sanctity of property is, like racism, a category of Western civilization: "The most superficial glance at our civilization discloses the power of the concept of property, and a good deal of what is radically destructive to human potentiality in our culture derives from its well known preference

for property rights over human rights." Griffith (1985: 203) makes a similar point.

206. It follows, from the way in which property in South Africa is at present distributed in relation to colour and class, that this conception is profoundly class racist.

207. 29 January 1993, Cape Town Magistrates' Court, Criminal Case Number 13/914/92, unreported.

208. The accused was also convicted of stealing 25 kilograms of rice. He was acquitted of the theft of the nylon bags.

209. Whereas the magistrate would have Mr Feni be saddled with a theft problem, he himself is quite clear that his problem is an economic one stemming from his underpayment as a worker.

210. 18 December 1992, Cape Town Magistrates' Court, Criminal Case Number 26/1205/92, unreported.

211. Translation: "Today a person cannot smoke where you want, you cannot walk where you want, you also cannot sit where you want. You are subjected to a host of rules. You have to act according to rules prescribed by others.
But there is one place where you determine the rules, and that is your house.... It is the one small corner of safety which you have in your life, your house. And that is why it comes as a great shock to anybody if one day you open your door and you realize that a stranger has entered your home. A stranger has scratched around in your personal things. And suddenly that small safe place which you have in the world is no longer safe. Suddenly you realize that any person who is prepared to take certain risks is able to gain entry to your home and scratch around in your safe place. And that is why the community desires that when people commit this type of crime the Courts should view it in a very serious light and hand down effective sentences."

212. Translation: "the Court should send a clear message to the community. And the community is not only the people present in the Court here today but also your family, your friends, the people who would want to know what happened to Priscilla Lewis, sothat they too will understand as a result of the sentence I am handing

down today, that when you break in and steal you are playing with fire."

213. Translation: "You find it extremely difficult to abide by the standards and norms that are prescribed for all of us. All decent people must live according to certain norms and standards and you are always contrary."

214. 4 March 1993, Cape Town Magistrates' Court, Criminal Case Number 19/1151/92, unreported.

215. Translation: "The community expects the Courts to act decisively against persons who are not prepared to show any respect for other people's possessions.
I have said on a number of occasions already that the ordinary man in the street usually has two valuable possessions namely his house and his car. It is a source of great frustration and the rise of anger when other persons, strangers invade the right which every person has to enjoy his property."

216. 8 January 1993, Cape Town Magistrates' Court, Criminal Case Number 19/1126/92, unreported.

217. Coetzee and Barends was heard after Lewis. Could the change in construction be motivated by an increase in the onslaught of the Other upon the institution of private property?

218. Translation: "Suddenly the place that you always saw as a safe haven where you are secure against the entire world, suddenly that place is no longer safe, and that is why the community, and it is all of us, it includes you, if you own a house, it includes you, that is why the community desires that when people commit these types of offences, there must be decisive action against them, regardless of who the victim is (emphasis added)."

219. See Du Toit (1981: 116) who says the following about the notion of balance in relation to the interests of the community: "Dit hou in dat die verhoorhof die belange van die gemeenskap sal dien, maar sonder om ooit uit die oog te veloor dat die oortreder 'n lid van die gemeenskap bly (emphasis added)."

220. Needless to say, we all do own private property of some sort or other. However, this truism does not make of

us a society of property owners with a common interest in the protection of property rights. The schism takes place around the amount and kind of property owned by different sections of the community. And it is another truism that the majority of South Africans -- people of colour -- are minor owners, with respect to both amount and kind of property.

221. Membership of this community appears to be predicated upon ownership of at least a house and/or a car.

222. But they cannot meet these requirements because they are black workers who own very little beside their labour-power.

223. Minnesota Supreme Court Task Force (1993: 9).

224. Du Toit (1981: 91-2).

225. Goldstone (1985: 5-6).

226. The question read as follows:
"Judge Goldstone said in 1985: 'In six years of judicial experience I have come across no evidence at all of conscious racial bias on the part of south African judicial officers.' Do you agree?"

227. Responses ranged from "Bullshit", and "That's rubbish", through "No one can agree with this" to "I don't entirely agree" and "I'm not certain I would classify that as being correct".

228. One black attorney had the following to say: "The fact that he uses the words 'conscious racial bias' does not, in my opinion, change the situation at all.... I feel the word 'conscious' being used here is being used as an excuse for judicial officers. There should be no racial bias whether conscious or unconscious in the exercise of the duties required from a presiding officer."
Another opined as follows: "But really, what is conscious racial bias? No magistrate is consciously going to display racial bias.... It's very seldom that you hear a [judicial officer] saying to people that because you are black and you live in the townships I'm sentencing you to 12 years. If that's the sort of conscious racial bias that he wants he won't get it. But racial bias that he will get is 'society must be

protected against people like you'. That's the racial bias."

229. A black male advocate responded as follows: "This comment by Judge Goldstone is outrageous. I've been in the criminal courts since 1976.... There are those [judicial officers] that endeavour to be fair to all who appear in their courts, but as a rule there is a definite racial bias against an accused of colour in our courts. I will not hesitate to say this openly to Judge Goldstone."
A black female attorney commented thus: "As far as I'm concerned it's a conscious decision. I refuse to accept that unconsciously they can now see this black person there and feel he must be sentenced heavily and see a white person there and give him a much lighter sentence for the same crime. But on the other hand, they've been conditioned to such an extent that they might be doing it without realizing it. I wasn't aware Judge Goldstone said this. I'm surprised."

230. See note 61.

231. Minnesota Supreme Court Task Force on Racial Bias in the Judicial System (1993: s-2).

232. See, for example, Birch (1985: 24-25): "In 1978, future Prime Minister Margaret Thatcher said, 'People are really rather afraid that this country might be swamped by people with a different culture'; the view of politician William Whitelaw was that 'Many genuine people, entirely free from racial prejudice, want reassurance'.
Views like these are seen by some people as forming a kind of racism which is more subtle than the Nazi brand, and all the more dangerous because it is 'respectable'. In The New Racism, Martin Barker explains how such racism can exist without insults: 'It need never talk of "niggers", "wogs" or "coons". It does not need to see Jews as morally degenerate, or blacks as "jungle bunnies". Nonetheless, in subtle but effective ways, it authorizes the very emotions of hostility that then get expressed in these terms.'
He goes on to outline how 'the new racism is a theory of human nature', which says that people are naturally aware of their differences from other groups or nations. They do not necessarily think of them as better or worse. They simply do not want outsiders to be admitted.
The view is epitomized by the comments such as the following, from another British politician, Winston

Churchill, during a parliamentary debate on immigration in 1976: 'We cannot fail to recognize the deep bitterness that exists among ordinary people who one day were living in Lancashire, and woke up the next day in New Delhi, Calcutta or Kingston, Jamaica.'"

233. Hiemstra (1977: 95).

234. Hiemstra (1977: 95).

235. Two points need to be noted here. First, it can be accepted that an important factor in the persistence of systemic racism is judicial ignorance of its workings. Second, judicial ignorance of the Other is closely related to the structure of society and the judiciary.

236. The (Canadian) Royal Commission on the Donald Marshall, Jr., Prosecution (1992: 29).
See also Currin (1992: 5): "Judges must understand the social context of the law and the needs of the situation. Judges must be able to put self in the position of the accused, irrespective of race gender and class; they must have a broad knowledge of life and a capacity for empathy.... [South African] judges were able to implement gross and inhumane laws because they were products of a system which confined their social context of law and justice to white, middle-class and male (emphasis in the original)."

237. This concern of interviewees emerged primarily in their responses to a question concerning mitigation. The vast majority felt that the courts do not pay sufficient attention to the life circumstances (referred to variously as social background, environment, culture, custom and lifestyle) of the accused in mitigation of sentence. The following comment of a black attorney is typical: "[T]hey tend to judge the accused according to the values that they have learnt.... They've always been distant from the things that influenced an accused and the man in the street -- they lived in their ivory towers -- and they tend to judge people according to their standards, which is wrong.... This is the big problem, the factor that they ignore. The economic imbalance, you know what motivates a man from Bonteheuwel to steal doesn't bother them. It might be a person who has never had anything in his life and the only way he will have is by stealing. They don't see that. They don't look at that. They look at it cold, clinically: theft, bad, dishonest, therefore must be punished."

238. See Hund (1988: 210-212) who argues, inter alia, that "what at first sight may appear to a South African legal official as an unprovoked theft or burglary proves in many cases to be a response to the wrong-doing of the putative victim". S v Booysen and Tamesi (8 October 1992, Cape Town Magistrates' Court, Criminal Case Number 23/810/92, unreported) in my sample is one such instance. The two accused were charged with assault with intent to do grievous bodily harm. It emerged, however, that they had beaten up the complainant because he had previously assaulted his girlfriend and refused to take her to hospital. To his credit, the magistrate rejected the prosecution's request for direct imprisonment.

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