STREET OFFENCES BY ABORIGINES: A.D.B. REPORT. 1982: A REVIEW

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Introduction

The criminal law does not operate in practice to effect equality of all individuals. At every stage of the criminal justice system there are class and racial biases operating. Empirical studies reveal that Aborigines are over-represented in our jails not because they have some inherent criminal characteristics[1], but because for engaging in exactly the same conduct as some white people they are more likely to be charged with an offence by the police, more likely to be arrested rather than proceeded against by summons, more likely to be convicted by a Court, and if convicted more likely to be sentenced to imprisonment rather than dealt with in some alternative non-custodial way. Further, even if all these racial and class biases were not operating in the enforcement and the administration of the law, it can be argued that the situation would not be completely rectified because the law itself embodies inequality i.e. it is argued that to apply equal treatment to individuals in a structurally unequal system is only to reinforce structural inequality.[2]

"FUCK-OFF": The Operation of Police Discretion

At the police enforcement stage of the criminal process both racial and class discrimination operate. It is difficult to adduce statistics which "prove" this statement because all the cases the police decide in their discretion not to proceed with are unrecorded. However, the bias of police in enforcing the law can be demonstrated by analysis of the operation of the "street offences" legislation in towns with a significant proportion of Aborigines in the population. A 1982 study by the Anti-Discrimination Board is most instructive in this regard. This study analysed the operation of s.5 of the offences in Public Places Act (NSW) in ten northern New South Wales towns with a high proportion of the population being Aborigines[3] and compared this to the operation of s5 over the whole state, and compared both of these results to a similar study conducted when the Summary Offences Act 1970 (NSW) contained the "street offences" legislation.

The Anti-Discrimination Board report shows that although Aborigines comprised on average only about 10-1[illegible] of the populations of the "Aboriginal towns" they accounted for over 90% of the charges laid under s5[4]. In 1980 61.1% of all charges under s5 involved the use of unseemly words[5]. As the authors of the report note, "despite the richness and diversity of the English language, only a very narrow range of words were alleged t[illegible] cause serious affront. "Fuck" and "cunt" alone or in combination accounted for 94.9% of the appearances for unseemly words in the 1978 sample and 91.3% in the 1980 sample"[6]. However, a study of the use of the word "fuck" in Moree in 1978[7] found that over 50% of the white sample and nearly 60% of the black sample had heard the word "often" or "very often". Nearly half of both samples admitted using the word often or very often and "only a minority said that they never use the word. It is worth noting that we did not come across a single male who said that he had never used the word"[8]. In analysing the use of the word "fuck" in various public places the researchers found that white people, including police officers, used the word more frequently than did blacks"[9]. This is some of the clearest evidence of discriminatory law enforcement by the police which has been documented to date in Australia.

Policing Aboriginal Towns: Enforcing Authority.

Discriminatory law enforcement is further evidenced by the over - policing of the "Aboriginal towns". The police obviously believe that Aboriginal people warrant more of their time and attention than do non-Aboriginal people. This is evidenced by relative police strength of the Aboriginal areas compared to the rest of the State.[10]

In other words, police identify Aborigines as "the real criminals" who deserve disproportionate surveill[illegible] ance.

The Anti-Discrimination Board Report studies led the authors of the Report to reject conventional explanations based on such concepts as equality of all citizens before the law. Drawing on class conflict concepts developed by the radical theorists, and on the necessity to understand phenomena in their historical context,[11] the report argues that the street offences laws serve the function of perpetuating the alienated, marginalised role which Aborigines are presently condemned to in our society. A lengthy quote developing this argument is warranted. The Report argues:

"Police are charged with the maintenance of order and discipline in the Aboriginal towns. This order is of a quite specific kind and the Aboriginal community occupies a quite specific place within it. Enforcement of street offences legislation in these towns can be seen as a continuation and contemporary expression of the historical role played by the police in the construction and maintenance of this order. It is not simply a matter of enforcing community standards as if some consensus existed with respect to these standards. Aborigines are often regarded as a "problem" insofar as they are actively unaccepting of "their place" in this order. It is at such points, and not simply where they are guilty of discrete criminal acts, that they run up against the law. Given the role of the police this frequently expresses itself as a challenge to the authority of the police, as the most immediate and palpable expression of authority in general. There is considerable evidence from elsewhere to suggest that among the principal criteria governing the way police respond in encounters with members of the public is demeanour of the person involved. In particular, police respond more favourably when respect and deference is shown to them. This enforcement of respect for their authority in particular circumstances is arguably a precondition to the police carrying out their other tasks. However, it is also an end in itself, a means of maintaining authority, discipline and order on the streets. In large part s5 provides them with the means of dealing with dissent from authority or displays of impropriety which express themselves in unruly or even irregular public behaviours, and specially those involving direct defiance of, or disrespect for, police themselves."[12]

The study cases do bear out the validity of this general approach. As was noted earlier most cases under s5 in the Aboriginal towns relate to the defendants use of unseemly words (61% compared with 43% for the whole state)[13] and in over 90% of these cases the offensive words were "fuck" and/or "cunt".[14] However, as the Moree "fuck" study[15] referred to above illustrates, the use of such words does not per se transgress general community standards since they are also widely used by non-Aborigines, including police officers. However, the use of such language by non-Aborigines, is generally not regarded as a criminal act. Wilson attributes this to their relative power positions in society when he says: "Law violaters and law enforcers are distinguished only by the amount of power the latter wields over the former. But the exercise of power by one group over another is what the social construction of deviance is about, and what the "fuck" study serves to illustrate". In the terms of the Anti-Discrimination Board Report use of such language by non-Aboriginals does not usually represent a "problem" as it does not usually represent a threat to the local social order. On the other hand the use of such language by Aboriginals often does represent a stand of defiance against their repressed and alienated social position, and against the authority of the direct instrument of their repression, the police. This theory is supported by the case studies done by the Anti-Discrimination Board which revealed that the police were the recipients of the unseemly words in 75% of the cases involving unseemly words.[16] Thus the Report concludes on this issue that "concern over much of the behaviour of Aborigines, especially of the type punished under s5, is less to do with genuine social harm caused than the perceived threat they, as a group, pose for local order and discipline".[17]

Sentencing Patterns: Massive Disparities.

David Chapman's study of sentencing of Aborigines in the Port Adelaide Magistrate's Court[18] reveals massive disparities between Aborigines and non-Aborigines, as the following tables show.

Sentences: Common Assault

Sentence	% Aborigines	% Non-Aborigines
Imprisonment	40	0
Fine	40	30
Suspended Sentence	20	30
Bond	0	40

Sentences: First offenders

Sentence	% Aborigines	% Non-Aborigines
Imprisonment	0	0
Fine	44.5	14.3
Suspended	0	7.1
Bond	33.3	78.6
No Penalty	22.2	0

Chapman's data reveals a particularly disturbing bias in sentencing. As he notes, the relatively high proportion of Aborigines imprisoned on conviction of common assault cannot be explained by reference to prior criminal records, and he argues that "one could speculate that black offenders may correspond more closely with the magistrate's conception of "the violent offender".[19] In view of the high proportion of Aborigines who eventually serve prison sentences in default of payment of fines, the percentage of Aboriginal first offenders fined is also a disturbing statistic.

David Chapman's study would suggest that racial bias in sentencing is not merely class bias in disguise, due to the vast over-representation of Aborigines in the lowest social classes but that in fact Aboriginal defendants suffer a double dose of injustice, part only of which is attributable to class bias. This result is confirmed by an American study which found that "both whites and blacks suffer a form of class discrimination. But for blacks this is not merely something which reflects economic position, but is added to what is purely racial discrimination in sentencing. In other words the black defendant is the victim of a double dosage of injustice".[20] In regard to street offences, Chapman's study revealed that, of Aborigines convicted of such offences 82% were fined and 18% were put on a bond, whilst, for non-Aborigines, 40% were fined, 20% given a suspended sentence and 40% were put on a bond[21]. The Anti-Discrimination Board report on Aboriginal street offences showed that in 1980 in the Aboriginal towns 88% of all defendants were fined and only 3.4% given a s556A dismissal, while over the whole of the state only 72.1% of defendants were fined and 7.3% were given a s556A dismissal.[22]

Aboriginals demonstrate against racial persecution outside the Fannie Bay Jail in Darwin, N.T.

Photo; We have Bugger All- The Kulaluk Story. Cheryl Buchanan.

"FUCK-OFF" - "GO TO GAOL": Imprisonment for Non-Payment of Fines

This evidence suggests that Aborigines who are convicted of criminal offences receive harsher penalties than non-Aborigines who are convicted of the same offence. Even for those offences where imprisonment is not an available sentencing option (such as street offences since the repeal of the Summary Offences Act 1970 (NSW)), a great number of Aborigines are imprisoned over and above what the above statistics on their face suggest. Because of the very high proportion of Aborigines who are imprisoned in default for non-payment of fines, the extent to which this occurs could not be empirically determined by the Anti-Discrimination Board in their Report. However, the Report noted that a "substantial proportion"[23] of Aborigines convicted under s5 of the offences in Public Places Act 1979 (NSW) go to gaol to cut out their fines. Aboriginal Legal Service workers interviewed by the authors of the Report estimated that, depending on the towns concerned, "at least 60% and as high as 99.9% were cutting out fines" by serving a term of imprisonment instead of paying the fine.[24] David Chapman's study of the Port Adelaide Magistrates Court reveals a similar pattern. Chapman found that whilst defendants defaulted in the payment of fines in only 10.5% of cases, Aboriginal defendants did so in 81.5% of cases.[25]

Thus the gaols of our country are largely populated by offenders whom the court considered should be dealt with in a less drastic manner than imprisonment. Indeed in NSW, in respect of street offences, imprisonment is theoretically not an available sentencing option. The legislature when repealing the Summary Offences Act 1970 felt that imprisonment was an unduly harsh sentence to be imposed on anyone for such trivial offences as constitute most street offences. When introducing the Summary Offences (Repeal) Bill, and the other Bills which constituted the transition to the Offences in Public Places Act, the Attorney-General, Mr. Frank Walker said of the imprisonment penalty "it is felt that such Draconian measures are unnecessary for what are relatively minor offences in most instances."[26] However, as the results of the Anti-Discrimination Board study indicate, this policy has not been effected because the vast majority of Aborigines who are fined for street offences go to gaol in default for non-payment of the fines. As one Aboriginal Legal Service Worker commented to the authors of the Anti-Discrimination Board report, "the situation hasn't changed from that that existed under the Summary Offences Act: the only difference is in the name of the legislation".[27] The perpetuation of the ludicrous situation where people are locked in prisons for being drunk[28] or for calling someone a "cunt" begs a deeper analysis of the role of the criminal law in general, and street offences in particular, in our society. These issues are dealt with later in this essay.

The reason why so many Aboriginal offenders default on payment of fines must be largely economic. Aborigines occupy a very marginal position in the social class structure of Australian society and thus suffer the attendant consequences of economic disadvantage which such a position dictates. The Henderson Poverty Commission[29] found that more than half of Australia's Aborigines live below a poverty line which the Commission admitted was very austerely drawn.[30] Tulloch[31] notes that "the Aborigines, who remain concentrated in unskilled jobs, enjoy the highest poverty and unemployment rates of any identifiable section of the Australian population. The Brisbane research study, undertaken for the (Henderson) Commission, found that of Aborigines who were working more than 90% were in unskilled jobs. Only 56% of those interviewed had done some paid work in the previous week, and 17% of fathers were unemployed"[32]. These figures justify Chapman's conclusion that "poverty appears to be a substantial cause of default with even very small fines often beyond the means of some Aborigines".[33] Chapman criticises magistrates for paying insufficient attention to their duty to consider the financial resources of the defendant before imposing a fine. This criticism seems to be warranted by the findings of the Anti-Discrimination Board study which concluded on this issue that "the fines bear little or no relation to the economic realities of Aborigines in the Study towns. While the magistrate is usually addressed by the Aboriginal Legal Service's

representative on the income, job status and general economic situation of each offender, it appears from many of the Court papers that the impact of this is not always fully appreciated by some circuit magistrates".[34] Thus it seems that many of the Aborigines who go to gaol to "cut out" their fines do so not out of choice but out of economic necessity. The fines that are imposed on them are often simply not within their capacity to pay, and their poverty directs them to prison in default. The deplorable situation of poverty many Aborigines face is highlighted by the comment of a police officer to the authors of the Anti-Discrimination Board report that "while they (Aboriginals) are locked up they're fed better than they would be at home".[35]

However, as the Anti-Discrimination Board report points out, to attribute Aborigines' defaults in payment of fines totally to economic deprivation is to adopt too simplistic an analysis of the phenomenon. One police officer commented to the authors of the Report that, "when some of the Aborigines have several fines they cut them out. Especially if they are receiving social service benefits, or if there is wet weather and no work - why not?"[36] In other words, in the employment circumstances many Aboriginal offenders are in, they suffer no economic detriment by serving a few days in prison and they are cutting out their fine at the rate of $25 per day. Thus, in their circumstances, they make a logical economic decision to go to gaol, even though they may be able to afford to pay the fine.

A further reason which explains the high proportion of Aborigines who cut out their fines in gaol, particularly in respect of street offences, is, in the Anti-Discrimination Board's view, a continuing "act of defiance and disrespect of authority", on the part of the offender. The report notes that "as one (Aboriginal Legal Service) field officer indicated, the attitude of many Aborigines is "fuck the cops, they're not getting any more out of me, I'll cut the fine".[37] The Anti-Discrimination Board Report argues that most street offences are themselves an act of disrespect for the Police who are symbolic of white authority and repression, and thus the act of going to gaol instead of paying the fine is often a logical continuation of that protest.

Conclusion: Inequality or Oppression?

Commenting on the higher "crime rates" of Aborigines compared to non-Aborigines in respect of "good order" (or street) offences which her study revealed Parker said: "The same situation obtains in Canada among economically and socially depressed Eskimo communities, and in the United States among similarly placed Indian communities, and among Maoris in New Zealand. Such factors as social and economic deprivation and alienation from the wider society are factors common to all these situations. Wherever an indigenous people has been subjugated and oppressed by a technologically superior power, strong feelings of frustration and hostility are translated into anti-social behaviour".[38] While such statements as this point to the existence of inequality in the impact of the law on differently placed socio-economic groups in society, they are unhelpful in that they assume that what constitutes anti-social behaviour is a constant, and imply that, albeit with understandable motives of frustration and hostility, the alienated and marginalised sector of the community transgress socially accepted norms whereas the integrated majority do not. As the Study of Street offences by Aborigines revealed this is not actually the case. What is perceived as anti-social behaviour is not a constant, and whilst the use of a particular word by one person in one context may be "anti-social" and attract the sanctions of the criminal law, the use of the same word by another person in another context may not. In respect of street offences, the argument that what constitutes "anti-social"behaviour has less to do with an examination of the social harm caused by the activity (and strictly constant social norms) and more to do with whether the activity is perceived to be a threat to the order and discipline of society, appears to be a preferable analysis.

In this regard the study of street offe involving Aborigines by the A.D.B. represents a significant departure from the usual social democratic assumptions analysis, style and 'solutions' adopted most state commissions, inquiries and reports. To that extent the report represents an important break with tradition and is useful ammunition in t development of more critical approaches the role of the criminal law in Austral

FOOTNOTES

1. As the Study of Street Offences by Aborigines, (New South Wales Anti-Discrimination Board, 1982) A.D.B. noted, at para 6.29 "the view that certain racial groups are more innately "criminal" than others is a long discredited one within criminological thinking".

2. Critique of Law Editorial collective, Critique of Law: A Marxist Analysis, UNSW Critique of Law Society, 1978, p.85

3. The percentage of Aborigines in the populations of the towns studied varied from 36.5% (Brewarrina) to 6.9% (Warren).

4. p.14

5. A.D.B. p.40

6. A.D.B. p.41

7. P. Wilson and J. Braithwaite (eds), Two Faces of Deviance, Paul Wilson, "What is Deviant Language?", University of Queensland Press, 1978.

8. ibid p.54

9. A.D.B. p.191

10. A.D.B. Appendix 5

11. A.D.B. at paras 6.12 to 6.18. The Report argues that the police role in respect of Aborigines during the first half of the nineteenth century was basically one of facilitating the dispossession of Aborigines of their land by the British settlers and, when this process was completed, was one of alienating Aborigines from the developing white society and perpetuating their alienated, marginalised existence through the enforcement of criminal (and "welfare") laws designed to introduce control over every aspect of their existence

12. A.D.B. at para 6.24

13. A.D.B. Table 3.19

14. A.D.B. Table 3.20

15. Paul Wilson, "What is Deviant Language?", op cit.

16. A.D.B. at Table 3.21. A disturbing finding of the study was that in 46.9% of all the s5 cases in Aboriginal towns the circumstances preceding the offence was that the defendant or his/her associate was approached by the police on a completely unrelated matter: ibid Table 3.17; para 3.21. In other words, the typical scenario is that the police, on no particular grounds, approach and hassle an Aborigine who tells them to "fuck off" or calls them a "cunt" and is then arrested for using unseemly words.

17. A.D.B. para 6.27

18. David Chapman, "Sentencing Aborigines: The Port Adelaide Magistrates' Court", Legal Service Bulletin, Dec 1976 p.13

19. p.132

20. Donald Warren, "Justice in Recorder's Court: An analysis of Misdemeanor cases in Detroit", in John A. Robertson (ed) Rough Justice, Little Brown and Company Boston 1974 Toronto at p.336.

21. Chapman op cit p.131

22. A.D.B. p.28

23. A.D.B. paras 4.63 and 7.18

24. A.D.B. para 4.41

25. Chapman p.132. Note that these figures are for fines arising from convictions on all offences except drunkenness.

26. Mr. F.J. Walker, Labor, Hansard, Legislative Assembly, 19th April, 1979, p.4676-7.

27. A.D.B. at para 4.54

28. In New South Wales, since the repeal of the Summary Offences Act 1970 and the enactment of the Offences in Public Places Act 1979 and the Intoxicated Persons Act 1979, it is no longer a criminal offence to be drunk in a public place.

However, under the Intoxicated Persons Act the police can detain an intoxicated person for up to 8 hours in a "proclaimed place" or police cells. There is a vast over-representation of Aborigines in the group to which this section has been applied (see Study of Street offences by Aborigines op cit para 8.41). As there are no "proclaimed places" in any of the Aboriginal towns in the study (ibid para 8.4) all those detained (72.8% of whom were detained because they were "in need of physical protection", ibid at para 8.41) spent their 8 hours in the police cells. As the Anti-Discrimination Board Report notes, the conditions in Brewarrina Police Station "are clearly unsuitable for any person, let alone one who has committed no legal wrong and is in need of care" (ibid para 8.45), but aside from this "it is clear that the high number of Aborigines detained compared to the rest of the State means that the Intoxicated Persons Act has been ineffective in "decriminalising" public drunkenness for Aborigines in these north-western towns. A night spent in the cells as a detainee under the Intoxicated Persons Act differs very little, in real terms, from an arrest and charge under the Summary Offences Act". (ibid para 8.42)

29. R.F. Henderson, Poverty in Australia, First Main Report, Volume 1 of the Australian Government Commission of Inquiry into Poverty, ACPS, 1975.

30. Ronald Mendelsohn, The Condition of the People (1979) p.113

31. Patricia Tulloch, Poor Policies: Australian Income Security 1972 - 77 (1979)

32. In 1975, when the Henderson Report was published, national unemployment was 4.4% of the workforce. In 1974 and 1973, the years when the research for the Report was done, national unemployment was 2.3% and 1.9%. This places Tulloch's finding in perspective. Source: International Labour Organisation Year Book of Labour Statistics 1981.

33. Chapman, op cit, p.132

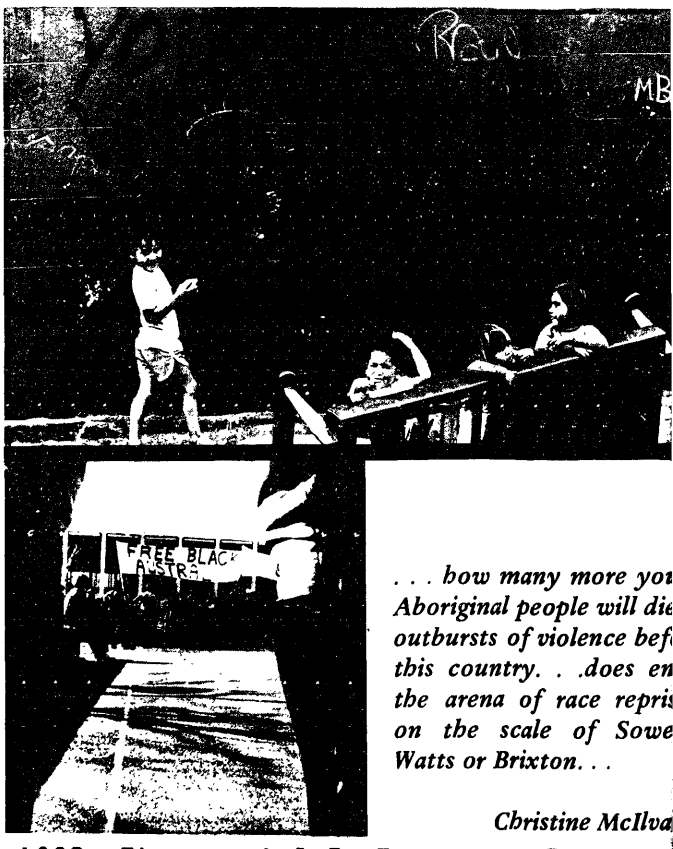
34. Study of Street Offences by Aborigines, op cit, para 7.21. As to the criteria on which the magistrates act when imposing fines for street offences in Aboriginal towns it is disturbing to note not only the observation that not much attention is paid to the defendants ability to pay the fine, but also: (a) "the fines appear to bear little relation to the offence" para 7.21); (b) higher fines were generally imposed by circuit magistrates than by visiting magistrates (paras 7.21; 4.35; 4.36); and (c) higher fines were imposed on those who pleaded not guilty in the Aboriginal towns than on those who pleaded guilty but this pattern was not evident over the rest of the state (paras 3.13; and 4.38)

35. ibid, para 4.39

36. In 1980 55% of Aboriginal street offences defendants were living on a pension or unemployment benefit: ibid para 3.17

37. A.D.B. paras 6.24 to 6.29

38. Dorothy Parker, The Pattern of Aboriginal Offences 1974 p.20



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Redfern 1983. Canberra 1983. Photos: A.I.C. Reporter, Dec. 19