

Culture, Milieu, Phenotype: Articulating Race in Judicial Sense- making Practices

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journals.sagepub.com/home/sls**Irene van Oorschot** *Erasmus Universiteit Rotterdam, the Netherlands*

Abstract

In this contribution, I trace the ways practicing judges articulate, as well as challenge, race. Drawing on an ethnography of everyday practices of adjudication and sentencing in a Dutch, lower Criminal Court, and working with Stuart Hall's conception of articulation, I show how judges draw on three articulations of race – that of culture, the social milieu, and the phenotype – to make sense of individual cases. Emphasizing how and where these articulations of race serve local, pragmatic goals – of individualized sentencing, or of identification of the suspect – I also pay attention to their local impracticalities, that is, where these registers are challenged or resisted. In so doing, I do not only understand race as multiple but also situate race as a pragmatic and local accomplishment with its own uses and instabilities.

Keywords

Culture, disparities, legal practice, milieu, phenotype, race, sense-making, sentencing

Judging with 'Difference'

'To treat like cases alike': this surely is modern law's most worthy and commendable goal. Its realization, however, has proven elusive. Scholars working within Critical Race Theory have pointed to the ways in which the law is a powerful instrument in the perpetuation and legitimation of racial forms of dominance and oppression. The notion

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of intersectionality, arguably the most well-known notion to come out of critical race theory, underlines the importance of apprehending interlocking forms of oppression (race, gender, class, and so on) in relation to each other, as legal categories tend to disassociate certain protected classes of individuals from wider social contexts and disaggregate the individual into separate identities (Crenshaw, 1989; Delgado, Stefancic and Harris, 2012; Razack, 1994). Critical legal scholars, then, have made important strides toward understanding how inequalities structure access to and treatment by the law, how legal forms of understanding and narrating reality silence or gloss over racial inequalities (Razack, 2000), and how the very notion of a liberal (autonomous, isolated) subject is itself a racialized fabrication (Eze, 1997; Mills, 2017). Meanwhile, statistically oriented social scientific approaches to racial discrimination in legal practices point to the continued effects of race on sentencing outcomes (see e.g. Lammy, 2017; Rhodes et al, 2015; Wermink et al, 2012). Taken together, these various approaches demonstrate that race *persists* – even though it too, is frequently an object of disavowal (Bonilla-Silva, 2006) or active forms of silencing, forgetting, and unknowing (Stoler, 2008; Vimalassery et al., 2016).

For practicing judges, I learned doing fieldwork among Dutch lower Court judges, the promise of equality before the law raises problems of a more pragmatic kind. Bringing into practice the ideal of individualized sentencing (Hutton, 2014), judges aim to account for and reckon with the unique ‘person of the defendant’ (*persoon van de verdachte*) and the unique circumstances of the offense. In that context, the question of equal treatment becomes an acute *pragmatic* problem, for how do judges ensure equal treatment in different cases? What makes a unique person similar to, or different from, the next? In that context, the promise of equality before the law raises the question what meanings and consequences judges may attach to what they call ‘differences’ (*verschillen*). Emphasizing that they are not ‘stuck in an Ivory Tower’ and ‘in touch with society’, the judges I encountered liked to emphasize that the courtroom is a space in which they are confronted with different and at times unfamiliar lives, habits, attitudes, utterances, and courses of action. ‘We see people from all walks of life, from all cultures, from all backgrounds’, one judge exclaims, ‘and we try our best to deal with all of that’. Neither ‘difference’ nor ‘diversity’ are neutral descriptors, of course: both evade and suppress the realities of race both ‘before’ and ‘under’ the law (Coates, 2003). Indeed, upon closer inspection, this seemingly innocent notion – ‘difference’ between defendants, or between defendant populations – proved to be pregnant with multiple meanings: judges tended to refer to ‘different cultures’, ‘different social milieus’, and, in the case of ethnic descriptors in police reports, simply ‘different looks’. At the same time, these forms of speaking about ‘difference’ were not without their interruptions, doubts, and hesitations. ‘It’s just, you don’t always know what’s going on’, one judge sighs when commenting on some defendants’ non-committal, seemingly indifferent demeanor in court, ‘Is it because of their culture? Or are they just intimidated or scared?’ Or take another judge, reflecting on a description of the suspect’s appearance as ‘Turkish’: ‘I mean, I sort of have a picture (*beeld*) of a typically Turkish man in my head, but I wonder how it got there’.

In this contribution, I unpack this pragmatic category of ‘difference’, shedding light on the continuing presence of race in judicial sense-making and decision-making practices. Showing how and where practicing judges order and classify defendants in

implicitly or explicitly racial terms, I seek to render visible ways of speaking, as well as *not* speaking, about race as they take place among practicing judges. In situating my account in the Netherlands, I aim to contribute especially to accounts of the way judicial actors, in the absence of an explicit race-discourse, make sense of and articulate race in their everyday practices of adjudication and sentencing. The Dutch context is especially instructive in this regard. In the Netherlands, the denial of legacies of colonialism and slavery is particularly tenacious (Wekker, 2016). Emphasizing its own enlightened and tolerant character, the Dutch self-conception quite readily projects racism historically, onto the scene of the Holocaust ('never again'), spatially, onto the United States ('racism is an American problem'), or demographically, onto the lower classes (Çankaya and Mepschen, 2019; Goldberg, 2006; Lentin, 2008; Slootweg et al. 2019). Tracing these 'afterlives' of race, then, is not only an attempt to situate the articulation of race within judicial practices but also a method of writing against the grain of color-blind, Dutch self-conceptions (see especially Essed and Hoving, 2014; Wekker, 2016).

In the following pages, I first discuss approaches to race in legal contexts. I am especially concerned with the contrast between approaches that take the object of race and treat it as an *outcome* or *product* of legal forms or practices and approaches that situate race as something evoked and produced *within* legal practices. After these theoretical notes, I discuss the ethnographic research on which this piece is based and situate this fieldwork in the Dutch context specifically. Staying with the way judges make sense of individual defendants with help of three different articulations of race (Hall, 1986), this study contributes to an understanding of judicial actors as implicated in the production and reproduction of (various forms of) race. Indeed, in tracing these articulations of race – which are also, as I show, partial disavowals of race – I wish to highlight two dimensions in particular: first, the *multiple registers* in which racial difference is evoked; and second, the *unstable* and *suspect* character of these registers in judicial practices, that is, the ways different conceptions can be challenged, undermined, or rearticulated in court. In so doing I treat race not as a stable presence in these practices but rather as – as Du Bois suggests – a 'group of contradictory forces, facts, and tendencies' (Du Bois, 1940: 67). Then, I move on to a discussion of three commonly used articulations of race: first, the culturist register, second, the register that highlights the social milieu, and third, the phenotypical register. Concluding, I argue that we have to emphasize not only on multiple character of articulations of race in judicial practices but account for their local instabilities and complexities as well.

Race and the Study of the Law

While space does not permit me to provide an exhaustive account of the various approaches to race and the study of the law, I wish here nevertheless to draw out two approaches, showing how the notion of articulation may contribute to the study of legal actors' perceptions and accounts of 'difference'.

In the introduction, I briefly referred to studies of sentencing disparities. These tend to privilege stable measures of race in its operationalization of difference and generally aim to gauge whether this variable is correlated with sentencing severity (e.g. Lammy, 2017; Rhodes et al., 2015; Wermink et al, 2012). Studies of this kind are absolutely crucial to

demonstrate racial discrimination across the board, yet, as a consequence of their chosen statistical methods, they do attribute to race the status of a stable attribute or predicate (see Mascini et al., 2016; Tata, 2007; van Oorschot et al. 2017). In so doing, they understand race to exist, as it were, ‘before’ the law, as an independent variable. Critical race theory, however, points out that legal classifications are precisely active in the production of raced subjects (Coates, 2003). Here, studies of the liberal notion of contract (Mills, 1997, 2017) or legal notions of property (Bhandar, 2014) have made important strides toward understanding the implication of the law in forms of oppression and domination. Race, within these accounts, is recognized to function as a powerful mode to distinguish between ways of living and ‘include[s] a set of hypothetical premises about human kinds (e.g. the “great chain of being,” classificatory hierarchies, etc.) and about differences between them (both mental and physical)’ (Goldberg, 1993). These studies, emphasizing the role the law plays in the production of race, have been absolutely crucial in apprehending law as an agent in the making of ‘people and things’ (Pottage and Mundy, 2004) or indeed the making of people *into* things. However, accounts such as these do not necessarily pay attention to the way race is performed into being within specific legal practices. That is, while they highlight race as a product of legal statutes or legal notions, the precise ways legal actors confront, evade, and articulate race as part and parcel of their everyday practices remains largely unaddressed.

Race in Practice, Race as Practice

Fortunately, however, we find a variety of studies that take up the task of studying how and where race is done as a matter of legal practice that is, the way various sorts of ‘hypothetical premises about human kinds [...]’ and ‘differences between them’ become articulated in concrete, everyday practices. Razack (1994) for instance suggests that the courtroom can be thought of as a space in which white, middle-class forms of demeanor and address are hegemonic, and as such erases raced structures of domination as these affect the lives and experiences of Aboriginal women in Canada. In understanding ‘difference’ in cultural terms – in this case, the preference for ‘looking people in the eye’ or evading their gaze – legal actors erase these realities of race, instead drawing on a cultural explanation that points to other as the divergence from the silent, white norm (see also Carlin, 2016). Johansen (2019), too, shows how judicial perceptions and interpretations of defendants’ emotions take place in relation to various intersecting identities, in which defendants of ethnic origin are often thought to display insufficient levels of humility before the court.

Interaction in court, then, is an important site in which race is articulated. But legal forms of case-construction may also be crucial to the production of race; take for instance a study by Brännström (2018), which shows that Swedish antidiscrimination judgment is a practice rife with different conceptions of ‘race’ and ‘ethnic origin’. Crucially, this study also suggests that neither race nor ethnicity has a stable meaning to judges, suggesting that race itself is a relational and situated category, mobilized at some times, and not others. Indeed, these findings resonate with broader approaches to the question of race that treat race as both historically situated accomplishment. Processes of drawing racial boundaries between selves and others may involve intersecting

social identities (Yuval-Davis, 2010), and social categories may come to overlay others: think, for instance, of the way the category of religion (especially Islam) has become vulnerable to racialization in that it has become tied to certain bodies and bodily practices (and not others) (Meer, 2013). In legal contexts, we can see such slippage between multiple registers of difference when actors attach raced meanings to (subcultural) forms of dress such as caps, gold chains, or hoodies (de Casanova and Webb, 2017; Johansen, 2019).

Crucially, race may also be disavowed, hide from view in appeals to color-blindness, meritocracy, or benign multiculturalism. This disavowal of race realities is, of course, more generally attended to in concepts like ‘white ignorance’ (Mills, 2017) or ‘white innocence’ (Wekker, 2016). However, such disavowal may take place in many ways, in many different sites and settings. Take for instance the way formalized and quantitative models of risk calculation (of crime, or recidivism) are implicitly, but undeniably, shaped by racialized fears or anxieties and in which risk itself becomes a proxy for race (Harcourt, 2010). Or take Hannah-Moffat’s and Maurutto’s (2010) account of the way Aboriginal offenders’ personal histories of racial violence and oppression are translated into more neutral and objective appearing risk factors in presentencing reports – a strategy that renders structural racism invisible and certain racialized realities inaccessible. These studies, then, demonstrate how race is enacted in legal practices, and perhaps especially how it is disavowed or hides from view. For that reason, some have thought of race as an ‘absent presence’: present precisely in its absence, present because it does its work in the periphery of vision – like a specter or ghost making its presence known in indirect, roundabout ways (M’charek et al., 2014; M’charek and van Oorschot, 2019). Drawing on these studies, I wish to unpack the notion of ‘difference’ I encountered in the field, paying attention in particular to its multiple and unstable character.

Articulating Race in Practice

To do so, I turn to Stuart Hall’s notion of articulation (2018[1980], 1986), which I find especially useful to draw out not only the relation and contextual production of race but also its potentially unstable and multiple character. Initially proposed as a way to attend to address the weakness of Marxist analysis in addressing race – in which Marxist approaches race tended to be understood as a superstructural function of the realer relations of production (Hall, 2018[1980]) – the notion of articulation treats race as a relatively autonomous phenomenon: while it may contribute and work in tandem with class-based structures of domination, it cannot be reduced to these. For my purposes here, the notion of articulation is instructive as it draws attention to the productive and contextual character of race in shaping social relationships. Furthermore, the notion of articulation suggests that the making and doing of race is a matter of forging linkages between different elements, and what is linked *here* to produce race is not necessarily what is linked *there*. Nor do these linkages produce seamless wholes: they are not ‘necessary, determined, absolute and essential for all time’ (Hall in Grossberg 1986: 53). As such, the notion of articulation does not quite operate as the notion of ideology would do: it asks, Hall elucidates, ‘how an ideology discovers its subject rather than how the subject thinks the necessary and inevitable thought which

belong to it' (Hall in Grossberg 1986:53). In that capacity, articulation can be read as a performative operation (Butler, 1990), in that it produces the entity it is supposedly 'about'. In the study of race and racialization, this notion productively opens up space to address the situated character of race-making. Emphasizing processes of attribution and categorization rather than stable identities, it is especially well suited to apprehend the way 'social actors [...] actively define, differentiate, and create hierarchies between people' (Çankaya and Mepschen 2019: 628). In that capacity, it can also be used to emphasize the *pragmatic* character of articulation: articulations take place to get something *done*, for instance, to correctly identify a suspect or to understand and weigh his or her seemingly noncommittal demeanor in Court. Indeed, if Visweswaran (1998) argues that the point is not to say *that* race is socially constructed, but to describe *how* it is constructed, that is, understanding the historical conditions which racial categories are produced and made meaningful' (p. 77, emphasis added), I would like to emphasize where and how such articulations serve local, pragmatic goals in practices of adjudication and sentencing. With this notion in mind, then, it becomes possible to unpack the notion of 'difference' the judges are working with, and to ask: where and how do what kinds of 'differences' become relevant to court actors? How do judges evaluate, reflect on, contest, negotiate, or disavow these 'differences'? And how, in so doing, is race articulated?

Methodological Considerations

This exploration of the different forms 'difference' assumes in judicial work practices is rooted in extensive ethnographic fieldwork in a Dutch lower court. I gained access to the Court in 2013, after a rather lengthy procedure in which both the court itself and the Dutch Council for the Judiciary (Raad voor de Rechtspraak) were involved.¹ In Spring 2013, then, I started reading case files, conversing with clerks and judges, observing court sessions, and importantly, started 'shadowing' judges (see for shadowing as a technique also Halliday et al., 2008). This concretely entailed that I read the case files of the judges' appointed cases, which cases involved minor cases of petty theft up until cases of assault and domestic violence; sat next to the judges when they were working on and with these files prior to the court session; and again sat at the judicial bench (properly attired in robe and bib) during the court session. In so shadowing 14 judges, I was able to trace the development and unfolding of roughly 250 court cases from case file to judicial decision. These case-based conversations usually started out as case-specific discussions of the case in question but tended to veer off in different directions quite organically, hence making way for more extensive reflections on various themes. Aside from these case-based conversations, I also joined a 3-day training course for prospective lower court judges organized by the court and made it a habit to socialize with various members of the court – administrative personnel, clerks, and judges – over lunch in the Court's cafeteria.

The approach taken throughout this ethnographic project was characterized by a focus on the practical, ongoing, and situated character of judicial 'case-making' (van Oorschot, 2018, see also Scheffer, 2011). Emphasizing that legal work is as much a practice of navigating sentencing philosophies and reasoning as it is a more mundane practice of

shuffling documents and talking with defendants, the project aligned itself theoretically with the idea of social and legal life as an ongoing accomplishment (see e.g. Dupret, et al., 2015; Garfinkel, 1967; Tata, 2020). It sought to carefully trace the ways judges make sense of cases and defendants not by assuming a central axis of difference – for example, by comparing and contrasting cases involving White versus non-White defendants, or defendants ‘from different cultures’ – but rather sought to stay with the ways judges perceived and constructed cases (van Oorschot 2014, 2018; van Oorschot and Mascini 2018) as well as ordered cases and individuals as similar or different (see also Mascini et al., 2016; van Oorschot et al., 2017). As such it was concerned with judges’ ‘lay ontologies’ (Durrheim and Dixon, 2000), that is, vernacular understandings of the way things are and have to be for them to get their job done.

Precisely by staying with these vernacular categorizations, I also came to realize that while judges at times seemed comfortable commenting on certain ‘differences’ in appearance, or in terms of defendants’ ‘cultural backgrounds’, I also encountered limits to their readiness and ability to speak about ‘difference’. Some of my follow-up questions, for instance, seemed to run up against not only a professional self-conception of neutrality (‘I don’t comment on these kinds of speculations’) but were also met with embarrassment and discomfort. I realize that my role as a researcher may have contributed to this unease; at the same time, this unease contrasted sharply with the judges’ overall readiness to discuss their work with me, so I tend to believe it was specific to the subject matter of ‘difference’. Of course, such affects are acutely informative; not necessarily because they are suggestive, perhaps, of well-kept secrets the researcher may then reveal but rather because they point to the presence of pressing ambiguities and unresolved tensions (Boersma, 2019; Çankaya and Mepschen, 2019). Tracing their articulations of race, then, is to include into these articulations the possibility that certain things may pointedly *not* be said or *go without saying*. Indeed, Stoler alerts us to forms of *aphasia* – an inability to speak, find a language – that are so characteristic of colonial forms of knowing and speaking (2016). Moreover, these affects may be accounted for in part, too, by the fact that the judges I grew familiar with over time do justice against a societal background characterized by ongoing debates over citizenship, Dutchness, and cultural, religious, or ethnic Others (see e.g. Mepschen et al., 2010; van Reekum, 2014; Wekker, 2016), as well as against a background of emerging debates about discrimination in practices of police surveillance and investigation (Çankaya, 2015; Rodrigues and van der Woude, 2016). Meanwhile, the judiciary itself remains predominantly made up of ‘autochthons’ or Dutch native borns, which predominance was reflected in the composition of the group of judges I worked with. These societal debates hit close to home when, in 2012, the Dutch Jurists’ Magazine published a controversial study suggesting that lower court judges punish ‘foreign looking’ defendants more harshly than Dutch-looking defendants (Wermink et al., 2012). As my fieldwork took place during the aftermath of the aforementioned, highly publicized study into sentencing disparities between foreign-looking and Dutch-looking defendants, this piece can be read as documenting a historical moment in which ‘difference’ became a particularly pressing and troubling matter of concern to judges, as well as a more general attempt to trace the afterlives of race in a postcolonial setting characterized by specific forms of forgetting and unknowing.

On Moroccan Confessions and Angry Antilleans: Race-as-Culture

The first salient register judges draw on to make sense of ‘difference’ is the culturist register. Throughout my fieldwork, judges would quite readily and comfortably speak of cultural differences as factors they need to ‘take into account’ when they speak with individual defendants. They tended also to map ‘different cultures’ onto different ethnic groups, especially the Turkish, Moroccan, Surinamese, or Antillean minorities in the Netherlands (the first two minorities tend to have a labor migration history in the 1960s and 1970s, while the last two groups have migrated to the Netherlands from the former colonies Surinam and the Dutch Antilles Aruba, Bonaire, and Curacao). ‘Culture’, to judges, functions as a way of accounting for and understanding communicational ‘differences’ in court and defendants’ ‘process attitude’ [*proceshouding*] more generally. Turkish and Moroccan defendants, for instance, tend to be understood to be especially concerned with a sense of ‘honor’. This sense of honor, judges point out, translates in court into forms of equivocation, that is: speaking in half-truths or moving between partial confessions and demonstrations of their innocence. To judge Laney, defendant Jalal’s ‘process attitude’ [*proceshouding*] is a case in point. This defendant had been accused of criminally insulting a police officer (a punishable offense in the Netherlands). A brief excerpt from my field notes is suggestive of defendant Jalal’s ‘equivocations’, but also, and especially perhaps, of judge Laney’s growing irritation with the defendant’s words:

Judge Laney: So, have you indeed insulted this police officer?

Defendant Jalal: Well what can I say? It was all very stupid.

JL: You’d been drinking, right?

DJ: Yeah, I had a few. And those cops were just messing with me, getting up in my face . . .

JL interrupts: And does that happen more often?

DJ: No, not at all.

JL: Yes it does. I see you’ve been sentenced for an insult just like this before, have you not?

DJ, confused: well, that’s in the past, isn’t it . . .

Having discussed his personal circumstances, defendant Jalal is given the chance to address the judge one more time – standard procedure in Dutch Courts. There, he again points to the police officials’ confrontational demeanor:

DJ: So I’ve got to be honest, I’ve been stupid. But those cops were really bullying me. And they’ve told their little story and I haven’t even been able to tell mine. It was just stupid. I wanted to say sorry but that one cop isn’t here today. And they’ve really made use of the fact I was drunk, just so they can charge me a fine.

Judges tend to be impatient with such demonstrations of equivocation; indeed, research on juvenile delinquents suggests that legal actors in the Netherlands feel better equipped to deal with a direct challenge to their authority – perceived as egalitarian and native ‘Dutch’ – than with what they perceive to be Moroccan and Turkish defendants’ more vacillating narratives and listless presence in court (Weenink, 2009). Another way

in which Turkish and Moroccan culture informs their ‘process attitude’, judges explain, is in defendants’ attempts to deny the charges, even in cases with a wealth of condemning evidence: ‘*He* knows he did it, *I* know he knows he did it, but he’s never going to *say* he did it’, one judge explains. It is in this register that a particular joke I heard a few times starts to make sense:

Question: What is a ‘Moroccan confession’?

Answer: It’s when a Moroccan defendant doesn’t file for appeal immediately after your verdict!

Suggesting that Moroccan defendants only express their guilt by not filing for appeal, this joke highlights the taken-for-granted notion that Moroccan defendants are particularly prone to deny the charges, no matter the evidence.

Other minority defendants are seen somewhat differently. If Moroccan and Turkish defendants are seen as evasive and prone to equivocate, defendants from the Dutch Antilles may be conceived as *aggressive* when they offer a counter narrative to that of the public prosecution or challenge the alleged facts, leading Judge Peters for instance to correct a defendant’s demeanor saying that ‘*I* am the boss here, you understand?’ Hindustan defendants, meanwhile, are usually understood to be overtly formal and deferential to the court: ‘They dress well, in their best clothes, suit and tie [*jasje, dasje*], “Yes Sir, no Sir”’, Judge Fielding characterizes their demeanor. It is a deference, however, that may lead them to be perceived as inauthentic and hard to ‘read’ – a problem for judges, as they are interested, too, in the way individuals see themselves and their own actions, especially in the light of the question whether the defendant is sufficiently and authentically remorseful (see Rossmann et al., 2018; van Oorschot et al., 2017).

As these observations show, culture is here understood to function as a cognitive and behavioral schema informing the way people feel, act, and speak. These ways of feeling, speaking, and acting can be contrasted with a silent norm of Dutch, native demeanor that emphasizes frank, direct communication (not: equivocation or inauthentic deference) and a healthy anti-authoritarian spirit (but not: aggression). Culture, to judges, is moreover something that individuals carry with them, wherever they go, and is ‘expressed’ in Court as a matter of defendants’ ‘process attitude’. Not only do these notions resonate with broader notions of Dutch identity as shaped by egalitarian, frank communication (‘we say it like it is’, see especially van Reekum, 2014), but they are also informed by a variety of social scientific knowledges. Indeed, I was to learn that judges have the option to attend post-vocational training days in which they are taught about ethnic minorities in the law.² These courses, titled ‘Turkish and Moroccan People in the Practice of Law’ and ‘Antillean and Surinamese People in the Practice of Law’, draw on a wide variety of criminological and social-psychological knowledges that suggest that certain forms of deviance (honor related violence) as well as certain forms of interaction (especially evasive behavior) are to be understood as rooted in offender’s ‘culture’ (see Studiecentrum Rechtspleging, 2012a, 2012b). Moreover, one of the pieces in the course literature – the book ‘Moroccan Sweethearts’ by cultural anthropologist Werdmölder (2005) – explicitly understands culture as ‘collective mental programming’ (p. 56) and gives voice to the suggestion that ‘the only thing they [Moroccan youth] really understand

is a repressive approach' (p. 36), *not* the supposed 'typically Dutch' emphasis on rehabilitation. It goes without saying that this account of 'their culture' is pretty damning: not only does it seem to elide the possibility that a Moroccan defendant really didn't do it. It also understands emotions such as upset, confusion, or anger as direct expressions of culture, in so doing not only erasing the possibility of agency but also attaching punitive consequences to such forms of communication in court.

Precisely in this capacity, this notion of culture is one way to articulate race. Accounting for and explaining observed 'differences', the notion of cultures operates in precisely the same way as race may once have done. Supposedly immutable, rooted somewhere inside the individual, culture assumes the tenacity and durability of 19th-century conceptions of race, which similarly treated individual tendencies as expressions not as born out of the freedom of a (white) liberal subject endowed with moral reason (see Eze, 1997) but rather as the nonvoluntary expression of certain passions and instincts. In precisely this sense, culture is not a move *away* from race but rather an *articulation* of it (Visweswaran, 1998). It is important to situate this articulation of race more specifically in a Western context, within which culture became an increasingly dominant register in which to articulate race (Balibar and Wallerstein, 1991, but see also Durrheim and Dixon, 2000). In the practices of these judges, this articulation of race allows them to make sense of defendants' 'process attitude' – but as we will see, only up to a point.

Indeed, while this culturist register resonates with a wider social context, judges do in fact display significant measure of discomfort with these culturist notions. The joke about Moroccan confession was related to me with a mirth that was almost defensive; defensive, even though 'this is how we experience it', judges also know very well that they cannot assume guilt from the start. Crucially, however, the notion of culture is also awkwardly positioned vis-à-vis the emphasis judges place on individualized sentencing (Hutton, 2014), that is the attempt to 'tailor' their sentences to the unique 'circumstances' and 'person' of the defendant. Culture, within this specific problematic, assumes a double role: on the one hand, culture offers itself up as a means by which to cater a sentence to an individual, for instance when it is suggested that rehabilitative options are not suitable for a Moroccan defendant, or when judges feel the defendants' 'culture' excuses his or her equivocating behavior in court. At the same time, judges express discomfort with this register as well: 'You always have to be careful not to lose sight of the individual *behind* the culture', one judge comments, and different styles of communication in court may also be a consequence of unfamiliarity with courtroom procedure or emotions. To iterate the words of one judge: 'You don't always know what is going on'. Culture, then, is both a lens onto the defendant – a tool to see him more clearly – but also something that may conceal his or her real 'person'. Culture-as-race, then, functions both as a lens and a veil (see Mitchell, 2012).

Secondly, judges may also contest this culturist register in cases where the realities of discrimination and racism are too difficult to avoid. Especially when it concerns cases of fraught or escalating interactions between defendants and police officers (e.g. disorderly conduct or assault of a police officer), judges tend to have eye for the lived experience of racial profiling and the situational dynamics of escalating interactions between police officers and defendants. Commenting on a case much like Jalal's, Judge Starr for

instance zoom in on tensions between ethnic minority youth and police officers rooted in ethnic policing practices:

‘Well, the bigger issue that plays a role here is also of course the fact that many Moroccans feel they’re treated badly by the police. Meanwhile we know the police does in fact seek out certain groups, people with a bit of a color.’

Indeed, other judges too may point to these lived realities of marginalization and persecution, often in connection to, or in explicit contrast with, the issue of ‘cultural diversity’. Here, judges echo more recent concerns with ethnic profiling (see e.g. Çankaya, 2015; Rodrigues and van der Woude, 2016), explicitly contesting the culture concept and its use in explaining crime. On the one hand, then, race is articulated and solidified with the help of a culturist register, in which individual defendants come into the court culturally programmed, as it were. On the other, this register is not necessarily all encompassing or stable: it can only imperfectly evade certain racial realities (of racial profiling, for instance), nor does the appeal to culture necessarily help judges get a ‘clear picture’ of the individual defendant. Culture, however, is not the only articulation of race.

‘Problems in All Areas of Life’: *Race-as-Milieu*

A second, prevalent way of understanding – and contesting – ‘difference’ is in the register of the *milieu*. This milieu-talk is evident in the way judges comment on individual defendants as well as on the ‘kind of people’ they deal with in their everyday practices. Indeed, the individual defendant is often conceived as a member of a kind or type (van Oorschot et al., 2017; Tata, 2007). Take for instance Judge Peters comments on a drug-addicted defendant: ‘Types like this, they’re just permanently stoned. They use it [marihuana] in their morning cigarette’. Or take Judge Masons commenting on a case of domestic violence by stating that ‘had my husband hit me, I’d be in my car, crying of course, but on my way to never come back. But it’s different for certain kinds of people. Some are just used to people being hit around you’. In this context, the notion of the social milieu provides these judges with a helpful cognitive shorthand to understand and account for these differences. ‘Looking at these cases you can’t escape the impression that some people are from *such* a different milieu’, one judge relates to the researcher.

Tracing the way this milieu concept operates in these practices, it becomes evident that it offers judges a particularly flexible way to speak of the relationships between certain bodies and certain spaces, for example, the marginalized delinquent and certain urban spaces. However, ‘milieu-talk’ tends to incorporate ideas about people’s lifestyles, attitudes, and expectations as well. It encompasses a complex of interacting factors. Judges may point for instance to personality disorders and learning difficulties, low educational attainments, traumatic migration histories, a lack of employment, living in impoverished and dilapidated areas, living among people engaged in illicit activity, and so on. Take for instance Judge Kingsley, who accounts for crime in reference to the complexity of today’s bureaucratized society as well as people’s social biographies:

‘Our target group has many problems, in the sphere of finances, relationships . . . Often they have traumatic experiences in their pasts, abuse and so on. [. . .] Society is just so complex. How to survive? Applying for social security, filling in forms, checking policies and regulations, paying taxes . . . it is just too difficult for people. Often, they can’t read or write. They’ve got problems in all areas of life.’

This complex of interrelating factors, taken together, produce a certain ‘milieu’. To judges, this milieu is rather ‘sticky’; if class may be transcended, the milieu more directly binds people to specific spaces and life trajectories. It understands bodies to be materially and affectively connected to their material and social environs. In this sense, it is close to the way Foucault understands the milieu: the milieu is ‘a set of natural givens – rivers, marshes, hills – and a set of artificial givens – an agglomeration of individuals, of houses, et cetera. The milieu is a certain number of combined, overall effects bearing on all who live in it’ (Foucault, 2007: 36). Emphasizing the materiality of bodies and their enmeshing in certain physical and social spaces, Foucault’s conception of the milieu resonates with the way judges conceive of it. And in this capacity, the milieu is quite unlike ‘culture’, in that the notion of ‘culture’ assumes a prime mover – people’s cultures – whereas the notion of the ‘social milieu’ connects a multitude of problems without necessarily zooming on any one particular cause: in the words of one judge, they have ‘problems in all areas of life’.

I mean, they live in areas where everything is broken, where people around them are also involved in petty crime, in which it isn’t that strange to deal some drugs for a while or steal something you’d like to have for yourself,

another judge comments. The milieu, then, is effective and affective: it shapes people’s purposes in life, as well as their orientation vis-à-vis property and the good life.

It is important here to note that this notion of the milieu is not, superficially at least, a racial category; I have heard judges refer to the urban poor in specific marginalized neighborhoods as constituting a specific ‘milieu’. Zooming in on this notion, however, demonstrates that it implicates especially specific geographic spaces, specific patterns of movement, as well as forms of cultural and physical reproduction. Take for instance Judge Kingsley, who comments on a defendant of Antillean descent. In the following passage, Judge Kingsley seamlessly switches from a more general understanding of underprivileged milieus to one that would be specific to Antillean defendants. Pointing to the parole service report of this specific defendant, he suggests:

Look, [citing from parole service report] ‘limited cognitive ability’ . . . A colleague told me a few days ago, well, they [the Dutch Antilles] are after all islands, they all sleep with one another. These are problems rooted in incest [sic].

Drawing together not only structural constraints, personal experiences, but also geography and genetics, Judge Kingsley’s understanding of the ‘milieu’ testifies to its raced character. On the one hand, it locates the source of problematic behavior partially in today’s complex, bureaucratized society. Yet it also includes an explicit concern with

geography and genetics, pointing to the influence of descent and biology in shaping people's possibilities in life and responses to adversity ('limited cognitive ability'). Arguments like these may also be mobilized to connect the practices of endogamy or cousin marriage found in certain Moroccan-Dutch or Turkish-Dutch communities on the one hand and mental illness, deviance, and antisocial behavior on the other. There, too, cultural practices, individual pathologies, and structural constraints work in tandem to produce a milieu that is difficult to escape.

The point of milieu talk, then, is less to suggest an etiology of crime but rather to point to its *ecology* – and the impossibility of neatly separating between structural, genetic, or temperamental 'causes'. In that capacity, it can be seen to excavate from history the relatively fluid, Hippocratic humoralist conceptions of race typical of pre- and early colonial times. These notions tended to connect 'climates and constitutions' (Harrison, 1999), suggesting that human bodies are 'humorally', that is affectively, enmeshed within specific spaces (often understood as climates). Unlike the more static categorizations that would come to prevail in the 19th century, this humoralist conception of race treats individual bodies and their tendencies (temperaments) as irreducibly shaped by the physical environment. In this mode of articulating race, race is not so much a matter of people sharing a determinative genetic makeup or cultural code but rather emerges at the interplay of specific humoral types and environments. It is against this background that the complex of factors hiding in the category of the 'social milieu' becomes legible as a form of articulating race.

Such differences in *milieu*, to judges, may be of relevance to thinking about the most desired punishment modality (community service, a fine, or detention) for individual defendants. Judge Jamison reflects on prisons sentences for those from a specific milieu: 'Of course, *we* would balk at our freedoms being stolen from us, but those people are from a milieu in which people don't find that all that bad'. Here, this milieu-centered articulation of race is instrumental in legitimizing punitive sentencing options; after all, it is not as if these punitive options are *experienced* as punitive for people from 'a certain milieu'. At the same time, this milieu talk is only partially efficacious in getting things done. The most important problem associated with it, to judges, is the fact that whatever milieu a defendant may be from, it is also desirable for him or her to 'take responsibility' and 'show remorse' (van Oorschot et al., 2017; Weisman, 2014). So even though 'It's not right what they do', Judge Jamison suggests that

it also partially just *happens* to them. There's always some reason: people just aren't that intelligent, have not had many opportunities in life, or have to struggle to leave their background behind.

The milieu, then, paradoxically takes away people's agency – they are a product of a specific milieu – while it at the same time calls for the taking of responsibility: perhaps the milieu can be transcended after all. In such cases, judges may opt for a (partially) conditional sentence, in which one of the conditions may be that defendants follow an aggression regulation course. In such cases, the court issues an invitation, backed by force, to 'take responsibility' for managing the dysregulated passions of one's bodies; to govern, in other words, the self (Rose, 1990).

'Look, a Hindustan!': Race-as-Phenotype

A third salient articulation of race in these practices, I suggest, is judges' routine use of phenotypical markers in their interpretation of the description of suspects in police reports. This dimension of legal practices is controversial (Walker, 2003) yet has received attention mostly as a matter for cognitive psychology (see e.g. work on the 'cross-race' effect in witness testimony, Sporer, 2001). These descriptions are important not only for investigatory actors who may use them as clues in the investigation but also for judges who may have to judge whether or not a suspect description was sufficiently specific to warrant certain procedural steps (an arrest or a search, for instance) or the conclusion that the accused was, in fact, the person a witness or victim identified as being the offender. A typical example is the following, taken from a process-verbal of a victim's account of her assailant's appearance:

'Short stature, maybe 1.70 cms
 Black puffy jacket with faux-fur hat, sneakers
 Dark hair, short, gelled back
 Hindustan'

The common use of such phenotypical suspect descriptions raises important political questions about ethnic profiling; it is not difficult to see how such suspect descriptions, especially when they start to circulate in society, may further criminalize already marginalized populations. However, I want to draw attention to the local, pragmatic instability of these forms of making differences, and the problems these instabilities raise for judges and other legal actors.

For one, while this description does not, crucially, describe the suspect's skin color, it nevertheless understands difference to be something on and of the body, a matter both of certain urban-style forms of dress ('black puffy jacket with faux fur hat') as well as ethnicity ('Hindustan'). As I've discussed, the use of *ethnic* categorizations of appearance is relatively common in the Dutch context, and especially the categories Dutch, Turkish, Moroccan, Antillean, Surinamese, and Hindustan, both in public debate as in social scientific research (see Essed and Nimako, 2006; van Reekum 2014). While the use of such ethnic categorizations is notoriously imprecise, the imprecision of such categorizations is not necessarily taken to be a problem in this context; in many cases, legal actors simply assume that witnesses, victims, and police officers categorize people in similar ways. This articulation of race, then, does not entail substantive ideas of human behavior but rather takes as its object of legibility and difference the surface of the body. Crucially, this is not solely or uniquely a matter of the skin – as epidermal definitions of race would have it (Gilroy, 1998) – but rather of the *phenotype*. The phenotype, here, is an assemblage of things and materials on the body, for example, style of hair and clothing, and points to the body as being from somewhere else, as it being out-of-place (M'charek, forthcoming). Importantly, this mode of articulating race comes with its own understanding of how 'seeing' and 'witnessing' take place: race can be seen at a glance, and as such has an immediate (unmediated) reality visible to anyone. Of course, this immediacy and legibility is itself an historically situated accomplishment,

contingent upon (post)colonial regimes of knowledge and vision: Gilroy warns that the seeing and recognition of race requires a trained 'sensorium' (1998). This supposed immediacy and legibility, of course, is attended to most famously by Fanon's account of being recognized at a glance as other: 'Look, a Negro!' (1986 [1956]).

At the same time, suspect descriptions, articulating race as a matter of the phenotype, may be treated as precisely that: *suspect*. For significant anxieties seem to surround their routine use and production. We find traces of these anxieties in written testimony and the police officers' descriptions. Not only are these hardly standardized (descriptions may variously speak of 'Turkish appearance' or 'Turkish background') mysterious phrases like 'a Turkish expression' [sic!] also testify to investigatory actors' unease with their own use of these categories. Alternatively, police officers may even ask defendants to describe *themselves* as a way to go about generating a possible 'match' between the victim's or witness' description and that of the suspect himself or herself.³ In their hesitating formulations, these documents testify to the fragility inherent in the way the suspect descriptions make relations between the individual (the suspect) and the collective (the ethnic group) (see M'charek, 2010); they also testify to the awkward and fraught character of the phenotype as a folding together of certain (sub)cultural preferences as well as categorizations of bodies according to history and geography (ethnicity) under the name of a suspect's 'appearance'. In that capacity, these documents testify, too, to a set of anxieties that the colonial archive seeks to suppress but cannot quite escape (Stoler, 2008).

Sometimes, these suspicions with regards to the phenotype raise to the level of the explicit in court as well. In the case involving the aforementioned suspect description, for instance, a lawyer successfully contested the victim's and witness suspect description by arguing that his client – someone with a Hindustani background – could have been mistakenly picked out as the culprit, which mistake was all the more plausible as there were doubtlessly much more people fitting the description in this urban-style night club. Here, the suspect description was deemed *too generic* to adequately identify the suspect (see also Walker, 2003). However, such descriptions may also be challenged as being *too specific*. In yet another case, for instance, a suspect description that included the phrase, 'Turkish appearance', was contested by the defendants' lawyer. The police officers apprehending his client, he argued, had acted on the basis of the suspect's description they had received from their colleagues. While this description included various bits and pieces of information like the length of the defendants' hair, his stature, and probable age, the lawyer raised an important question about the non-innocence of visually classifying people on the basis of their appearance: 'Precisely *on the basis of what expertise*', he asked provocatively, 'do these police officers categorize my client as Turkish?' In so doing, the lawyer complicated the articulation of race as phenotypically legible on and beyond the surface of the individual body. Evoking the possibility that 'seeing' the phenotype accurately is not a simple or straightforward matter but rather something rooted in specific forms of expertise (one does wonder what these forms of expertise may be, though), this lawyer managed to cast doubt on the officer's decision to stop and search his client. In this case, this proved a successful strategy: the judge dismissed the charges, albeit, in his own words, 'begrudgingly'. On the one hand, then, this form of seeing the phenotype is taken to be stable enough to merit investigatory action – an

arrest, a stop and search – while on the other, the instabilities inherent in such forms of seeing may be evoked to rear their head in court. As such, these contestations of the phenotype in court demonstrate their inherent instability.

Suspect Presences, Ambiguous Absences: Toward a Sociology of Ghosts

In the previous pages, I have attempted to trace the multiple character of race as it is articulated in judicial practices. To sum up, judges regularly use the notion of culture to understand certain forms of communication or defendants' 'process attitudes'; in so doing, culture is a mode of attributing to certain group fundamental, inalterable differences in habit and thought that become expressed in and through action. In so doing, this culture concept operates functionally as race. It also serves local goals, in that it helps judges to render intelligible certain actions they conceive to be 'outside the norm', and as such – their suggestion – helps them to 'see' the individual and tailor their sentence accordingly. Culture-as-race, then, functions as a lens onto the unique person of the defendant. At the same time, culture-as-race may also present itself as a screen, standing between the judge and the defendant, rendering their grasp of the unique defendant more tenuous (Cf. Mitchell, 2012). Moreover, this understanding of culture may also be ruptured by an understanding of the often tense and fraught interactions between police actors and certain minorities, which awareness further destabilized this register of sense-making. Secondly, the often evoked notion of the 'social milieu' is saturated with notes on geographical isolation, genetic selection, or a cultural penchant for cousin marriage and endogamy – bringing to the surface a concept of race that excavates, and draws on, humoral–environmental understandings of the relationships between bodies, places, and temperaments. On the surface, this notion incorporates references to marginalization and lived experiences of inequality, yet it remains a politically suspect register, in that it treats the milieu as a sticky, pervasive force that cannot quite be escaped: just when you think you are out, it pulls you back in . . . This register, too, also contrasts with the judicial emphasis placed on 'taking responsibility', and in that capacity may be evoked only to be disavowed immediately: the defendant still has to better himself or herself, still has to find a way to manage his or her temperament. Last, while phenotypical markers such as a 'Turkish appearance' have a common-sense obviousness to many investigatory, prosecutorial, and judicial actors and rely on a conception of race as immediately legible on the body, these markers may also be problematized and contested in Court as being too specific or too generic. Questions may also be raised about the 'visual expertise' necessary to correctly 'read' these markers, further underlining the instability of the register itself – because upon what racialized forms of seeing and witnessing is it based anyway? As such, these three registers show that race is, as Du Bois has it, indeed a 'group of contradictory forces, facts, and tendencies' (1940). But they also show that these articulations of race serve local, pragmatic goals – to see the individual defendant clearly, to identify him correctly – and that they come with specific instabilities.

Of course, this account clearly rebuts any self-serving appeals, on the part of judges, to color-blindness. Even though biological race may not be the first or primary register in which judges conceive of individual defendants, shades of its biological dimensions

persist in their use of the milieu concept, which so readily includes notes on geographic isolation or a cultural–religious emphasis on endogamy and their genetic consequences. But race escapes these narrow, biological confines: it is variously articulated as ‘culture’, and certain styles and forms of dress coproduce certain defendants as, for instance, ‘Turkish-looking’. Precisely in this shape-shifting capacity, race persists. But that does not mean race always takes the same shape and operates in the same way everywhere. Articulations take place within specific problematics and settings and draw on specific histories. The vernacular of the milieu especially is a rather typically Dutch notion, and its social history remains to be written. In this analysis, it functions as an supposedly respectable, civilized mode to speak about and understand ‘difference’ (even though references to incest should give us pause), and in that capacity seems to be particularly middle-class, Dutch way to situate oneself vis-à-vis racialized realities of marginalization without having to mention or think about discrimination. Last, the use of ethnic denominators, rather than categories such as ‘Black’ or ‘Hispanic’ in suspect descriptions also distinguishes this practice from others, in which vernaculars about race and appearance are articulated perhaps more explicitly (although there, too, questions about the historical situatedness of ‘seeing race at a glance’ remain).

Although the ethnographic character of the data gathered in this project does not lend itself to drawing solid conclusions about whether these differences exert uniform, overall influence on sentencing severity, these findings do raise important questions about social justice. Given a cultural lens onto both crime and communication in court, do judges sufficiently entertain the possibility that a Moroccan defendant really didn’t do it? Indeed, while culture-talk may strike some as relatively benign, its emphasis on culture as an immutable, fixed characteristic barring truthful communication between judge and defendant should pause the reader. And are we equipped to recognize and think through the implications of connecting deviance and crime to the sticky notion of the ‘social milieu’, with all defeatism that entails not only about people’s capacity for self-governance and self-improvement but also about the possibility of ameliorating structural conditions? And is it desirable, given a wider societal context in which crime and deviance are projected onto ethnic Others, that phenotypical markers feature so often in suspect descriptions?

Reckoning with Ghosts: A Note on Affects in the Field

Tracing these articulations of race, in my experience, has also been an effort to uncover those things that are not said, or only said with embarrassment, a sense of anxiety. This is an observation not only reflective of ‘white innocence’ (Wekker, 2016) but also one that creates a specific set of methodological challenges as well. That is, it takes a specific awareness of not only to histories of colonial knowledge production and power but also requires practically a willingness to allow one’s own interactions with legal actors to become, or remain uncomfortable, as well as to dwell in that discomfort and allow oneself to learn from it (Boersma, 2019). Asking judges further questions about what they understand as ‘differences’ also meant staying with and wading through affects such as discomfort, embarrassment or perhaps even shame on the side of the judges I worked with – some of whom felt easily attacked, or some of whom found it difficult to respond

to recently publicized concerns that they punish certain groups of defendants more harshly than others. I learned that to stay what difference is and does in these practices I had to develop a certain methodological sensitivity to what I've come to call the ghosts that haunt a practice. I realized that the promise of equal treatment within a society that is increasingly understood as becoming 'super-diverse' creates a set of anxieties and problems judges did not always feel equipped to deal with explicitly.⁴ How, in other words, to *judge with difference* is, for judges, an acute and pragmatic question. On a practical level, the law's promise of equal treatment continually poses and fails to answer the question: when is different different *enough* to merit different treatment? What differences are *allowed* to matter? While these concerns may not always rise to the level of explicit attention, race nevertheless haunts these practices as a question, a calling, and perhaps an indictment. Both methodologically and conceptually, then, the topic at hand requires an approach to social life that is sensitive to both jokes and silences, to the said and the unsaid, to race as a *suspect presence* and an *ambiguous absence*.


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Notes

1. The Court and the Council for the Judiciary had few concerns with regard to the content of the research project (although they did find my ethnographic jargon somewhat 'vague') but did at the beginning express doubts about the feasibility of the project, citing the rather time-intensive character of the research method I had proposed (ethnography). Emphasizing that my ethnographic focus would be on shadowing, and hence not significantly interrupting, judges' everyday work I could fortunately assuage these fears. Of course, all personal data, from clerks, to judges, to defendants, were and are treated with confidentiality and properly anonymized in these published materials.
2. Sources in criminal justice tell me that these courses have recently been discontinued and replaced with courses on multiculturalism and the law. At the time of my fieldwork, they were still being organized. Back then I explored whether I could attend these as a researcher, but the organization did not allow me to join in and observe. It cited the importance of judges being able to frankly discuss these matters as its overriding concern in barring me from attending.
3. Defendants may not readily understand these questions as pertaining to their appearance; in one case, a defendant answered the question how he would describe himself saying, 'I don't know, I'm usually a nice and quiet person?'
4. See also (M'charek et al., 2014; M'charek and van Oorschot, 2019) on the notion of hauntology in relation to race in forensic, DNA phenotyping practices.

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