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INSTITUTIONAL RACISM, PRE-EMPTIVE CRIMINALISATION AND RISK ANALYSIS

ABSTRACT

In the context of ongoing debate about negative stereotyping and poor risk assessment practices with minority ethnic groups in British society, this article attempts to develop an account of the dynamics of discrimination against black people in the area of mental health policy and practice. It is argued that a framework for the analysis of discrimination can be usefully constructed in terms of the relationship between the processes of *pre-emptive criminalisation*, *institutional racism* and *risk analysis*.

Introduction

This article argues that discrimination against black people in the areas of criminal justice and mental health policy can be understood in terms of the relationship between three processes. The first, *pre-emptive criminalisation*, (see Fitzgibbon, 2004) refers to a process in which the activation of criminal justice responses, normally consequent upon the committing of criminal acts by individuals, increasingly takes an anticipatory form. In other words such responses, by criminal justice and allied agencies, are increasingly based upon the expectation that individuals are likely to commit criminal acts in the future rather than they have already done so. This is closely related to a second process, *risk analysis* which refers to the practice, now common across a range of agencies, including probation, social work, and mental health, of responding to individuals by allocating them to groups categorised in terms of the statistical likelihood of committing certain types of acts. The acts which pre-occupy criminal justice and allied agencies are obviously those related to crime or danger to the public.

The third process which will be examined is *institutional racism*. Despite its widespread usage, this is often a difficult concept to grasp and can be subject to a variety of interpretations (see Lea 1986, 2000). Here it will be used to refer to a dynamic of racial discrimination which is rooted in the mode of operation of an institution rather than simply in the cultural or psychological attitudes of its practitioners. Racism as a set of attitudes has traditionally provided justifications for controlling black and mentally ill people through both criminal justice and psychiatric institutions (Prins 1999, Bhui 1999). The concept of institutional racism allows the development of such attitudes to be understood as part of the normal process of socialisation of practitioners into an 'occupational culture' which is sustained by, and in turn sustains, key aspects of the working of the institution.

the growth of pre-emptive criminalisation

The foundations of pre-emptive criminalisation can be found in two directions. Firstly, a crisis within criminal justice systems in which certain types of crime are seen as decreasingly amenable to prosecution using traditional models of proof and due process. In the Anglo-Saxon jurisdictions this involves *proof beyond reasonable doubt.* An obvious reason for the move away from such rigorous procedures has been the perception that under conditions of globalisation certain types of organised crime are increasingly difficult to prohibit because of the ease of laundering of funds through international electronic networks. Thus for example the Proceeds of Crime Act 2002 enables the authorities to seize assets of those suspected of organised criminal activities irrespective of criminal conviction in the courts. The civil law lower standard of proof on the *balance of probabilities* is used and the burden of proof is reversed, thus it becomes the responsibility of the accused to demonstrate that the assets in question were not the proceeds of crime. (see Lea 2004)

Such legislation is just one aspect of a wider shift in the orientation of criminal justice. Since the end of the 1970s, there has been a gradual undermining of the traditional commitment to *due process* and the rights of the accused (Belloni and Hodgeson 1999, Kennedy 2004). In criminal procedure, through such changes as dilution and reversal of the burden of proof, reduction in the role of jury trial, removal of the right to silence, admission of hearsay evidence in court, these commitments have been, to a considerable extent, displaced by those of efficient crime control, protecting the public, and 'rebalancing the criminal justice system in favour of the victim'[1]. This preoccupation with the *efficiency* of criminal justice in prosecuting the guilty has come to predominate over a concern for its *fairness* in guaranteeing the rights of the accused.

A desire to increase efficiency does not of itself of course constitute pre-emptive criminalisation. Rather the shift away from due process towards effective crime control (Packer 1968) weakens the commitment to due process which would otherwise be an obstacle to the second foundation of pre-emptive criminalisation: namely the shift from crime control to security (see Johnston and Shearing 2003). If the concern with effective crime control becomes decreasingly restrained by considerations of due process then the issue of crime control itself can widen out from strict criminality to include more generalised conceptions of public protection and public security. Under such circumstances notions of due process and suspects rights, in particular the presumption of innocence, will exercise decreasing constraint.

Since the early 1980s the concern with low level disorder in public places as something in need of police regulation has undergone a renaissance. The argument, originally identified with James Q. Wilson and George F. Kelling, (Wilson and Kelling 1982, Kelling and Coles 1996) is that firm policing of minor disorder or 'incivilities' rather than being a diversion from the policing of 'real crime' is an important instrument in preventing the conditions which give rise to the latter. In the traditional model of consensus policing, officers would ignore all manner of 'pre-criminal' disorderly or boisterous behaviour, as well as certain varieties of low level criminality, such as petty theft, in order to secure community support in acting against serious criminal activities. This relationship is increasingly reversed thus the effective policing and control of varieties of anti-social behaviour, including noise, graffitti, street-begging and drinking, is seen as an essential backdrop to enabling poor and marginalised communities to rediscover respect and reinforce cohesion.

Despite numerous criticisms of the logic of this argument (see Harcourt 2001) it has nevertheless functioned as an intellectual legitimation of tactics such as 'zero tolerance' policing (see Stenson 2000) as well as the growth of a large variety of civil constraints, such as Anti-Social Behaviour Orders (ASBOs). ASBOs, initially introduced by the Crime and Disorder Act 1998, are granted on the civil law standard of *balance of probabilities*, that individuals are engaging in behaviour which 'causes or is likely to cause harassment, alarm or distress'.[2] The ground is thus set for the normalisation of constraint sanctioned by law against those who have not committed criminal offences but are regarded as potential offenders by virtue of actions viewed as disruptive or annoying to the public's tranquility.

It is important to add that a focus on public security creates a pressure to widen criminalisation to include activity both prior to and consequent upon conviction in the courts. Thus if *pre-emptive criminalisation* applies legal restrictions to those as yet unconvicted of criminal offences, *incapacitation* extends constraint in the other direction. Regimes of permanent surveillance after completion of sentence (e.g. for convicted paedophiles), drug treatment testing orders against those convicted of drugs offences are all aspects of a 'new penology' heavily oriented towards incapacitation in the name of public protection. (Feeley and Simon 1992, Garland 2001)

Criminal justice has, since the eighteenth century at least, been partly an aspect of the government and regulation of populations. According to Foucault, an important feature of modernity is that '…the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative and so on) whose functions are for the most part regulatory.' (Foucault 1979: 144) But the regulatory function of criminal justice has undergone a dramatic widening with the weakening of the welfare state and the concepts of social citizenship and social inclusion. The division of labour between the welfare state and criminal justice in which the latter deployed constraint against those recalcitrants who had slipped through the net of reintegration through welfare and socialisation involved a complex interchange. (see Pitch 1995) The displacement of welfare and social inclusion by security and public protection has created a vacuum into which criminal justice agencies, such as the police, fulfil a frontline role in dealing with social disorder. It has also, as a consequence, increased constraint backed by law to the status of a general means deployed to regulate of social problems. In such a context, it is less the extension of constraint to those as yet unconvicted of criminal offences or to those who have served out their sentence, than the restriction of constraint to only those who have been so convicted that comes to be seen as arbitrary. The threat to public security comes in a wide variety of risks, incivilities, threats, indications of dangerousness, some of which will be direct transgressions of criminal law, others not.

Pre-emptive criminalisation and the management of risk

Pre-emptive criminalisation is closely associated with a second key contemporary discourse and practice: the management of risk. The new scenario as described by social theorists (Garland 2001, Lea 2002, Young 1999) is one in which substantial sections of the poor are socially excluded and perceived as dangerous and risky by the integrated majority. These risk groups comprise very poor households, the young unemployed or insecurely employed, the inhabitants of 'sink estates' with a high proportion of single parent families and high truancy rates. There are a large proportion of non-white ethnic groups concentrated in such groups by virtue of racial discrimination in housing and employment. The stresses of life in such an environment produce disproportionate rates of mental ill health. (Social

Exclusion Unit 2004) Fear of the excluded minority is less based on their actual criminality than on a generalised perception that they are *likely* to commit crime or engage in other forms of anti-social behaviour. The state contemplates these fragmented communities of the socially excluded less as citizens in need of policies aimed at rehabilitation and restoration of citizenship rights than as risks to be managed until they can, via their own efforts, for example to gain employment, be re-integrated within the community.(Fitzgibbon 2004)

The task of government in this era of the 'death of the social' (Rose 1996) is seen as that of the devising of effective responses to these concerns. The state attempts to manage, sort and classify the various categories of risks and the degree, established by actuarial predictors, to which they may hinder community cohesion and public security.

> For those concerned with governance (at any level) it means the centring of everyday practices on 'bringing possible future undesired events into calculations in the present, making their avoidance the central object of decision making processes, and administering individuals, institutions, expertise and resources in the service of that ambition'. (Rose, 2000: 332 cited in Hudson 2003: 44)

Current discourses of risk and its management bring an actuarial element which combines with pre-emptive criminalisation to widen and consolidate the impact of the latter. In the Wilson-Kelling argument discussed above, it is primarily individuals who are to be subject to varieties of pre-emptive constraint on the basis that their behaviour may lead to future crime, either by themselves or others. Combined with actuarial risk strategies pre-emptive constraint is applied to individuals on the basis of their membership of groups with a statistical likelihood of criminality and/ or disruptive incivilities. A good example of the mutual interaction of pre-emptive criminalisation and risk analysis in recent English legislation might be the *Football (Disorder)* Act of 2000 which enables the courts to restrict the travel of individuals to football matches on the grounds of reasonable suspicion that they are likely to engage in disorderly conduct.[3] But their likelihood of engagement in disorderly conduct at a proximate future date is established on the basis of their known association with individuals already convicted of such behaviour.

It is a small final step to infer dangerousness and liability to criminalisation on the basis not even from known association but from simple membership of a group whose actuarial character constitutes a high probability of offending or anti-social behaviour. The commission of a criminal act by an individual before recourse to the law could take place is increasingly overlaid by the evidence that a person is judged to belong to one of these identified groups whose aggregate behaviour is considered a risk.

> Dangerousness, risk posing, is a property of a data set, which is constructed out of the possession of designated risk factors. Conviction for an offence occasioning or threatening serious physical harm as the criteria for adverse risk assessment has been replaced by 'categorical suspicion'. (Marx 1988 cited in Hudson 2001: 153)

To the extent that criminal justice agencies are required to participate in this process they have to move away from classic concerns with due process and the acquisition of sufficient evidence to prove criminal activity, towards a greater orientation towards the management of groups. This reflects back on criminality itself with a tendency for the latter to be 'normalised' as simply another everyday risk whose harmful consequences need to be minimised and one among several indicators of risk (Garland 2001). Thus when members of risk groups do commit criminal offences this may trigger a sequence of measures designed to anticipate and prevent repeat offending and other risky behaviour. The perceived need for generalised constraint of those who constitute a risk gives rise to various forms of pre-emptive criminalisation taking the form of constraint of those 'likely' to commit crime or engage in disruptive behaviour. To those measures already mentioned above can be added others, such as electronic tagging, curfew orders, and Drug Treatment and Testing Orders which were originally developed as alternatives to custody for those convicted of criminal offences. These are increasingly viewed by the courts as additional safeguards to effectively monitor and incapacitate risk groups, when they return to the community. (Bottomley et al. 2004) The effect of these institutional processes is the process, first identified by Stan Cohen (1985), of the widening of the net of social control.

Strategies aimed at the neutralisation and management of risk tend to displace traditional concerns with rehabilitation. The latter focused on individuals and usually involved a casework approach oriented towards the needs of individual offenders. (Oldfield 2002) In the criminal justice system, this displacement is illustrated by the gradual shift in the orientation of the National Probation Service (NPS), from a service seeking 'to advise assist and befriend' offenders, a classic social work approach, to that of a 'public protection' and 'law enforcement' agency, where risk management and containment is a primary goal, over and above rehabilitative interventions (Bhui, 2002). Furthermore, the trend is illustrated by the adoption of terminology such as the 'National Offender Management Service' which makes explicit that offenders (the 'other') as a group are to be 'managed'. This anti-individualistic and depersonalising terminology avoids the humanitarian and redemptive overtones of 'rehabilitation' and 'reintegration' favoured throughout the history of the English and Welsh probation service. Although there has been a renewed interest under New Labour in some forms of rehabilitation via accredited programmes in criminal justice (Chui and Nellis 2003), supported housing

and mental health policies urging more treatment of those with Personality Disorders, this rehabilitation takes places within a managerialist approach based not on individual needs but according to 'types' of needs. Thus stereotyping members of certain vulnerable groups i.e. mentally ill people, black people etc becomes even more powerful and important in terms of the treatment received.

This new combination of pre-emptive criminalisation and actuarialism as a technique of regulation to secure public security is reminiscent in many ways of middle class concern with the 'dangerous classes' during the early nineteenth century. The concern was not so much with those who were identifiable criminal offenders as with the working class and the poor as a whole as a threat to social stability (Lea 2002). The current shift is governed by the breakdown of a society in which the vast majority of the population were socially integrated through full employment and shared welfare citizenship rights and in which criminal justice was concerned with an identifiable minority of criminal offenders who were seen as in need of rehabilitation and reintegration.

institutional racism

We can now turn to the third of our three processes, institutional racism. In recent years the term institutional racism has become increasingly popular but, as noted above, there is still confusion over its meaning and dynamics. It is often taken to mean simply that racism *pervades* an institution in the sense that most people who work in the institution concerned are racists, unconscious or otherwise; that there are more than a few 'bad apples', that the institution has been 'taken over' by a racist culture and set of practices which only a few 'good apples' have the will and understanding to resist. A recent example of this approach is the report of the investigation by the Commission for Racial Equality into police racism which referred to the police service being like a *perma-frost – thawing on the top, but still frozen solid* . Sir David Calvert-Smith, in 2005, who led the investigation, stated:

> There is no doubt that the Police Service has made significant progress in the area of race equality in recent years…Willingness to change at the top is not translating into action lower down, particularly in middle-management where you find the ice in the heart of the Police Service. For example, managers are not properly supported or fully trained on how to handle race grievances, so relatively minor issues are often unnecessarily escalated. (Calvert-Smith 2005)

The assumption here is that it is the failure of individuals to properly handle race grievances rather than the basic mode of operation and tasks of the institution which is the problem. Clearly, many individuals may be prejudiced for reasons of personality makeup. Such prejudice may take root in the institution and persist by virtue of the fact that the membership of an institution (such as the police) is predominantly white and those it deals with are disproportionately poor and black. Thus the Macpherson report (1999) heard evidence to the effect that institutional racism was a product of the fact that white officers rarely met black people outside of an arrest situation and thus enabled stereotypes of the black communities which labelled them and *de facto* pre-emptively criminalised them (see Lea 2000)

However, policing provides a good example of how institutional racism, pre-emptive criminalisation and risk management interconnect in a stronger sense which is rooted less in the lack of cultural communication by members of the institution but in the *tasks or role* of the institution itself. Of all the criminal justice agencies the police are most habituated to the techniques of pre-emptive criminalisation. This is because a substantial part of the policing task since the inception of the institution has been the general management and surveillance of the poor and unemployed: the 'dangerous classes'. (Bittner 1975) The increasing preoccupation with risk groups in all areas of social policy reinforces this traditional police role as front line agency in the management of the poor and the 'underclass'. Such policing is evidenced in the use of *stop and search* based on *reasonable suspicion.* Although this is an ineffective means of controlling actual criminality (Miller et al 2000), it is eminently suited to the surveillance and management of the poor and unemployed. (Lea 2000) This is the pre-emptive criminalisation of those out on the street late at night or during the day when the worthy socially included citizen will be in legitimate locations such as work, school, home etc. (Cohen 1979) These are the young, poor, socially excluded who, in many large cities, are disproportionately black. Thus these *tasks of the police institution*: the perceived need to stop and search a population of young men which is disproportionately black gives rise to the assumption that being black is a predictor of criminality or other forms of disorder and anti-social behaviour. Police racism sustains police culture which then turns back and magnifies the disproportionality through the deployment of race as a shorthand for risk and as a sufficient trigger for suspicion. The task of generalised surveillance of risk groups creates an institutional environment in which race is elevated to the status of indicator of risk. As Jones observes:

> [I]f arrest is the criterion measure and police agencies are biased or selective in their arrest procedures- by race or social status, for example- then the (criminological prediction) study will likely identify those factors associated with police selection procedures as 'predictors' of criminality. (Jones 1996: 45)

Of course to stop and search must be added the whole expanding panoply of curfews, Anti Social Behaviour Orders and as Hudson summarises:

> People can be and are excluded from shopping malls, made subject to curfews, coercively recruited to behaviour programmes, all because of who they are and what they look like. (Hudson 2003:69)

Where the aim of policing is simply to catch and process offenders, then police attention will be governed by actual offending. Disproportionate racial balance in police arrests will be a simple reflection of crime rates. However, if the primary aim of policing is the management of the socially excluded then police attention will be governed not by actual criminality but by membership of a group—the poor and socially excluded defined as a risk group. Because of the disproportionate concentration of black people in this group (see Home Office, 2005, 2005a), race then becomes a signifier of risk group membership and a trigger for stop and search. In this case pre-emptive criminalisation (stop and search irrespective of individual criminality) flows not from the prejudices of individual practitioners (police officers) so much as the tasks of the police as an institution (to manage the socially excluded as a risky group). These tasks involve ensuring there is social order and safety, crime investigation and prevention.

I have argued, then, that pre-emptive criminalisation, risk analysis, and institutional racism are strongly interconnected. The control and management of the socially excluded as a risk group creates a pressure towards pre-emptive criminalisation of groups irrespective of actual criminality. As far as policing is concerned, stop and search strategies are a major example of this link between the management of groups and pre-emptive criminalisation. To the extent that the group in question is disproportionately black, then this in turn creates a dynamic for an institutional racism in which racist culture and attitudes by practitioners are less the cause of discrimination than the result of the normal working practices and tasks of the police institution. We can now turn to see how similar dynamics are at work in the area of mental illness.

Race and Pre-emptive Criminalisation in Mental Illness

There is no doubt that black people are over-represented in criminal justice and psychiatric situations (see Fernando, 2003; Bhui, 1999) and there are a number of competing explanations for this. They range from the individualised and racist (they are more criminal and more susceptible to mental disturbance) to the institutional and structural (they are victims of a racist society). (Bhui 1999) All explanations are a considerable challenge to the idea of a neutral, value-free risk assessment practice. In broad terms, these explanations stress either structural inequalities or racist stereotyping, both overlapping to some degree. The former implicitly accepts that there is a higher rate of crime and mental disorder amongst black people. This is because their demographic spread means that they are more likely to experience psychological and environmental strain, social marginalisation and exclusion, which are indicators of heightened risk (e.g. SCMH, 2002; Meltzer et al, 1995). There is explicit government recognition that social exclusion (and all the disadvantages and negative associations that flow from this status) disproportionately affects black and minority ethnic communities (SEU, 2004), to the extent that measures designed to combat deprivation in general are likely to be combined with policies targeted at black and minority ethnic groups in particular (Pilkington, 2003 See also Young 1999; Lea 2002 on the link between social exclusion and crime). As regards criminality, Smith (1995, Quoted in Bhui, 1999: 173**)** carefully summarises the position as follows:

> "... one should expect a higher rate of crime among the black population as a whole, but not necessarily a higher rate than that of whites *of a similar age, and in similar economic and social circumstances*." (1995: 137 *italics added by Bhui*).

In other words, as with crime, mental illness is correlated with social exclusion and black people are disproportionately socially excluded. Factors such as unemployment, homelessness and lack of support from family, were all identified by the Social Exclusion Unit (2004) as contributing to mental health problems. It follows that higher rates of dangerous mental illness in the black communities compared to the population as a whole, are to be expected, due to the socially constructed factors which are identified and selected as signs of mental health problems. The Social Exclusion Unit identified that ethnic minorities are more likely to enter mental health services after initial contact with the police and other forensic services (2004:45). Black and minority ethnic people are less likely to seek early medical intervention for mental health problems due to difficulties including language, fear of compulsory admissions, cultural and racial stereotyping, stigma and fears concerning in confidentiality. The Mental Health National Service Framework [MHNSF]

(DoH 1999) illustrates how ethnic minorities express general dissatisfaction with mainstream services (cited in Sashidharan, 2004). Sashidaran argues that General Practitioners continue to fail to diagnose mental disorders in black and minority groups. Thus black and ethnic minorities 'follow aversive pathways' into mental health care, often via more coercive and inappropriate services (i.e. the criminal justice system) and face over or misdiagnosis (Sashidharan, 2004, p.13). It is, however, where the orientation of the mental health institutions is towards the identification and management of risk groups that, in a similar manner to stop and search in policing, blackness will come to be read as an actuarial indicator of likely dangerous mental illness and that this will feed back into the cultural assumptions and stereotypes of practitioners.

In the area of mental health, as in criminal justice, there has been a steady shift in attitudes towards the mentally ill away from that of citizens in need of reintegration to that of a risk group to be managed and controlled. (Fitzgibbon 2004) Successive mental health inquiries following violent incidents and subsequent criticism of care of mentally disordered people in the community, has strengthened the association between mental disorder, risk and dangerousness (see Reith, 1998, Zito 1999). Arguably, the management of the potential risk to the public posed by people with mental health problems, has become the primary concern of mental health services (e.g. Petch, 2001). This is evident in the White Paper *Reforming the Mental Health Act* (Home Office 2000) where the focus on protection of the public reinforces a notion of the social exclusion of the mentally ill as a *risk group* in need of neutralisation and management:

> This second part of the White Paper sets out new arrangements for managing people who need to be detained and treated under Mental Health Act powers because of the high level of risk that they pose to others as a result of their mental disorder. The arrangements form part of the wider changes to the powers for compulsory care and treatment and the delivery of mental health services. (Home Office 2000 Part II: 5)

In fact there is limited evidence of a direct link between mental disorder and dangerousness (Prins 1999) and evidence that clinical or actuarial techniques of risk assessment, which are disproportionately applied to poor and black people, are a remarkably inefficient way of predicting who will proceed to commit offences (HM Prison Service, 2002; Lewis & Webster, 2004; Mossman, 1994; Rice, 1997; Tolman & Mullendore, 2003). For example, Mossman (1994) identifies a number of limitations, including poor definition and measurement of harm, and misleading and confusing statistics. For instance, a risk assessment which always predicts a low risk of harm could be interpreted as being 95% accurate even if 5% of subjects assessed go on to cause future harm. Inspite of the inaccuracy or rather the bluntness of such instruments of prediction regarding risk these assessments are being increasingly used to identify and contribute to a process of pre-emptive criminalisation whose aim is, in reality, simply the surveillance and control of surplus, potentially troublesome, populations with some mental health problems.

This is because such blunt predictors are functioning less as a diagnostic tool than as the signifiers of group membership. Where the diagnosis of mental illness is subordinated to the management of dangerousness and risk, then aggregate indicators become important. If a mentally ill person is already a member of a risk group (poor, unemployed, etc.) then those group characteristics will reflect back and subtly influence the diagnosis of the dangerous mental disorder either to their self and the public. This is because one is no longer asking a simple medical diagnostic question 'is this person ill?' (and in need of treatment) but 'how dangerous is this person given that they belong to a group whose aggregate characteristics include a higher than average level of dangerousness?' Race becomes incorporated into the criteria of indicators of risk group membership. Black people are more likely to be poor and unemployed and these factors are associated with mental illness and dangerousness. Therefore, in a similar way to criminality, race becomes a sign of *dangerous* mental illness. As Prins (1993) highlighted in his inquiry into the death of Orville Blackwood, there was a tendency to see black patients as ' big black and dangerous'(Prins 1999:132). This was also a comment made in other inquiries into such cases as Christopher Clunis and David Bennett (Ritchie et al 1994, Blofeld, 2003).

Thus although, as Kemshall (2003) observes, individual practitioners may fall back on traditional psychiatric individual case methods as a way of *negating* the new risk analysis techniques, there is a constant pressure towards over-diagnosis due to the need to use mental illness as a device for the identification of a risk group to be managed. An example of this is how the Probation Service ,with the new enhanced accountability could be seen to be forcing practitioners to make 'defensible decisions', including those undertaking OASys assessments, towards the over-prediction of dangerousness and potential risk. (Kemshall 2003) Recent research indicates that OASys assessments identify and focus on the prediction of dangerousness and potential risk, particularly with those who, like the mentally ill, are more vulnerable and fulfil many of the criminogenic factors by virtue of their mental illnesses not their criminality, i.e. unemployment, homelessness, lack of support from family.[4] There is a dilution of the concept of serious mental illness which allows a wider definition of mental health problems (Fitzgibbon 2004), and those from socially excluded backgrounds could be assimilated to this category and seen as dangerous. This, in turn, allows race to be read as a de facto indicator of dangerousness. It also increases the possibility of people labelled as mentally disordered being seen

as in need of containment. Recent proposals for mental health legislation (First Draft, Home Office 2002, Second Draft Home office 2004) which fell due to the general election of May 2005 but may well be reintroduced in the present parliament, brought forth the comment from John Wadham, who was the director of the civil rights organisation Liberty that:

> The definition of mental disorder is made broader and vaguer. The bill risks turning our psychiatrists and nurses into prison warders, and filling much-needed psychiatric beds with people detained on dubious grounds and with no prospect of actual treatment…The scope for injustice here remains alarming – especially while medical opinion on the nature of severe personality disorder remains so divided. (Wadham 2002: 21)

This, in turn, means that concepts of risk and the boundaries of risk groups can become 'gendered and racialised' (Shaw and Hannah-Moffat, 2004: 98) and that assessment tools are defined from the 'standpoint of white middle class morality' (ibid: 112). Quoting Homel, Shaw and Hannah-Moffat point out that

> Few studies of risk pay attention to individual or group differences in pathways to crime, or to how risk and protective factors may vary from group to group. This is of particular concern for women and minority ethnic groups, for whom the nature, meaning, and impact over the life course of risk protective factors may be quite different from the mainstream. (ibid., 2004, p. 99):

Thus concepts of mental illness can, precisely because they are functioning as general identifiers of risk groups, fall prey to stereotyping which misinterprets culturally appropriate behaviour and reflects deep-rooted racism at different stages of the criminal justice and psychiatric processes (Fernando, 2003; NACRO, 1999; Littlewood and Lipsedge, 1997). It could be argued that interventions by criminal justice and psychiatric institutions in a racist society are in themselves fundamentally racist (e.g., Hall *et al,* 1978; Fernando *et* al, 1998. See Bhui, 1999, pp.173-176, for a more detailed discussion of this position). This form of labelling is both encouraged and reinforced by the structural factors discussed above. Both negative stereotyping and structural inequalities can encourage reinforcement of the pre-emptive criminalisation of black people with mental disorder at an institutional level.

Conclusions And Some Thoughts On Practice

This paper has argued that there is a clear relationship between notions of pre-emptive criminalisation, risk analysis and institutional racism, a relationship which is both complex and deep rooted. There is considerable resistance to the notion that racial discrimination in mental health, as in policing, is institutional in the sense that it derives from the tasks and mode of operation of mental health organisation and assessment. To the extent that the issue of prejudice is grasped it is very much, in both mental health and policing, predominantly at the level of the cultural attitudes and prejudices of practitioners. Like the Calvert-Smith inquiry (2005) into police racism, the Bennett report into issues surrounding the case of David Bennett defined the issues as the need for cultural awareness and sensitivity training to combat racism.

Bennett was certainly on the receiving end of prejudice. Not only did he approach his G.P. for treatment prior to being involved in the Criminal Justice System, he quickly received a custodial sentence despite his mental health problems (Blofeld, 2003). This was largely because he, like Orville Blackwood (Prins, 1993), was seen as ?big, black and dangerous?. The enquiry would not accept that there was institutional racism within the National Health Service despite Sadiq Khan, the solicitor for the Bennett family, stating that his treatment by the health service:

> Epitomises the way black families are treated and continue to be treated by the NHS…while the end result of Bennett's treatment may be exceptional ,his treatment was not… to conclude unequivocally that there is institutional racism in the NHS…[as the evidence demonstrated the] culture of inadequacy, incompetence, neglect and racism in the NHS. There is a stark difference in the experience that a young black man has in the NHS to that of a middle-aged, middle-class white man with the same symptoms and conditions. (Khan cited in Community Care 2003)

Not only was David Bennett labelled early on as a criminal rather than some one with treatable mental health problems, he received constraint and over medication rather than care and understanding. The inquiry concluded that:

> from black and minority ethnic communities who are involved with the mental health services are not getting the service they are entitled to. Putting it bluntly, this is a disgrace. (David Bennett Inquiry cited in Community Care February 2004)

Tackling cultural attitudes and individual prejudice is, of course, a vital part of combating the perpetuation of racism. This can help to promote change in institutions and empower practitioners to feel they can make an impact on institutional discrimination (Bhui, 1999). But the argument of this article has been that institutional racism is inextricably connected to risk analysis and pre-emptive criminalisation. It is this material and institutional connection that must be grasped if the mechanisms which perpetuate racist attitudes and assumptions are to be confronted. On the individual level this means that there is a need for practitioners in the mental health and criminal justice systems to develop awareness and knowledge about the kinds of issues raised in our discussion here. Institutional racism is a difficult thing to combat on an individual level, but individual action can change the atmosphere of an institution. Reflexive practice and risk assessment (see Tuddenham, 2000) can contribute to social justice and inclusion, and help to change the 'body language' (Runnymede Trust, 2000) of an organisation. Bhui (1999: 179) quotes Littlewood (1992) who refers to the need for a

> 'self-reflexive practice which examines its own prejudices [and] ideology' which is aware of the ironies and contradictions in its own formation, and which is prepared to struggle with them. (1992, p.13).

But the connection between institutional racism and risk analysis must be eventually confronted. This involves a greater focus on the characteristics of the individual rather than the group. In policing a serious attempt at confronting the roots of institutional racism in the injustices of stop and search requires a shift to 'intelligence led' policing with a focus on individuals against whom there is some real evidence of criminality rather than deducing the latter from membership of a risk group. (See Lea 2000) In a similar way combating the pre-emptive criminalisation of mental illness requires the clear separation between mental illness and its treatment from the search for indicators of risk and dangerousness. The environmental background for this involves necessarily a return to many features of the rights and citizenship orientations of the classic welfare state.

> In every decision about the liberty of an individual offender/patient the least infringement test should be applied; in every harm prevention policy innovation a rights audit should be carried out to ensure that the policy makes as few inroads into rights as possible and does not curtail rights at a higher level than necessary or permissible. (Hudson 2003: 221)

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[1] The prime minister is recently reported as having ‘described one of his aspirations for a better Britain. It was a "historic shift from a criminal justice system which asks: 'how do we protect the accused from the transgressions of the state and police?' to one whose first question is 'How do we protect the majority from the dangerous and irresponsible minority?'" (Hattersley 2005)

[2] A political version of the ASBO was introduced in the Prevention of Terrorism Act 2005, whereby Control Orders, imposing severe restrictions on the liberty of individuals without criminal conviction in the courts can, be imposed by the Home Secretary on the basis of *reasonable suspicion* that individuals are involved in terrorist-related activity.

[3] Examples from the field of mental illness will be dealt with later.

[4] This study, undertaken in 2005 in a large urban probation area, involved a close reading of case files and their accompanying eOASys assessments and reviews to ascertain the accuracy and effectiveness of the tool with regard to mentally disordered offenders . (Fitzgibbon and Green forthcoming)