ABORIGINAL YOUTH A HISTORY OF INEQUITY IN THE DELIVERY OF AUSTRALIAN JUSTICE

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When I first met Diane Barwick in 1961 she was concerned about the extreme disadvantages under which Aboriginal people lived. Diane committed her life to the righting of those inequities through meticulous scholarship. It is in appreciation of her leadership in this area that I offer this paper on Aboriginal inequality within the juvenile justice system.

The current publicity being given to Aboriginal deaths in custody serves to highlight the wrong and inappropriate detention of Aboriginal people by a justice system that has failed to deal equitably with these people. For a people who make up such a small proportion of Australia's total population the high rate of deaths in custody, some ninety-seven between 1980 and 1987, serves as a stark reminder of the inability of our justice system to deliver equity to Aboriginal people, especially to young men.

Since most of these young men would not have died if they had not been held in custody, the serious question which must be asked is: why are they being detained in such large numbers? Criminological theory, which followed the exponents of social Darwinism and later the ecological approaches of the Chicago school, led to a firm belief that crime is, to a large degree, the result of poor socio-economic circumstances and squalid living conditions. There is still considerable popular support for the view that crime is largely environmentally determined.

Empirical evidence, however, offers little support for this entrenched and popular view. Enormous inputs of money into Aboriginal health, housing, education and welfare have not reduced the reported crime rate or the disproportionate numbers of Aboriginal youths and young adults being taken into custody. Nor has the introduction and growth of Aboriginal legal aid changed the disproportionate numbers of Aboriginal males committed to gaol or to detention centres.

For some years, and in conjunction with associates Rebecca Bailey-Harris from the Law School and Joy Wundersitz in the Department of Geography at the University of Adelaide, I have been studying the way in which the justice system operates differentially towards Aboriginal youth.¹ We have found no evidence that Aborigines commit more offences than their non-Aboriginal counterparts or that their socio-economic position moulds them towards criminal behaviour. Rather, our research has shown that the whole justice system operates in favour of the mainstream middle-class 'norm'. Aboriginal people, being primarily

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¹ The work was made possible by the co-operation of the South Australian Department for Community Welfare, which gave us access to the computerised records of young offenders.

outside the basic rationale upon which justice is predicated, are severely disadvantaged in all their dealings with agents of the Australian legal system

Aboriginal over-representation in the criminal justice system in Australia was clearly documented by Eggleston.² Her studies showed that in the mid-sixties Aborigines were much more likely to be arrested, refused bail and sentenced to imprisonment than were non-Aborigines. This situation does not seem to have changed in the intervening years. In fact, in spite of huge government expenditure to improve socio-economic conditions in the twenty years since Eggleston first collected her data, it would appear that the situation has deteriorated rather than improved. Although no precise comparison with the Eggleston study is possible, our statistics, taken at a different time, in a different place and with a different population of Aboriginal people, suggest that the position for Aborigines in relation to justice may now be actually less advantageous than it was twenty years ago.³ This conclusion is confirmed by studies closer to Eggleston's area.⁴

We have searched our very large data base for evidence that Aboriginal youth are more criminally inclined than are non-Aboriginal youth but have found no support for such an hypothesis. Nor have we been able to find the oft-assumed causative links between crime and socio-economic conditions. Indeed our data would suggest that all such popular theories defining social disadvantage as causing criminal behaviour have dubious roots. The popular beliefs, and their overflow into policy making, may arise from people mistaking symptoms for causes and confusing the end result, namely high crime statistics, with actual criminal behaviour. It would appear that the whole issue has been approached from the culturally and socially blinkered point of view of the mainstream middle-class 'white' agents of the law.

Our studies suggest that Aborigines, rather than being greater criminals than other Australians, are actually greater victims of our justice system. But so persuaded are we as to the equity of a justice system based on British principles that it is easier to impute greater criminal behaviour to Aborigines than it is to examine the possible inequities of our legal system. Thus the cry more regularly heard is for a study of the causes of Aboriginal crime rather than for a study of inequities in our justice system

Our analysis of the very extensive computer-based records held by the South Australian Department for Community Welfare, dating back to 1972, has shown that Aboriginal youth are massively over-represented in all areas of the juvenile justice system and that this disproportionate position has not improved over time. Aboriginal youth stand out from all other ethnic groups as well as from mainstream Australians in their very high visibility in all criminal statistics.

There are several stages in any criminal justice system. In the juvenile system in South Australia youths are first apprehended by police, at which point a decision is made whether to warn or to charge. If police decide to press charges then young people can be either arrested, that is, taken into custody, or allowed to go home and later issued with a summons. In South Australia each case on which a charge has been laid is referred through a pre-trial process or filtering mechanism known as a screening panel, which decides to refer the youth either to a children's aid panel, where he or she will be warned and counselled but will not

² Eggleston 1976.

³ Gale and Wundersitz 1985.

⁴ Martin and Newby 1984.

have any penalty applied or a conviction registered, or to send the youth to court for trial. At the court stage various penalties can be applied, detention being the most serious outcome of a court trial.

At all of these points in the juvenile justice system in South Australia Aboriginal youth appeared to be treated more harshly than any other group.

At the point of initial apprehension by police, Aboriginal youth are 8.6 times more likely to be charged than are other Australian-born youths. The next most likely ethnic group to be charged are youths of Greek descent, and they are apprehended only 1.9 times as often as other Australian-born youths. At the point where police must decide whether to charge by means of an arrest or to issue a summons we find that Aboriginal youth are 25.5 times more likely to be arrested rather than issued with a summons in comparison with other Australian-born youth. Even the disadvantaged position of youths of Greek descent has deteriorated only marginally at this point. Their arrest versus summons rate is 2.4 times greater than other Australian youth.

When we look at the filtering or screening process we find the extreme difference continues. Whilst youths from the Greek community, still the closest in treatment to Aboriginal youths, are directed to court rather than to aid panels almost 2.5 times as often as other Australian youths, Aborigines are being referred to court 22 times more frequently than are other Australian youth.

Not surprisingly, therefore, at the sentencing stage we find that, per capita, Aboriginal youth are even more outrageously over-represented. In fact our figures suggest that Aboriginal youth are 56.5 times more likely to be given detention orders than are other Australian-born youths. At this point of greatest severity in the system the only other group facing disadvantage, namely youths of Greek descent, are over-represented by 5.3 times.

The disadvantaged position of Aboriginal youth is thus evident in all areas of the system but is seen most severely at the point of sentencing. Given the outrageously disproportionate rate at which Aborigines are taken into custody by police and placed in detention by judges and magistrates, is there any reason for the community at large to be surprised that these people feel so hopelessly ill-treated by the system?

These figures are quoted at a state level, combining all apprehensions across the state. But if we break these figures down into regions we find even more disquieting contradictions. Aboriginal youth in the far north of the state are likely to be arrested about 38.5 times more often on a per capita basis than are non-Aboriginal youth. By contrast, Aboriginal youth living on Yorke Peninsula are arrested 148.5 times more often than non-Aborigines in the northern areas, but for Aboriginal residents of Yorke Peninsula the chances of detention are more than 535 times greater than those of their non-Aboriginal neighbours. These figures may be somewhat inflated, given the very small number of appearances available for analysis at the regional level. Nevertheless, it is evident that extreme regional differences do exist, which cannot be explained in terms of variations in Aboriginal behaviour.

Even when we take two country towns seemingly comparable in every way we find enormous differences in the treatment of Aboriginal youth by the whole gamut of the justice system. Similarly, there are considerable variations to be found from one metropolitan area to another. We are therefore faced with the conclusion that the much-vaunted British justice system does not deliver equal justice to Aboriginal people and that the degree of its inequitable delivery disquietingly varies from place to place.

Using the large data base available we tested a number of factors and subjected them to

a considerable degree of statistical analysis. Although we were unable to prove or to disprove that Aboriginal youth commit more serious offences or offend more frequently than do non-Aboriginal youth, we have been able to demonstrate that they are substantially over-represented in every sector of the justice system and that the degree of over-representation varies enormously from one place to another. It does not seem possible to account for the differences purely in terms of Aboriginal behaviour.

Similarly, we have not been able to prove that poor socio-economic conditions cause criminal behaviour. However, we can show that distinct socio-economic disadvantages which Aborigines face do affect how they are processed by the justice system. Two critical social factors were found to have an impact upon whether Aboriginal youths are arrested, whether they are sent to court rather than to an aid panel, and whether they are sentenced to detention. These two variables concern employment status and household structure. No other socio-economic factors were seen to carry much significance. Aborigines who are unemployed are more likely to be arrested and taken into custody than are those who are working. The latter are more likely to be released and later issued with a summons. Similarly, unemployed Aborigines are more likely to be sent to court than to an aid panel and eventually to be sentenced to detention rather than fined.

Given the very high rate of unemployment in all Aboriginal communities, the tendency to treat all unemployed persons differently, whether they be Aboriginal or not, inevitably means that relatively more Aborigines will be given the harsher of the options at each point in the justice system. From the point of view of the agents of the law, this discretionary process appears quite logical. Police, with some justification, argue that a person in employment is less likely to abscond and is easier to issue with a summons than is one who is unemployed. Similarly, the police and social workers who make up the screening panels, which determine whether a youth is sent to court or not, perceive a court appearance as seriously handicapping the future of an employed person but as having less effect on one who is unemployed. A sentence of detention ensures that an employed person will lose that job and this is viewed as a double penalty. It cannot apply to the unemployed. Furthermore, those in employment are more able to pay fines and more likely to obey bond conditions. So these options appear as more practical sentences for employed persons than they do for those who are unemployed.

Whilst we have not been able to prove that unemployment causes crime, in spite of the theoretical and popular views on the issue, we can show that unemployment causes differential treatment by the justice system. Clearly, Aborigines are severely handicapped by this factor.

Aboriginal youth are also disadvantaged in the legal system by their household structures. Nuclear families in the conventional sense are relatively infrequent among Aboriginal people. Aboriginal families tend to live in household aggregations somewhat different from those of the mainstream middle class. Whilst the household formations may have very sound cultural bases and valid economic reasons,⁵ they nevertheless disadvantage Aboriginal youths when apprehended by police. Aboriginal youths living in nuclear households were found to be three times less likely to be taken by arrest initially and issued with summons than were those living in more complex households. At the final stage of the justice system it is also

⁵ Gale and Wundersitz 1982.

clear that household structure plays a part, with significantly more youths from nuclear families being given a fine or a bond in preference to detention in comparison with those residing in other forms of household.

Again from the point of view of the agents of the law these appear to be realistic decisions. Youths living at home with their parents will be much easier for police to find when the time comes to issue a summons, and they are equally seen as more likely to fulfil the conditions of a bond or a fine than are those living in more complex households or persons who appear to move regularly from one household to another.

Thus the more serious of all the possible outcomes which are imposed upon Aboriginal youth at each point of the justice system reflect the needs of the operators of the system rather than the best interests of the individual Aborigines concerned. And it appears to be the structure of the legal system rather than the overt racism displayed by individual agents of the law that most determines the differential and less advantageous treatment given to Aboriginal youth. Looked at in racist terms it appears, at least from the individual agent's point of view, largely unintentional. The extent to which it is consciously discriminatory is decided more on class than racial lines; but Aborigines who are apprehended also happen to be at the bottom of the class ladder.

Aware that Aborigines feel highly discriminated against by police, we set out to test the extent to which conscious racism was operating at the point of arrest. We used a number of statistical tests in attempting to ascertain the extent to which police might determine an arrest or screening panels refer a case to court on racist grounds. Logistic regression analysis was eventually found to be the most suitable form of testing for the large data file. What we found was that the racial identity or ethnicity of a person appears to play a seemingly minor role in the police decision to arrest and only a slightly more significant role in the screening panel's decision to refer offenders to court. In both cases the purely racist factor was quite minimal in comparison with the two other factors already identified, namely unemployment and household structure.

To determine whether actual overt racism was still operating, even after allowing for socio-economic factors, we had a control carefully for other variables. Given the enormous variation from one region to another, we decided to take matched pairs of Aborigines and non-Aborigines residing in the same areas and possessing comparable socio-economic and demographic attributes and offending histories. When matched pairs were tested we still found no cause for concern over racist actions by police or other agents of the law. That is, if we take one hundred Aborigines and one hundred non-Aborigines from the same areas and match them on all available socio-economic criteria, whilst at the same time controlling for their criminal record, we cannot show that Aborigines were treated differently from non-Aborigines.

However, this matching process was difficult to achieve in any valid statistical manner because so very few 'whites' matched 'blacks'. The main reason for this was not the difficulty of finding non-Aboriginal youth who possessed comparable socio-economic, demographic and residential criteria to Aboriginal youth but that those who did seldom possessed similar criminal records. It would appear that police charge Aborigines differently even from non-Aborigines who are socio-economically similar. We could not determine the reason for this. Why should Aborigines from identical residential areas and comparable socio-economic backgrounds be charged so differently from non-Aborigines? Are those two groups of young people from similar living conditions really committing quite different offences? We could

find no evidence for this in either our household surveys or from the participant observation studies we undertook.

The alternative answer would be to suggest that police are using entirely legal processes to discriminate against Aborigines; that is, police charge Aborigines differently from the way in which they charge non-Aborigines and as a result the remainder of the justice system unintentionally treats them differently also. Once particular charges are laid against Aborigines they are treated according to those charges quite comparably with non-Aborigines from similar socio-economic and residential backgrounds.

This then brings us back to our main finding from the statistical analysis, namely that the structure of the juvenile justice system disadvantages Aboriginal youth, and as a result they can be treated differently in a manner which is entirely legal and 'just'.

Furthermore, we found that many of the welfare measures aimed at assisting Aborigines and other disadvantaged youth may actually operate against their best interests. The juvenile justice system is a highly discretionary system. The police officer on the beat and the social worker on the screening panel have wide discretionary powers. It is the decision of an individual, or at best the decision of two individuals, which determines whether a particular person is arrested and whether he or she is sent to court. In a system like ours, where there is both a high level of discretion and primarily a rehabilitative rather than a punitive goal, then inevitably the decisions taken will operate in favour of those people who best fit society's perceived norms.

With a primarily rehabilitative goal in operation it is entirely logical for a police officer to use his or her discretion to avoid arrest for an employed youth or one living in a 'stable' family situation. Indeed, to arrest such a youth except on the most severe charges would be quite contrary to the rehabilitative goal. It scarcely rehabilitates young people to cause them to lose their jobs or take them away from the support and/or disciplinary action of their parents. The prime and indeed proper function of the juvenile justice system, that of rehabilitation, requires a highly discretionary mechanism which in turn inevitably advantages some youths but disadvantages others; and Aborigines become the most disadvantaged.

There are also a number of areas where active attempts to assist Aborigines through welfare mechanisms appear unintentionally to disadvantage them. Take, for example, one of the functions of solicitors in Aboriginal legal aid services. The advent of legal aid for Aborigines has led to a much greater representation of Aborigines in court than was previously the case; in fact, Aborigines are now represented more often than are non-Aborigines. In the juvenile justice system which we have been studying over three quarters of all Aboriginal cases are represented by a solicitor whereas less than half of the non-Aborigines appearing in court have legal representation. But this has not always been to the advantage of Aboriginal youth. In fact, in seeking the best interests of their Aboriginal clients legal-aid solicitors frequently request adjournments so that social background or other reports can be made available. It is not difficult to lodge such a plea for an Aboriginal client.

In our analysis of juvenile-court proceedings in South Australia we found that approximately one-quarter of all Aboriginal cases were adjourned whereas only one-twentieth of the non-Aboriginal cases were given an adjournment. This means two things: Aboriginal youths experience more delays before their cases are finalised; and in the case of custody adjournments they are held much longer in custody, before being convicted, than are non-Aborigines. This is especially disadvantageous: not only are Aborigines more likely to be given adjournments, but they are also more likely to be held in custody during the adjournment rather

than placed on bail. This is clearly a case of being disadvantaged for 'their own good'. In view of the fact that several of the reported suicides whilst in custody have taken place prior to a final trial or conviction, the differential use of such well-intentioned measures must be seriously questioned. But, as it stands, the whole rehabilitative structure of the juvenile system encourages solicitors to seek adjournment, even if they are custody adjournments. Thus, even before being convicted, Aborigines stand a much higher chance than do non-Aborigines of being held in custody and that, ostensibly, for their own good.

With so many 'just' forces apparently operating against them is it so surprising that Aborigines feel seriously and hopelessly discriminated against? To such an extent that suicide may result?

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