Judicial Racism & The Lammy Review
Professor Leslie Thomas QC
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I want to start this lecture by telling a couple of stories.

The first in time is the story of Mohammed Mattan. Mr. Mattan was a Somali man living in Cardiff, who was in an interracial marriage with a White woman – something that was unusual and stigmatised at the time. In 1952, he was tried, convicted and hanged for a murder he did not commit. Important exculpatory evidence, showing that the witness identification of Mr Mattan was unreliable, was not disclosed to the defence or put before the jury. At his trial, his own defence counsel described him as, *"this half-child of nature, a semi-civilised savage".* Following the refusal of leave to appeal, he was hanged at Cardiff prison on 8 September 1952. Eventually, following a reference by the Criminal Cases Review Commission, he was finally acquitted by the Court of Appeal in 1998.[1]

The second is the story of David Oluwale. Mr Oluwale was a Nigerian immigrant living in Leeds in the 1960s, who spent eight years in an asylum following a fight with police officers. After his release, he became street homeless. He was subjected to a systematic and horrifying campaign of beatings, harassment and humiliation by two White police officers. Eventually, under circumstances which remain unclear, he drowned in the River Aire. In a 1971 trial, the two officers were convicted of multiple counts of assault but acquitted of manslaughter. Startlingly, however, the trial judge, Mr Justice Hinchliffe, described Mr Oluwale as *"a dirty, filthy, violent vagrant",* a *"menace to society"* and *"a frightening apparition to come across at night".* That is what a High Court judge in 1971 thought of a homeless Black man who was brutalised by the police.[2]

Most people know that the English legal system has long had a race problem. Yet, we often attribute this to policing only, allowing the wider justice system – judges in particular – to get off scot-free. However, judicial racism has, and still does, play a critical role in perpetuating racial inequity.

Judges are some of the most powerful actors in our society, and decisions they take can often be life-changing for individuals, communities, and society as a whole. At some point in your life, a judge may decide whether you go to prison. A judge may decide whether you lose your home, lose your state benefits, lose custody of your children. A good judge can transform lives for the better. A bad judge can ruin lives irreparably.

In this lecture, I'm going to tackle judicial racism head-on. This lecture will be in three parts.

First, I'm going to look at the history of judicial racism, for this lecture is as much about history as it is about law.

Second, I'm going to look at judicial racism today.

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[1] Jamie Wilson, '£1.4m award for family of wrongfully hanged man' (*The Guardian*, 14 May 2001)

[2] Kester Aspden, 'The long hours: remembering David Oluwale' (*The Critic*, 15 October 2020). See also: Harmit Athwal, 'The hounding of David Oluwale' (Institute of Race Relations)

And third, I'm going to close the lecture with some thoughts about what we, as a society, can do about it.

A couple of acknowledgments. First, to Colin Bobb-Semple, who sent me his excellent book "Race, Jail v Bail"[3] which has been extremely useful in putting together this lecture. Second, to Micah Anne Neale, who has recently completed her PhD on eighteenth-century domestic service and who provided helpful insights into the scholarship on British Black people in the early modern period.

One final caveat: Although much of what I will be saying is applicable to Britain as a whole, I will be focusing primarily on the legal system of England and Wales, rather than those of Scotland or Ireland.

Historical Context

So, firstly – putting English judicial racism in its historical context. This will necessarily be a broad-brush overview – the history of race in the English legal system could be an entire lecture series, and many books have been written about it.[4] But we do need to understand, albeit briefly, the relevant history before we can understand present issues.

The presence of Black people in Britain is not a recent phenomenon.[5] As long ago as 1596, Elizabeth I's Privy Council issued a proclamation authorising a Lubeck merchant called Casper van Senden to take "blackamoors" from England and sell them as slaves in Spain and Portugal, to defray his costs incurred by repatriating English prisoners.[6]

And as most people know, during the seventeenth and eighteenth centuries Britain profited greatly from the trans-Atlantic slave trade, abducting huge numbers of people from Africa and enslaving them in its American and Caribbean colonies. Many of the wealthiest and most powerful families in Britain made their fortunes through slavery. By the eighteenth century there were numerous Black people in Britain itself, some of whom had been purchased overseas as slaves and brought here to work for wealthy families. It's sometimes said that *"every brick in Bristol was cemented with the blood of a slave."*[7]

It's widely known that in the 1772 case of *Somerset v Stewart*[8], the Lord Chief Justice, Lord Mansfield, granted a petition for habeas corpus brought by an enslaved man held aboard a ship bound for Jamaica, ruling that there was no basis for his detention. Many people have credited Lord Mansfield's judgment with catalysing the end of slavery in England.[9] However, some 13 years later in the case of *R v the Inhabitants of Thames Ditton*[10]*, Lord Mansfield* stressed that his judgment in the case of James Somerset was to *"go no further than to establish, that the master had no power to take the slave by force out of the Kingdom*". As historian Carolyn Steedman has underlined, these words by Lord Mansfield made "*his famous Somerset*

[3] Colin Bobb-Semple (2012) Race, Jail v Bail

[4] See e.g.: Colin Bobb-Semple (2012*) English Common Law, African Enslavement, and Human Rights.* Further reading is cited throughout the lecture.

[5] See: File, N. and Power, C. (1981) Black Settlers in Britain 1555-1958 (Pearson Education Limited); Walvin, J. (1973) Black and White: The Negro and English Society, 1555-1945 (Allen Lane)

[6] See: David Olusoga (2017) Black and British: A forgotten history (Pan Books) pp.57-76; Emily Weissbourd (2015) "'Those in Their Possession': Race, Slavery, and Queen Elizabeth's 'Edicts of Expulsion.'" *Huntington Library Quarterly*, *78*(1), 1–19.

[7] See: Peter Fryer (2018) Staying Power: The History of Black People in Britain (Pluto Press); J.F. Nicholls and John Taylor, *Bristol past and present* (Bristol, J.W. Arrowsmith, 1881-2), vol 3, p.165

[8] (1772) 98 ER 499 <http://www.commonlii.org/int/cases/EngR/1772/57.pdf>.

[9] Helen Catterall, 'Judicial Cases Concerning American Slavery and the Negro (5 vols., Washington DC, 1926-37)

[10] R v Inhabitants of Thames Ditton (1785) 4 Doug KB 300, 99 ER 891

judgment seem a very small thing indeed. It is his qualification that will echo through the law reports, down to the 1830".[11]

And as we know, it wasn't in fact until the Slave Trade Act 1807 that the slave trade was abolished in England. And not until 1833, with the Slavery Abolition Act, that slavery itself was formally abolished.

Let's turn to the criminal law, specifically the courts and judges. At the end of the eighteenth and the beginning of the nineteenth century, criminal law sanctions handed out by local magistrates (unpaid officials) and Crown Court judges were particularly brutal – often called the 'bloody code'.[12] A huge number of offences, including damaging Westminster Bridge and impersonating a Chelsea Pensioner, were punishable by death. Public hangings, transportation to the colonies, and whipping were all everyday practices.[13]

Historian Norma Myers, in a study of Old Bailey court records, has documented the stories of Black people who came before the criminal court in the late eighteenth and early nineteenth centuries, including many who were transported to Australia. Myers' work underscored the extreme harshness of the criminal law of the time – for Black defendants, Irish defendant[14], but also for the English White working class. She notes that the most common offence for which people were transported to Australia was the theft of a handkerchief.[15]

And Britain exported this system of disproportionate punishment and brutality to its colonies.

As historian Diana Paton noted after a study of the records of slave trials in eighteenth-century Jamaica: *"Jamaican slave courts and the punishments they inflicted … enacted rituals that both dramatized and sustained the power relations of this colonial slave society. Rather than representing the supposed common discipline of all to a single rule of law, as did the contemporary English spectacle of trial and punishment, Jamaican judicial practice emphasized the difference between enslaved and free, and valorized the slaveholder's private penal power"*.[16]

In the West Indies, the magistrates were drawn from the plantation-owning aristocracy, and this did not change when slavery was finally abolished in 1834. As Colin Bobb-Semple writes in *Race, Jail v Bail*, *"Throughout the British plantation system, it was customary for the planters to become magistrates. They were the people responsible for constant whipping and other forms of torture of enslaved Africans, in addition to performing their roles as justices. After emancipation, the planters continued to act as magistrates and*

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[11] Steedman, C. (2020) History and the Law: A Love Story (Cambridge: Cambridge University Press) p.156; Steedman, C (2009) "Labours Lost: Domestic Service and the Making of Modern England" (Cambridge: Cambridge University Press), p 126.

[12] Gwenda Morgan and Peter Rushton (1998) Rogues, Thieves and the Rule of Law: The Problem of Law Enforcement in North-East England, 1718–1800 (Routledge); Harriet Evans, 'The Bloody Code', Manchester Student Law Review', Vol. 2, No. 28 (2013), pp. 28-40

[13] V. A. C. Gatrell (1994) The Hanging Tree: Execution and the English People, 1770–1868, pp.56–7; Thomas W. Lacqueur, 'Crowds, Carnival and the State in English Executions, 1604–1868', in A. L. Beier, David Cannadine and James M. Rosenheim (eds.), The First Modern Society: Essays in English History in Honour of Lawrence Stone (Cambridge, 1989); Leon Radzinowicz, A History of English Criminal Law and its Administration from 1750, 5 vols. (London, 1948–86), vol 1, chs. 8–18.

[14] See also: King, P. (2013). Ethnicity, Prejudice, and Justice: The Treatment of the Irish at the Old Bailey, 1750-1825. *Journal of British Studies*, *52*(2), 390–414.

[15] Myers, N (1996) Reconstructing the Black Past: Blacks in Britain 1780-1830 (Taylor and Francis), chapter 5; Myers, N, 'The Black Presence Through Criminal Records, 1780-1830', *Immigrants and Minorities*, 7 (1988), 292-307

[16] Paton, D. (2001). Punishment, Crime, and the Bodies of Slaves in Eighteenth-Century Jamaica. *Journal of Social History*, *34*(4), 923–954. For a discussion in parliament on Jamaica slave trials, see: "Jamaica Slaves' Trials" (HC Deb 01 March 1826 vol 14 cc1007-75) <https://api.parliament.uk/historic-hansard/commons/1826/mar/01/jamaica-slaves-trials>

*dispensed justice, sometimes very harshly." A*s Bobb-Semple highlights, the entrenched racism of the British establishment did not go anywhere post emancipation.[17]

In fact, at the end of the nineteenth and beginning of the twentieth century, eugenics was very much in vogue in Britain and America. The central tenet of eugenics was that some humans were genetically superior, while others were genetically inferior. Crime, poverty and mental illness were all ascribable to inferior genes. Eugenicists advocated the forced sterilisation of people whom they regarded as "feeble-minded" and "defective".[18] This tended to go along with pseudoscientific racism. Many eugenicists divided human beings into "Caucasoid", "Mongoloid" and "Negroid" races, who were all believed to have different characteristics – with the so-called "Negroid" race being at the bottom of the pile. And as such colonialism was regarded as being justified because of the inherent superiority of the White race, and inherent inferiority of the Negroid race. These ideas were very politically influential before and after the First World War on both sides of the Atlantic.[19]

Eugenics had a great deal of influence on the legal system. In the United States, numerous states passed laws that provided for the compulsory sterilisation of "defectives" – laws that ultimately inspired Hitler's fascist reign.[20] Here in Britain, eugenic ideas inspired the enactment of the Mental Deficiency Act 1913, which provided for the institutionalisation of those it labelled "defectives", including – in the explicit language of the Act – "idiots", "imbeciles" and the "feeble-minded". Although the British Act, unlike its American counterparts, did not provide for sterilisation, this Act shows how commonplace and widely accepted eugenic ideas were in the early and mid-twentieth century. And although eugenics generally fell out of cultural favour in the mid-twentieth century[21], many scholars have argued that the ongoing legacy of eugenic thinking about crime and punishment, the inherently criminal, continues today.[22]

Let's move on to the post-war decades. As I talked about in my last Gresham lecture – *The Immigration Act 1971: Celebrated or Flawed?* – between the 1940s and 60s, large numbers of Black and Asian people came to Britain from the Commonwealth. This group of people are often known as the "Windrush generation", after the ship HMT Empire Windrush which docked in Britain on 22 June 1948 bringing people from the Caribbean.

This era was a high point of racial tensions. Until the Race Relations Act was passed in 1968, it was common for landlords and businesses to display signs saying, "No blacks, no Irish, no dogs".[23] The vicious racism of this era resulted in the enactment of the Commonwealth Immigrants Acts 1962 and 1968 and the Immigration Act 1971, which, as covered in detail in the last lecture, restricted immigration from the Commonwealth for the first time.

It was in this fraught context that the cases of Mohammed Mattan and David Oluwale, with which I opened this lecture, took place. And as most people know, this era was also a real high point of police corruption. It was common for the police to fabricate cases, frame people, plant evidence, blackmail and bride. Sometimes they would beat confessions out of people. While this affected working-class people of all races, it fell most heavily on Black people and people of colour, who were persecuted by the police.[24]

And unfortunately, the infallible image of the "British bobby" permeated the attitudes of judges. Time after time, the judiciary allowed the police to get away with it and the prosecution to present cases which would

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[17] p.37

[18] Francis Galton (1904) "Eugenics: Its Definition, Scope, and Aims" Vol. X, No. 1 *The American Journal of Sociology*

[19] See: Dan Stone, 'Race in British Eugenics' 2001 *European History Quarterly* Vol. 31 No. 3

[20] Edwin Black, 'Hitler's debt to America' (*The Guardian*, 6 February 2004)

[21] xxxx

[22] Jonathan Simon, "'The Criminal Is To Go Free': The Legacy Of Eugenic Thought In Contemporary Judicial Realism About American Criminal Justice" 2020 Boston University Law Review Vol. 10

[23] Rahul Verma, "It Was Standard To See Signs Saying, 'No Blacks, No Dogs, No Irish'" (*Each Other*, 29 November 2018)

[24] See: 'Bent Coppers: Crossing the Line of Duty' (BBC iPlayer)

now be dismissed, potentially for an abuse of process. The judiciary were part of the establishment, and they were not on the side of people of colour or working-class people.[25] We only have to look at some of the most well-known miscarriage of justice cases involving police corruption and the deliberate framing of Black people. Take for instance, the Stockwell Six and the Oval Four, all of whom had their convictions recently overturned by the Court of Appeal.[26]

Meanwhile, my own career at the Bar started in the 1980s. I have practised in many fields of law, but in the latter part of my career I have concentrated on inquests, inquiries and actions against the police, although not exclusively. I have represented many Black people and people of colour who have been assaulted, harassed or falsely accused by police officers, or whose family members have been killed by police officers. And I have seen plenty of judicial racism over the years. It has nearly always been my experience with one or two exceptions that for a Black litigant, a jury is a better bet than a judge.

Judicial Racism Today

Now I will move to the second part of the lecture: judicial racism today.

You might think that the examples I've given in this lecture are about the distant past. But judicial racism is still very much with us, and still influences the fate of the many Black and minority ethnic people who come before the courts as criminal defendants, civil litigants, victims of crime and bereaved families and survivors.

It's with this in mind that I turn to four manifestations of judicial racism:

- The criminal courts, racial disparities, and racialised evidence.
- Judicial decisions which attempt to silence race in cases where Black people are victims and the bereaved.
- The Supreme Court's approach to race issues.
- The legal profession and judicial bullying and mistreatment.

Criminal Court & Racial Disparities

Judicial racism in the criminal courts is pronounced when looking at sentencing practices. The Government's 2017 commissioned Lammy Review by David Lammy MP comprehensively lay bare this truth, reporting the results of a 2016 Ministry of Justice review of Crown Court sentencing for three groups of offences – offences involving acquisitive violence, sexual offences and drugs offences. This review found that *"[u]nder similar criminal circumstances the odds of imprisonment for offenders from self-reported Black, Asian, and Chinese or other backgrounds were higher than for offenders from self-reported White backgrounds."* Starkly, it also found that *"[w]ithin drug offences, the odds of receiving a prison sentence were around 240% higher for BAME offenders, compared to White offenders."*[27]

There are also stark disparities in the sentencing of firearms offences. In fact, the Sentencing Council published eight new guidelines for firearms offences at the start of this year – and within them were formal directions by the Sentencing Council for judges and magistrates to "be aware" of disparities in sentence outcomes, including that *"a higher proportion of Black and Asian offenders receive an immediate custodial sentence than White offenders and that for Black offenders custodial sentence lengths have on average been longer than for White offenders."* [28]

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[25] *Ibid*

[26] Jon Robins, "British Transport Police apologise for 'systemic racism' over Oval Four and Stockwell Six convictions" (*The Justice Gap*, 9 November 2021)

[27] Lammy review: final report, p.33

[28] Owen Bowcott,"Judges told they should consider previous racial bias before sentencing" (*The Guardian*, 9 December

The Lammy Review also raised concern about magistrates' court decisions, although stressed that comprehensive data collection was a big problem. But the data that did exist showed some racial disparities in the rate of conviction of women of colour, as compared with White women.[29]

The picture for "BAME" children is even more depressing, where judicial discretion is leading to real problems. Take for instance remand – where someone is imprisoned pending a trial. Last year, Transform Justice and the Howard League for Penal Reform revealed that between July and September 2020, 87% of children on remand in London were from a BAME background, while 61% were Black.[30] A recent report by the Youth Justice Board (YJB) also paints a worrying picture for BAME children, concluding that BAME children are:

> more likely to receive custodial remand as opposed to bail.
>
> less likely to benefit from out-of-court disposals
>
> more likely to receive a custodial sentence and the length of the sentence is likely to be longer
>
> more likely to be subject to harsher requirements if a Youth Rehabilitation Order is imposed

The YJB further noted that *"even when taking into account all available information (demographics, offence-related factors, remand status and practitioner-assessments) we are unable to explain all of the disproportionality seen for Black children. Black children are still more likely to receive harsher sentences*".[31]

By contrast, the Lammy Review described juries as a "success story". It cited a 2010 study of jury verdicts, which was updated in 2017 to inform the review, with analysis of over 390,000 jury decisions between 2006 and 2014. This study found that jury conviction rates were very similar across different ethnic groups. BAME and White conviction rates were similar across a range of offence-types, with only small differences and no overall pattern. The review concluded: *"This does not mean that every jury decision is perfect, but it does indicate that the system as a whole is working."*[32]

This data confirmed what many working lawyers know from our anecdotal experience: judges are, on average, more racially prejudiced than juries. I am not a criminal practitioner, but in my experience as a civil practitioner representing claimants in actions against the police, a Black claimant is generally better off with a jury trial than a bench trial. In my experience, the jury system has much to commend it.

But jurors can of course also be influenced by race – often by racist tropes, stereotypes and unfairly prejudicial evidence. Take for instance the use of drill music in cases involving predominantly Black boys accused of gang-related crime. Simply being in a drill music video on YouTube can become "persuasive" evidence for the prosecution when trying to convince the jury of their case.[33]

2020). See also: the Sentencing Council guidelines for Firearms offences.

[29] pp.32-33

[30] Jamie Grierson, 'Nine out of 10 children on remand in London come from BAME background'' (*The Guardian*. 21 December 2020). See also: Howard League for Penal Reform, 'What's wrong with remanding children to prison? Remand briefing one: Emerging themes' (2021)

[31] YJB, 'Ethnic disproportionality in remand and sentencing in the youth justice system Analysis of administrative data', pp.8-10

[32] pp.31-32

[33] Eithne Quinn, 'Lost in translation? Rap music and racial bias in the courtroom' (University of Manchester, Policy@Manchester Blogs, 4 October 2018); Kamila Rymajdo, 'Drill Lyrics Are Being Used Against Young Black Men in Court' (Vice, 24 August 2020); Abenaa Owusu-Bempah, 'Part of art or part of life? Rap lyrics in criminal trials' (LSE British Politics and Policy, 27 August 2020); 'Courts relying on Drill music to reinforce racist stereotypes' (*The Justice Gap*, 23 September 2020); Steve Swan, 'Drill and rap music on trial' (BBC, 13 January 2021)

I unfortunately don't have speak in detail on the courts' approach to those suspected of being a gang but do advise you all to check out the Garden Court Chambers six-part YouTube series on: *"Drill music, gangs and prosecutions: challenging racist stereotypes in the criminal justice system"*.[34] The series addresses, amongst many other things, gang injunctions and criminal behaviour orders. And although these injunctions and orders must initially be sought by the prosecution, police or local authority – it is criminal court, County Court and High Court judges that authorise such a racially disproportionate and Draconian measures.

You see, the legal system's approach to race is pernicious and paradoxically convenient. As the Institute of Race Relations neatly captured:

> *"Ironically, 'race' marks individuals out when they are the alleged perpetrator of a crime, but race and racism are elided by institutions when such individuals are victims of crime. And families end up disillusioned and isolated by legal process that appears unwilling to address the impact of racism in their lives."*[35]

So, let's look at this: when race is elided, silenced.

Silencing Race

The West has long had a race problem, but equally relenting is the West's denial of this problem. Racists and racist violence are treated as outliers. And using the term 'institutional racism' is shunned as 'unhelpful', or outright rejected.[36]

As Judge Bonello neatly captured in his dissenting opinion in the 2002 Strasbourg case of *Anguelova v Bulgaria*, a case brought by the mother of a 17-year-old Roma boy who died in police custody in Bulgaria. It was alleged that racial discrimination was a decisive factor in the police's use of force as well as the subsequent bungled investigation; however, the ECtHR rejected the discrimination claim under Article 14 of the Convention. As Judge Bonello said:

> *"I consider it particularly disturbing that the Court, in over fifty years of pertinacious judicial scrutiny, has not, to date, found one single instance of violation of the right to life (Article 2) or the right not to be subjected to torture or to other degrading or inhuman treatment or punishment (Article 3) induced by the race, colour or place of origin of the victim … Leafing through the annals of the Court, an uninformed observer would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism, intolerance or xenophobia. The Europe projected by the Court's case-law is that of an exemplary haven of ethnic fraternity, in which peoples of the most diverse origin coalesce without distress, prejudice or recrimination … [As such], Misfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence."*[37]

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[34] The recordings for the series can be found here and here. For further legal analysis, see: Nick Whitehorn and Rebecca McKnight, 'Drill music in the dock' (3TG Barristers)

[35] Harmit Athwal and Jon Burnett, 'Investigated or ignored? An analysis of race-related deaths since the Macpherson Report' (IRR, 2014)

[36] See for example: Benjamin Bowling, 'Violent Racism: Victimisation, Policing and Social Context. Revised Edition' (1999, Oxford University Press); Edward Said, *Orientalism* (London, Penguin, 2003); Fitzpatrick, P. (1987). Racism and the Innocence of Law. *Journal of Law and Society*, *14*(1), 119–132.

[37] Anguelova v Bulgaria, Merits and just satisfaction, App No 38361/97, ECHR 2002-IV, [2002] ECHR 489, (2004) 38 EHRR 3, Judge Bonello's dissenting opinion, paras 1-2.

Such a charge can justifiably be levied at England and Wales. A charge I make. From Met[38] to the Government's recent Sewell Report[39], issues of racism and racial inequality continue to be refuted.

But judicial decision making has itself played a critical role in the silencing of race[40], especially in cases involving violence and where the state is implicated, including (of course) criminal justice processes, but also our senior judiciary, inquests, public inquiries as well as other fact-finding and accountability processes.[41] Consequently, those who seek to expose racism via state and legal processes face an arduous task, where the potential for meaningful accountability and racial justice remains illusory.[42] As the European Commission against Racism and Intolerance underlined in 2016: "racially-motivated aspects of cases are often filtered out by the police, CPS or judiciary through a combination of unwillingness to recognise racist motivation, the reclassifying of racist attacks as disputes or other forms of hostility, and the over-strict interpretation of the provisions on racist motivation".

A 2004 report by the Joint Committee on Human Rights ('JCHR') into deaths in custody stressed that *"the unsafe use of restraint is an ongoing problem across all forms of detention"* and *"the possibility that racial stereotyping has been a contributory factor in at least some deaths in custody resulting from restraint should be taken seriously"*.[43] In 2020, the JCHR again stressed that a "key issue that needs addressing" is *"transparency over the role that race and/or racism played"* in a death in custody, and that due to the *"absence of greater action, Black people have continued to die"* disproportionately.[44] Most recently, in June 2021, the United Nations High Commissioner on Human Rights ('UNHCHR) published a scathing report which called on, amongst others, the UK to "end impunity" for human rights violations against Black communities by law enforcement agencies and reverse the "cultures of denial" towards institutional and systemic racism, particularly in the context of policing and deaths in custody.[45]

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[38] Imogen Braddick, 'Met is not institutionally racist, says Commissioner Cressida Dick' (*Evening Standard*, 13 August 2020)

[39] *Commission on Race and Ethnic Disparities: The Report* (March 2021). See also: "Rights experts condemn UK racism report attempting to 'normalize white supremacy'" (*UN News*, 19.04.2021); Amanda Parker, 'UK report on race is a masterclass in gaslighting' (*Financial Times*, 01.04.2021)

[40] For discussion of the European Court of Human Rights, see for example: Dembour, Marie-Benedicte, 'In the name of the rule of law: the European Court of Human Rights' silencing of racism' In: Bhambra, GK and Shilliam, R (eds.) Silencing human rights: critical engagements with a contested project (Palgrave Macmillan, 2009) pp. 184-202; Marie-Bénédicte Dembour, 'Postcolonial Denial: Why the European Court of Human Rights Finds It So Difficult to Acknowledge Racism', in Kamari Clarke and Maxine Goodale (eds), Mirrors of Justice: Law and Power in the Post-Cold War Era (Cambridge University Press 2009); Jasmina Mačkić, Proving Discriminatory Violence at the European Court of Human Rights (*Brill Nijhoff*, 2018); Rory O'Connell, 'Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR' (2009) 29 (2) *Legal Studies: The Journal of the Society of Legal Scholars* 211; Marie-Benedicte Dembour, 'Still Silencing the Racism Suffered by Migrants . . . The Limits of Current Developments under Article 14 ECHR' (2009) 11 European Journal of Migration and Law 221; Mathias Möschel, 'Race in mainland European legal analysis: Towards a European Critical Race Theory' (2011) 34 Ethnic and Racial Studies 164; Mathias Möschel and Ruth Rubio-Marín, 'Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism' (2015) 26(4) European Journal of International Law;

[41] See e.g.: Harmit Athwal and Jon Burnett, 'Investigated or ignored? An analysis of race-related deaths since the Macpherson Report' (IRR, 2014)

[42] See e.g.: Victor Quintanilla, 'Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination', (2011) 17 MICH. J. RACE & L. 1; Angela Turner, 'The Elephant in the Hearing Room: Colorblindness in Section 8 Voucher Termination Hearings' (2011) 13(1) Berkeley Journal of African-American Law & Policy

[43] JCHR, 'Deaths in custody' (3rd report, 14.12.2004, HL Paper 15-1), paras 227 and 256.

[44] JCHR, 'Black people, racism and human rights' (11th report of session 2019-21, 04.11.2020, paras 71, 73

[45] UNHCHR's inquiry report, 'Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officer'

Let's take for instance the Jimmy Mubenga case. Mr Mubenga died in October 2010 of cardio-respiratory failure caused by restraint used by three G4S guards on a plane during his deportation to Angola. The three guards stood trial at the Old Bailey in late 2014 for charges of manslaughter by negligence. It was the prosecution's case that Mr Mubenga was handcuffed from behind, in a compressed position in his seat for over 30 minutes, where guards ignored his cries that he could not breathe. All three guards were acquitted of manslaughter. However, most concerning about this case was the judge's decision, Mr Justice Spencer, to rule as inadmissible copious amounts of racist texts sent by two of the guards. Take for example one text which read – and I warn you in advance that it's not pleasant – *"Fuck off and go home you free-loading, benefit grabbing, kid producing, violent, non-English speaking cock suckers and take those hairy faced, sandal wearing, bomb making, goat fucking, smelly rag head bastards with you."* It was accepted by Mr Justice Spencer that allowing such evidence would *'release an unpredictable cloud of prejudice'* in the jury.[46] Further, the judge told the jurors not to be concerned if they later read about evidence excluded from the trial.[47] Evidence which included the inquest jury conclusion of unlawful killing as well as the coroner's Rule 43 report, which said: *"it seems unlikely that endemic racism would not impact at all on service provision. It was not possible to explore at the Inquest the true extent of racist opinion or tolerance amongst DCOs or more widely. However, there was enough evidence to cause real concern, particularly at the possibility that such racism might find reflection in race-based antipathy towards detainees and deportees and that in turn might manifest itself in inappropriate treatment of them … This may, self-evidently, result in a lack of empathy and respect for their dignity and humanity, potentially putting their safety at risk, especially if force is used against them"*.[48]

This takes me onto inquests (consisting of coroners and juries), which are the state's main investigative mechanism for investigating deaths in custody and ordinarily the means by which the state discharges its Article 2 procedural duty to investigate deaths in custody.[49] For over 30 years, inquests have offered the only opportunity to officially establish whether racism contributed to a person's death; however, in my experience, they have consistently failed in ensuring transparency and true accountability.[50] In fact, I would go so far to suggest that the accountability mechanism where race is most elusive, unfortunately, is the inquest process, even in comparison to police, CPS and IOPC investigations. An inquest into the death of a Black person in state custody has never explicitly concluded that racism (whether that be individual prejudice, or institutional racism) contributed to a person's death. The closest we've come to such a conclusion was that of coroner Karon Monaghan QC's rule 43 report in the Jimmy Mubenga inquest mentioned just before. But this case must very much be treated as an outlier, unfortunately. As the charity INQUEST said in its submission to the United Nations High Commissioner on Human Rights inquiry on police brutality against Black people, "*the question of racism remains the 'elephant in the room', neither part of the investigation process nor inquest*".[51] It is missing from narrative conclusions and very rarely in scope of what a coroner directs a jury to consider.

(June 2021)

[46] Robert Booth, 'Jimmy Mubenga: Judge refused to allow jury to hear about guards' racist texts' (*The Guardian*, 17 December 2014); Clare Sambrook, 'The racist texts. What the Mubenga trial jury was not told' (Open Democracy, 17 December 2014)

[47] Frances Webber, 'Justice blindfolded? The case of Jimmy Mubenga' (IRR, 16 December 2014)

[48] Report by the Assistant Deputy coroner Karon Monaghan QC under the coroner's Rules 1984, Rule 43, Inquest into the death of Jimmy Kelenda Mubenga (09.07.2013), para 46

[49] R (Middleton) v HM Coroner for Western Somerset [2004] UKHL 10; [2004] 2 A.C. 182, para 20. See also: Leslie Thomas et al, 'INQUESTS: A Practitioner's Guide' (Legal Action Group, 2014) chapter 18.

[50] Aaron Andrews, 'Truth, Justice, and Expertise in 1980s Britain: The Cultural Politics of the New Cross Massacre' (2021) 91(1) *History Workshop Journal*, pp.182–209,

[51] INQUEST evidence submission to UNHCHR inquiry on 'Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers' (December 2020), para 33.

INQUEST has also reported numerous times – which I can wholly attest to – that, instead of the inquest investigating how the deceased came to their death, Black families report feeling as though their private life and that of their relative was subject to the most scrutiny. It's not uncommon to see clear attempts by the state to "demonise" the deceased, introduce racist narratives, creating a negative reputation and the idea of an undeserving victim. Like with criminal trials, drug and gang stereotypes are often part of the state's defamatory arsenal during inquests.[52] As a result, official incompetence, criminality or wrongdoing are cloaked by disinformation. Unfortunately, criticism cannot only be levied at state interest parties and counsel; coroners have also engaged in the perpetuation of stereotypes.[53]

This takes me onto the Supreme Court – where the impact of its decisions reverberates far beyond individuals, instead sometimes changing the direction of the law – sometimes to the detriment of racialised minorities. I want to give a few examples of this.

Race and the Supreme Court

One case that my colleague David Neale talked about in my previous lecture was the 2005 case of *N v SSHD*.[54] In that case, a Ugandan woman who was a rape survivor and was suffering from HIV was facing removal to Uganda. If she returned to Uganda, she would be unable to access antiretroviral medication and would face an early and painful death. She sought to remain in the UK under Article 3 of the European Convention on Human Rights, the prohibition of inhuman or degrading treatment or punishment.

The House of Lords had an opportunity to define the ambit of Article 3 for sick and disabled migrants for a generation, but chose to dismiss her appeal, and to hold that Article 3 did not preclude her removal to Uganda. This case served as a precedent for the next 15 years which led to many sick and disabled migrants being sent back to their deaths – even people with end-stage kidney failure.

As my colleague said in the previous lecture, this was not a case where the House of Lords was simply applying pre-existing law. It had an opportunity to define the boundaries of the law. A panel of White judges chose to send a disabled Black woman to her death because she wasn't British.

A second case I want to mention, in a completely different area of law, is the 2015 case of *Roberts v Commissioner of Police for the Metropolis*.[55] That was a case about "suspicionless" stop and search powers, which allow the police to stop and search a person despite having no basis for suspicion that they are guilty of any crime. The law in question allowed senior police officers to authorise suspicionless stops and searches in a particular locality for a 24-hour period. In deciding that this law was not incompatible with the human rights of Black and minority ethnic people, Baroness Hale stated:

> *"The purpose of [any random "suspicionless" power of stop and search] is to reduce the risk of serious violence where knives and other offensive weapons are used, especially that associated with gangs and large crowds. It must be borne in mind that many of these gangs are largely composed of young people from black and minority ethnic groups. While there is a concern that members of these groups should not be disproportionately targeted, it is members of these groups who will benefit most from the reduction in violence, serious injury and death that may result from the use of such powers. Put bluntly, it is mostly young black lives that will be saved if there is less gang violence in London and some other cities."*[56]

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[52] *Ibid*. See also: INQUEST evidence to JCHR inquiry on 'Black people, racism and human rights'

[53] See e.g.: 'Andrew Hall inquest: Man died after 'violent struggle' in police cells' (*BBC*, 22.04.2021)

[54] *N (FC) v Secretary of State for the Home Department* [2005] UKHL 31

[55] *Roberts v Commissioner of Police for the Metropolis [2015] UKSC 79*

[56] *Ibid*, para 41

Essentially, then, despite acknowledging that stop and search powers have a disproportionate impact on Black people, the court rubber-stamped this stark racial inequality on the basis that it is for Black people's own good, despite no evidence to support such a broad-brush conclusion.

Finally, a very recent case – the 2021 case of *Begum v Special Immigration Appeals Commission*.[57] This was the high-profile case of Shamima Begum, which probably needs no introduction for most people. Even though Ms Begum was born and raised in the UK, the UK Government used draconian powers to deprive her of her British citizenship. As was widely reported in the press, the Supreme Court, reversing the Court of Appeal decision, held that Ms Begum had no right to return to the UK to pursue her appeal against the deprivation of her British citizenship, even though it was acknowledged that she could not have a fair hearing of her appeal from Syria. The Court didn't stop there, though. It also changed the standard of review in all appeals against deprivation of citizenship, reducing the freedom of tribunal judges to gainsay the Home Office's decisions. And it emphasised the need for judges to defer to the Government's assessment of what "national security" requires. In short, it handed the Government everything it wanted, while denying Shamima Begum the basic right to a fair hearing of her case.

Of course, all of these three decisions have their defenders. But I make no apology for saying that they all illustrate the race problem in the British judiciary. In all of these cases, the highest court in the land was faced with a novel legal question and had the opportunity to set a precedent. In the *N* case, White judges sent a critically ill Black rape survivor to her death. In the *Roberts* case, White judges decided that Black people should continue to be disproportionately stopped and searched, without any grounds for suspicion, ostensibly in Black people's own best interests. In the *Begum* case, White judges decided that the executive's concerns about "national security" outweighed a British woman of colour's right to a fair hearing.

Would all these cases have gone the same way if we had a genuinely diverse senior judiciary? Would they have gone the same way if we had Supreme Court justices who had lived experience of racialised stop-and-search? Or Supreme Court justices who had lived experience of the immigration system?

Well, let's pause and take a look at the judiciary and the profession more generally. To understand our judiciary, we must look at our legal profession. With the exception of lay magistrates, all of our judges are drawn from the ranks of barristers or solicitors. Most senior judges are barristers.

Judicial Mistreatment & Bullying

This systemic inequality in the legal profession is reflected in the make-up of our judiciary. Nationally, only 1% of judges are Black, while 5% are Asian and 2% are mixed race.[58] And there is a big difference between the junior and senior judiciary. While the junior judiciary is slowly diversifying – I stress *slowly* – the senior judiciary is not, and remains overwhelmingly White, and overwhelmingly from privileged backgrounds.[59] In fact, there are currently no Black judges in the High Court, Court of Appeal or Supreme Court. Not one. There never has been, save for Dame Linda Dobbs who was a former High Court judge.[60]

When a working-class Black person looks at the judges who may decide their fate, they don't see their own face, or their own experiences reflected back at them. So too for other marginalised minorities, in particular the Gypsy, Roma, Traveller community, who often face horrific levels of racism in the legal system.

And this is reflected in the lived experience of the legal system for litigants, lawyers and judges from ethnic minorities. Racist remarks in Court are far from unknown. As I once wrote in Counsel magazine, a colleague of mine, who is Black herself, once appeared before an immigration judge who, upon seeing her clients,

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[57] R v Special Immigration Appeals Commission [2021] UKSC 7

[58] Diversity of the judiciary: 2021 statistics (Ministry of Justice). See also: Diversity of the judiciary: Legal professions, new appointments and current post-holders 2020 statistics (Ministry of Justice).

[59] Dominic Cadsciani, 'Judicial diversity: Black lawyers least likely to be made judges' (*BBC*, 15 July 2021)

[60] See: JUSTICE launches 'Increasing Judicial Diversity: An Update' (2020)

remarked how nice it was to see a Somali family working.[61] In 2000, a senior Old Bailey judge in his summing up of the case told a jury (which included two Black women) that: "When a lot of witnesses give evidence in a case that is going to take a little time I try to pencil in a description. I try to bring them back to you when I sum up. It was quite difficult in this case with the Ethiopian witnesses because you may think they all looked rather similar, and it was difficult to find any distinguishing features." Judge Stephens' summing up was made just months after the Lord Chancellor had issued the Equal Treatment Bench Book, which the then chair of the bar's race relations committee said was intended to "sensitise judges to the effect their pronouncements have on the minorities who appear before them and sit as jurors."[62]

Even bullying between judges is a real issue – or to quote The Times: "judges face 'bullying on an industrial scale'".[63] For instance, in April of this year, a group of serving judges called for a parliamentary inquiry into claims of discrimination and bullying, saying it had led to ethnic minority judges missing out on top jobs.[64] Only a few months later in July, retired a crown court recorder and an immigration judge Peter Herbert settled a high-profile claim of racial discrimination as well as victimisation and harassment against the judiciary. Judge Herbert contended that: "The judiciary is probably one of the last bastions of the British establishment", adding further that, "Racism is alive and well and living in Tower Hamlets, in Westminster and, yes, sometimes in the judiciary."[65]

The problem of judicial bullying was raised most recently in by the Bar Council, in its very illuminating report on race at the Bar.[66] The report writers must be commended for their frank words and for shining a light on the apparent inequality in our profession. So often, when the legal profession is confronted with its own racism, we see obfuscation and denialism. I'm glad that the representative body of the Bar has published a document that tells it like it is.

Prior to judicial conduct though, let's just look at the report's other main findings:

"a) *Black, Asian and other ethnic minority candidates are less successful in achieving judicial appointment; rates of recommendation from the eligible pool of applicants are an estimated 36%, 73% and 44% lower respectively when compared to White candidates*."

b) *Black and Asian barristers are under-represented in taking Silk (becoming Queen's Counsel). There are just 5 Black/Black British female QCs and 17 male Black/Black British QCs in England and Wales. There are 16 male and 9 female Silks of Mixed ethnicity. There are 17 Asian/Asian British female QCs and 60 male Asian/Asian British QCs. This compares 1,303 White men and 286 White women*.

c) *Black and Asian women at the Bar are 4 times more likely to experience bullying and harassment at work than White men.*

d) This report categorically and definitively evidences, in quantitative and qualitative terms, that barristers from ethnic minority backgrounds, and especially Black and Asian women, face systemic obstacles to building and progressing a sustainable and rewarding career at the Bar.

e) Candidates from ethnic minority backgrounds are less likely to obtain pupillage than candidates from White backgrounds, even when controlling for educational attainment [university ranking, BPTC grade and degree class].

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[61] Professor Leslie Thomas QC, 'Racial diversity at the Bar matters' (*Counsel Magazine*, 11 June 2020)

[62] Clare Dyer, 'Old Bailey judge accused of racist remarks at trial' (*The Guardian*, 29 February 2000)

[63] Catherine Baksi, "Judges face 'bullying on an industrial scale'" (*The Times*, 18 March 2021)

[64] David Collins and Tom Calver, 'Discrimination is keeping UK bench white, say judges' (*The Times*, 25 April 2021)

[65] Izin Akhabau, "Peter Herbert: A Black judge said racism existed in the judiciary, and was almost dismissed – his legal battle against 'racism and bullying' in judicial institutions continues" (*The Voice*, 13 January 2021); Diane Taylor, 'Retired judge Peter Herbert settles race claim against judiciary' (*The Guardian*, 2 July 2021)

[66] Bar Council, 'Race at the Bar: A snapshot report' (November 2021)

f) Even when factoring in practice area, work volume, region and seniority, women earn on average less than men; Black men earn less than White men; and Black and Asian women earn less than Black and Asian men, and Black women earn the least. The income differentials vary between practice area but are significant."[67]

Specific to judicial bullying and its disproportionate impact on barristers of colour, the report read states:

> *"The point was made that there is not an obvious route for a self-employed barrister to raise the bullying where it was not potentially detrimental to an individual's career. Participants felt that they had to quietly internalise others' behaviour…*
>
> *…in the courtroom when judicial bullying and hostility were repeated the experience was inevitably both unpleasant and exhausting for counsel…*
>
> *Recognition also needs to be given to the impact on perceptions of the justice system and on perceptions of the decisions that are reached about clients of ethnic minority barristers. Clients, witnessing bullying and discriminatory treatment of their counsel, may well have the feeling that if counsel is not treated with basic respect, they themselves can have little confidence that the case being made on their behalf has been fairly considered."*[68]

That last observation is absolutely right. Against this backdrop, how can people of colour – whether lawyers or litigants – have faith that the legal system will treat us fairly?

Another helpful feature of this report, as you can see from the findings I've just read out, is that it looked at gender as well as race. It explicitly acknowledges the role of intersectionality, with Black women being disadvantaged at the Bar even compared to Black men. As the report states:

> "*The Bar Council recognises that we live in a society in which interpersonal, structural and institutional racism contribute to differing experiences and outcomes for individuals based on their race and ethnicity. There is an additional impact where race and ethnicity intersect with other protected characteristics such as sex or religion, or with poverty or social class*."[69]

It goes on to state:

> "*Access to the Bar, career progression at the Bar, access to the most prestigious and best paying work, retention, and working environment are all bound up with forms of privilege and power."*[70]

I just want to, again, commend the authors of this report for shining a light on the issues we as racialised lawyers face.

What Should We Do About Judicial Racism?

Now we turn to the third and final section of the lecture. What should we do about judicial racism?

I want to start with the easy, obvious answers. Let's look at seven really obvious steps:

Firstly, judges must accept their own prejudices and be committed to ensuring they do not influence their decision making. Although an obvious answer, being able to see one's own prejudices is difficult for the best of us. As Lord Nicholls recognised in *Nagarajan v London Regional Transport* [1999]: *"All human beings have*

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[67] *Ibid*, pp.8-9

[68] *Ibid*, pp.51-53

[69] *Ibid*, p.12

[70] *Ibid*

preconceptions, beliefs, attitudes and prejudices on many subject ... We do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated."[71] The judiciary as a whole and individual judges must accept this – and engage in meaningful introspection. The Equal Treatment Bench book goes some way to prompting judges to do this.[72] But it's not enough.

Second, to appoint more Black judges and judges of colour, and to reform legal training, recruitment and career progression with a view to ensuring that current barriers impeding the judicial appoint of Black people are broken. The responsibility for this falls on a number of bodies – the Judicial Appointments Commission, the Bar Standards Board, the Solicitors Regulation Authority, and law firms and chambers.

Third, to mandate training on race issues for judges at all levels of the legal system. This would require action by the Ministry of Justice.

Fourth, to take swift and decisive disciplinary action against judges who make racist comments in court or who treat litigants and lawyers of colour with disrespect, and to foster a climate in which junior lawyers no longer feel afraid to speak out against poor treatment. The responsibility for this falls mainly on the Judicial Conduct Investigation Office and on judges with leadership roles. It also falls on the regulatory bodies and on law firms and chambers, to make sure that lawyers who make complaints are protected and don't suffer adverse professional consequences.

Fifth, to conduct comprehensive race audits of the key institutions within the legal system to expose and address the causes of race inequality. This includes audits of the legal regulatory bodies, the major law firms and chambers, the Judicial Appointments Commission, and the judiciary itself. There were talks that the Equality and Human Rights Commission should conduct an inquiry into the judiciary, but this hasn't come to fruition so far.

Sixth, to mentor talented young people of colour at school and university level and to help them to access careers in law. This is a responsibility that we all have, and I'm glad to say that my own chambers is already doing it.

Seventh, reverse mentoring and outreach work. All judges should be required to do outreach work and liaise with grassroot organisations. They must be required to communicate, outside of a court setting, with people and communities for whom their decisions impact. This is not to say a judge should become a youth worker – but they must be able to appreciate the lives and experiences of those that come before the courts. To think that most judges who sentence children have never visited a youth offending institute, or a pupil referral unit, is seriously concerning to me.

All of those steps are comparatively uncontroversial. I imagine most people in this room would agree that we need to take them. Some law firms and chambers are taking these steps already, as far as they can. And the Bar Council report is a great first step towards recognising and addressing the fundamental problems at the Bar.

But we mustn't stop at the easy, obvious answers. Because those answers aren't enough.

Even if we had a judiciary that fully reflected the racial and ethnic diversity of Britain from the bottom to the top, and even if our judges were completely "free" of prejudice, we would still have a problem. Our judges administer laws and operate within a legal system which have racism baked into their very fabric.

For instance, as we covered in the last lecture, our system of immigration law has been built on foundations of racism ever since its inception in the 1960s. The architecture of our modern immigration law was established to keep out Black and Asian people from the Commonwealth. And our system of immigration law continues to have a hugely disproportionate impact on Black people and people of colour today.

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[71] *Nagarajan v London Regional Transport* [1999] IRLR 572, HL

[72] Equal Treatment Bench Book (February 2021) chapter 8

And more broadly, our legal system was designed by and for the rich, to protect the property and privileges of the rich against encroachment by the poor. Our law punishes poor people for shoplifting or begging: it doesn't punish the politicians whose policies keep them poor. Our law punishes homeless people for squatting in empty buildings: it doesn't punish the landlords who leave buildings empty. It punishes environmental protestors for disrupting fracking operations or blocking roads: it doesn't punish the corporations that are destroying our environment. And in our system of racialised capitalism, the rich are disproportionately White, and the poor are disproportionately people of colour.

Against this backdrop, appointing more Black judges won't be enough. We won't have a truly just legal system until we have fundamental social and political change, until we change the balance of power in our society.