Muslims in the Dock: A Transgressive Narrative of Law and Life[1]

Greta Bird[2] and Mark McDonell[3]

We sit in a living room in Byron Bay, tea and chocolate nearby. Archie Roach on the tape-deck.[4] Outside the air is filled with the sounds of the ocean and local parrots enjoy the winter blossoms. Sun spills through the glass doors onto books and notes and bodies. In this peace-filled atmosphere we start to talk about our reason for being here. We have both been researching the impact of the law on Indigenous peoples and non-Anglo Australians and have decided to write a paper for the Critical Legal Conference to be held in September 1996 in London.

The application for bail, the trial, sentencing and imprisonment of two Muslim women charged with shoplifting is the starting-point for an interrogation of law and its problematic relationship with cultural production. We already know something about the case from media reports and the interviews we have conducted. Our project is not to discuss the guilt or innocence of the women but to explore issues of bias raised by the case. The fact that the case was heard in Lismore is irrelevant except that it points to the added difficulty of delivering "justice" in a rural area distant from metropolitan facilities.

Before we can start to write we need to clearly position ourselves theoretically. We both agree that this case raises issues of ethnicity and gender and that these issues cannot be separated. There is, as critical race theorists argue, an intersectionality

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1 This article is an edited and updated version of a paper entitled "Muslims in the Dock: Australian Courts on Trial", delivered at the Critical Legal Conference, "Other Justices; Others' Justice", University Of East London, 6-8 September, 1996.

2 Associate Professor, School of Law and Justice, Southern Cross University.

3 Research Assistant, School of Law and Justice, Southern Cross University.
The authors would like to thank bell hooks, Patricia Williams, Paulo Freire, Archie Roach and numerous colleagues and friends, among them Judy Grbich, Ian Duncanson, Anne Orford and Sam Garkawe for inspiring us to write this piece.

4 Archie Roach is an Indigenous Australian musician. We listen to his song "Walking into Doors" which contains a message to men to refrain from family violence.

here.[5] However it is necessary to take a theoretical step backwards and question the basis of law's claims to authority and to the production of 'innocent knowledge'. As Peter Fitzpatrick has written:

> racism is compatible with and even integral to law ... the very foundational principles of law as liberal legality import racism into law.[6]

Postmodernism, feminisms and critical race theory are instructive in this interrogation of law. Drawing on our understanding of this work (and after a few more cups of tea) we establish our guiding principles. We share a skepticism of traditional notions of authority and seek to decentre this authority by opening ourselves up to the voices of "others" and valuing the knowledge they produce. We believe that knowledge must be contextualised and localised and have no faith in metanarratives. We understand the ability of cultural constructions, such as works of fiction and film, to shape our reality.

We remove Archie Roach from the player and insert another tape. It starts and we are transported in time and space to summer, November 1995 and the Local Court at Lismore.

The Court

On this hot, humid November day, two Jordanian women, who we will call Hanifa and Fatima, stand in the court.[7] They are dressed in dark clothes, wearing "head-gear"[8] and are appearing on a number of counts of shop-lifting. The women do not speak English. One of them, Hanifa, has a seven month old child whose "baby noises" can be heard on the tape. The women's application for bail is before the court.

Australian courts are run on the English model which is hierarchical and adversarial.[9] People appearing as witnesses before the court cannot tell their "story".

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5 See for example Crenshaw K "A black feminist critique of antidiscrimination law and politics" in Kairys D (ed) *The Politics of Law: A Progressive Critique* (Pantheon, New York, 1991).

6 Fitzpatrick P "Racism and the innocence of law" (1987) 14(1) *Journal of Law and Society* 119 at 119.

7 We have changed the names of the women to protect their privacy.

8 This is a reference by the journalist covering the case to the 'hijab', a head-covering worn by some Muslim women.

9 See Carlen P *Magistrates Justice* in Campbell CM and Wiles PNP (eds), (Law in Society Series, Martin Robertson and Co Ltd, London, 1976), for a description of how legal personnel achieve dominance in the courtroom.

They must speak only in answer to questions put to them by persons judged "experts" by the system. A process of filtering thus occurs which results in legal "truth" being constructed.[10] Legal truth, even if based on fiction,[11] is regarded as knowledge, unlike the "stories" of non-lawyers which are dismissed as anecdotal or subjective.

Legal knowledge is portrayed as objective and neutral; in doing so the law denies the reality of class, or gender, or race. This "truth" is legitimated by the courts which dispense justice (or so the story goes), in a blind-folded fashion. Judges make decisions based on the "facts" and their unbiased and unproblematised version of the values of the community. The courts in this theory are a 'neutral medium' for the transmission of these values.[12]

Into this innocent,[13] lawyerly domain come Hanifa and Fatima. They stand before the spatially and ideologically dominant magistrate awaiting justice. The women have an Anglo solicitor assisting them, the magistrate is also Anglo as are the prosecutor and other court staff. None of these people has received any systematic cross-cultural training.[14] Although they are people of good-will and considerable expertise their monocultural outlook will impede the delivery of justice.

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10 Carol Smart discusses law's "truth" in these terms:

> ... I shall concentrate on law as a form of discourse which can make claims to scientificity and hence truth. This, in turn, positions law on a hierarchy of knowledges which allows for the disqualification of "subjugated knowledges" and hence gives rise to the power of law. Smart C *Law, Crime and Sexuality* (Sage Publications, London 1995) p 72.

11 For example the legal system in Australia was based on an application of the doctrine of *"terra nullius"*, literally land belonging to no-one. This legal doctrine, which denied Indigenous people not only ownership of their land but their very humanity, has been judged by the High Court to have been a fiction. See *Mabo (No. 2) v Queensland* (1992) 175 CLR 1.

12 See, for example, the comments of Sir Guy Green, KBE, Chief Justice of the Tasmanian Supreme Court found below at p 119.

13 For a discussion of the impossibility of 'innocent' knowledge within the Western paradigm see Flax J "The end of innocence" in Butler J and Scott J (eds) *Feminists Theorise the Political* (Routledge, New York, 1992).

14 Some law schools do now include cross-cultural perspectives in their curriculum, and a number of seminars and workshops have been held for magistrates to inform them of these issues. The Australian Institute of Judicial Administration (AIJA) obtained a grant

The Interpreter

The prosecution calls on an Arabic speaking police officer, Constable al-Bishri[15], to act as an interpreter. Constable al-Bishri does not speak Jordanian but translates from English to Arabic. A male friend of the women, we are later told, then translates from Arabic to Jordanian. In our interview with the Constable he points out that he undertook the task of interpreting in order to "help out". Without his assistance the women would have been held for a longer time in police custody before their application for bail could be heard. His motives are good; however, the use of an unqualified interpreter hampers the proper functioning of the court. Further it breaches the spirit if not the letter of Australia's international obligations.[16]

The Magistrate at first speaks without allowing time for any translation to take place. When the magistrate does slow down, by request, it is apparent that only the first interpretation, from English to Arabic, is taking place. The Arabic/English speaking friend is picking up information which may later be conveyed to the women. However, during the hearing they are in reality silenced. The presence of the police officer as interpreter does not put the women in the same position as an English

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from the former Federal government to develop specialist professional education for judges. Stage One of the project is found in Stubbs J et al *Cross Cultural Awareness for the Judiciary: Final Report to the Australian Institute of Judicial Administration* (Institute of Criminology & Cultural Diversity Training Program, Faculty of Education, Sydney University, AIJA Incorporated, 1996). The Coalition government has not, as yet, agreed to continue funding the project. Many of these initiatives are, however, ad hoc, one-off events. They are poorly funded and rely on the commitment of a few dedicated individuals.

15 We have changed the Constable's name in order to protect his privacy. For a discussion of the right to an interpreter in Australian courts see: Bird G "International law, natural justice and language rights in Australia" in Eades D (ed) *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* (University of NSW Press, Sydney, 1995).

16 Australia is a signatory to Article 14, clause 3 of the *International Covenant on Civil and Political Rights* which states in gendered terms:

> In the determination of any criminal charge against him, every-one shall be entitled to the following minimum guarantees, in full equality:
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> ...
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> (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

speaking defendant. This is the test that a court ought to apply when making decisions about interpreting.[17]

New South Wales has a new *Evidence Act* which guarantees the right to an interpreter.[18] However, the Act is silent about the qualifications that such a person must hold. Further the section provides only that "a witness may give evidence about a fact through an interpreter"; it does not provide that a party to a proceeding has a right to have the trial interpreted for them. The focus of the legislation is on assisting the court to gain access to the witness. There is no corresponding right in the witness to have access to the language of the English speakers in the court. Decisions about linguistic matters are left in the hands of a largely monolingual judiciary who are not capable of exercising this discretion in a professional manner.[19]

The court is a frightening and alien environment for the women who must argue their case for bail without the benefit of a Jordanian speaking interpreter. Their solicitor later says that he was unable to obtain proper instructions until the appeal hearing in the District Court because he did not have the benefit of speaking to Hanifa and Fatima with the assistance of a professional interpreter.

One of the fundamental principles of Australian law is the 'right to be heard'. These women are represented by a solicitor, but where the solicitor does not speak their language and the interpreters are unqualified, is this sufficient to ensure that the defendants can exercise their right to be heard in the court?

Bail applications are often matters of urgency and there is an argument in favour of proceeding with such a hearing without a qualified interpreter. However to accept such an argument would be to privilege one human right over another. In any case why was there was no qualified interpreter available at the hearing of the shop-lifting charges a week later? The absence of the interpreter on this occasion is explained by the prosecution as being due to an "unfortunate error". The "unfortunate error" is connected to the closeness of the date of the court hearing to Melbourne Cup day. Evidently the qualified interpreters could not be contacted while the nation took time out for a horse race. Constable al-Bishri is once more called upon to interpret. This event is an example of the difficulty of delivering justice in rural Australia. Only the capital cities have interpreter services, other areas must rely on the telephone interpreter services.

17 See *Gradidge v Grace Bros* (1988) 93 FLR 414.

18 *Evidence Act* 1995 (NSW), s 30.

19 See Bird, (1995) *op cit.*

The women plead guilty and at the conclusion of the hearing of the charges a three month sentence of imprisonment is handed down. The court orders that the baby be taken into care by the Department of Community Services and the women, who have been silent to this point, start sobbing. We hear the sobbing and the peace of the room is shattered.

The construction of the "other": Ethnic stereotypes in the law

The words "Muslim" or "Arab" are connected with the image "terrorist" in the Western psyche and create what sociologists call a "moral panic". This process allows the free-floating fears connected to rapid change in society to be projected by mainstream citizens onto a deviant "other".[20] The "other" is then the repository of the threats that to the psyche spell danger and, ultimately, death.[21] This fear of the "other" is seen as rational and is rarely linked to the fears residing in the collective unconscious.[22]

We would argue that since the collapse of the Soviet Union the Muslim nations have assumed for the West the category of deviant and dangerous "other", relieving for

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20 For a discussion of projection see Gay P *Freud: A Life for Our Time* (Papermac, London, 1989). Gay explains Freud's theory of the psychological defence of projection in these terms:

> Projection is the operation of expelling feelings or wishes the individual finds wholly unacceptable – too shameful, too obscene, too dangerous – by attributing them to another. It is a prominent mechanism, for example, in anti-Semites, who find it necessary to transfer feelings of their own that they consider low or dirty onto the Jew, and then 'detect' those feelings in him. This is one of the most primitive among the defences, and it is easily observable in normal behaviour ...(at p 281).

21 For an analysis of the competing drives of Eros and Thanatos in Freud's psychoanalytical work see, Isbister JN *Freud: An Introduction to His Life and Work* (Polity Press, Cambridge, 1985).

22 For an analysis of the collective unconscious see Jung CG *The Archetypes and the Collective Unconscious* (Princeton University Press, New York, 1968, 2nd ed). Jung writes:

> this personal unconscious rests upon a deeper layer I call the collective unconscious. It constitutes a common psychic substrate ... present in every one of us. The contents of the collective unconscious are known as archetypes (at pp 3-4).

Jung discusses the horrors of Hitler's regime and goes on to warn at p 48: "There is no lunacy people under the domination of an archetype will not fall prey to".

many citizens the anxiety of life in a post-modern world.[23] This western "moral panic" provides a sub-text to the court hearings. The discourse of the court in this and the two later hearings contains negative images of Muslims and Islamic society. Because the women's voices are not heard they stand outside this cultural production of reality.

In this way Australian courts are involved in the construction of ethnic stereotypes in the law. In an earlier work one of the authors has analysed two criminal cases where assumptions have been made by the court about the behaviour of men from non-Anglo backgrounds.[24] At this point it is worthwhile stressing that because of the paucity of research in this area and the lack of categories for "ethnicity" in the volumes recording the current law we have only a few reported cases in this field.

One of the cases *R v Dincer*[25] involved a Muslim man. He killed his daughter because she had, while only 16 years old, left home with a non-Muslim boy-friend. He perceived this act as bringing dishonour on the family. His lawyer argued that as a Muslim man Dincer felt responsible for the honour of the family and that the virginity of his daughter was central to that honour. On cultural grounds therefore Dincer should be excused or partly excused for the killing. The judge accepted the argument that Dincer's ethnicity could be a partial excuse.

His Honour told the jury that they were to take the defendant's ethnicity into account in considering what an ordinary man would do in reponse to his daughter's sexual (mis)behaviour. This "ordinary" man, he said, is:

> Turkish by birth and Muslim by religion ... There is evidence that such a man expects to be the undisputed head of his house and that he expects his daughters to live in fairly close confinement in the home circle and to avoid contacts with young men other than those of the family's selection.[26]

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23 This process of cultural construction can be seen in Hollywood "block-busters" such as *True Lies* (1994), *Executive Decision* (1996) and *The Long Kiss Goodnight* (1997).

24 See Bird G "Power, politics and the location of the 'other' in multicultural Australia" in *Multiculturalism and the Law* (Australian Institute of Criminology, Canberra, 1996).

25 (1983) VR 460.

26 *Ibid* at 461 per Lush J.

This direction to the jury was lauded as culturally sensitive and progressive by a number of commentators. However such a construction embeds stereotypes in the law which are profoundly racist:

> The inclusion of male versions of ethnic characteristics and belief systems into a legal system that is already profoundly gendered doubly disadvantages non-Anglo women.[27]

The High Court has recently rejected, by a majority, the inclusion of ethnicity in the construction of the "ordinary man".[28] We would argue however that the ethnocentric attitudes underlying these cases are still operating. This bias has been most clearly documented in cases where non-English speaking background women have gone to court to complain about the violence done to them by their partners and the man has used his ethnicity as an excuse for his behaviour. This is known as raising the "cultural defence".

Empirical work by Hannah Assafiri and Maria Dimopolous in the Melbourne courts has documented a number of cases where the courts have accepted the so-called "cultural defence".[29] The courts have indulged in a gendered and racist discourse, a familial speech that views non-Anglo women as subject to the will of their fathers and spouses.

In one case the court accepted that Turkish culture permitted a husband to discipline a wife who was an adulteress. The man was said to be "driven to violence by traditional Muslim values". A Turkish man could be expected to act in a more volatile manner than a person from "our own society".[30] Thus the court constructs an image

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27 Bird, (1996) *op cit* p 5.

28 See *Masciantonio v R* (1995) 69 ALJR 598, following *Stingel v R* (1990) 171 CLR 312. The High Court has ruled that ethnicity is not to be taken into when determining the level of self-control of the 'ordinary man'. For a discussion of this issue see Leader-Elliott I "Sex, race and provocation: In defence of Stingel" (1996) 20 *Criminal Law Journal* 72 and Yeo S "Sex, ethnicity, power of self-control and provocation revisited" (1996) 18(3) *Sydney Law Review* 302

29 Assafiri H and Dimopolous M *NESB Women as Deviant: The Legal System's Treatment of NESB Women Victims of Male Violence* (Australian Institute of Criminology, Canberra, 1995).

30 Dimopolous M "Pathologising NESB women and the construction of the 'cultural defence'", unpublished paper, Law and Society Conference, Southern Cross University, Lismore, 1995.

of the Muslim man as "other". Unlike "Australian" men he is brutal and his wife and children are seen as being the natural targets of his violence. This is the cultural "sensitivity" being displayed daily in Australian courts. The impact of feminist scholarship in law has, to some extent, altered the gendered discourse in relation to "mainstream" women. However, perhaps because this theory has concentrated on describing the reality of Anglo women, the magistrates and judges have not shifted significantly in their perceptions of "other" women. Judges are now engaging in gender awareness training but cross-cultural training is still at the pilot stage.[31]

Sir Guy Green, Chief Justice of the Tasmanian Supreme Court, has argued that:

> When a court either tacitly or expressly applies considerations of public policy or notions of fairness, reasonableness, justice and the like, it is in essence operating *as a more or less neutral medium* for the expression of current community values. (emphasis added).[32]

We would challenge the notion of the court as a neutral medium. We ask the questions: Who stands outside the vision of community the law constructs, and what are the origins of the community values that the court seeks to reflect?

Questions of Context, Power and Representation

We are indebted to Foucault for his analysis of power as being all-pervasive and as providing the basis of knowledge. "Experts" use their power to define the boundaries of normality by describing the attributes of the 'abnormal'. Power is exercised through the "microphysics"[33] of family, schools and universities, the media, unions, big business and government.

While individuals can, and regularly do, resist this disciplinary power they cannot extricate themselves from it. The very language in which we think our thoughts is affected by the dominant power structures. Thus the English language is gendered, racist and heterosexist. At the deepest level some scholars have asserted that the binary divide in Western language systems prevents the fluidity necessary for the acquisition of identity in a post-modern world.[34]

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31 See Stubbs et al, *op cit.*

32 Green G "Basic values and the criminal law" (1993) 17 *Criminal Law Journal* 229 at 235.

33 Foucault M *Discipline and Punish: The Birth of the Prison* (Pantheon, New York 1977).

34 See de Sassure F *Course in General Linguistics* (Trans Wade Baskin, Fontana, London, 1974) for a discussion of the basis of Western language systems.

Edward Said, a well-known Middle-Eastern scholar, has written widely on the West's interpretation of the East.[35] Said, although critical of Foucault's failure to attend to the imperial context of his theories,[36] owes Foucault an intellectual debt. Said's work is concerned with a central Foucaultian theme, the power of experts to construct knowledge. In his books *Orientalism* and *Covering Islam*, he has shown the extent to which the portrayal of Islam by the media, the academy and governments of the west is dominated by a discourse of *otherness*. Said uses the term "Orientalism" to describe this process whereby Islam is reduced to a singular construct of negative associations. He writes:

> ... there is a consensus on "Islam" as a kind of scapegoat for everything we do not happen to like about the world's new political, social, and economic patterns.[37]

This ethnocentric process is not new to Australia. Australia has a history of constructing ethnic, minority and Indigenous groups in this fashion.[38] The nation

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35 The major work of Said in this area is Said EW *Orientalism* (Random House, New York, 1978). Williams and Chrisman have written:

> It is perhaps no exaggeration to say that Edward Said's *Orientalism*, published in 1978, single-handedly inaugurates a new area of academic inquiry: colonial discourse, also referred to as colonial discourse theory or colonial discourse analysis ... . Colonial discourse analysis and post-colonial theory are ... critiques of the process of production of knowledge about the other. As such, they produce forms of knowledge themselves, but other knowledge, better knowledge it is hoped, responsive to Said's central question: 'How can we know and respect the Other?' (Williams and Chrisman, *op cit*, pp 5, 8).

36 Said EW *Culture and Imperialism* (Vintage, London 1993) p 336.

37 Said EW *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World* (Routledge and Kegan Paul, London, 1981), p xv.

38 For a deconstruction of the process of writing history see Broome R "Historians, Aborigines and Australia: writing the national past" in Attwood B (ed) *In the Age of Mabo: History, Aborigines and Australia* (Allen and Unwin, St Leonards, 1996). Richard Broome asserts:

> Ignorance, indifference, arrogance and racial ideology shaped these European views of culture contacts on the Australian frontier. In the following century these views were reproduced by historians. Most writers of Australia's history were concerned with

was constructed on a racist ideology encapsulated in the phrases *terra nullius*[39] and "White Australia".[40] This ideology was transmitted via various sites of authority.

For example in 1975, Russel Ward,[41] an eminent historian revised his book *Australia: A Short History*. Ward writes: "In Australia as elsewhere, through the medium of mass communication, people were taught *the truth* about race."[42] This "truth about race" Australians were taught is presumably that presented in chapter three of the book, under the heading "Mild Aborigines". Here Ward weaves a tapestry of misinformation, racist assumptions and half truths, the end result being the subtle message of white Australia's own "racial superiority":

> The Australian Aborigines were ... amongst the most primitive and peaceable peoples known to history. ... From Phillip's time until today, Australian governments have had to be much more concerned with protecting the Aborigines then with fighting them.[43]

Though much more subtle than the hate propaganda of the Nazi Party directed against Jewish and other peoples earlier this century, this process legitimates the entrenched racism of the Australian state. By constructing the "other" as infantile and inferior, the academy supports the state in its project of wielding control over Indigenous Australians.

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justifying domination by representing the British settlement of Australia as eminently peaceful, intent on drawing a veil over violence so s not to sully Australia's reputation or injure the sensibilities of post-frontier reader (pp 55-56).

39 *Terra nullius*, as already discussed, means land belonging to no-one. This was the doctrine that permitted the taking of the land in the name of the British sovereign. The doctrine was not rejected until the High Court decision in Mabo (No 2), *op cit.*

40 The first piece of policy legislation passed by the Australian Parliament was the *Immigration Restriction Act* 1901 (Cth).

41 Professor of History and Chairman of the History Department at the University of New England, NSW. In Pilger J *A Secret Country* (Cape, London 1989) at p 22 there is a quote from a 1952 Ward school text *Man Makes History: World History from the Earliest Times to the Renaissance* which states:

> There are still living today in Arnhem Land people who know almost no history. ... We are civilised today and they are not. History helps us to understand why this is so.

42 Ward R *Australia: A Short History* (Ure Smith, Sydney 1975).

43 *Ibid* pp 25-26.

In a 1984 speech to Rotarians at Warrnambool, (an unremarkable town in country Victoria), Geoffrey Blainey, then Professor of History at Melbourne University, spoke of the dangers in increased Asian immigration thereby sparking off a confronting debate that is, as yet, unresolved. In wanting to retain Australia's "crimson thread of kinship" by reducing Asian immigration, Blainey's "truth about race" sends a clear message of racial purity and division. Blainey's "crimson thread" is a quote from Sir Henry Parkes, a "founding father" of the Australian Constitution, a document born out of the British imperialist project. The discourse that Blainey taps into is one directly linked to imperialist beliefs of racial hierarchy and purity and leads to the construction of an inferior, dirty and dangerous "other" so threatening to the Australian psyche.[44]

While we write the debate continues. A national newspaper, in response to racist remarks by Pauline Hanson, an independent member of the Federal Parliament, commissioned a survey into attitudes to Australia's immigration policy. The results were reported on the front page of *The Australian* on 4 October 1996 and purported to establish that 71 per cent of Australians thought that Asian immigration was too high. This negative response is, we would argue, a projection of subconscious fears and goes against the weight of evidence in terms of the benefits of Asian settlement. It demonstrates the danger in the manipulation by elites of the collective unconscious.[45]

Cultural essentialism allows "mainstream Australia"[46] to discriminate against groups seen as "other", while maintaining a (mythical) construction of itself. In Australia these myths centre on adherence to the "rule of law", human rights, and the impartiality and objectivity of the judiciary.

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44 For example in 1909 the South Australian Protector of Aborigines said: "The white blood being the stronger must in the end prevail ... ." Quoted in Watson I "Nungas in the Nineties" in Bird G, Nielsen J and Martin G (eds) *Marjah: Indigenous Peoples and the Law* (Federation Press, Annandale, 1996) p 4. Thus the "crimson thread" that unites is not the blood that all humans share, rather it is coloured white.

45 For a discussion of the violent results of this racist debate in Australia up to 1990, see Human Rights and Equal Opportunity Commission *Racist Violence* (AGPS, Canberra, 1991) and Bird G (ed) *Racial Harassment* (National Centre for Crosscultural Studies in Law/Centre for Migrant and Intercultural Studies, Monash University, Clayton, 1992). For an overview of the broader theoretical issues see Matsuda MJ et al (eds) *Words That Wound* (Westview Press, Boulder, Colorado, 1993).

46 The Howard government says that it is governing for "mainstream Australia" – this was reported in the print and electronic media on 24 August 1996.

Construction of Islam

The Western perception of gender relationships in Muslim societies, as portrayed in the media, is fraught with negatives. As Pryce-Jones, a Middle-Eastern war correspondent asserts:

> Relationships between the sexes are matters of choice in Western societies. ... Things are not so in the Arab world, where women are unable to make their own life choices and are not on any sort of equal footing with men over rights or status.'[47]

This quotation opens the chapter titled "Men and Women". The book, *The Closed Circle*, acclaimed as "well-informed" by the Times, and offering 'many acute insights into how the Middle East works' according to the Times Literary Supplement, is part of building the western consensus about Islam.[48] Pryce-Jones' account of the "Arab world" shows the problems encountered when trying to represent a people as a monolithic cultural identity. Through this work he constructs "The Arabs".

The central thesis of the book is that "the Arabs" are caught in a "closed circle from which they have not been able to escape, a circle defined by deeply rooted tribal, religious and cultural traditions".[49] Arab society through this lens is regarded as unrelievedly brutal. As Pryce-Jones would have it:

> A handful of absolute despots oppress and attack with every available stratagem all those within reach. The rich and strong mercilessly bully and exploit their inferiors. Fathers subjugate wives and children. From the proudest power holder down to the humblest family, all are engaged in pillaging whatever they can for themselves, or at best for their tribe or religion, rather than considering the public interest and constructing the commonwealth.[50]

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47 Pryce-Jones D *The Closed Circle: An Interpretation of the Arabs* (Palladin, Hammersmith, 1990) p 122.

48 We would point out here that there are parallels between our earlier discussion about the construction and legitimation of knowledge in the academy and what Edward Herman and Noam Chomsky call the "manufacture of consent" in the media. They assert that the media's purpose in a free society is to manufacture consent among the governed, rallying the population to endorse elite decisions. See Herman ES and Chomsky N *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon Books, New York, 1988). These networks of power we would argue constitute the real "closed circle".

49 Pryce-Jones, (1990) *op cit* cover page.

50 *Ibid* p 402.

This construction of Islam is a popular one in Western societies. As Professor Jack Shaheen writes:

> The Arab male is portrayed as a contemptible character – cowardly, primitive, ignorant, cruel, vicious, lecherous and fabulously wealthy. An Arab woman is either a sensuous belly dancer, whore, terrorist or a veiled, silent appendage to her husband.[51]

Mainstream media is saturated by these negative images. Headlines in the Australian press are designed to raise anxiety, for example: "Arab Terrorist Fear for Australia' and 'Iran Ready to Unleash Germ Warfare".[52] Recent films such as *True Lies* and *Executive Decision* portray Arabs as terrorists hell-bent on destroying the western way of life.

These examples serve to illustrate the pervasive and convincing nature of such cultural constructions. We would argue that this "knowledge" about Arabs and Islam affected the way that some legal professionals in Lismore related to the Jordanian women. But what does this construction really represent?

Pryce-Jones' interpretation of the Arabs is just that, his interpretation of the "Arabs". His work is part of a genre that essentialises Arab culture. This scholarship hinders a proper understanding of the myriad of beliefs, attitudes and practices that constitute Islam. In building this thesis Pryce-Jones has created a society that is gendered, hierarchical and despotic. He has not acknowledged the resistance of those who reject aspects of the dominant paradigm. However these people are an integral part of Islamic culture. The "other" represented by Pryce-Jones is a negative construction of such intensity that all "humanity" has been removed from the Islamic people. Within such a world there is no room for the notion of human rights.

Yet as Ann Elizabeth Mayer argues in her paper published in 1994:

> Independent NGO's [non-government organisations] ... founded for the defence of human rights in Muslim countries have spearheaded campaigns to improve respect for human rights. Such NGOs proliferated throughout the Middle East and North Africa in the 1980s in the face of daunting obstacles and dangers. One of the most important of the NGOs is the Arab Organisation for Human Rights founded in 1983, which still continues to operate

51 As quoted by Cleland B "The roots of ignorance" in Bird, (1992) *op cit* p 70.

52 *The Australian* 12 August 1996, 8.

> in the face of daunting obstacles. Like other major independent human rights organisations, it espouses the human rights standards set forth in international law.[53]

Pryce-Jones ignores this positive aspect of the "Arab" world in order to further his argument. It is this process of cultural essentialism that occurs in the Lismore courts.

Lismore Local and District Court

Let us quote from the Magistrate's judgment:

> This court is unaware of the penalties for this offence in Jordan, but one has a suspicion based on general information, that a part of their anatomy at least would be removed for this type of offence.[54]

What is the background to this form of analysis? How has the Magistrate acquired this suspicion? Cultural essentialism allows "mainstream Australia"[55] to discriminate against groups seen as "other", while maintaining a (mythical) construction of itself. In Australia these myths centre on adherence to the "rule of law", human rights, and the impartiality and objectivity of the judiciary.

What the judge refers to as "general information" about Jordan is a negative construction of an entire culture. This (mis)information is used to assert the dominant system's moral and ethical superiority and to justify the negative

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53 Mayer AE "Universal versus Islamic human rights: A clash of cultures or a clash with a construct?" (1994) 15 *Michigan Journal of International Law* 307 at 365. Mayer also discusses the difficult issue of cultural relativism versus universal human rights. There is an argument that the "West" has imposed its values on the Third World through mechanisms such as the United Nations, as part of an on-going imperialist project. Mayer rejects this argument. She asserts that once the notion of universal human rights is rejected in favour of cultural relativism elites may gain legitimacy in the international arena for their oppressive acts against women and other minority groups. For a further discussion of cultural relativism see Garkawe S "The impact of the doctrine of cultural relativism on the Australian legal system" (1995) 2(1) *Murdoch University Electronic Journal of Law* 29.

54 Unreported, Lismore Local Court, Linden J, 15 November 1996.

55 The Howard government has claimed that it is governing for "mainstream Australia", reported in the print and electronic media on 24 August 1996.

stereotype of the "other".[56] The process de-sensitised the court to the individuals standing trial. Their "otherness", we would argue, affected their experience in the court. The outcome, as expressed in the sentence, may not have been affected, but this is not the issue. The humanity of the defendants was diminished by the failure to hear their voice.

> Deception is their stock in trade that's how they manage to commit these crimes, well they're not going to deceive this court.[57]

Many stereotypical assumptions as to what constitutes a "Jordanian woman" are made by both the visiting magistrate and the District Court judge, yet there is no reference to any source material except in the Magistrate's judgment, which refers to "a suspicion based on *general information*" (emphasis added).

The ideology of femininity[58] prevails in the District Court where the judge suspects they "may not have even been the architects of this series of offences". The men travelling with them, because they too are of "Jordanian appearance", are guilty by association. The magistrate uses "familial discourse"[59] to construct these women as "bit players". Their femininity means that these men must be the ring-leaders.

Although shop-lifting in other circumstances is viewed as the quintessential woman's crime, this is no ordinary shop-lifting. It is "slick" and "professional" and therefor master-minded by male criminals. The details of the men's passports are to be forwarded to the immigration authorities with a recommendation that those authorities "ascertain whether they should be permitted to remain in this country".

These women, in the District Court's view, are incapable of independent behaviour. They are viewed as part of a bigger criminal organisation with themselves only the

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56 This process has been used effectively throughout Australia's history to disempower Indigenous Australians.

57 Unreported, District Court of NSW, Ducker J, 23 November 1996.

58 "The ideology of femininity as it is usually portrayed lends support to the view that women have low crime-rates and that women's crimes are trivial and insignificant. Neither of these statements is necessarily true ...". Rice M "Challenging orthodoxies in feminist theory: A black feminist critique" in Gelsthorpe L and Morris A (eds) *Feminist Perspectives in Criminology* (Open University Press, Milton Keynes, 1990) p 65.

59 See Eaton M *Justice For Women?* (Open University Press, Milton Keynes, 1986) for a discussion of the concept of familial discourse.

"troops" or "workers" in that organisation. At this point the court's discourse of gender relations within Islamic societies impacts on the sentencing of the women. Jordanian society, with its mediaeval treatment of women, shares the blame, perhaps reducing their individual guilt. The willingness of the women to act as "troops" in such a "chillingly similar", "series of offences" is due to their downtrodden position under Islam.[60] They are incapable of handling their "new-found freedom" in Australia.[61]

In sentencing the women the magistrate refers to the fact that if the offence occurred in Jordan they would have lost "at the least a part of their anatomy". They are "fortunate" that they committed this crime in Australia.

The women are being tried for an offence under the NSW *Crimes Act* and we would argue that the penalty attached to a similar crime in Jordan is irrelevant. The court appears to be influenced by its perception of the cruelty of the law in Muslim countries in dealing with these women.

From the transcripts it appears that no attempt is made by the court to inform itself of the operation of the law in Jordan in the 1990s, although a telephone call to the Jordanian Embassy in Canberra or the Australian Embassy in Jordan would readily elicit this information.[62] It is enough that "one has a suspicion based on general information" about the operation of the criminal justice system in Jordan? This suspicion is of a justice system that is inherently violent. In reality the Jordanian criminal law is based on a civil code, not the Shar'ia law. Jordan is a signatory to the same human rights instruments as Australia in the criminal law field.[63]

This is an example of the process discussed above of constructing an essentialist reading of Islam which does not take account of the variety of Muslim societies and of the transgressive movements within fundamentalist Islamic states.[64]

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60 The reference to the women acting as "troops" is made by their solicitor in response to the judge's belief that the women were part of a professional gang led by men.

61 The reference to new-found freedom is made by their solicitor.

62 We would like to thank the Middle Eastern section of the Department of Foreign Affairs and Trade and the Consul at the Jordanian Embassy in Canberra for giving us information about the criminal justice system in Jordan.

63 We would like to thank the officers of the Department of Foreign Affairs and Trade who supplied us with details of the human rights instruments to which Jordan is a signatory.

64 For an argument that Islam is not incompatible with international human rights paradigms see: Mayer EA *Islam and Human Rights* (Westview Press, Bolder, Colorado, 1995).

The court's transcripts show elements of a patriachical and an ethnocentric ideology. As defendants in a criminal trial the women are "other" in terms of their gender as well as their ethnicity.

Going back in time, after bail was refused the women were held for a week in Grafton Correctional Facility before their trial.

The Gaol

Hanifa and Fatima are taken in a police vehicle to Grafton Correctional Facility. The gaol was erected last century and is subject to an historic buildings order which ensures that it cannot be substantially altered. Constructed of locally quarried red bricks the building is massive and intimidating and unsuitable for human habitation. The concrete exercise zone around the cells is freezing in winter and unbearably hot in summer. The women arrive in a heat-wave.

They are searched on arrival, issued with prison clothing, and taken to the women's unit. We are told in an interview with an employee at Grafton that they would have been searched by a female officer "if one was available". The women's unit is situated inside the male medium security area. Housed here are Grafton's most serious offenders. Women are confined to their cells for 23 hours a day because it is not "safe" to allow them outside in the exercise area with the men. Each cell houses two women.

Hanifa and Fatima feel "absolutely isolated" in Grafton.[65] No-one else speaks their language, Hanifa's child has been taken away, and there are no provisions for their special diet, or for ritual washing. There is no access to an interpreter during their eight days in the gaol and their closeness to the male prisoners is culturally inappropriate.

Although they are allowed to make any number of calls this freedom is constrained by reality. They can purchase a phone card, if they have the money. They can make calls, but they can only do so in their one hour a day out of the cell, and then only if a phone is free. This freedom to make contact with the outside world is rendered further illusory given their inability to speak English.

A Chaplain from a Christian denomination is provided who is sensitive to the spiritual needs of prisoners. He will try to meet spiritual requests. However, the

65 This is from a statement made to the Local Court by their solicitor.

request must come from the inmate; where people cannot speak English communicating their religious needs is problematic.[66]

Until recently criminology has been a male domain.[67] There is little research on women in prison and of those studies there are few that deal with women from non-English speaking backgrounds.[68] What we do know, however, is that Indigenous women are vastly over-represented in gaol.[69]

The nexus between crime and minority groups in Australia is a neglected area of study. Patricia Easteal has however undertaken a number of studies, and cites work in NSW which found that there was a high rate of remand for non-English speakers. This was related, amongst other things, to the inadequacy of interpreting services and a lack of knowledge about the Australian criminal justice system. Easteal's work also uncovered evidence that overseas women were serving longer sentences than Australian born women. This may have been linked to the type of offence charged, but as Easteal points out: "Undoubtedly there is also judicial discretion in sentencing with a resultant variation in minimum terms for the same crime."[70]

Human Rights and Government Policy

We have said that the case was but a starting-point for an exploration of the links between law and life, or to rephrase it between law and cultural production. In particular we are examining racism and sexism which are very complex cultural productions. Negative images of the "other" circulate freely in our society. Can we hold the Lismore Courts responsible for merely reflecting what is the general consensus in society? Obviously not. If we want change then we must ask: "Where do we go to from here?"

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66 This information was provided in an interview with the current Chaplain who was appointed to the position after the women were incarcerated.

67 See Howe A *Punish and Critique: Towards a Feminist Analysis of Penality* (Routledge, London, 1994) for an analysis of the masculinity of criminology. For another transgressive feminist reading, see Rice, *op cit.* Rice writes: "The bulk of the research on women in custody has referred to 'woman' as a heterogeneous category ... There is an assumption that all women are equally disadvantaged" (p 61). This article is an attempt to deconstruct the category "woman" and map out the experience of two non-Anglo women.

68 Easteal P *The Forgotten Few: Overseas-born Women in Australian Prisons* (AGPS, Canberra, 1992).

69 See Brooks M "The incarceration of Aboriginal women" in Bird, Nielson and Martin *op cit.*

70 Easteal P "Ethnicity and crime" in Chappell D and Wilson P (eds) *The Australian Criminal Justice System – the mid 90s* (Butterworths, Sydney, 1994) p 99.

Michael Dodson in his fourth report as Social Justice Commissioner with HREOC suggests that strong political leadership is central to this issue. While stating that the Howard government cannot be held responsible for recent shifts in public attitudes and behaviour Dodson asks:

> ... how can it be that within nine months of the Coalition's election to government, it became necessary for the House of Representatives to pass a Joint Resolution affirming the fact that equality and not racial intolerance characterises this country? ... At one level the answer is simple. ... Racism is still alive and abroad in this country.[71]

We would argue that human rights is tied to the concept of full citizenship. People are not full citizens if they do not have the power to shape public institutions. In Australia public power is distributed along race, gender and class lines.[72]

In 1996 we saw the defeat of the Labor Government and the return of a conservative Coalition government. The events in the Lismore courts outlined above occurred during Labor's term in office. Is there any comfort to be drawn from the election of the Howard/Costello government? Unfortunately all the indications suggest otherwise.

The Labor government managed to create bi-partisan support on the issues of multiculturalism and Indigenous self-management.[73] The Howard government has withdrawn its support in this area. In not condemning Pauline Hanson's attacks on Asian immigration John Howard has sent a clear message to Australians that racism is acceptable behaviour. As Alan Ramsay writes: "John

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71 Aboriginal and Torres Strait Islander Social Justice Commissioner *Fourth Report* (AGPS, Canberra, 1996), p 3.

72 See Bird, (1996) *op cit* for a discussion of this issue. For a discussion of the centrality of self-determination to the concept of human rights for Indigenous Australians, see Watson, *op cit.*.

73 The Labor government set up the Office of Multicultural Affairs in the powerful Department of Prime Minister and Cabinet and introduced policies and programs designed to further cultural diversity and tolerance. The government also claimed that it had introduced Indigenous self-determination via structures such as Aboriginal and Torres Strait Islander Commission (ATSIC). However, we agree with Indigenous critics that ATSIC is a limited exercise in self-management. As Irene Watson writes: "The example of ATSIC as a model initiative in Indigenous self-determination is, in reality, a process of self-management of federal and state government policies." Watson, *op cit* p 8.

Howard declines ... to even mention Hanson by name, let alone 'denounce' her clear incitement of 'racial intolerance'".[74] This failure in leadership has led to "a backlash against Asians, with people being spat upon in the streets and suffering other forms of harassment".[75] Some members of Parliament have shown leadership and called for a recognition of the basic ideals of "justice and humanity".[76] Brendan Nelson, for example, spoke in these terms, "leadership ... is about trying to invoke genuine enthusiasm to support things that are in the best long term interest of others, the community and society."[77]

The Coalition is re-drawing the notion of the citizen to put at the centre the "traditional family". This traditional family lives on a quarter-acre block, with a hills hoist in the backyard and a picket fence across the front.[78] According to Coalition wisdom traditional families deserted Labor because its attention was directed to Indigenous people, ethnic minorities, artists, greenies, and (radical) women. These groups were regarded as the protégés of the leftist, university educated yuppies who had come to dominate the ranks of the Labor Party hierarchy.

Labor was thought to have lost contact with its "blue-singlet" heart-land leaving this group open to seduction by the conservatives. In the United Kingdom Thatcher achieved power by attracting the working-class, Howard managed to emulate her and achieved government in Australia with an enormous majority and a belief in a conservative "mandate" to introduce wholesale change. There was an immediate

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74 Ramsay A "Howard's talk is cheap when chips are down" *Sydney Morning Herald,* 12 October 1996, 39.

75 Millett M and Brough J "Wave of racism warning to PM" *Sydney Morning Herald,* 9 October 1996, 1.

76 Chris Pyne as quoted in Ramsay, *op cit* 39.

77 Ramsay, *op cit* 39.

78 Alan Ashbolt describes the central figure in this family in these terms:

> A block of land, a brick veneer and a motor-mower beside him in the wilderness - what more does he want to sustain him, except a Holden to polish, a beer with the boys, marital sex on Saturday nights, a few furtive adulteries, an occasional gamble on the horses or the lottery, the tribal rituals of football, the flickering shadows in his lounge room of cops and robbers, goodies and baddies, guys and dolls. (Quoted in Castles S et al *Mistaken Identity* (Pluto Press, Sydney, 1990) p 119.

transfer of resources away from minority groups towards "traditional" families and a call to end the "censorship" that had protected minorities from criticism.[79]

For the purpose of this article it is interesting that one of the first acts of the new government was to down-grade the Office of Multicultural Affairs and shift it from the powerful Department of the Prime Minister and Cabinet to the marginal Department of Immigration and Multicultural Affairs.

The Labor government had worked to redefine Australian identity in a plural fashion.[80] This fragile inclusiveness is now threatened by Prime Minister Howard's own project of "lifting the pall of censorship"[81] around race issues. Combining this new "freedom" with the ideology and practices of economic rationalism has led to an exclusionary citizenship shaped by a government dedicated to its vision of "mainstream Australia."

The End

Narratives, unlike life, require a coherent ending or a reader may be left feeling "unsatisfied".[82] Our project in this article was not to point to an improper verdict of guilty in the case under study. Rather, we sought to explore the images of gender and ethnicity that reverberated in the court-room and prison. This knowledge allowed the trial and imprisonment to operate "efficiently" without any real input from the women concerned. The discourse circulated around them but did not include them.

It is niave to assume that law by itself can change these things. Translating human rights intruments into legislation cannot end prejudice and discrimination. The

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79 John Howard in a speech to the Queensland Liberal party Convention said:

> ... the vote on March 2 was a vote against government in submission to noise of minority groups ... people (now) feel able to speak a little more freely and a little more openly about what they feel. In a sense the pall of censorship has been lifted on certain issues. (Published in *The Australian* 25 September 1996, 13).

80 For a discussion of the ideological shaping of identity in the Australian context, see Castles et al, *op cit.*

81 This is a reference back to John Howard's speech to the Queensland Liberal Party Convention quoted above in note 79.

82 See Davies M *Asking the Law Question* (Law Book Co, North Ryde, 1994) p 275 for a discussion of the impossibility of ending a text that is connected to life beyond words.

problem lies elsewhere. The myths at the heart of the nation's psyche are both monumental and monocultural. They are white and egalitarian and, because we have not interogated them, they are fundamental to our notion of what it is to be "Australian". The niavete that law can change our cultural unconscious denies the power of the dominant myths to shape reality and thereby prevents us accepting responsibility for that reality.

If we want to make real our commitment to equality before the law we must end this silencing of racial and ethnic "minorities." We must recognise that our structures are inter-linked. Change must take place throughout institutions in the public and private sectors. Resources must be directed to such areas as cross-cultural training and the provision of professional interpreter services.

These things have been said before. But in the final analysis our standpoint is that the division between theory and life is untenable, and therefore we must interrogate our own practices and strive to act in a non- racist manner.

> If we wish to make oppression culturally unacceptable then we must confront our own unconscious programming. We must take responsibility for our thoughts and actions.[83] ●

83 See McDonell M *Racism Module: Law Curriculum Materials* (Department of Education, Employment, Training and Youth Affairs, Canberra, 1997) (in press).