RACE and RACIALIZATION

essential readings

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CHAPTER 31

THE CRIMINALIZATION OF INDIGENOUS PEOPLE

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THE IMPACT OF POLICING ON OFFENDING

The police role is the one most directly connected to the production of knowledge about offending patterns of individuals or groups. In most instances, Indigenous people would not be before the courts without having been previously charged by the police with an offence. Indeed, for public-order offences in particular, the police play a direct role in observing and defining the commission of an "offence" and apprehending the offender. In this sense, there is a symbiotic link between policing and offending. Such a link makes nonsense of the notion of discrete criminal behaviour separate from the criminal justice system itself.

For the purposes of the current argument it is important to consider in general terms the way policing interacts with, and shapes, the measures we use for understanding criminal behaviour among Indigenous people.

Policing Effects on Criminal Charges

One way in which police can influence official figures for offending is through over-policing, particularly in relation to public-order offences. The concept of over-policing has been used to describe how Indigenous individuals in particular, and Indigenous communities more generally, are policed in a way that is different from, and more intensive than, the policing of non-Indigenous communities. Over-policing can partly explain the over-representation of Indigenous people in the criminal justice system, particularly where offences like assault police, hinder police, resist arrest, offensive behaviour, or language and public drunkenness are involved. These charges are often representative of direct police intervention and potential adverse use of police discretion. Except for a notional "community," the victim of the offence is almost invariably the police officer, as shown by numerous studies in most Australian jurisdictions.[1]

Levels of police intervention can impact on offending figures, particularly where police are the victims of the offences. Thus, the greatest policing impact is likely with less serious offences such as "offensive language," and the impact will be less with the most serious offences such as homicide. Between these two extreme examples exists a variety of policing practices which are likely to influence the extent to which official figures on offending represent the actual occurrence of crime. For example, with property offences there are a range of factors which limit the extent to which we can discuss the actual level of offending as measured by official statistics. In commenting on the South Australian experience, Gale and her colleagues note, "it is not clear to what extent Aborigines actually commit more serious property offences or whether other factors and, in particular, police discretion in charging are at work" (Gale et al. 1990, p. 46). The authors cite examples of police discretion in charging where less serious offences, such as being unlawfully on premises and larceny, could be substituted for the more serious charge of break, enter, and steal. Similarly, Cunneen and Robb (1987, p. 96) found that of all property offences, it was arrests for "break and enter with intent to steal" for which Aboriginal people were most over-represented. In such circumstances there is a range of possible resolutions available to police officers, including the use of diversion or other less serious charges.

Similarly, quite basic issues, such as the extent to which offences are reported, can be related to the level of policing and the perceived likelihood of a satisfactory response on the part of the victim. The extent to which offences are reported impacts on how we might measure the level of their commission. In addition, there is the question of what we might make of police clear-up rates.[2] Clear-up rates are notoriously low for offences like motor vehicle theft and break, enter, and steal, often little more than 5 percent (NSW Bureau of Crime Statistics and Research 1990, pp. 19–20). The low clear-up rate means there is considerable room for speculation about what type of crimes are solved and which offenders are caught. The information on the few offenders who are apprehended is particularly susceptible to policing practices, reporting levels in particular areas, and the relative age and sophistication of the offenders. The over-representation of Indigenous people in some categories of offences may tell us as much about detection by police as about the frequency with which crimes are committed.

The Use of Police Discretion

Policing is an activity characterized by high levels of "discretion," which is routinely used even by the most junior members of the organization and often with little supervision. There is considerable evidence from various inquiries and research literature that demonstrates that police intervene in situations, particularly in relation to street offences involving Indigenous people, in ways that are unnecessary and sometimes provocative (ADB 1982; ICJ 1990; HREOC 1991; Wootten 1991a; Amnesty International 1993; Cunneen and McDonald 1997). Beyond the available observational evidence, it is difficult to demonstrate that police routinely use their discretion to intervene in situations involving Aboriginal people where the same behaviour or situation would

be ignored if it involved non-Aboriginal people. However, the substantial contemporary and historical accounts presented in a range of forums, as well as other documentation on adverse police decisions after intervention, lend substantial weight to the conclusion that discretion is adversely used in this regard.

After police intervene in a situation, a number of discretionary decisions are made depending on the age of the person and the reason for intervention. These include decisions about whether to place a person in custody, whether to deal with the situation informally or to arrest or summons the person for the alleged offence, whether to administer a caution rather than charge the person if they are a juvenile, whether to grant bail to the person and what bail conditions should be imposed, and so on.

In relation to juveniles, police make "negative" decisions concerning Indigenous young people which, independent of the reason for apprehension, have the effect of harsher decisions being made at points where discretion is available (Gale et al. 1990; Luke and Cunneen 1995; Aboriginal Affairs Department and Crime Research Centre 1996). When dealing with both adults and juveniles, police have the discretion to proceed by either arrest and charge or the use of a summons. Summons is a less intrusive way of ensuring attendance at court and does not require being detained, brought to the police station to be fingerprinted, and having bail determined. All the available evidence indicates that Indigenous people are significantly less likely to be proceeded against by way of summons than non-Indigenous people. For instance, in the Northern Territory, 42 percent of non-Aboriginal people appeared in court by way of summons compared to 29 percent of Aboriginal people during 1996 (Luke and Cunneen 1998, p. 19).

After police have decided to intervene and charge a person with a criminal offence, discretion is applied to the number of charges which are laid. Over the years there have been many references to what appear to be unnecessary numbers of charges laid against Aboriginal defendants arising out of single incidents (Wootten 1991b; ICJ 1990; Amnesty International 1993). These complaints are often associated with public-order offences and the use of what has colloquially been referred to as the "trifecta": charges for offensive behaviour/language, resist arrest, and assault police.

Police decision-making and the use of discretion can have an enormous impact on the number of Indigenous people appearing before the courts and the nature of the offences with which they are charged. The discretions available to police in terms of whether to charge a person with a criminal offence, which charge and how many charges should be laid, as well as subsequent procedural decisions in relation to arrest or summons, the use of custody and bail and so on, all fundamentally mould the apparent criminality of the person detained. The public expression of criminality confirmed in the courtroom occurs at the end of a long social process. In the case of Indigenous people, we know from the evidence that police decision-making invariably gives rise to the use of the more punitive options available.

THE LAW AND POLICING

Police intervention does not occur in a legal vacuum, and at least on the face of it police are there to enforce the law. For a significant part of the European history of Australia, police have been required to enforce legislation which denied basic rights and protections to Aboriginal and Torres Strait Islander people. Colonial legislation embodied in various Protection Acts was used to exert control over Aboriginal people and communities in a racially discriminatory manner.

While laws based on overt racial discrimination have been repealed, the impact of law and its interpretation by police as they conduct their routine activities may still lead to profound, even if indirect, discrimination. Legislation covering public order is one example. In relation to recent legislation covering public drunkenness, in both its criminalized form in Victoria, Queensland, and Tasmania, and its decriminalized form in South Australia, New South Wales, Western Australia, and the Northern Territory, there has been concern that the laws have been used to maintain high levels of police intervention and custody. Some criminal laws appear to be applied only to Indigenous people. For instance, in north-western New South Wales, offences of riot and affray and various local government ordinances were used exclusively in relation to Aboriginal people (Cunneen and Robb 1987, p 221–2). There is widespread concern over police use of charges under various Summary Offences or Police Offences Acts with provisions for offensive behaviour and language. This tvpe of legislation has been strengthened in recent years with increased penalties and rising numbers of arrests (Cunneen and McDonald 1997, pp. 114–16).

Police may also use alternatives to the criminal law, such as welfare provisions, in the policing of Indigenous young people. In Western Australia, for example, it has been claimed that provisions providing for the protection of children are routinely used to remove Indigenous voting people from the streets and to place them in custody (NISATSIC 1997, p. 511). Similar provisions exist in New South Wales in the *Children (Protection and Parental Responsibility) Act 1997*. Complaints about the abuse of police powers under existing legislation are frequent, particularly in areas such as stopping and questioning Indigenous adults and young people (NISATSIC 1997, p. 512) or in the abuse of both search warrants and commitment warrants as a way of harassing individuals (Cunneen and McDonald 1997, p. 62), or in some cases whole communities (Cunneen 1990; NSW Office of the Ombudsman 1991).

The legislation covering the right to bail for a person charged with a criminal offence varies between different Australian jurisdictions. However, police determine in the first instance whether a person will receive bail and what conditions might be attached to the granting of bail. This gives rise to a number of issues. First, are Aboriginal people more likely to be refused bail than non-Aboriginal people? Second, are the conditions attached to bail unnecessarily onerous for Aboriginal people? Third, the need for a bail determination demonstrates the interconnectedness between adverse decisions by police. The

police preference for proceeding by way of arrest and charge rather than using summons creates the need for bail in the first place. The Royal Commission into Aboriginal Deaths in Custody noted that the available evidence shows that police are more likely to refuse bail to an Aboriginal person than to a non-Aboriginal person in similar circumstances (Wootten 1991a, p. 353). Recent research has indicated widespread concern within Indigenous organizations that bail is determined in a discriminatory manner. Some of the discrimination can arise indirectly: Aboriginal and Torres Strait Islander people are more likely to be unemployed and homeless, and as a consequence are considered to be at greater risk of failing to appear in court (Cunneen and McDonald 1997, p. 122).

JUDICIAL DECISION-MAKING

Ultimately it is magistrates and judges who, within the constraints of sentencing legislation, impose sentences on Indigenous people who are brought before the courts. There has been considerable argument about whether those sentences are equitable in comparison to the sentences received by non-Indigenous people.

Indigenous people are more likely than others to be sentenced to imprisonment. For example, in Western Australia it was found that magistrates were six times more likely to sentence Aboriginal adults to imprisonment than non-Aboriginal people (Harding et al. 1995, p. 69). In the absence of further details on offence seriousness and prior record, the researchers felt constrained in drawing any conclusions from these figures. Some commentators have argued that there is no adverse discrimination by the courts against Aboriginal people, if prior record is taken into account.

Walker, for example, argues that "the Courts often refer explicitly to prior record as a reason for remanding in custody and for greater severity in sentencing" (1987, pp. 110–11). Although Indigenous prisoners were more likely to have been previously imprisoned, the average length of sentence for an Indigenous prisoner was 42.6 months compared to 74.9 months for a non-Aboriginal prisoner. Walker argues that the shorter average prison sentences for Aborigines "cannot be entirely attributed to different types of offences committed by Aboriginal people," nor to "the relative youthfulness of Aboriginal offenders or to any differences in sentencing practices between States" (1987, p. 111). He concluded "that the courts cannot be held to blame for the high rates of Aboriginal imprisonment. On the contrary, they appear to be particularly lenient to Aboriginal offenders, especially when one considers that prior imprisonment record is regarded as a key factor in sentencing, tending towards longer sentences" (1987, p. 114). More recently, Walker and McDonald (1995) have argued that the results of the 1992 prison census show that Aboriginal offenders generally serve shorter terms of imprisonment than non-Indigenous people for a range of offences. They suggest that "courts may have a lenient view of Indigenous offenders, biasing sentence lengths in their favour to avoid accusations of racial biases in sentencing" (1995, p. 4).

However, there are serious flaws in this argument. There is no analysis of why such disproportionate numbers of Indigenous people are brought before the courts in the first place, the extent to which alternatives to prison are used for Indigenous and non-Indigenous offenders compared to imprisonment, or the relative seriousness of the offences beyond broad categories such as "fraud" or "drugs."[3] Much of the problem with this type of analysis derives from the methodology of using prison statistics to analyze comparative sentencing decisions. A simple comparison between the length of prison sentences for Indigenous and non-Indigenous people provides us with no comparative information on their passage through the criminal justice system, nor on the decisions that are made at each stage. In particular, the effect of police practices in relation to targeting, arrest, and bail all impact on the crucial question of why Aboriginal people appear before the courts in the first place and how they in fact obtain criminal records. The end result may be an "accumulation of disadvantage" in the system deriving from the original police decision to arrest (Gale et al. 1990; Luke and Cunneen 1995).

A recent study of sentencing in the Northern Territory found that courts were using jail sentences more frequently for Aboriginal people and at an earlier stage in their offending history, and that they were more likely to have a prior offending history than non-Aboriginal people. However, when Aboriginal and non-Aboriginal offenders were matched by prior record and offence, a greater proportion of Aboriginal people were sentenced to imprisonment—irrespective of the offence or the level of prior record. The study also found that while Aboriginal people received shorter imprisonment sentences than non-Aboriginal people, they were less likely to receive the benefit of non-custodial sentencing options (Luke and Cunneen 1998). Thus a picture emerges of Aboriginal people receiving fewer non-custodial sentencing options and more frequent short-term jail sentences than non-Aboriginal people.

In regard to juvenile offenders, Aboriginal young people have a greater chance of being sent to an institution than do non-Aboriginal offenders (Gale et al. 1990, p. 107; Broadhurst, Ferrante, and Susilo 1991, p. 74; Luke and Cunneen 1995). South Australian research showed that differences in penalties remained even when specific charges were analyzed. Thus, twice as many Aboriginal young people compared to non-Indigenous young people were sentenced to detention for break, enter, and steal or for assault, for example. It was not the specific offence which determined the penalty (Gale et al. 1990, p. 109). The major determinant influencing penalty was the young person's prior offending record. Unemployment and family structure were also relevant, with those who were unemployed and living in a non-nuclear family situation being more likely to receive a custodial sentence. Research in New South Wales has reached similar conclusions in relation to the importance of prior criminal record (Luke and Cunneen 1995). A New South Wales Judicial Commission report confirmed that Indigenous and non-Indigenous youth received the same number and length of detention orders when factors including offence, prior record, bail, employment, and family structure were accounted for (Gallagher and Poletti 1998, p. 17).

The major import of this discussion on sentencing in relation to the question of policing is that sentencing decisions cannot be seen as discrete from policing practices. Police decisions obviously affect the number and type of criminal charges on which the court makes a sentencing decision. Policing also impacts on whether the person arrives in court in custody, on bail or by way of summons. Besides the actual offence, a prime determinant of sentencing outcome is prior record, which itself is an outcome of the social and political processes which involve police decision-making.

Policing practices partly shape sentencing, particularly where prior record becomes a factor in imposing more punitive sentencing outcomes.

SPATIAL FACTORS: ENVIRONMENT AND LOCATION

The shape of criminal behaviour—its nature and size—is also influenced by a range of spatial factors which lie outside both individual influence and the immediate responses of the criminal justice system. Environmental opportunities can structure criminal activity. Environment and location can also impact on the response by the community and the police.

For example, Gale and her colleagues, in their study of Aboriginal young people and juvenile justice, argued that even if it could be shown that Aboriginal people do commit more serious property offences, this would not demonstrate any greater inherent "criminality" because environmental opportunities and pressures influence the nature of property crime. In particular, urban-rural differences structure opportunities and pressures differently (Gale et al. 1990). Simple theft and shoplifting are primarily urban offences, particularly associated with large shopping complexes. The opportunities for these types of offences are considerably constrained in the environment of small rural communities. Similarly, there is increased likelihood of being detected either breaking into or attempting to break into a dwelling in a small country town or remote community. In these locations offenders are often easily identified by the community and the police.

Location also has a bearing on the likelihood of coming into contact with the criminal justice system as well as possible responses. While the results of research are somewhat conflicting, a number of criminologists, geographers, and sociologists have considered the spatial dimension of Indigenous contact with the criminal justice system. Gale et al. have shown that there are "enormous geographical variations in the position of young Aboriginal people before the law" in South Australia (1990, p. 36). Broadhurst (1997) has argued that the highest rates of Indigenous imprisonment are in the "frontier" areas like the Northern Territory and Western Australia, and the lowest rates are in settled states such as Victoria and Tasmania. A recent study in the Northern Territory showed Aboriginal people living in major centres were four times more likely to appear in court than those living in remote areas (Luke and Cunneen 1998, p. 21).

The processes of colonization significantly impacted on the human geography of Aboriginal and Torres Strait Islander communities. It is worth noting that many Indigenous communities in Australia have arisen out of the forced relocation of Aboriginal and Torres Strait Islander people into specific areas during the period of "protection." This movement has given rise to its own set of problems, which may manifest themselves in social conflict and disagreements over access to scarce resources. Some of the recent literature in the area urges a consideration of the diverse experiences of Indigenous people, both in terms of understanding the nature of offending (Broadhurst 1997; LaPrairie 1997) and in terms of the development of policy (Cunneen 1997).

CULTURAL DIFFERENCE

Cultural difference can lead to criminalization for a number of reasons. First, Indigenous people may have difficulties based on language and culture during police interrogation and in courtroom procedures. Second, Aboriginal people's cultural practices may lead to criminalization. Third, the attacks on Aboriginal culture through various colonial policies over many decades have weakened certain social control mechanisms within some communities, causing problems of disruptive and criminal behaviour.

The vulnerability of Aboriginal people when faced with police interrogation techniques has been noted in several government inquiries.[4] Some of the disabilities Aboriginal people face in front of the courts as a result of language and cultural differences have been explored by Eades (1995a, 1995b). For instance, cultural difference expressed through body language can be falsely interpreted as implying guilt. Cross-examination and interrogation techniques can lead to gratuitous concurrence, which may be interpreted as admission of guilt (Eades 1995a). Failure to provide interpreters is still a major problem in many parts of Australia, and affects both police and court stages of intervention (Cunneen and McDonald 1997).

There is now a significant body of literature which outlines the difficulties that face Indigenous people in the formal legal process (Eades 1995b; Criminal Justice Commission 1996; Mildren 1997), difficulties which derive from both cultural and communicative (verbal and non-verbal) differences and can also include medical conditions (such as middle-ear infection leading to hearing loss). They are part of the structural parameters which prevent Indigenous people receiving fair treatment in the non-Indigenous legal process, and at times can lead to significant miscarriages of justice (Criminal Justice Commission 1996).

Distinct cultural patterns may also lead to intervention and eventual criminalization. One example is the policing of activities which occur in public places. Cultural differences in this area arise where Aboriginal social activities are more likely to lead to visibility and surveillance by police. Cultural differences in child-rearing practices can also lead to the intervention of non-Indigenous welfare and juvenile justice agencies, including police. Indigenous societies in Australia had, and continue to have, very different cultural notions in relation to childhood and young people compared to non-Indigenous groups. Generally there is not the same separation or exclusion of children from the adult world. Responsibility for children and young people is allocated through the kinship system and the wider community (Sansom and Baines 1988; NISATSIC 1997; Watson 1989).

A critical question is whether non-Indigenous criminal justice institutions simply fail to recognize and value Indigenous methods of social organization, or whether they in effect treat cultural difference as a social pathology and criminalize it. For example, from the late 1970s there has been considerable criticism of the ethnocentric nature of social-background reports and of the psychological tests administered to Aboriginal young people coming under state supervision. The reports gave free rein to the expression of prejudices in relation to Aboriginal culture, family life, and child-rearing practices through descriptions of "dysfunctional families" and "bad home environments" (Milne and Munro 1981; Gale et al. 1990, p. 102; Carrington 1993, p. 48). Apparently neutral means of assessment such as IQ and psychological testing can reflect the norms of the dominant culture and provide apparently "scientific" evidence of maladjusted individuals or families. There have been similar criticisms of the social assumptions which can underlie the reports of probation and parole officers which are presented to the courts (Ozols 1994, p. 3).

Colonization has also wrought changes in the social patterns of Aboriginal life by wholesale disruption to communities through expropriation of the land, concentration of differing kinship groups on reserves, and through specific policies such as the removal of Aboriginal children and young people. Colonial processes have attacked Indigenous mechanisms of governance and social control. For example, the Royal Commission into Aboriginal Deaths in Custody has noted in detail the extent to which disruption, intervention, and institutionalization have left Aboriginal and Torres Strait Islander families facing severe difficulties with their children and young people. The historical legacy of colonialism is that families and communities now cannot call on the social and economic resources necessary to resolve these problems. It is important to recognize that since much of colonial policy was about undermining Aboriginal authority and methods of social organization, it is hardly surprising that now, in some communities, parental authority and traditional responsibilities have been rendered less effective.

Finally, it is important to recognize the cultural differences between Indigenous communities in Australia. While the most obvious are the significant cultural differences between Aboriginal people and Torres Strait Islanders, there are obvious cultural and linguistic differences between Indigenous peoples throughout Australia. Some of these differences derive from pre-colonial Australia, while others have arisen as a result of the colonial experience. These differences are often poorly understood and can lead to a simplistic approach to criminal justice policies (Cunneen 1997; NISATSIC 1997).

SOCIO-ECONOMIC FACTORS

A person's position in the social and economic class structure of society has a direct impact on their likelihood of ending up in the criminal justice system. The disadvantaged position of Aboriginal people in Australia has been well documented, not least by the Royal Commission into Aboriginal Deaths in Custody, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, and various ATSIC reports (1995, 1997).

Numerous studies have indicated the links between the socio-economic position of Aboriginal people and their level of offending, including Cunneen and Robb (1987), Devery (1991) and Beresford and Omaji (1996). A recent Australian Institute of Criminology study has also noted the importance of considering the links between offending levels (as measured by imprisonment figures) and employment and educational disadvantage (Walker and McDonald 1995). The authors identify the association of social problems such as crime with unemployment and income inequalities. They suggest that the reason crime is so problematic in Aboriginal communities is due to the lack of employment, educational and other opportunities, and argue that social policies aimed at improving these conditions are likely to have a significant effect on the reduction of imprisonment rates (p. 6). More recently, Hunter and Borland (1999) found that the high rate of arrest of Aboriginal people, often for non-violent alcohol-related offences, is one of the major factors behind low rates of employment.

Marginalization

Another way of considering socio-economic disadvantage and some offending patterns by Aboriginal people is through the notion of marginalization. Marginalization in this context is taken to mean separation and alienation from work relations, family, and other social relations which bind young people and adults to communities and give value and esteem to people's lives. The results of marginalization include self-destructive behaviour (including substance abuse), increased likelihood of violence among family members, and the development of strategies for survival, which include crime.

Marginalization and its relationship to crime are clearly not a phenomenon particular to Aboriginal people. However, because of the history of dispossession, colonial policy, and racism in Australia, it can be argued that marginalization impacts greatly on Aboriginal and Torres Strait Islander people, who show very poorly on all social indicator scales in terms of health, housing, education, unemployment, and welfare dependency. There have been many studies that show that poverty is associated with detected crime and police intervention. In South Australia, it was found that, of young people who had left school and were apprehended by police, some 91 percent of Aboriginal young people, compared to 61 percent of non-Aboriginal young people, were unemployed (Gale et al. 1990, p. 56).

Other social factors which correlate with poverty, such as single-parent families and residential location, were also more prevalent among Aboriginal young people who were apprehended by police (Gale et al. 1990, pp. 57–8; see also Devery 1991). The Royal Commission into Aboriginal Deaths in Custody argued that part of the high level of property offences committed by Aboriginal youth is indicative of the extent of poverty. At the most basic level, some offences are committed by young people because of their need for food (Johnston 1991, p. 287).

Marginalization is also important in understanding the extent of self-destructive behaviour and its relationship to offending. Some Aboriginal communities have problems with substance abuse by young people and adults, including alcohol abuse and petrol sniffing. Substance abuse can be associated with offending in many ways, from the commission of break and enters to obtain alcohol or petrol to the association of alcohol abuse with violence. The Royal Commission into Aboriginal Deaths in Custody has also noted the effect peer group pressure and boredom have on offending. This would appear to be a particular problem in remote communities and is clearly related to marginalization, where juvenile and young adults have no opportunity for employment, for formal education in the community beyond junior high school, or for extended social activities (Johnston 1991, pp. 289–90).

The notion of marginalization and economic disadvantage must always be seen within the context of colonialism, dispossession, and the destruction of an Aboriginal economic base. As many Indigenous people have stated, their people are not simply a disadvantaged minority group in Australia: their current socio-economic status derives from a specific history of colonization. In other words, an overly simplistic application of socio-economic (or class) analysis prevents an understanding of the distinct historical formation of Indigenous people within a dominant (and colonizing) society.[5]

RESISTANCE

The concept of resistance may also play some role in explaining the patterns of Aboriginal over-representation in crime figures. Some of the offences committed by Aboriginal people are specifically aimed at non-Indigenous targets or as responses and resistances to non-Indigenous institutions and authorities. A number of researchers have commented upon the fact that some property offences, vandalism, assaults, or behaviour classified offensive can be understood as a form of resistance (Brady 1985; Cunneen and Robb 1987; Cowlishaw 1988; Hutchings 1995). Brady notes that in the Aboriginal community where she did her research, the break-ins, by young people in particular, were directed at school buildings, non-Aboriginal staff houses, and the store (Brady 1985, p. 116). Aboriginal organizations have also noted that resistance has become part of Aboriginal culture, with a particular effect on juveniles. "What has been described as [juvenile] delinquency could also be regarded as acts of individual defiance. The scale and nature of Aboriginal children's conflict with 'authority' is reflective of a historical defiance" (D'Souza 1990, p. 5). In some cases, public disorder may erupt in anti-police riots as a direct response to harassment (Cunneen and Robb 1987; Goodall 1990).

Other patterns of offending which might be considered under the notion of resistance relate to defiance of court orders. Goodall has noted that, historically, the tactics which were used against welfare and protection board intervention included passive resistance, non-cooperation and absconding (cited in Johnston 1991, p. 77). Today these types of offences are typically grouped under the category of "justice" offences. It is important to consider the extent to which breaches of court orders might reflect a refusal to comply with what are considered to be unjust levels of intervention and control. Similarly, high levels of fine default may reflect not just poverty (the inability to pay a fine), but also resistance to the idea of paying a fine deriving from an unjust conviction.

THEORIZING THE IMPACT OF POLICING ON CRIME FIGURES

The role of police specifically in implementing colonial policy is a large topic. It is important to note in the present context, however, that the colonial project involved a diverse range of strategies, including the murder of Indigenous people, dispersal away from traditionally owned lands, and the destruction of an economic base in many parts of Australia, concentration of diverse groups in government and mission-run reserves, and the removal of Aboriginal children from communities. The manifold effects of these policies were well documented by the Royal Commission into Aboriginal Deaths in Custody. The impact of policies such as child removal was noted in the investigations into various deaths, as well as other tangible outcomes of colonial policy, such as the enforced "invisibility" of Aboriginal people moved away from white communities, and the policing tactics that were employed to achieve those ends.

More recently the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997) examined the effects of forced removals. It is worth clarifying the criminogenic effects generated by this particular colonial policy. It led to the destabilization and/or destruction of kinship networks, and the destabilization of protective and caring mechanisms within Indigenous culture.

It led to the social and legal construction of Aboriginal child-rearing as socially incompetent and of Aboriginal culture as worthless. It led to a legal regime without procedural justice, which has been defined as genocide within international law. It led to the economic and sexual exploitation of Aboriginal children. It has contributed to a culture of resistance within Indigenous communities to welfare and criminal justice authorities. It has contributed to the generation of higher levels of mental illness, psychiatric disorders, and alcohol and substance abuse among those removed. It has contributed to the creation of a new generation of Aboriginal adults ill-equipped for parenting.

It would of course be an impossible task to "measure" the impact of a particular colonial policy such as child removal on contemporary Indigenous crime figures. Yet we know through the traumatic effects of such policies on individuals, families, and communities that the impact has indeed been great. We gain some glimpse of this in data that consistently show the greater numbers of the stolen generation among Indigenous arrests and deaths in custody. At one level, the concept of "colonialism" provides a highly generalized level of explanation for understanding Indigenous criminal offending, but as the example of the impact of the forced removal of Indigenous children shows, colonial policy can be contextualized with concrete examples and specific criminogenic effects.

A sophisticated approach to explaining the level of over-representation of Indigenous people in official criminal statistics is needed. It is not accurate to suggest that Indigenous people do not commit offences and are merely imprisoned as the result of a racist criminal justice system. Nor is it the case that the criminal justice system is simply a neutral institution enforcing an impartial legal system. At the broadest level, the legal system has been informed by a colonial project with a specific regime for Indigenous people. In more prosaic terms, the police (as part of the legal system) utilise their discretion in ways which have a negative impact on Indigenous people. The level of policing and the nature of police intervention impact directly on the extent to which Aboriginal and Torres Strait Islander people appear in the criminal justice system. In addition, the economic and social conditions under which Indigenous people have been forced to live as a result of dispossession and marginalization are criminogenic.

These explanations are not mutually exclusive and, if framed in either/or categorizations, fail to capture the complexities of social reality. For example, if we consider the comparatively large number of motor vehicle registration and licence offences for which Aboriginal people are imprisoned, we might consider the complex interaction of environmental considerations, the effects of unemployment and poverty, and the extent of discriminatory policing practices. Environmental considerations are important, because Aboriginal people often live in rural and remote areas poorly serviced by public transport and are therefore dependent on a motor vehicle in a way that the "average" non-Aboriginal person is not. Unemployment and low income effect the ability both to pay for registration and to own vehicles more likely to be classified roadworthy, and negatively impact on the ability to pay for any traffic fines. Failure to pay traffic fines results in licence cancellation. Discriminatory police practices may increase the likelihood of detection of unlicensed drivers through selective procedures of stopping Aboriginal drivers.

A similar explanation could be utilised for the comparatively large number of break and enters for which Aboriginal young people appear in court. When a small group of Aboriginal children is apprehended and appears in court in Brewarrina, New South Wales, say, for breaking into a house and stealing food, a satisfactory explanation for that event must be one that recognizes the economic and social outcomes of colonization and marginalization, the role of environmental opportunities for crime, the increased likelihood of detection as a result of police numbers and surveillance in small and predominantly Aboriginal communities, and the increased likelihood of an adverse police discretional decision to charge (rather than caution) an Aboriginal young person in the first instance.

In the end, measures of "crime" need to be understood as social, political, and historical artefacts. Their "truth" is certainly dependent on the regimes of which they are a product. In the case of Indigenous people, the regime has been particularly harsh, the empirical measures showing the deep levels of their criminalization in contemporary Australian society. Yet to see that as merely a reflection of offending levels in Indigenous communities would indeed be to mistake the outcome of social processes for a simple and unambiguous "fact." Crime as a social artefact needs to be continually deconstructed—it has no essential inner core other than the purely formal requirement of legal transgression.

There is little doubt that policing shapes the measuring of crime, and police decision-making can significantly impact on what we "know" as offenders and offences. In the specific case of Indigenous people in Australia, we can expect an even greater shaping of offending levels through police practices, given their contemporary role in Indigenous communities and their historic role in colonial policy.

NOTES

1. See, for example, ADB (1982); Cunneen and Robb (1987); Gale et al. (1990); Luke and Cunneen (1995); Mackay (1995); Allas and James (1996); Cunneen and McDonald (1997); Luke and Cunneen (1998).
2. Clear-up rate: the percentage of recorded offences cleared by police.
3. For instance, it is not surprising that Indigenous people receive shorter sentences for drug offences given their lack of involvement in more serious trafficking offences.
4. For an examination of these issues two decades ago, see the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' Report on Aboriginal Legal Aid (Ruddock 1980). The courts have also expressed concern in this regard in *R v Williams* (1976) 14 SASR 1 and *Collins n R* (1980) 31 ALR 257. For an early summary of these issues, see Rees (1982). More recent reports drawing attention to the same issues include the Royal Commission into Aboriginal Deaths in Custody (Johnston 1991) and CJC (1996).
5. See Brennan (1991) for a succinct discussion of why Indigenous people are not simply an oppressed minority group within Australia.

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FURTHER READING

Cummins, Bryan, and John Steckley. 2002. "Chapter One: Introduction to Aboriginal Policing." In *Aboriginal Policing: A Canadian Perspective*. Toronto: Prentice Hall.

This introductory chapter is short but does an excellent job of explaining the issue of structural racism in the context of the relationship between Canadian policing agencies and aboriginal citizens. In particular the authors distinguish between "personal" and "institutional" racism, and in doing so also problematize the issue of "intention" (i.e., the issue of whether or not an individual knew he or she was being racist) in the continuation of the latter form. The chapter ends with a case study of structural racism in the death of a Cree woman who, after being struck by a car, was deemed a "drunk squaw" by attending officers who proceeded to act according to that stereotype.

Cunneen, C. 2001. *Conflict, Politics, and Crime: Aboriginal Communities and the Police*. Crow's Nest, Australia: Allen & Unwin.

Cunneen's chapter in the present collection is taken from this larger book. This work brilliantly traces the role of colonialism and racism in the construction and maintenance of Australia's various policing forces and the Australian nation(s)-state more generally. Cunneen's point is generally that the current overrepresentation of Australia's indigenous peoples in the Australian criminal justice system is evidence of the political devaluation of indigenous sovereignty and associated governing practices. Cunneen succinctly connects the "usual suspects" used to explain overrepresentation (usually individual-level explanations) with the more structural socio-economic and geopolitical impacts of ongoing colonial practices. He concludes by offering possible ways forward to deal with this startling overrepresentation.

Delgado, Richard, and Jean Stefancic. 2001. *Critical Race Theory: An Introduction*. New York: New York University Press.

Critical race (legal) theory is an intellectual subfield that gained steam in mid-1980s legal scholarship. CRT, as it is often termed, is strongly focused on demonstrating how race continues to operate at the heart of (supposedly) liberal democratic societies (like Canada, the United States, and Britain). Critical race theory is centrally concerned with understanding how the unstated privilege of "whiteness" and the concomitant marginalization of minorities are, although central to the reproduction of social inequality, rendered largely invisible in such societies. In their text Delgado and Stefancic lay out the basic principles of critical race theory: its origins and early intellectual impulses, its themes of analyses, its methodologies, critiques of its intellectual trajectories, and the state of the discipline today.

Gabor, Thomas. 2004. "Inflammatory Rhetoric on Racial Profiling can Undermine Police Services." *Canadian Journal of Criminology and Criminal Justice* 46: 457-466.

In a challenge to the original Wortley and Tanner article discussed above in chapter 31, Gabor argues that while in some locations good data exists to prove the presence of racial profiling, Wortley and Tanner's definition of racial profiling fails to distinguish between "bigotry" and good, solid police work. In other words, Gabor essentially critiques Wortley and Tanner for failing to differentiate between "good" and "bad" racial profiling. "Bad" profiling is the simple result of police officials relying on racial stereotypes to make decisions about whether, for example, to stop a black motorist (i.e., "He or she is driving a nice car, it must be stolen"). "Good" racial profiling, by contrast, is the result of solid police work that uncovers crime patterns in (for example) predominately black neighbourhoods.

Toronto Star. 2002. "Police Target Black Drivers: Star Analysis of Traffic Data Suggests Racial Profiling," 20 October, Ontario edition, A1.

This interesting newspaper article discusses the issue of racial profiling in the context of policing in Toronto. It includes some of Scot Wortley's findings but also the denials by the Toronto Police Services and allied organizations. Most interestingly, however, it includes anecdotal information from Toronto black youth about their feelings in seeing police cruisers in the rear-view mirror.

Reber, Susanne, and Robert Renaud. 2005. *Starlight Tour: The Last, Lonely Night of Neil Stonechild*. Toronto: Random House Canada.

This fascinating journalistic account tells the story of the disappearance and death of Neil Stonechild, an aboriginal youth living in the city of Saskatoon, Saskatchewan. In explaining Stonechild's death at the hands of police officials practising "Starlight Tours" and the subsequent police cover-up, Reber and Renaud weave a tale of racism, bigoted policing, and a city unconcerned with the welfare of the aboriginal community living within it.