

Chapter 13

Racism in Justice: The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System

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Criminal justice is an important domain in which to examine uses and abuses of state power. Events such as the brutal treatment of female prisoners at the Prison for Women (Arbour 1996), the “accidental” death of Robert Gentes at the hands of guards at the Kingston Penitentiary and the wrongful convictions of Donald Marshall, David Milgaard, Guy Paul Morin and others are spectacular reminders of the power that state officials wield, and of the terrible consequences that may follow when they make the wrong choices (Kaufman 1998; Nova Scotia 1989; *Reference re Milgaard* 1992). Questionable uses—and misuses—of power appear also in routine practices, such as the casual mistreatment of victims, especially female victims, by the police and in the courts, and police harassment of Aboriginal Canadians, blacks and other racialized people (Alberta 1991; Liao 1995).

These examples share a context in which law regulates the uses of power, in which law sets the terms and limits the extent to which officials may control, confine and coerce individuals. As law enables power, it also restrains. Only within the boundaries of law are uses of power official, authorized and legitimate; outside law’s limits, the use of power becomes its abuse. It might be expected, therefore, that law would provide not only a base from which to examine misuses of power in the criminal justice system, but also a starting point for progressive responses—or better still, resistance—to the abuse of power by or within the criminal justice system. There are, however, good reasons to doubt the progressive potential of legal regulation. Despite the liberal ideology of equal application of the law, law enforcement processes serve to protect and maintain an unequal social order in which the power of the state is routinely deployed against marginalized people (Cashmore and McLaughlin 1991; Hagan and McCarthy 1994; Reiman 1990). Reforms intended to control abuses of power may leave untouched the broader problem of how power is lawfully used in ways that sustain inequality (Jefferson 1991).

Racial injustice is an important context for the exploration of this problem. One deeply disturbing feature of multiracial societies in advanced capitalist countries is the rate at which criminal justice authorities control and confine people of colour within those societies (Mann 1993). In this context, as in so

many other areas of the criminal justice system, the most appalling statistics are found in the United States, where, for example, in the late 1990s about one in three young black men—as compared to one in fifteen young white men—was subject to some form of correctional control (Cole 1999; Mauer 1997, 1999). Studies in Britain, New Zealand and Canada (Hood 1992; LaPrairie 1990; New Zealand 1988; Manitoba 1991) also document inordinate and disproportionate incarceration of indigenous, black and other racialized populations, although not to the same extent as in the U.S. Such findings suggest an urgent need for change, but first it is important to understand why law enforcement tends to produce these results.

Rationalizations to the effect that people—or more specifically, young men—from racialized communities commit more crime or more serious crimes than others have currency in popular, official and academic discourses (Tonry 1995; Wilbanks 1987). Reasons given for this alleged difference in behaviour may range from the overtly racist, “they are criminals,” to more socially situated analyses that link detected offending to factors such as poverty and neighbourhood conditions; and note, usually correctly, that in many multiracial societies, indigenous, black and other racialized people are on average poorer than those of European descent (Carey 2000; National Council of Welfare 2000b). Whatever the precise reason offered for why people commit crimes, explanations of racialized outcomes in terms of differential patterns of offending tend to cast the criminal justice system itself as a neutral process that simply responds to the social conflicts it confronts. Administrators of criminal justice are not responsible for the havoc their decisions may wreak in racialized communities. Solutions lie outside the realm of criminal justice, perhaps in the alleviation of poverty or the strengthening of social institutions such as the family, the “community” and the school.

An alternative explanation maintains that the criminal justice system is at least to some extent responsible for the racialized consequences of how it exercises power (Baker 1994; Cook and Hudson 1993; Hagan and Peterson 1995; Mann 1993; Nelson 1995). This approach focuses less on the objects of criminal justice power (suspects, accused and convicted persons) than its subjects (police, lawyers, judges, prison officials) and the procedures, policies, courts and prisons that comprise its institutions. It draws on a variety of studies to make the point that far from being a neutral tool to maintain social peace, the criminal justice process systematically selects particular classes of people to enjoy its protection and targets others to experience its might. Self-report studies of illegal behaviour, for example, indicate that criminal activity is rife among young males of all social classes, but the vast majority of persons suspected, accused and convicted of crimes are poor young men with tenuous connections to the formal labour market (Elliott 1994; Gabor 1994; Hagan and McCarthy 1994; National Council of Welfare 2000b). It is true that most of the crimes committed by middle-class and employed young men in the self-report studies are fairly trivial offences; but exactly the same can be said of most offences that result in convictions for

working-class and unemployed young men (Hagan and McCarthy 1994; Schissel 1993). Research into corporate crimes that are committed in pursuit of profit provides additional evidence of selection biases. Corporate/white-collar crime kills, maims and robs at rates that far exceed the injuries inflicted by individual or “street” crime (Snider 1993).

Despite the harm it causes, corporate crime is much less likely than street or individual crime to be policed, prosecuted and punished by the criminal justice system. Both self-report and white-collar/corporate crime studies suggest that the exercise of law enforcement power produces outcomes that differ with the class of offenders and that this effect occurs within the boundaries of lawful action. Are similar or parallel processes responsible for racial injustice in the outcomes of criminal justice processes?

Investigation of this question was a central task of the Commission on Systemic Racism in the Ontario Criminal Justice System, a public inquiry established by the government of Ontario in October 1992 with a mandate to conduct research into “systemic racism” at all stages of the administration of criminal justice. The commission published an interim report on Ontario’s prisons in February 1994 and its final report on the entire criminal justice process in Ontario at the end of 1995 (Ontario 1994, 1995). This chapter uses the commission’s work to illustrate some of the complexities of relying on legal understandings of uses and abuses of power as an organizing framework for change in the criminal justice system. I shall first explore the creation of the commission as a response to mobilization of black communities in Ontario, whose initial demands were organized around abuses of police power. Second, I will consider the extent to which the commission framed its work and findings in terms of ideas about the abuse of power, and the implications of this framework for the struggle against systemic racism.

Background and Context of the Commission²

Although the creation of the commission was formally an initiative of Ontario’s first social democratic government, its genesis lay in the mobilization of members of Toronto’s black communities in response to police shootings over the previous fifteen years (Glasbeek 1994; Williams 1999). Between August 1978 and May 1992, Ontario police officers shot one black woman and at least thirteen black men; eight of these victims were killed. Eleven of the fourteen shootings occurred in Toronto. One striking aspect of the shootings—and a factor that likely shaped the community mobilization—is that they tended to occur in clusters. Three killings happened in a fifteen-month period between August 1978 and November 1979; another four shootings occurred between August 1988 and October 1989; and in the eight months between September 1991 and May 1992, police officers shot five black men (Ontario 1995).

Members of Toronto’s black communities reacted to these tragedies by organizing for change. Activist groups formed and developed an analysis that identified “racism” in policing as a contributory factor in the shootings. They also

pressed for accountability for the deaths and injuries that had occurred and for reforms to policing practices to prevent future shootings. A key theme underlying the analysis was that law and legal processes did not sufficiently restrain police officers’ powers to use deadly force and that this lack of restraint was in part responsible for the shootings. In calling for “accountability,” the activist groups were concerned with the responsibilities of both individuals and institutions for the deaths and injuries. Individual responsibility lay with the officers who had fired the shots. Their accountability would be promoted by independent investigation, vigorous prosecution and criminal convictions. Institutional responsibility was located in the procedures, policies and practices that formed the context within which police officers shot black people with such disturbing frequency. Enhancing this form of accountability would require fundamental reforms to police recruitment, training and operations. Largely in support of this latter goal, the activist groups generally supported—and participated in—special inquiries and task forces that were struck in the aftermath of the shootings to explore the dynamics of “race relations and policing” (Metro Toronto Task Force on Human Relations 1977; Ontario 1980; Race Relations and Policing Task Force 1989).

In the early stages of mobilization, community groups focused on the shootings and their struggle to elicit acceptable responses from officials and policy-makers. During the 1980s, however, the diagnosis of “racism” as a dimension of black Ontarians’ experiences of criminal justice was extended, first, to more routine aspects of policing, such as police stops and arrests, and then to encompass non-policing elements of the criminal justice system, including courts, lawyers and judges. Black people who had experienced contact with criminal justice officials and institutions complained about unfair bail and sentencing decisions, and about the conduct of trials and other hearings (Equal Opportunity Consultants 1989). Stories circulated about mistreatment in prisons and in the criminal courts. Community groups that had organized around demands for police accountability began to protest harassment and mistreatment of black people in other parts of the criminal justice process. Police violence came to be seen as part of a larger picture of pervasive (or systemic) mistreatment of black people in the criminal justice process. As the analysis developed, so also did calls for a more systematic response to what was seen as abuse of racial power.

Although the police remained the most visible and intrusive element of the criminal justice system, and the target of most of the anger and frustration, many activists insisted that police violence was just one element of a broader problem of how power is used—or misused—to control racialized people, especially black people, in urban centres. These concerns were largely ignored by the criminal justice establishment, even as it attempted to manage the anger that erupted after each shooting. A different response was warranted, however, after the events that followed the police killing of Raymond Lawrence in May 1992. This shooting coincided with the acquittal of the American police officers whose beating of an African-American man, Rodney King, had been captured on videotape, and

with the riots that ensued in Los Angeles. At a rally organized by a prominent black community group in Toronto, some participants drew parallels between the failure of the U.S. legal system to hold police officers accountable for the violent abuse of their power over African-Americans and the police shootings of black Ontarians. Since few charges had been laid after the shootings in Ontario and there had been no convictions for homicide or assault, it was not difficult for the activists to characterize the administration of criminal justice in Ontario as indifferent to abuses of police power.

Some young people who had attended the rally subsequently launched a protest along Toronto's main commercial street during which they challenged police authority and damaged commercial property. Against the backdrop of the nightly visions of Los Angeles burning that were beamed across the planet, events in Toronto provoked a swift response. Then premier Bob Rae appointed a special advisor on race relations—Stephen Lewis—to develop a comprehensive action plan for resolving whatever problems lay behind the disturbances.

Lewis consulted extensively with black and other racialized people in the province. His report re-presented their demands in ways that fit into the political discourse of the time. There were three key elements to this re-presentation. First, Lewis recognized the “reality of systemic discrimination” as a pervasive characteristic of Ontario society (Lewis 1992). This recognition marked a departure from reliance on the language of “multiculturalism” and “race relations” to name and frame the experiences and concerns of people from racialized communities in their dealings with social institutions. To many who had participated in the mobilization against racial injustice, it denoted a shift from a model of racial difference that emphasized intercultural (mis)understandings to an acknowledgement that racial inequality is a manifestation of racial power.

Second, the Lewis Report identified black people as especially vulnerable to systemic racism. On this point it states:

[W]hat we are dealing with, at root, and fundamentally, is anti-Black racism. While it is obviously true that every visible minority community experiences the indignities and wounds of systemic discrimination throughout Southern Ontario, it is the Black community which is the focus.... Just as the soothing balm of “multiculturalism” cannot mask racism, so racism cannot mask its primary target. It is important, I believe, to acknowledge not only that racism is pervasive, but that at different times in different places, it violates certain minority communities more than others. (Lewis 1992: 3)

By identifying black people as the “primary target” of systemic racism, the Lewis Report broke with the convention of earlier reports which had treated all racialized people except those of Aboriginal or First Nations heritage as undifferentiated “racial” or “visible” minorities and implicitly assumed that all such minorities had similar experiences in their dealings with social institutions.

With this move, Lewis made it more difficult to marginalize black people's complaints about systemic racism by pitting their negative experiences against the allegedly more positive experiences, or perhaps more muted complaints, of people from other racialized communities.

The third important element of Lewis's re-presentation of his consultations was his focus on the criminal justice system in its entirety. He noted significant complaints not only about policing but also about racial discrimination in non-policing phases of the criminal justice process, commenting that he had heard “anecdotal horror stories about alleged racist episodes” (Lewis 1992: 14). As is indicated by the use of terms such as “anecdotal” and “alleged,” however, Lewis was not persuaded that existing knowledge about the nature and extent of any problems outside the policing sector was sufficient to justify reforms. Indeed, in his view, a central obstacle to progress was that the exclusive focus on policing in earlier inquiries had led to “a curious distortion” of knowledge about the administration of criminal justice. Many reports had documented the case for reforms to police recruitment, training and practices, but no systematic studies had examined what Lewis here described as “race relations” in other parts of the Ontario criminal justice system. To correct this “curious distortion” Lewis proposed a comprehensive investigation of racial discrimination in “those parts of the Justice System which cry out for assessment and evaluation but always seem to escape it” (Lewis 1992: 14).

By recommending such an investigation, Lewis sought a means of creating official and authorized knowledge of the complaints of black and other racialized people about abuses and misuses of power in the criminal justice system. Many people who had participated in the mobilization of black communities may have believed that there existed within the black communities sufficient authentic knowledge drawn from experiences with the criminal justice system to justify reform (Scott and Ayles 1995). Implicit in Lewis's report, however, is an assumption that the power to reform practices and procedures lay with the legal actors responsible for criminal justice processes, who, in the absence of official and authorized knowledge, would likely resist change.

A scant four months after Lewis reported, the Ontario government established a six-person commission of inquiry with a mandate to examine the extent to which “systemic racism” affects the administration of criminal justice in Ontario. Consistent with the Lewis Report, the terms of reference directed the commission to focus on “anti-black” racism but also to pay attention to the vulnerabilities of other racial minority communities (Ontario 1995: Appendix A).

Nowhere in the Lewis Report or the commission's terms of reference is the focus of the inquiry described in terms of the misuse or abuse of power. The characterization of the central problem as “systemic racism,” however, created space to address one of the main claims to emerge from community demands for such an inquiry: that the failure to treat black and other racialized people equally with white people in the routine processes of criminal justice constitutes an abuse

