The impacts of drug and alcohol use on sentencing for First Nations and non-Indigenous defendants

Abstract

This paper examines the ways personal use of illicit substances and alcohol are constructed as either mitigating or aggravating factors to explain offending. We consider the differential constructions of these factors for people who appear in supreme and district courts in northern Queensland, Australia, for offences involving illicit substance use, alcohol use, drug-related offences, and violence. Qualitative analysis of courtroom observations is understood through the lens of critical race theory. Our findings reveal that personal use of illicit substances was primarily constructed by legal practitioners as an indicator of disadvantaged circumstances when discussing non-Indigenous defendants. In these cases, drug use was connected to other disadvantages such as poor mental health, physical pain, and trauma. In contrast, alcohol use was primarily raised as an aggravating factor for First Nations defendants, constructed by legal practitioners as a personal flaw linked to violent offending, and overshadowed the interrelated disadvantages that many First Nations defendants experience. This reflects social attitudes about First Nations people, reinforces individualistic explanations for offending patterns, and points to the institutional racism embedded in the structural processes of Queensland's higher courts that continues to profoundly impact First Nations people.

Key Words

First Nations, critical race theory, mitigating and aggravating factors, substance use, systemic racism, supreme and district courts

Introduction

The Black Lives Matter movement in the United States has brought considerable attention to the issue of racialized police brutality, and the impact of this movement has spread throughout the world. Australia is one of many countries that held protests in 2020 in solidarity with Black Americans, and to draw attention to similar local issues (Hurst, 2020). While activists were accused of 'importing the things that are happening overseas to Australia' by Prime Minister Scott Morrison (Hurst, 2020), the Black Lives Matter movement struck a chord because Australia has a long history of protest against what are locally referred to as Black deaths in custody (Allam et al., 2021). The movement in Australia focuses on First Nations people, many of whom refer to themselves as Black (or sometimes "Blak"), and who have collectively experienced continuous state violence since the start of the colonization process (Munro, 2020). Australia's Indigenous population is made up of two broad groups, Aboriginal people and Torres Strait Islander people, and these categories in turn are made up of hundreds of individual nations with unique languages, cultures, and social structures (AIATSIS, 2014). In this paper, we preference the term First Nations to respect that diversity, though the sources we reference often use the terms "Aboriginal" and "Indigenous".

Australian activism in the 1980s led to a nation-wide focus on Black deaths in custody, and spurred a Royal Commission into the issue. The Royal Commission into Aboriginal Deaths in Custody report (hereafter, the Royal Commission) (RCIADIC, 1991) was a watershed moment that emphasized the intersecting disadvantages experienced by First Nations people in the criminal justice system. In examining the quality of care for First Nations people in custody, its primary focus investigated deaths in police and prison custody, while also considering underlying social factors leading to these deaths in custody. While the Royal Commission was never about

investigating the issues surrounding the over-representation of First Nations people, a number of its key recommendations do relate to reducing their contact with the justice system. However, despite fluctuation in respective rates since the release of the report three decades ago, First Nations people remain consistently over-represented across the justice system (Allam et al., 2021; Anthony et al., 2021; Baldry & Cunneen, 2014; Baldry, Cunneen, & Carlton, 2015; Cunneen & Tauri, 2016). The continued over-representation in turn reflects the ongoing historical patterns of oppression, marginalization and racial bias across police, courts, and prison jurisdictions (Cunneen & Tauri, 2017, 2019).

The way in which First Nations defendants are portrayed and represented in the court system, by both legal teams and the judiciary, reflect the normalized, institutional racial bias embedded in its structures (Cunneen & Porter, 2017; Kelly & Tubex, 2015; Marchetti & Ransley, 2014; Porter, 2016; Tubex & Cox, 2020). The presentation of mitigating and aggravating factors is an important court process that influences sentencing, and is intended to account for differential life circumstances (Caxton Legal Centre, 2017). However, the ongoing over-representation of First Nations people in prison suggests the outcomes may not match the stated intentions (Smallwood, 2015). This paper is about the way the personal use of illicit substances and alcohol use is constructed by legal practitioners in Australian supreme and district courts (or higher courts, used interchangeably). We argue that the constructions of drug and alcohol use as mitigating or aggravating factors impact defendants' narratives differently depending on their Indigeneity, which in turn perpetuates the historic and systemic racism embedded within the court system, as First Nations defendants are not afforded the same considerations given to non-Indigenous defendants.

In this paper, we draw on ethnographic observations from the higher courts in northern Queensland, Australia, to explore the intersectional nature of the construction of drug and alcohol use in the court system. We first explain the critical race theoretical framework we apply, and then provide background information about the over-representation of First Nations people within the criminal justice system in Australia. This is followed by a discussion of our qualitative data on the ways illicit drug use and alcohol use are constructed by legal practitioners through formal court processes like the presentation of mitigating and aggravating factors.

It is important to point out that this paper is not about micro-level interactions or attitudes of legal practitioners; we do not discuss intentional discrimination against First Nations people. Instead, this paper emphasizes the complex structural ways criminal jurisdictions operate as a whole and offers a rich explanation of how the higher court system adversely impacts the treatment of First Nations people. Our work here focuses on northern Queensland higher courts, and makes no claims about other states. However, given the nature of settler-colonialism across Australia (discussed below), there are likely parallels to other jurisdictions.

Critical Race Theory

Critical Race Theory (CRT) is used in this paper as a framework to guide both the method and the analysis of the ways in which the personal use of illicit substances and alcohol was constructed in the higher courts of QLD for First Nations and non-Indigenous defendants. Developed from the legal discourse of the Civil Rights Movement in the 1960s and the legal work of Kimberlé Crenshaw and Derrick Bell, CRT establishes the interconnections between race, racism, and power. Rather than a biological fact, CRT defines race as a historical social construct created and informed by insidious discourses of power that determine the superiority and inferiority of certain groups. In this framework the deeply entrenched nature of racism as a

historically reproduced and systemically embedded feature of all social institutions is highlighted (Benveniste et al., 2019; Bonilla-Silva, 2015; Crenshaw, Gotanda, Peller & Thomas, 1996).

Inferior racial identities and racialized hierarchies are normalized through everyday social interactions (Vass, 2015). As such, racism is such a common and taken-for-granted experience for people of color that it is almost impossible to detect especially (but not only) for those who benefit from its perpetuation (Delgado & Stefancic, 2017). With a focus on the social construction of race, CRT exposes the way power and influence are distributed in ways that privilege whiteness in Australia (Vass, 2015). Exploring the intersections of race, racism, and power within the criminal justice system, CRT encourages us to look at "…the entire edifice of contemporary legal thought and doctrine from the viewpoint of law's role in the construction and maintenance of social domination and subordination" (West, 1995, p. xi). Our discussion below does not assess the veracity of narratives presented as mitigating factors; instead we consider how those constructions are racially inflected. That is, while all narratives are constructed, the narratives in the court system are more deliberately chosen in order to make a particular legal argument. However, these narratives, including defense narratives, still "reflect the cultural and structural features of their production" (Ewick & Silbey, 1995, p. 200).

In Australia, while many First Nations people identify as Black, CRT does not fully account for Indigeneity. For example, Moreton-Robinson (2000) highlights that the absence of First Nations' experiences as a framework in American literature "tends to locate race and whiteness with the development of slavery and immigration, rather than the dispossession of Native Americans and colonisation" (Moreton-Robinson, 2000, p. viii). A critical tenet of CRT is Whiteness as property, articulated by Harris (1993) with regards to both slavery and dispossession of Native nations from their lands. This tenet is highly relevant to the Australian

history of colonization which likewise defined First Nations' "possession" of land as "too ambiguous and unclear" (Harris, 1993, p. 1722). Moodie (2018) adapts the concept of Whiteness as property to elaborate the experience of First Nations Australians. The distinct Australian story of dispossession, stolen children, and stolen wages highlights the "place-based histories of resistance and struggle, emancipation and success, meanings and traditions" (Moodie, 2018, p. 36) that shape the relationships of power between First Nations communities and non-Indigenous Australians at all levels and through all institutions.

We explore the ways structures of the higher courts maintain the oppression of First Nations people through everyday normalized racist practices (Baldry & Cunneen, 2014; Cunneen & Tauri, 2017; Hogg, 2001; Marchetti & Ransley, 2014). In particular, the contemporary racialized landscape in Australia must be understood in context to avoid "decontextualized and dehistoricized accounts of Indigenous criminality and victimization that explain these complex phenomena as simple manifestations of individual, aberrant Indigenous behaviour" (Cunneen & Tauri, 2016, p. 11). Thus, in this paper we use CRT to make sense of the ways the structures of the higher courts perpetuate racism toward First Nations peoples as a group and to frame the issues as both racialized and as the product of Australia's settler-colonialism.

First Nations People in the Australian Criminal Justice System

The historical relationship between First Nations people and the criminal justice system (CJS) is marked by two overlapping issues: the colonial project and institutional racism (Blagg, 2008; Cunneen & Tauri, 2019). Colonization in Australia, like in the US, Canada, and New Zealand, is *settler-colonialism,* an attempt to replace the original population with settlers (Wolfe, 2006). Importantly, settler-colonialism is not something that happened in the past and is now finished: "invasion is a structure not an event" (Wolfe, 2006, p. 388). One ongoing strategy of

settler-colonialism is the labeling of First Nations people as ‘criminal’ resulting in the significant adverse impacts that First Nations people experience through their contact with police, courts, and prison jurisdictions (Kelly & Tubex, 2015; Wolfe, 2006).

Australia’s settler-colonial project is characterized by several key phases, and the criminal justice system has played important roles in all of these. Along the ‘frontiers’, First Nations people resisted colonial advances. Police played an important role in these early stages of Australia’s settler-colonial project, with early police officers tasked to eradicate First Nations people and their culture in a violent process known euphemistically as ‘dispersal’ (Tatz, 2001). As settler-colonialism progressed beyond frontier expansion to the ‘segregation’ era, police were used to remove First Nations people from their lands to reserves and missions, with police officers serving as local “Protectors of Aborigines” (Cunneen & Libesman, 1995). In this era, the movement of First Nations people was severely restricted; missions and reserves were tightly controlled, with “Protectors” having the authority to decide on employment, housing, marriage, and far more for First Nations “inmates” (McGregor, 1997). While historians are careful to avoid terms like ‘slavery’ about this era, First Nations workers were paid less than their white counterparts, and their wages were controlled by “Protectors” rather than being paid directly to workers (McGregor, 1997). Police and the courts then contributed to the ‘Assimilation Era’, from approximately the 1930s, which saw both the forced removal of First Nations children from their families to be raised in group homes or adopted by white families (NISATSIC, 1997) and the ongoing criminalization of First Nations people (Kelly & Tubex, 2015). The ‘assimilation’ era officially ended only in the early 1970s when governments agreed to a program of self-determination. These policy eras relied on stereotypes which still prevail today that First Nations people are bad with money, are neglectful parents, and are culturally more inclined to violence -

stereotypes which continue to impact on First Nations interactions with the criminal justice system (Cunneen & Porter, 2017).

First Nations people in Australia today remain subject to racism in their everyday lives. This manifests in nation- and state-level statistics that present First Nations people as disadvantaged economically, and in terms of health, employment, and education. These statistics are often framed as a deficit, generalizing about all First Nations people as "other" to the race-less "non-Indigenous Australians" (Walter, 2018). In northern Queensland, Aboriginal and Torres Strait Islander people make up a higher proportion of the total population, representing 6.8% of Townsville as opposed to just 3.3% of Australia's overall population (ABS, 2019). This higher visibility perhaps exacerbates widespread stereotypes of First Nations people as heavy users of alcohol. Police practices remain crucial to the over-representation of First Nations people in the CJS (Baldry et al., 2015). In particular, the discretionary decisions police make after intervention and the imposition of charges suggest that First Nations people are over-policed (Cunneen, 2006). Police practices then segue into contact with court and prison jurisdictions, which in turn contributes to the over-representation of First Nations people across all stages of criminal jurisdictions (Baldry et al., 2015). The history of police discretionary powers is important in order to both understand how contact between the police and First Nations people reinforces differential treatment, and to emphasize the ways that police jurisdiction as a structure of the justice system contributes to the adverse treatment experienced by First Nations people (Cunneen & Porter, 2017; Porter, 2016).

In similar ways, judges are in positions of power that impact First Nations defendants' contact with other jurisdictions. Judges legitimize conduct by the police, thus reinforcing over-policing practices (Cunneen, 2001; Cunneen & Libesman, 1995). For example, the racially

discriminatory treatment by police officers toward First Nations people was legitimized by court jurisdictions through Protection Acts (Cunneen, 2006). Research in the 1980s and 1990s found First Nations defendants received adverse court treatment due to judges' overtly racist attitudes towards First Nations people (Charles, 1991; Coe, 1980; O'Shane, 1980). Judges' discretion, particularly in sentencing, has the power to disrupt systemic inequalities through either "intervention and diversion, or …a deepening engagement with the criminal justice system" (Marchetti & Ransley, 2014, p. 2). Despite this potential for disruption, the adverse treatment still experienced by First Nations people in the courts impacts their contact with prison jurisdictions and contributes to the alarming rates of Indigenous people in prison (Marchetti & Ransley, 2014). For example, while only 3.3% of the total Australian population, First Nations people account for 29% of the total Australian prison population, and their over-representation is increasing (ABS, 2020). Despite the 148 recommendations within the Royal Commission intended to reduce First Nations contact with the CJS and improve their safety within it, they continue to be apprehended by the police, appear before the courts, and be sentenced to prison, at higher rates than their non-Indigenous counterparts (ABS, 2020).

This over-representation of First Nations people across Australia similarly reflects ongoing disproportionate rates in Queensland. The rate of First Nations people that come into contact with the police as defendants in the state is at least five times higher than non-Indigenous people between 2010 (8,243 vs 1,668 per 100,000) and 2020 (8,574 vs 1,579 per 100,000). First Nations deaths in custody continue to be a significant issue. Data from *The Guardian* Deaths Inside project, supplemented with data from the Australian Institute of Criminology (AIC)'s National Deaths in Custody Program (NDICP), estimate 474 deaths in custody since the Royal Commission was released (Allam et al., 2021; Doherty & Bricknell, 2020). This is an average of

16 deaths in custody per year, which compares to 10 per year for the decade investigated by the Royal Commission, pointing to the government's failure to address the institutionalized racism embedded in these processes (Anthony et al., 2021).

Process of Criminalization: Drugs & Alcohol

Though they are both considered behavior-altering substances, illegal drugs and alcohol are criminalized differently throughout Australia, as some drug laws vary by state and territory and therefore cannot be generalized across the nation (Caxton Legal Centre, 2017). In Queensland, the consumption and possession of alcohol is legal with restrictions, such as age (e.g., over 18 years), activity (e.g., not while driving) and location. However, other substances are legislated as illegal, and even personal use of these substances is considered a serious indictable offence to be processed in the higher courts. In Queensland, the seriousness of a drug offence, and the penalties it attracts, is evaluated against two key considerations: type and amount (Caxton Legal Centre, 2017). For example, production of cannabis is classified in the Schedule II category of drugs, alongside morphine and barbiturates (Caxton Legal Centre, 2017). This group of drugs carry lesser penalties than Schedule I drugs which include amphetamines, cocaine, heroin, LSD, and ecstasy. The amount of the drug in question determines whether the use is considered personal as opposed to trafficking drugs for commercial purposes. Personal use is treated more leniently than trafficking drugs for sale with the intention of profits, which carries a penalty of up to 25 years imprisonment (Caxton Legal Centre, 2017).

Although alcohol is legal in most contexts, intoxication can be criminalized through public order offences like endangering or disrupting other people (Caxton Legal Centre, 2017). According to the Summary Offences Act (2005) in Queensland, behaviors that affect the quality of community use of public places are considered offences under this legislation and include

being intoxicated in a public space, public nuisance behavior, or urinating in a public place (State of Queensland, 2020). Public order offences are lower-level offences which are not processed at the higher courts, but surface in the higher courts in the form of a defendant's previous offence history or as aggravating factors (Cunneen & Tauri, 2016). Not all intoxication is treated the same, however, with discretionary police interventions influenced by discriminatory and prejudiced attitudes, beliefs and interpretations. As Brown et al. (2011, p. 752) explain,

> The cornerstone of public order legislation is usually a provision that permits police to act where behaviour in a public place is regarded as offensive, insulting, abusive or indecent. Such provisions are inevitably vague and open-ended, with the characterisation of the behaviour left to the discretion of the police in the first instance, and subsequently to the discretion of magistrates.

The situation in Australia is reminiscent of the mass incarceration of Black men in the US, which Alexander (2010, p. 4) describes as "a stunningly comprehensive and well-disguised system of racialized social control". The disproportionate rates of public order offences involving alcohol use for First Nations people compared to non-Indigenous people is historical and ongoing. At both national and state levels the rate of people charged with public order offences has decreased, regardless of Indigeneity (ABS, 2020). However the gap has widened on the basis of race. In 2009 First Nations people were at least six times more likely than non-Indigenous people to be charged with public order offences; in 2019 this increased to eleven times more likely (ABS, 2020).

The over-representation of First Nations people in the CJS points to the institutionalized racism embedded across criminal jurisdictions (Blagg, 2008; Cunneen & Tauri, 2016) and this research, which explores the racist narratives and language in the construction of First Nations defendants,

further highlights the systemic oppression experienced by First Nations peoples through "the enactment of colonial settler sovereignty" (Kelly & Tubex, 2015, p. 12).

The Research Project

The data for this paper come from in-court observations and are selected from a broader study that examined the treatment of First Nations women in the higher courts in northern Queensland. The observations serve as case studies about defendants who appeared before the higher courts. The aim of our ethnographic observations is to provide a critical interrogation of the ways in which the identification and presentation of mitigating and aggravating factors construct disadvantage differently based on Indigeneity. All aspects of the court process were observed, from arraignment to sentence hearings. Observations were supplemented with the Daily Law Logs, which is an online government service that provides the details of cases processed. During the fieldwork, women were the minority of defendants, therefore our analysis in this paper includes ethnographic field notes from cases involving both men and women.

Fifty-nine total cases were observed with 27 defendants formally identified as First Nations people. Amongst the First Nations defendants, 2 cases included illicit drugs charges, 17 were charged with violence, and 4 of these explicitly mentioned alcohol use. For the 32 non-Indigenous defendants, 19 cases included illicit drugs charges, and 2 others mentioned alcohol use. In the analysis for this paper we reviewed all field notes for these 27 cases. As we discuss below, in general illicit drug use by non-Indigenous defendants was treated as a mitigating factor linked to other experiences of disadvantage. This is in contrast to alcohol use by First Nations defendants which was presented separately from the context of their lives. In other words, the alcohol use by First Nation defendants was presented as an aggravating factor.

We discuss notes from our ethnographic data as rich qualitative material. Author 1 took notes on events in the courtroom, dialogue by legal practitioners, statements and commentary by judges, and reactions of those in the courtroom to the events observed (following Gonzalez Van Cleve, 2016). Author 1 accessed the court system through the normal channel as a visitor observing cases brought before the higher courts. The data for the larger project were analyzed through thematic coding: reading and reviewing the data several times, identifying words and phrases that stood out and grouping them into themes. We categorized patterns and concepts from the set of themes that emerged from the analysis. From the analysis of the larger project, we noticed the difference in how defendants were discussed based on race and substance charges, so we compared the presentation and language of the narratives in these particular cases. Critical race theory offers the best explanation for the pattern we noticed, with race operating largely unnoticed and embedded within the society (following Bonilla-Silva, 2015) the courts represent and reinforce.

Importantly, we recognize this qualitative research as subjective and thus our voice is actively present and embedded throughout. All quotes from dialogue should be read with this understanding, and we present them in italics, rather than in quotation marks, to acknowledge the filtering that happens in the process of writing field notes. The ethnographic filter means that the field notes are impacted by our positionality (Pacheco-Vega, 2019). Just as narratives are constructed about defendants by legal practitioners, our lenses and viewpoints about judges, the prosecution, and public defenders set the context for this paper. Given this ethnographic filter, it is essential to describe ourselves to give readers a sense of how we engage reflexively with these data.

Researcher Positionality

Author 1 is a Mexican American woman with a background in criminology who collected the data we discuss here. Authors 2 and 3 are white women from American and Australian backgrounds, respectively, in the disciplines of sociology and social work. Given we are not First Nations researchers, we are acutely aware of the limits on our ability to understand First Nations people's experiences of the CJS. Thus, our focus is not on the experiences of those defendants we observed but rather on the structures of the court system. The narratives for all defendants discussed below are constructed by others, particularly their legal teams, prosecutors, and judges, and do not represent how defendants might choose to talk about themselves. We recognize the role that we play in constructing these narratives in our research. Although it is likely that defendants had input into their legal defense, they have very little influence over their representation in the courtroom by prosecutors, judges, or researchers. Other research is needed which creates space for defendants to voice their own narratives, but here we look to deconstruct the racialized and colonizing politics embedded in the higher courts that impact First Nations people.

Findings

In the sections below, we discuss our data according to central themes that arose in our analysis. We do not seek a straightforward comparison; as discussed above, these case studies are qualitative in nature, and each case is unique. We cannot control for the complexities that contribute to the case, including the specifics of the charges, the background of the defendant, and the impacts these have on sentencing outcomes. Instead, we use these case studies to highlight common patterns that we have seen in our analysis. Thus, we have combined our findings for both illicit drug and alcohol-related cases, and will discuss some key similarities and differences in the final section of this paper.

Mental and Physical Health as Mitigating Factors

Non-Indigenous Offenders

Defendants' legal teams often justified illicit drugs charges as a symptom of poor mental health. This was the case for personal use charges as well as drug production and drug trafficking. The mitigating factors presented included severe stress, depression, anxiety, grief, and childhood trauma. Defendants were sometimes presented as victims of mental illness who self-medicated with illicit drugs. For example, one case involved a non-Indigenous woman charged with cultivation of cannabis. Her legal representation argued, with written support from a counsellor, that the plants were for personal use, and explained the personal drug use as symptomatic of unresolved grief over her daughter's death, and subsequent depression. Poor mental health was accepted as a mitigating factor by the judge, who said in his sentencing remarks that the defendant *had a difficult life, especially after the loss of your daughter. It seems you found yourself in this situation because of how you've chosen to treat your depression* (Field notes, Case no. 69). The judge's sentencing remarks specifically acknowledge the steps the defendant made to address her depression: *She's getting the appropriate treatment in any event* (Field notes, Case no. 69).

In another case, a non-Indigenous woman was charged with armed robbery and possession of morphine. This woman's defense raised a number of life events which were presented as traumatic and included teenage single motherhood, a history of sexual assault during adolescence, and physical pain symptoms from surgery as examples (Field notes, Case no. 57). The defense narrative constructed her addiction as caused by this trauma, and her robbery offence as an attempt to feed her addiction. The narrative here presented drug addiction as the *ultimate factor* in the offending, with her counsel saying that there was a *spike in seriousness of offences*

due to drug use (Field notes, Case no. 57). However, her lawyers also portrayed the defendant through a positive rehabilitative narrative, saying that she was *no longer drug dependent, [as she] sought help from the nurse* (Field notes, Case no. 57). Her legal team pointed out that she had been free of these drugs for ten months, and that she had sent a formal apology letter to the complainant. The judge returned to the impacts of sexual assault on the defendant's mental health in the sentencing remarks, and saying she was a *victim of rape offences and this has impacted on you* (Field notes, Case no. 57). Accepting the defense case, the judge also referred to the addiction, summing up that the armed robbery was *spur of the moment due to drug addiction* (Field notes, case no. 57). The defendant was sentenced to a prison term, due primarily to the seriousness of the offence as a violent act, however the sentencing explanation made clear that the violence of the armed robbery was understood through the lens of mitigating factors.

Another case observed involved a non-Indigenous man charged with unlawful production of cannabis, unlawful possession of a shotgun, possession of explosives, and possession of a controlled drug (Field notes, Case no. 71). The prosecution presented the defendant as profiting from commercial drug production, pointing out the large quantity of drug found, as well as the elaborate watering system, drying racks, scales, and packaging materials. In contrast, the defense team attributed the drug production charge to others, and positioned the defendant's personal use of illicit substances as the result of poor mental and physical health. His legal team highlighted his PTSD diagnosis and his use of prescribed antidepressants as context for his drug use: *He was self-medicating with cannabis, but now he's back to morphine* (Field notes, Case no. 71). There was an overlap between mental and physical struggles in this case, with the defense team describing the defendant as the victim of a *catastrophic* vehicle accident who would *soon be wheelchair bound* (Field notes, Case no. 71). His legal team attempted to downplay the

commercial aspects of his drug production charges, saying *He allowed his property to be used by others to cultivate cannabis. He would cook, bake, and make cannabis cookies for himself* (Field notes, Case no. 71). The judge in this case did take account of the mitigating factors of poor physical and mental health, describing the defendant as a *complete and utter mess physically* (Field notes, Case no. 71). While the severity of the drug production offense described by the prosecution was acknowledged by the judge during sentencing, the physical and mental health issues were considered inseparable and clearly mitigated the sentence. The judge explained that the custodial sentence was fully suspended *because of your health and only your health* (Field notes, Case no. 71).

Other drug-related cases similarly linked illicit substance charges to disadvantages of poor physical health. One case involved a non-Indigenous man charged with production of cannabis, and his lawyer explained his drug use was to manage ongoing pain. They pointed out that he had been using endone and marijuana due to pain from a work-related knee injury, and then he injured his arm which *then escalated his use* (Field notes, Case no. 59). While we did not observe the judge's summary in this case, we did see the sentence outcome. In that part of the proceedings, the judge explained he was imposing a fine so *that you have the opportunity to stay in the community*. This suggests that the mitigating factors were considered in sentencing (Field notes, Case no. 59). Another case featured a defense that linked drug trafficking charges to debilitating physical health problems and their resultant impact on the defendant's ability to maintain paid work (Field notes, Case no. 55). In this case the charges included both cannabis and methamphetamine, but the mitigating submission focused on the defendant's experience with meningococcal and lupus. Although he was in remission, his lawyers noted that *employers are not sympathetic to sick people* (Field notes, Case no. 55). Other mitigating factors included

disability support pension, limited writing and reading skills, five children, separated after 10 years (Field notes, Case no. 55). While the aggravating factors of this case, namely reoffending, contributed to a 20-month custodial sentence, the impact of the rehabilitative narrative was also noted. The defendant was lauded for having achieved sobriety without professional help – a detail which was brought up in the judge's sentencing remarks possibly indicating some moderation of the sentence (Field notes, Case no. 55).

For the cases above, poor physical and mental health were constructed as mitigating factors which led to illicit drug use and addiction which in turn become key to explaining the defendants' involvement in more serious offending like drug trafficking, drug production or even violent robbery. In other words, offences involving non-Indigenous defendants were presented as the result of drug use and addiction and therefore, strongly connected to the mitigating factors of poor physical and mental health.

First Nations Offenders

In contrast, the legal representation for First Nations people did not raise physical or mental health as mitigating factors. This is despite significant rates of mental illness amongst First Nations peoples (Australian Institute of Health and Welfare [AIHW], 2020) and long standing evidence of poorer physical health for First Nations people than non-Indigenous Australians (AIHW, 2018). In the cases we observed, First Nations defendants were rarely afforded any narrative of disadvantage causing substance abuse and no links to poor mental health were used to justify substance use. For First Nations defendants, their alcohol use was constructed as a personal pathological flaw that prevailed over other concerns.

The links between mental health problems and alcohol use, when they were presented, were not as straightforward as in the narratives about drug use. For example, in a case involving a First Nations woman intoxicated at the time of her offences, her legal representation resorted to labels and made minimal links between alcohol use and factors of disadvantage. In the mitigating submission, for example, the defense said the *client is a deeply troubled alcoholic* and asked the judge to structure the sentence to focus on deterrence (Field notes, Case no. 54). Social and emotional wellbeing were only raised briefly, when her counsellor commented that she was supported by her family despite her alcohol *problem* (Field notes, Case no. 54). The focus of the legal representation was clearly on alcohol use as the key factor in offending rather than the contributing issues of disadvantage. In this case the presiding judge had access to a psychiatric report which did link the defendant's alcohol use to mental health factors and which also indicated some *prospects of rehab* (Field notes, Case no. 54). The sentence outcome for this First Nations woman did not include a custodial sentence, reflecting the judge's explanation: *There are signs she's trying to do something. I intend to give you a chance and leave you in the community* (Field notes, Case no. 54). This defendant's *sad background*, as the judge described, likely did have mental health impacts which the judge would have been privy to via the psychiatric report, but this history was ignored as part of her defense (Field notes, Case no. 54).

Violence and Alcohol

Below we discuss how alcohol use was narrated in the courts without significant contextual explanation, in stark contrast to how we saw illicit drug use presented. In this section we expand on that and explore how alcohol use was discussed in specific ways that directly linked consumption itself with violent offenses. In other words, while personal drug use was

treated as a mitigating factor for more serious drug offenses, alcohol use by First Nations defendants was constructed as an aggravating factor that *led to* more serious violence.

For example, a First Nations man charged with unlawful wounding had problematic alcohol consumption placed at the center of the narrative of his case; this is despite his clear disadvantaged circumstances, his attempts to achieve sobriety, and that none of his charges related to intoxication. The defense counsel explained that *the defendant grew up in a household with domestic violence, and he left that household when he was just 14 as he became a father himself…he witnessed his mother go into a shelter for a period of time* (Field notes, Case no. 70). There were also details included which indicated attempts to curb his alcohol consumption: *At the time of the offense he had a job on a cattle station, which he found after moving to a dry community* (Field notes, Case no. 70). However this mitigating narrative also included the admission that *he is a binge drinker* and that he *sometimes uses cannabis when drinking* (Field notes, Case no. 70). The inclusion of these details in the defense narrative supported the prosecution focus and were reflected in the judge's sentence remarks that focused on the negative ways alcohol impacted the defendant's behavior, rather than the way the circumstances of the defendants life led to alcohol use and subsequent offending: *When you get affected by alcohol, you resort to violence toward women. You have a shocking history of violence toward women* (Field notes, Case no. 70). Even though alcohol use was submitted as related to mitigating disadvantaged circumstances and framed through a potentially rehabilitative lens, it was ultimately constructed as an aggravating factor and as the cause of violent behavior. The sentencing remarks did not indicate consideration was given to the defendant's own experiences of growing up with domestic violence and the impacts that may have on his own behavior.

Alcohol use and violent behavior was understood, in this case, as a personal responsibility or individualized criminogenic pathology, not as an outcome of, or a response to, disadvantage.

The judge's remarks in the case above are echoed in another case of a First Nations man charged with manslaughter. In this case, the defendant's alcohol use was submitted as an aggravating factor by the prosecution, and then reflected in the sentencing remarks as the judge said *He's a product of heavy drinking and violence, violence toward women* (Field notes, Case no. 64). In this case, even the victim, a First Nations woman, was described in negative undertones as *a drunk, intoxicated woman* (Prosecutors' comment, Field notes, Case no. 64).

Public Order Offences and Criminal Histories

Violence and alcohol are often intertwined in public order offences which, as discussed above, are disproportionately brought against First Nations people. We observed only one case involving a non-Indigenous person whose aggravating factors included submissions related to involvement in public order offences. So while a history of public order offences can be presented for non-Indigenous defendants, this was far less common in our observations than in cases involving First Nations defendants, where a history of public order offences was present in all. For example, in a case involving a First Nations man with previous public order offences, his antecedents relating to *assault and street offences* were highlighted by the prosecution (Field notes, Case no. 64). Similarly, in the previously discussed case involving a First Nations woman charged with burglary and assault, her involvement in *street offences* was brought up as aggravating submissions (Field notes, Case no. 54). Public order offences, which had been concluded in the magistrates' courts well prior to the cases we observed, appear consistently in the narratives presented for First Nations defendants. This demonstrates two systemically adverse experiences: first, the systemic racism embedded in public order legislation results in First

Nations people being over-represented in the magistrates' courts for public order offences; and second, the enduring differential impact this has when these offenses are depicted as aggravating factors in the higher courts.

Cooperating with Police

'Cooperation with police' is presented in the higher courts as one redeemable factor in what might otherwise be a long list of aggravating factors. Our observations data however, reflect that this factor was applied differently on the basis of Indigeneity. Non-Indigenous people were explicitly noticed as cooperating with the police whereas First Nations people were consistently presented as non-cooperative. For example, a non-Indigenous man, whose cannabis-production case we briefly discuss above, was positively described by the prosecution for *admitting to the police* that he used and supplied cannabis (Field notes, Case no. 59). Other non-Indigenous defendants were explicitly praised for being *cooperative with police* (Field notes, Case no. 41) and for providing *frank admissions* to the police (Field notes, Case no. 51). Even when submissions for non-Indigenous defendants pointed to lengthy criminal history, the presence of police cooperation in that history was treated positively: *Has a history of cooperating with the police...Pleaded guilty, cooperated with police* (Field notes, Case no. 48).

Importantly, we observed *both* defense and prosecution lawyers raise police cooperation in the narratives they presented for non-Indigenous defendants. When defendants are obliging and accommodating to the structures of the criminal justice system, they are treated positively, even by the lawyers prosecuting the case against them. The racial privilege embedded in concepts like 'police cooperation' appear difficult to detect in the court setting; white Australians are unlikely to recognize that they have privileges in their interactions with police. The same lack of recognition influences the white Australian defense and prosecution lawyers who consistently

treat police cooperation by non-Indigenous defendants positively, without any apparent consideration of the racial dynamics of these interactions (Moreton-Robinson, 2000). Again, we are not commenting here on individual actions but rather highlighting the role that whiteness and Indigeneity play within the structures of the courts.

For First Nations defendants, silence, reluctance to talk with police and fabrications were all considered a *lack* of police cooperation and treated as aggravating factors. In these cases, prosecuting lawyers constructed and formally submitted the defendants' behavior as a lack of police cooperation and therefore, an aggravating factor, and presiding judges then took this factor into consideration as part of their sentence decision-making. For example, we previously discussed a case in which a First Nations woman was charged with violent offences involving burglary and assault. In that case, the presiding judge noted her lack of police cooperation in the sentence remarks: *The police arrested you and you declined to take part in an interview* (Field notes, Case no. 54). Likewise, in the case above featuring a First Nations man charged with manslaughter, although he *had made statements to police*, he provided a false testimony *that the deceased had simply fallen over her foot and hit her head* and then he denied that he had made this false statement (Field notes, Case no. 64). Here, we have a defendant who seemingly cooperated with the police, but this was ultimately interpreted as an aggravating factor because of the false evidence he provided.

Regardless of whether police cooperation submissions were brought up by the prosecution or counsel, First Nations defendants were consistently constructed as non-cooperative. This harkens back to our earlier discussion of the historical relationships between First Nations people and the police. Where First Nations people *are* reluctant to cooperate with police, this likely stems from the long history of over-policing and violence at the hands of police authorities

experienced by First Nations people throughout history (Kerley & Cunneen, 1995). Many First Nations people generally lack confidence and trust in police authorities and avoid interviews with police authorities as a self-protection strategy (ATSISJC, 2002). Certain behaviors, then, are construed as cooperative and constructed as positive characteristics reflecting the prominence and unquestioned status of Western paradigms that in turn permeate the criminal justice system to the detriment of First Nations people (Rowe, Baldry, & Earles, 2015).

Discussion and Conclusions

Our research in northern Queensland's higher courts provides specific observations that further reveal how institutional racism impacts the narratives about First Nations peoples in the criminal justice system. Non-indigenous defendants were generally treated as victims of circumstance, while First Nations defendants were given individualized narratives that blamed their choices. This is a product of systemic, but invisible, racism embedded within the criminal justice system. Critical race theory (CRT) provides a useful lens through which to examine the uneven and inconsistent application of processes such as the consideration of mitigating and aggravating factors (Jeffers, 2019). Our dataset is small, and we do not attempt to generalize our findings but instead look in depth at these cases and the nuance they offer to understandings of systemic racism in the higher courts in northern Queensland.

The defendants who appeared before the higher courts for cases involving illicit drugs during the period of our research were almost all non-Indigenous. In these cases, mitigating factors of mental and physical health problems were used to rationalize personal substance use, along with any related offences. In all the cases involving First Nations defendants, alcohol use was raised entirely as an aggravating factor, without the explanatory context of the mental and physical health issues, even when such issues were present. Thus, we focus here on the

construction of defendants by legal representation and the prosecution, coupled with the ways that the higher courts respond to these constructs through the presiding judges' decision-making. Drawing on CRT, we identify that the initial identification of mitigating and aggravating factors presented to the court and the way they are subsequently used by the presiding judges are examples of "…race-based discretionary decision points" (Jeffers, 2019).

The constructions of personal use of illicit substances and alcohol use are identified through specific narratives supported by formal submissions of aggravating and mitigating factors. These constructions differed on the basis of substance and Indigeneity. The language used to describe First Nations defendants linked alcohol use to violence and overshadowed any potential mitigating factors. Both prosecution and defense teams drew on the stereotype that alcohol use and violence are endemic to First Nations peoples (Brady, 2017). CRT highlights the ways systemic racism is embedded within the legal support offered to First Nations defendants (Crenshaw et al., 1996); even defense lawyers relied on these stereotypes. In reality, despite fluctuations between remote and non-remote residents, the proportion of alcohol consumption by First Nations people is actually lower than the general Australian population (Wundersitz, 2010). Similarly, while alcohol use is a risk factor linked to gendered violence (Bryant & Willis, 2008), First Nations scholars argue that victimization by First Nations men toward First Nations women is not a cultural issue but on the contrary, are consequences of colonization (Atkinson, 2002; Langton, 2015; Lucashenko, 1996).

Despite widespread evidence of intergenerational trauma experienced by First Nations people, and links between such trauma and alcohol usage (RCIADIC, 1991; Wundersitz, 2010), we saw First Nations defendants receive very different treatment than non-Indigenous defendants who were afforded some context to their offending. Specific consequences of colonization

include interrelated experiences of violence, alcohol use, and poor mental health (Wilson et al., 2017). The roles police and the CJS played in colonization means that many First Nations people do not trust either, and this influences how First Nations defendants respond to arrests and court processes. More broadly, the intergenerational trauma experienced by First Nations people can be directly linked to damage brought about by colonization – dispossession from their lands and systemic and institutional racism embedded in legislation and public policy as methods of control (RCIADIC, 1991; Wilson et al., 2017; Wundersitz, 2010).

The lives of First Nations defendants in our observations were narrated in ways that positioned alcohol use, though legal, as a personal flaw that caused violent offending. Rather than beginning the explanation with difficult life circumstances to explain alcohol use and thus provide context for alcohol-related criminal behavior, the starting point of narratives about First Nations defendants was the alcohol use itself. This may be partially a result of the nature of the crime, with the CJS treating violence as a more egregious offense than drug-related charges like trafficking. However, given the context of colonization these courts are situated within, we turn to CRT and suggest that it is also directly related to systemic racism and deeply entrenched racist stereotypes about First Nations people (Delgado & Stefancic, 2017).

Our research highlights the ways racism is subtly embedded in the narratives presented in the higher courts in ways that further perpetuate race-based marginalization. Drawing on CRT, we emphasize that these racialized narratives rely on contemporary stereotypes, and stem from historical processes of colonization. Even though formal structured submissions related to mitigating and aggravating circumstances were submitted for both Indigenous and non-Indigenous people, specific factors were used differently, or excluded altogether, on the basis of Indigeneity. For example, non-Indigenous people were more likely to have their personal use of

illicit substances and subsequent drug related offending explained through mitigating factors than aggravating factors. Many non-Indigenous defendants were positioned as now drug-free and well on the way to being rehabilitated. This factor was extolled by defense teams and presiding judges and contributed to explicitly positive portrayals of non-Indigenous defendants that invoked sympathy and hope. In stark contrast, the narratives constructed about First Nations defendants mostly excluded any mention of mitigating circumstances that contributed to their alcohol use and ignored or modulated any examples of self-help or rehabilitative behaviors. The construction of enduring alcohol use stemming from individual pathology was almost exclusively portrayed as an aggravating factor.

In general, our observations suggest that legal teams created narratives for First Nations defendants that constructed problematic alcohol use as indicative of deviant pathology, previous public order offences as indicative of historical delinquency, and reticence to engage with arresting police as indicative of acrimony.

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