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FROM PENAL COLONY TO SUMMARY PENALTY

AN HISTORICAL ANATOMY OF AN OFFENSIVE ACT:

THE SUMMARY OFFENCES ACT, 1970, No.96 (N.S.W.)

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INTRODUCTION

> In a modern state, law must not only correspond to the general economic condition and be its expression, but must also be an internally coherent expression which does not, owing to internal conflicts, contradict itself. And in order to achieve this, the faithful reflection of economic conditions suffers increasingly. All the more so the more rarely it happens that a code of law is the blunt, unmitigated, unadulterated expression of the domination of a class - this in itself would offend the conception of right. [1]

On the 9th December 1970 a new criminal statute was assented to and became law.[2] This new Act was said "to make provisions with respect to certain offences to be made punishable in a summary manner." As a logical corollary of the Act's preamble, the name given to this new statute (the short title) was the Summary Offences Act, 1970 (hereafter referred to as the Act). The preamble further stated its intention "to repeal the Vagrancy Act 1902 and certain provisions of the Police Offences Act 1901."

The Act is divided into four parts, namely: Preliminary; Offences; Powers of Police; and General. Part II of the Act is further divided into seven divisions: Offences relating to public places; Vagrancy and similar offences; Prostitution; Betting; Frauds, unlawful possession, etc; Public Assemblies; and Other offences.

While the long title of the Act may give the impression that certain criminal offences such as vagrancy, were being repealed, the reality was different as the promulgation of the Act did not result in a single previously enacted offence being

abolished. On the contrary, rather than decriminalising any social activity or behaviour, the Act dramatically increased the number of possible acts to which criminal sanctions could be attached. The Act also had the effect of bringing together what might be called offences against perceived concepts of public order under a single criminal statute and to conjointly widen police powers for maintaining such public order. The passing into law of the Act introduced what were in essence a number of new offences, such as criminal trespass, unseemly words, demonstrating without permission. At the same time it re-enacted many traditional offences such as vagrancy, prostitution, consorting etc. There were thirtyeight offences listed in the provisions of the Act, however, because of the wide definitions and the ambiguity of some of the provisions, it is impossible to state the number of possible acts of behaviour which could constitute an offence under the provisions of the Act. To say its reach was extreme would be almost to understate the wide-ranging nature of the Act's powers of control.

Rights and Liberties

Conceived in a period of official antagonism, put together with little regard for legal definition and clarity, and given a title which showed a remarkable lack of political skill, the Act serves as a precious reminder of how tenuous rights and liberties are in today's anonymous corporate society and remote government rule.[3]

The very title is itself sufficient to break the 'golden rule' that laws, in a class society of which Australia is one,[4]

should never appear to be the 'blunt' expression of the interests of one class. The skill of law making is of appearing to do one thing while actually doing another. If this is a skill necessary to retain class dominance then the Act was a lamentably poor expression of that skill.

Nothing can be more calculated to stir indignation and inspire opposition than crude statutes and laws which appear to be against the 'conception of right', and few things are more offensive than an offensive law. Offences under the law will be viewed with disapproval, but offences of the law will be vigorously opposed by those directly affected.[5]

The Act was doomed to a short (even if oppressive) life from the moment of its promulgation. Thus it was that one of the pledges of the Labor Opposition during the 1976 State Elections was to repeal the Act, a policy which nevertheless was delayed two and a half years until the New South Wales Premier announced it would be repealed at the first sitting of Parliament in 1979,[6] which subsequently occurred.

Instrumentally, the Act dramatically redefined rights and liberties and curtailed traditional legal safeguards by transferring the rights of individuals into the discretionary powers of the police. The most junior constable was suddenly armed by the legislature with new and increased powers. For example, it has been argued that under s.59 the power of a member of the police force to stop, search and detain, could make lawful the acquisition of evidence which under the Karuma Case[7] rule would have been unlawful.[7a]

The Motivation Behind the Act

The Act was the perpetuation of the past, a perpetuation of ruling class reaction to demonstrative political opposition. The decline from 50 per thousand population in 1960, to 25 per thousand in 1970 of offences of a disorderly nature[8] is, I submit, strong testimony that the Act was not passed to curb conventional criminal activity but passed for another purpose: to control political dissent.

Each new criminal law passed automatically gives the state, through its police force and other law enforcement agencies, an extension of its operation for social control and an ability to erode and restrict people's freedom. Hence each new law increases what is euphemistically called the discretionary power of the police. Even supposing the law is justified, it still must increase the chance of police administrative arbitrariness.[9] The police themselves argue that discretionary power is supported because

> it permits police to devote more time to enforcing those laws which relate to the more serious crimes. It permits them to take account of the changing norms and social values occurring within society and to be selective in enforcing minor offences. [10]

Civil liberties are too precious "to depend upon the consent of a policeman."[11]

Herein lies the problem in relation to the Act. If it is reasonable to assume that the legislature determined that increased powers in the Act were necessary, then it is also reasonable to asuume that the police would consider it was intended for the Act to be enforced and that the kinds of

disorders the Act covers would fall into the category of 'serious crimes'. In fact according to the then NSW Minister for Labour & Industry (Mr Willis) who introduced the Bill in Parliament, the Act was the result of a Police Department committee's recommendations.[12]

A reading of the Parliamentary debates dealing with the Summary Offences Bill (as it was then) clearly suggest that the Government expected the Act to be enforced almost as a matter of priority. Indeed, the Minister when introducing the Bill quoted a recently published Gallup Poll claiming that sixtysix percent of people had "a preference for stronger laws for controlling demonstrators."[13] And while the Minister asserted that his Government subscribed to preserving "traditional liberties and rights" and that the Bill had been"drafted in accordance with this basic concept",[14] the numerous references by himself and other members of his Government to "sit-ins", "gate-crashers", "porno-political behaviour", "extremist", "violently inclined minority", "campus turmoil", "hoodlums and pests", "demonstrators",[15] does appear to contradict his claimed intention. It is hard to escape the conclusion that the main motivation for the Act was the then political contingencies (an upsurge in industrial action, and demonstrative actions against conscription and the Vietnam War). This is not to say that within the Act there could be found a weakening of all rights, quite the contrary, as while what might be termed political rights of association, assembly and free speech had been eroded and limited, the rights of property were given added protection.

Traditionally the State has had two opposite functions "with respect to the problem of the security and defence of its citizens."[16] There is the external function which is theoretically carried out by the army, and the internal defence of citizens (from the criminal activities of others in society) which is supposed to be the function of the police. However, "the police (force) is more and more used to harass and oppress idealistic and rebellious youth, exploited dissatisfied workers (and) dissident intellectuals."[17]

The above is particularly relevant not only to the activities of the police before the Act, but also after the Act's promulgation. The initiators of the Act seemed to have seen the suppression of dissent as more important than providing minimum police security against the traditional concepts of criminality. The offences prescribed by the Act have an emphasis towards victimless crime or crimes where there are no real victims, which appears to put the Act at variance with the Minister's stated intention to protect "traditional liberties and rights."[18] It is certainly contrary to liberty of action in the John Stuart Mill bourgeois tradition, where any interference with a person's liberty for their own protection is a prima facie evil.[19]

The Act's orientation towards victimless crime was not only contrary to the theory of bourgeois freedom but also an indication that the Act was more concerned with limiting rather than guaranteeing political freedom. While precise figures are not available on how many people were convicted of victimless offences under the Act, the fact remains that of 89,383

criminal informations laid in Petty Session courts in 1977, at least 58,852 were for victimless offences.[20]

With this in mind, there are reasonable grounds to conclude that among the last things that were in the minds of the drafters of the Bill, were a person's civil liberties. It was probably this deficiency which was at the back of the Law Reform Commission(not wanting to be tainted by the omnibus nature of the Bill) withholding any public approval of the Bill, or later the Act.

Discriminatory Aspects of the Act

At best the Act can be described as one which brought together some of the worst existing discriminatory laws with the addition of some new ones of the same character, into a single offensive Act and in that sense it is appropriately named the "Summary Offences Act." Not once in the Parliamentary debate did any government member bring forward any empirical data or statistical evidence on crime to justify the Bill, with its wide-ranging extensions of what were to be prescribed criminal activities. The Minister, in introducing the Bill preferred to justify the new offences which would be created once the Bill became law, as modernising, when he said, "what is being done is to get rid of out-moded legislation ... and to create offences to regulate developments in modern society...".[21]

The substance of the Act was not opposed by most of the Opposition, but rather various peripheral aspects of its content. This was the position even though the Vice-President

of the New South Wales Council of Civil Liberties had referred to the Act as an "abomination", a "catch-all ... for everything a policeman finds objectionable...".[22] One Opposition back bench member who did address himself to what was the essence of the Bill stated that the Bill was "designed to promote the power of the authoritarian over the poor, the power of policemen over the people, and the power of the tired, the smug, and ignorant over the critical youth ...".[23]

There are three ways in which a person charged with a criminal offence can be brought before a court: by arrest on warrant, by arrest without a warrant, or by summons in writing. Throughout the history of criminal law for charges involving minor criminal conduct, the police have shown a propensity to dispense with summons and warrants and instead use their common law and statutory powers of arrest. The passing of the Act could only increase this trend of depriving a person of their freedom for minor infractions of the law. The widening of police powers seemed to be based on what Ward and Woods refer to as one of the three false assumptions which underly the 'law and order' approach. The assumption that increased police powers lead to a substantial improvement in the prevention of crime and the effectiveness of law enforcement.[24] In fact a study done in the United States showed that massive growth in the size of police forces and soaring expenditures to maintain them resulted in the position where between 1961 and 1971 a growth in the size of one police force of 55% was matched by an increase in the rate of robbery in the same period of 299%.[25]

In NSW there seems to be some parallel with the U.S. findings as in the four years prior to the promulgation of the Act, charges heard in Magistrates Courts increased by 23,000, but within the two years after the Act came into force charges heard jumped by 67,000.[26] Further substantiation of the U.S. findings can be found in the fact that NSW, with its greater expenditure, proportionately larger police force and the Act, had 80,000 convictions for offences against good order, while Victoria had only 33,064.[27]

It is the kinds of prescribed offences contained in the Act which make increased police powers most unlikely to reduce or prevent crime, for not only are many of the offences under the Act victimless, they are also offences dealing with morality. And while it may be true that "There are no theoretical limits to the power of the State to legislate against ... immorality,"[28] there is a real practical limitation on how far those morals can be enforced by legislation.

To give just one example, the use of language is as wide as there are numbers of people. Yet the legislature has continuously tried to control, by standardisation, the use of language. All to no avail, people still use the language that best suits the occasion or their purpose. The Act tried to further narrow our means of language communication when it prescribed that any use of "unseemly words" within hearing of public places was a punishable offence.[29]

What are unseemly words? Chambers Dictionary defines the word

unseemly as "indecorous" and the Oxford English Dictionary as "unbecoming". The law in Australia has yet to judicially define its meaning. The Act defines unseemly as "obscene, indecent, profane, threatening, abusive or insulting."[30] Hence, by a vote of the legislature a word can be made to mean something it does not mean in the vernacular.

The legislature was doing more than just changing common definitions of English words to bring more morality into our society, it was also deeming it appropriate to enhance the discretionary powers of the police, to increase the powers of control by the state and to make the conviction of dissident behaviour more likely to follow an arrest. But more important than all of these, was that the police could shoot first and leave the victim to ask questions afterwards when they get in front of a magistrate. Police decisions not to invoke the criminal process largely determines the outer limits of law enforcement.[31]

Arbitrariness or Discretion

A characteristic of the criminal law is the wide discretionary power necessary at every level of its implementation and enforcement. At the first level it is the police who exercise very wide discretionary power in determining what they will or will not permit. Police prosecution and the judiciary not only provide (through the use of discretion) for flexibility, but also discrimination in the enforcement of the law. Indeed, such discrimination is enforced by the judiciary, when a judge can state, "a selective approach to law enforcement is a well known phenomena...".[32] And in relation to demonstrations that

are very big:

> It will still be a matter in which police discretion and policy will determine what is to be done, and police in different places or at different times or in relation to different groups appear to exercise their discretion differently even in relation to big demonstrations in the streets. 33

One of the ratios of the Wright Case seems to be that the discretion of a police officer in relation to an arrest is not a justiciable issue.[34] Discretion is necessary in any delegation of authority, but without control there is no longer a proper delegation of authority, but rather the granting of the arbitrary use of authority.

Law enforcement exists in all modern societies, equally it is becoming obvious that there is a distinction between law enforcement and legal repression, i.e., the South African Immorality Act.[35] The NSW Act leaves the field of law enforcement and enters the gates of legal repression. As one writer has noted in respect to the passing of 'law and order' type statutes, "Civil liberties do not enjoy high priority in the platform of political parties."[36]

The Hidden Contest

The contest which is contained within the parameters of the Act is a contest between civil liberties and the rights of property owners and the state, and it is a sad testament to the socio-political economic conditions of Australian society that property and state rights are normally or usually considered to be more important than civil liberties.

The Act was based on recommendations made by a Police Department Special Committee, as already mentioned. How was it that the instrumentality for 'law and order', the police, was so important in deciding the kind of 'law and order' they wanted? To ask the police to recommend the changes required in the law is like asking a company director what the Companies Act should declare to be an offence, or to ask a gambler how the laws relating to gambling should be amended. All three must inveitably give a distorted view. The police have an interest in having more offences prescribed by law, not because it reduces crime, but because it increases it and this increases the need for more police to be employed.[37]

Hence the result is more police and more police power and not as one would expect, less crime. Within the dialectics of legal repression,[38] there is a unity of opposites, a unity between ruling and subjugated classes in which a quantitative battle takes place for freedom or oppression. Indeed, if this dialectic did not exist then the necessity for increasing both the police budget and the force would evaporate. The police (and the establishment) must always find reasons for expanding their powers. The Act gave them at least 38 reasons.

Some Explanations

The questions posed and still to be answered are - how did it happen? what were the causes? and why did it happen in 1970? This paper will attempt to answer these and other questions. It will attempt to show that part of the answer lies with the albatross of our past, for the law cannot only be explained

in terms of the present, it is also influenced by our past.

People -

> make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past. The traditions of all dead generations weigh like a nightmare on the brain of the living. 39

Neither is the law a reflection or manifestation of the idiosyncracies of a gathering of legislators, even though these may mould and refine its final shape. Law is not the product of the individuality of people but that of a whole social matrix, both past and present, with the present being the final determinant. The Act was no different in the above respect, it still allowed room for a section of the Act to deal with the F.S.M. (Filthy Speech Movement) to satisfy the peculiarities of one member of Parliament, who claimed such a body was an "aspect of the revolutionary movement."[40]

It is not being melodramatic to ask the question: "How was it that such repressive legislation found its way into the NSW statute books?" Quite the contrary. The very fact that the then Opposition promised to repeal the Act is itself testament that a substantial part of the electorate recognised its repressive features. After all most political parties seek to win votes, not lose them and therefore are not likely to make promises which are unpopular with the 'thinking' segment of the voters.

Offensive in its conception, offensive in its birth and

application and a contradiction of the ideals of liberal freedoms and democratic practices, which are generally strongly held in our society. The explanation for such a contradiction can, in my view, only be satisfactorily found by considering the Act within the general contemporary social matrix: political and industrial actions; the media; our cultural heritage; the law and judicial process; the police and most importantly, class relationships and conflicts together with other factors.

Strict legal analysis is unsatisfactory (although by no means useless) because it tends to deal with a phenomena in isolation from its causes, hence this study will combine both legal and human factors, thus posing a materialist explanation of the Act.

Footnotes to Introduction

1. Engels F., (1890) "Letter to Comrade Schmidt" in Marx & Engels, Selected Correspondence, Progress Publishers: Moscow (1975), pp.399-400.

2. Short title: Summary Offences Act, 1970, No.96.

3. see Cardan, P., Monopoly Capitalism and Revolution, Labor Solidarity Pamphlet, 2nd ed (1972).

4. see Connell, R.W., Ruling Class: Ruling Culture, Cambridge University Press: Melbourne (1977).

5. see Law in Disorder: Politics, the Police & Civil Liberties in Queensland, Queensland State Committee C.P.A., November 1977. On the question to the Anti-march laws in force in Queensland;
Also "Short Fuse" The Weekend Australian, Oct 13-14, 1979, reporting the opposition being generated by the anti-public assembly provision s.54B of the Western Australian Police Act.

6. see "Government to repeal Summary Offences Act", The Sydney Morning Herald (S.M.H.) 14.12.78.

7. Kuruma v. R. [1955] A.C. 197. It was held that as long as the evidence is relevant to the matter before the court it is admissible as evidence. With the exception that if the evidence was gained by trickery or impropriety and would operate unfairly against the accused, a judge has the discretionary power to disallow such evidence.

7a. see Abadee, S.R., and his discussion of the Summary Offences Act, in Justice, No. 4, May (1971), 17.

8. see N.S.W. Police Department Annual Reports.

9. see Stewart, Richard., "The Reformation of American Administrative Law", in (1975) 88 Harvard Law Review, pp. 1711-1760.

10. Friedlander, C.P., & Mitchell, E., The Police: Servants or Masters? Hart-Davis: London (1974), p.22.

11. Deputy Leader of the Opposition (Mr Einfeld), NSW Parliamentary Debates Vol.89 1969-70 p.7887.

12. Ibid., p.7864

13. Ibid., p.7873.

14. Ibid., p.7514.

15. see debate on the second reading of the Bill; ibid., pp.7864-7920.

16. Markovic, Mikailo., On the Legal Institutions of Socialist Democracy, Bertram Russell Peace Foundation Ltd: Nottingham (1976), p.15.

17. Ibid., p.16.

18. For example, of the 38 offences created by the Act, at least 27 would be either victimless or an offence where no actual victim need exist.

19. see Mill, John Stuart., On Liberty (Everyman edition), pp. 72-73.

20. see Court Statistics 1977, Department of the Attorney General & of Justice, NSW Bureau of Crime Statistics & Research, Statistical Report 9, Series 2.

21. see New South Wales Parliamentary Debates, op.cit., p.7511.

22. Professor Ken Buckley; The Australian, 18.11.70.

23. Hon. J. Ferguson, M.L.A., in New South Wales Parliamentary Debates, op.cit., p.7910.

24. Ward, Paul & Woods, Greg., Law and Order in Australia, Angus & Robertson Pty Ltd: Sydney (1972), p.21.

25. see Levine, James P., "The Ineffectiveness of Adding Police to Prevent Crime", Public Policy, Vol.23, No.4 (Fall 1975) pp. 523-545.

26. see Year Book Australia 1966-1974. Unfortunately the Year Book does not give an adequate breakdown of the class of offence. This could have been the fault of the system of crime recording which until 1972 was wholly the responsibility of the Police Department.

27. Ibid.

28. Devlin, Lord Patrick., The Enforcement of Morals, Oxford University Press, London (1965), p.14.

29. see s.9. Summary Offences Act No.96 1970 (N.S.W.)

30. s.4(1)(b)., ibid.

31. Milte, Kerry L. & Weber, Thomas A., Police in Australia: Development Functions, Procedures, Butterworths: Sydney (1977), p.245.

32. Kerr J., Wright v. McQualter (1970) 17 F.L.R. 305 at 319.

33. Ibid., p.320.

34. Since the Wright Case the English courts have re-emphasised that it is only in "extreme cases" that mandamas will lie against the exercise of police discretion. See R. v. Commissioner of Police of the Metropolis Ex Parte Blackburn [1973] 1 Q.B.241.

35. see Tubbs, M., "Emergency Powers, Class and State" in Australian Left Review, No.57, March 1977, pp.26-36.

36. Buckley, Ken., All about Citizens Rights, Thomas Nelson (Australia) Ltd: Sydney (1976), p.154.

37. see Reasons, C.E., "The Dope on the U.S. Bureau of Narcotics" in Reasons, C.E. (ed), The Criminologist, Pacific Palisades, California (1974).

38. see Boehringer, G., "The Dialectics of Capitalist Legal Policy" in Australian Left Review (1976) No.55.

39. Marx, K., "The Eighteenth Brumaire of Louis Bonarparte" in Marx-Engels Selected Works, Vol.1, Foreign Language Publishing House: Moscow (1950), p.225.

40. Hon. P. Coleman M.L.A., New South Wales Parliamentary Debates, op.cit., p.7883.

CHAPTER I

LAW AND SOCIETY

What is meant by the term 'law' is itself the subject of basic disagreement between philosophers, sociologists and jurists. This disagreement is important for purposes of analysing the Act, because the concept of law from which a person proceeds, determines to a large extent the manner in which they will explain the Act.

There are two concepts of law. One can be termed the 'idealist' and the other the 'materialist'. Stanley Moore suggests that the former concept tends to identify law as "the minimum rules of conduct" while the other defines law as the "formal commands of the governing authority."[41] The former of these traditions would generally fall within the functionalist concept of society and can be termed as the 'functionalist pluralist'[42] and the latter tradition falls within the structuralist camp[43] and can be termed as 'materialist conflict'.[44] This paper will adopt the materialist conflict theory of law in its considerations of the Act.

There is dispute about the origin of law, with some seeing that wherever and whenever society exists morally, so must law.[45] However, for purposes of criminal law (of which the Act was part), law exists when there is the existence of executive power centralised into an administration which appears to stand above the public and commands and obliges adherence to that body's proclamations.[46]

Law can be understood to be the manifestation and the product of conflict between a dominant and a dominated class. In a class society, all law has its genesis in the notion and reality of private property which is owned predominantly by one class.[47] Thus Engels argues that: "Civil law develops simultaneously with private property out of the disintegration of the natural community."[48]

It is impossible to conceive of the relevancy of the laws of larceny, fraud, trespass or the offence of being on land without "reasonable cause",[49] without the existence of private property. All of the above mentioned laws are laws directly related to property rights. Once the notion of private property exists (a notion, not a thing[50]), other indirect laws, such as defamation, nuisance and criminal laws, become necessary to maintain the existence of the notion of private property.

The Dimensions of Law

The purposive, functional characteristic of law has both a symbolic and instrumental nature.[51] There are many laws on the statute books yet they are not all given the same priority. Some of them are only occasionally or irregularly implemented, yet it cannot be said that the reason for this is because they are rarely breached or that little harm results when they are breached. Can we say that only an odd breach of the Hire Purchase Act, the Landlord and Tenant Act, the Consumer Protection Act, the Companies Act, and the Factory and Shops Act occurs? Many people seem to think otherwise.

Relatively little in the way of resources is allocated for the enforcement of symbolic laws. For example, in 1977-78 the NSW Budget allocated 25¢ per head to the Department of Labour and Industry[52] for the enforcement of such laws as the Factory and Shops Act, and the Lifts and Scaffolding Act, yet as far back as 1970 an instrumental law such as the Criminal and Traffic Laws were allocated over $5 per head for their enforcement.[53]

The difference between the two groups of laws is that the former are symbolic, relying heavily on the individual to voluntarily adhere to them for their application, while the latter belongs to the instrumental group, relying for their adheremce on the forces of the state, the police. The former are likely to be directed to regulating the activities of the capitalist class, and the latter directed mainly at controlling the behaviour of the working class.

All laws have both symbolic and instrumental dimensions and thus there is no strict dichotomy, they "contain both elements."[54] However, the primary dimension of a law is that which is emphasised at the expense of the other. This can only become clear in an analysis of its impact in society, i.e. in social practice.

The Act emphasised the instrumental dimension of law. It widened police powers so that the Act would be enforced and so that the police could act under virtually any conceivable contingency.Some indications of this extended power are in

sections 57 - 59 of the Act. Under s.25 of the repealed Police Offences Act the power to enter and search a vessel was restricted to a superintendent or inspector. Sections 57 & 58 of the Act conferred the power on any member above the rank of sergeant (or an officer in charge of a police station or vessel) to enter, stop, detain and search any vessel. And in relation to stopping and searching persons and vehicles,[55] the difference was that under s.36 of the repealed Police Offences Act the court ultimately had to find a reason to suspect,[56] wheras under S.59 of the Act it was only the police officer who had to reasonably suspect.

Given the stratified nature of our society it is reasonable to assume that these police powers to stop and search were more likely to be used where the vehicle was a cheaper make than if it was expensive.

In spite of the widened police powers the very fact that the Act repealed the powers contained in the Police Offences Act and the Vagrancy Act[57] and in so doing created many new offences,[58] is itself suggestive that the Act was to be instrumental in its dimensions.[59] Indeed, the Act contained most of the statutory powers given to the police for what is euphemistically called 'law and order'. It is hard to estimate how much resources for law enforcement were allocated for the Act's implementation, but judging from the number of convictions under the Act, it would have been quite substantial.[60]

This cannot be said to be the case with a symbolic law such as

the Factories, Shops and Industries Act (NSW) when out of 35,125 registered factories in 1977 only 53 informations were laid.[61] It is this kind of social practice that can be used to identify a particular law's dimension.

Criminal Law

Criminal law has numerous functions relating to the production and reproduction of the capitalist system - an essential one being the protection of private property. Hence criminal law can be understood to be a shield behind which private property stands for protection. Theoretically it protects all private property alike. The problem is that not all people have private property or have insufficient to be able to use the shield of criminal law. Hence criminal law does not protect all property owners equally, but proportionate to the amount of property held. For example, "when a man who is starving enters a house and takes food in order to keep himself alive, our English law does not admit the defence of necessity. It holds him guilty of larceny..."[62] Property here has the protection of the law and overrides the needs of the propertyless individual.

Criminal law protects property interests. It does this by controlling the subjugated class' behaviour and activities.[63] Criminal law is, in essence, about the relationship to property[64] and as such must in its application control the propertyless. A quotation from Lord Denning from the London Borough Case reveals that the law is both a "shield" and a "weapon" for the benefit of property owners and no matter what human necessity may be, that necessity cannot take precedence over what are considered by some to be the natural rights of man given by

the Almighty.[65]

An analysis of the Act will show that it concerned itself with two inter-related matters: the defence and protection of property rights and in particular private property,[66] and the social control of the class which had the least amount of property. Under capitalism "the disjunction between existence and essence - require that the subordinate classes remain oppressed by whatever means necessary, especially through coercion and violence of the legal system."[67]

Capitalism centralises economic resources either under the direct control of corporations or under the indirect control of government agencies. The distinction between what is private and what is public becomes blurred and increasingly difficult to identify.[68] As Miller notes, "the corporation ... particularly the super-corporation - is a species of private government ..."[69] Super-corporations have expenditures as large as many governments, have as many departments to look after both in their domestic and foreign activities and they perform in much the same manner. Like Weber's theory of government, they equate efficiency with bureaucracy.[70] But unlike Weber, they do not see the choice as being "between bureaucracy and dictatorship.",[71] but rather a dictatorship by bureaucracy.

Not only does capitalism concentrate economic resources in the hands of a few to be under their control, it also, as a necessary corollary, segments its lesser competitors and the subjugated class, and as a result centralises, unifies and

cements political power within the capitalist class. And as power has always been found to be corrupting, so the capitalist class (particularly its corporate elite) becomes the most corrupted and corrupting.[72] Their corrupting influences permeate throughout society even affecting governments.[73] This corrupting practice stands as a contradiction to the stated morality of the system which the capitalist class with its corporate elite dominate.

There is a contradiction between the capitalist class' call for 'law and order' on the streets and the corruption that exists in the top echelons of the capitalist corporations. This contradiction or even duplicity comes as a result of the nature of capitalist business rivalry where survival often leaves no other option but to participate in illegalities.

Crime, under capitalism starts to be redefined, so that bribery becomes 'good business' and 'unseemly' words a criminal offence (another distinction between existence and essence), so that the 'draft card burner' is a seditious criminal and a positive threat to national survival but the manufacture of a jet passenger aircraft known to be unsafe is business and a benefit to the country's economic wellbeing.[74]

The attempt to redefine what is criminal was well stated by one corporate crook when before being sentenced for (among other things) bribery, he said -

> I will never believe I have done anything criminally wrong. I did what is business. If I bent any rules, who doesn't. If you are going to punish me, sweep away the system. If I am guilty, there are many

> others who should be by my side in the dock.... What big company doesn't spend that much and more on entertainment and getting contracts. 75

Even the rulers of corporate capitalism have very definite views of making separate distinctions on what is criminal. A Vice-President of the United States made the distinction very well when before his own conviction for corruption, in a speech on criminality, he said -

> I'm talking about muggers and criminals in the streets, assasins of political leaders, draft evaders and the flag burners, campus militants, hecklers and demonstrators against candidates for public office... 76

We see here that the traditional criminal image is replaced with that of a political activist.

It is therefore not surprising that the Act has many offences relevant to demonstrators, draft resisters, hecklers, campus militants and flag burners, but no offences relevant to crimes committed by the 'powerful'. The Act was never perceived or intended to be a statute which would be used against the corporate elite of the capitalist class. The ruling class do not readily make laws with the intention of them being used to repress themselves.

The class which dominates -

> besides having to constitute their power in the form of the state, have to give their will, which is determined by these definite conditions, a universal expression as the will of the State, ... an expression whose content is always determined by the relations of this class, as the civil and criminal law demonstrates in the clearest possible way. 77

Unfortunately criminal law does not demonstrate itself to be clearly the ideas and self-interests of the ruling class. If it did, the real power of criminal law, that of its ideological impact and influence, would be lost. Because criminal law appears to be about order and security for the 'common good' it is able to dominate the consensus and meet the approval of the overwhelming majority. It is these characteristics which result in remarkably few in society having to feel its full wrath. And it is my contention that the Act made the cardinal error of appearing to be a law which expressed the very definite interests of corporate economic and political power. It was simply too easily identified for what it was - a class interest law.

In order for the ruling class to maintain its dominance, their task is to carry through their aims and ideas into universal acceptance so that they become the common ideas and represent the 'common interest'.[78] Law, even right down to legal education,[79] is an important vehicle for carrying through the will of the ruling class.[80] For apart from certain compromises which result from the conflict between the classes, law, in the final analysis, represents the will of the ruling class. The overall interests of the whole of the class and not just of individual members. Thus criminal law is, in the first place, the concretised will and ideals of the ruling class turned into legislative and case law.

In criminal law two distinct functions can be identified, they are the economic purpose and the wider social purpose[81] and of

the two functions social control is more generally emphasised by law enforcers or commentators. However, Chambliss has shown that the original purpose or function of vagrancy laws were, in a feudal society, to coerce workers into cheap labour for their feudal lords (an economic purpose), and that with a change in the labour market, resulting from an expansion of trade, their function was changed when they were used to control the movements of potential street robbers and bandits (social purpose).[82] While this example goes to show that in the area of sociology there are very few absolutes, it does not distract from the general rule that criminal law is primarily concerned with the function of social control: control as deemed necessary by the ruling elite.

Law can be said to be the modified consciousness of the ruling class resulting from the reflections and experiences of their control over the means of production, distribution and exchange. In this sense it represents perceived class interests. It is a misunderstanding and a misconception to think that society is based on law, quite the contrary, that would be -

> a legal fiction ... it must be an expression of society's common interests and needs, as they arise from various material methods of production, against the arbitrariness of the single individual. 83

What exists is law based on society.

Ideology of Law and the Political Economy of Repression

The ideological content of criminal law in general tends to represent its real power and not that of law's punitive characteristics: they only represent its force. No social

system can survive unless its rulers obtain in general the voluntary acquiescence of their subjects, for each time force is used it increases alienation from the rulers.[84] "A piece of power used is a piece of power lost, and when you run out of power your time as a ruler will run out."[85]

The balance between consensus and force represents the real skill of maintaining ruling dominance. Thus order that has to rely on, or has to be obtained through "intimidation" rather than "integration", threatens social and civil order because it results in "the continuing need" for such a destabilising forceful means of ruling.[86] It is a misconception of the concept of law and turns things upside down on their heads to perceive the law as being primarily coercive. In general the violent character of the law is felt and experienced by comparatively few in society. And to do as Quinney does, to present criminal law as the "foundation" of "legal order"[87] is to distort history.

Criminal law grows out of material and social intercourse: the way in which people set about to produce their means of survival. The form of economic relations, which set the basis for both production and social reproduction determines the shape and form of the massive superstructure, and thus the economic base gives its expression to the superstructure.[88] The legal order of capitalism is thus founded first and foremost on the relation to private property,[89] the relation to the means of production. This is the foundation stone of capitalist legal order, this is <u>the</u> 'social order', if it were not, criminal law would have nothing upon which to conceive

its order, and further, if economic relations were unable to found and provide social order, then no amount of coercion by criminal law could maintain order. Criminal law can never be a substitute for a social system's own base relations but it can be an instrument for the social control of those dissidents in society who do not comply with the 'order' created by basic economic relations. I submit there is a political economy of repression. Rights and liberties are based not on individuals as such, but on the surplus value that is created, because -

> the primary base of law is rooted in commodity relations, and hence so-called private, or civil law, and that modern public or criminal law is an extension of this conceptually. 90

In a commodity production system it is in the course of exchange that rights and liberties are created mainly because the yardstick upon which value can be measured is that of the exchange value of commodities. The allocation of rights and liberties is located in economic relations and based on the extent of the value that is created and the requirements for its distribution. Hence, it seems that while bourgeois legal doctrine states that there is equality before the law, the law itself is anything but equal.[91] Indeed this legal tenet of bourgeois law ensures that the inequality of the system continues. Another writer said much the same thing when he observed, "Once property has been deified, it becomes the measure of all things. Even human life was weighed in the scales of wealth and status."[92]

Rights and functions originated in property rights, the slave

who owned no property had no rights. Rights simply express a hidden value in property, the value of accumulated labour. The commodity production system turns people into commodities because -

> in a capitalist mode of production, products take on the form of individual commodities, (and) people take on the form of individual citizens. ... The existence of political exchange or representations thus requires that qualitatively distinct individuals with otherwise incommensurable interests enter into formal relationships of equivalence with one another. 93

Which of course is precisely what happens with commodities.

Therefore rights and freedoms and surplus value form a unity with each reflecting on the other. The contradiction in this unity is that in capitalism, the greater society's total surplus-value, the greater the need becomes to curtail or limit certain rights and freedoms. This becomes necessary because the greater the total surplus value, the greater the degree of exploitation of the subjugated class. Which itself increases the potential for class conflict. Restricting rights and freedoms limits the capacity of the subjugated class to end their exploitation

But that is only one side of the coin. The other side is that for capitalism, based on 'free labour', the size of society's absolute suplus-value rests on there being extensive rights and freedoms, because the extraction of surplus labour value does not rely primarily on the slave-master's whip, but on the willing compliance of the workers in their own exploitation.

Therein lies the dilemma which the system must try to live with, and it is because the system must rely heavily on the voluntariness of the 'free' worker (where the worker has ceased to be a concern in the making of company profits), it must at least give him/her the appearance and feeling of freedom. One of the governors of the system was saying precisely this when he referred to industrial democracy as the "next necessary consequence of the Industrial Revolution."[94]

It would be true to say that an important factor which prevents the realisation of the full surplus-value potential, are strikes by workers either in defence of their existing rights, or to extend those rights.[95] Richard Hyam made the point that the most dramatic strikes in history have been those where the worker's right of association has been threatened by a direct attack on the worker's organisation itself.[96]

Capitalism necessitates that this contradiction between increased surplus-value and restricting freedom be a continuing one. In some respect this dilemma appears in the Act. The 'proper' balance between the two contradictory interests were not reflected in the substance of the Act. In fact so poor and so distorted was the balance that New South Wales witnessed (a rare occurrence) strikes against the law itself, and (an even rarer occurrence) strikes against criminal law, when trade union organisers and other members were arrested under the Act.[97] The weighted balance of the Act against rights and civil liberties was recognised from the time the new law was proposed. Predictably then, the action of opposing a law

before it was even promulgated occurred when 150 union officials and rank and file members signed a declaration of opposition to the proposed Act (which had just been announced by the Liberal State Government). The declaration said that "marches, demonstrations, public meetings and other such gatherings are traditional forms of action for unionists."[98] And in saying that, they were at the same time saying that they recognised the Act as being one to curtail, restrict and even repress political or civil rights.

What is Crime?

Some see crime as "simply the breach of the legal norm,"[99] but this tells us precisely nothing about the reasons for the legal norm in the first instance. Others see crime as labelling deviancy[100] but like the former, they do not tell us "deviant to whom? or deviant to what?"[101] Everybody seems to want to deal with and categorise[102] the victims of crime making: those who are prosecuted and convicted. One can divide people into groups like conformists, innovationists, ritualists, retreatists and rebels,[103] but to do so is to turn attention towards the individual psychology of people and away from the sociological nature of what constitutes a crime and why the offence exists to be committed.

Laurie Taylor raised a basic weakness of the functionalist approach in his delightful analogy of the capitalist system and the process of categorising deviance -

> It is as though individuals in society are playing a gigantic fruit machine, but the machine is rigged and only some players are consistently rewarded. The deprived ones then either resort to using foreign coins or

> magnets to increase their chances of winning (innovation) or play on mindlessley (ritualism) give up the game (retreatism) or propose a new game altogether (rebellion). But in the analysis nobody appeared to ask who put the machine there in the first place and who takes the profits. Criticism of the game is confined to changing the payout sequences so that the deprived can get a better deal. What at first looks like being a major critique of society ends up by taking existing society for granted. 104

Another concept of what is criminal is the "moral" perspective of the definition of crime, arguing that it should be based on a "humanistic criteria" and not the "functional inspirations" of the system.[105] However, while such an idealist criteria of crime and criminality is to be commended it becomes impossible, firstly because what constitutes a humanistic criteria is not something that is static but varies in accordance with social conditions, and secondly, because "moral" wrongs are determined by each social system's dominant values.

Unfortunately for the 'moralists' there can be no separation of crime from the functional imperatives of any social system be it capitalist or socialist. Value and ethics emanate from material reality and the central most important part of social reality is a social system's productive or economic base. It is this base which provides subsistence needs and thus what is acceptable social behaviour is determined by what endangers the economic base's survival. Ideas, which sanction and cement the economic and social relationships to that base and which provide for more productive activities will in general be approved, while those that are negative to such requirements

are either dismissed or suppressed. And where the negativism is perceived to be an actual threat it is criminalised.

Where society has divided into classes then the more serious acts which attack or threaten the stability of existing productive relations will generally be declared to be criminal. As Marx put it, "By producing their means of subsistence men are indirectly producing their actual material life."[106] Crime therefore under capitalism is the capitalist class' conception of what is criminal - a conception that through the process of acculturation and inculcation is transmitted to the working class.[107]

It would be an over-simplification of the process of defining criminality to see it in terms of mere pronouncements by legislatures in their statutes, because whether the rulers' command is obeyed as legitimate[108] is determined by the social matrix. Legitimacy is, in this sense, more than a judicial concept or finding, it is what reflects material reality, and what corresponds to ruling ideas. The legitimacy of rulers finds its correlation in the minds of the people being ruled and not in words in a documented constitution.

The Correspondence of Prevailing Ideas to the Notion of Criminality

If law is the crystallised will of the ruling class made by the legislature and courts, then it follows that the hegemony of ideas establishes the framework for the ideological content of law. Further, this hegemony sets and limits the parameters of what law can do. Even in conditions of martial law or a

a state of emergency,[109] the prevailing hegemony of ideas acts to limit absolute power in its application.[110] All of which is understandable when it is realised that it is not the consciousness of humans that determine their being but their social being that determines their consciousness,[111] and part of that sociality of being is the existence of prevailing ruling ideas.

Ideas are not primarily the result of a fertile mind but the result of the reflection of material reality on our consciousness.[112] Hence the ideological content of law (the ideas it conveys) must have some correlation to prevailing ruling ideas. These are not simply the ideas of an individual within the ruling class, even though they may have originated in the mind of such an individual, but more a reflection of a total matrix of the ideas of that class.[113] In general, what becomes law is the interests of the ruling class as a whole Just as law is rarely the unadultereated expression of the ruling class' interests, all the more so is it rarely the expression of the interests of an individual member of that class.

The totality of this conception of the ideological content of law means that stautory law (and particularly criminal law) cannot be legislated without there first being a change in prevailing ruling ideas, there must be a preparation, a change in ideas, before they can be received as 'good' law.[114]

This rule applied to the Act, shows that in a number of its important concepts it failed to correspond with what were prevailing values and ideals and this assists in explaining

the rise of hostility and opposition to it as criminal law. Was it a prevailing value that to abuse or insult someone; to enter a fountain in a public place; to write on a wall some abuse; to play a game in a public place and cause obstruction; or to knock on a door and disturb the occupier should be criminal acts?[115] Particularly as with most of these offences, private remedies in the form of injunctive or tort actions were available to any inidivudal suffering annoyance or harm from such activities. That these should be criminal acts seems preposterous but following the strict legal interpretation which governs judicial construction of statutory laws (what a High Court Judge, on his appointment to that position, called "complete legalism"[116]), one would have to say that they are possibilities. Particularly as a court will not admit in evidence speeches made in Parliament which purport to show the intention of the legislature in making the law.[117]

What the Act sought to make criminal could hardly be said to have corresponded with prevailing ideas, although some of the ruling class would consider the above examples to be criminal activities. The Act was a dangerous manifestation of 'offending the conceptions of right'. Unlike most laws which appear to do one thing but are intended to do another, the Act was unable to cover up what its intentions were and thus lacked a degree of sophistication. Appearance and intention merged so that what appeared to be was precisely what was intended to be.

The absudity of a number of offences within the Act is borne

out by the fact that in the seven years after the Act came into force, information relating to a number of offences in the Act do not appear to have been laid.[118] The reasons for the declaration of a number of offences contained in the Act find their rationale in political and industrial contingencies during the period leading up to the passing of the Act. It was because of these contingencies that the Act placed wider power to control behaviour in the hands of the police.

The Disjunction Between Criminal Rationality and the Dominant Class' Interests

It has been said of the law that it must provide for 'legal security' and give 'legal rationality' and that in order to achieve this "the legal system must be insulated from the immediate political conflicts of the day."[119] In this respect the Act failed because it was seen to be a law to meet the expediency of a governing party rather than a law 'for society' as a whole. The goals of the political actors in their substantive appearance must of necessity be seen to be those of social needs. This form of presentation when employed by political actors, gives criminal law the apperance of representing social order in the common interest. The more neutral law appears the more stable are the conditions for the accumulation of capital and the more convinced are the working class that they have legal rights.[120] Hence opposition to the Act can be explained by reason that the 'neutral' features were missing.

The application of criminal law is fundamentally concerned with the fact that an act was committed and only marginally

concerned with why. The first question to be determined by a court is "did the accused commit the act?" In this way important sociological factors are prevented from entering into the formal legal rationality. However, if the only facts of the criminal act are sociological reasons, then formal legal rationality is undermined. In other words, if the offence to be proved it taking part in an unauthorised procession,[121] and the only possible unauthorised procession is a political one, then the fact of the offence and its reasons become hard to separate and distinguish and this jeopardises formal legal rationality of an important strength of the bourgeois legal system. (This could help explain why in 1979 the charges under the Act against 72 demonstrators in Sydney were dropped.[122])

What amounts to a crime can only be the ideas of the ruling class. This is so because those who own the material means of production must automatically control the means to produce knowledge.[123] "The production of ideas of conceptions, of consciousness, is at first directly interwoven with the material activity, and material intercourse of man, the language of real life."[124] Criminality can therefore be understood to be a conjunction between society's material base and the dominant interests that the base serves,[125] a reflection of a social system's morality.[126]

The Contradiction Between Freedom and Free Labour

Under the capitalist mode of production the 'free labourer' being the living source of surplus-value,[127] is at one and the same time its opponent,[128] and it is this dialectic that is the

cause of the contradiction which forms the political economy of oppression, or what Foucault called the "economy of social control."[129] Labour itself becomes a commodity which is exchanged like all other commodities for its value.[130] However, the value it exchanges for is not the value it creates, because if it exchanged for its full value there would be no surplus-value for capitalists to turn into profits. The 'free labourer' cannot be so free as to threaten the very existence of the master, the appropriator of surplus-value. What is considered a crime therefore must proceed from and have its genesis within the perception of what constitutes a threat to the 'right' to appropriate surplus-value. If the political economy of oppression goes too far in alienating the 'free labourer' by declaring activities to be criminal, it will eventually lead to strong reaction of opposition by those who have been alienated and in extreme cases will result in the modern phenomena of urban terrorism.[131]

The Act understood within the perspective of the political economy of oppression represented a rupture in the balance between the 'free labourer' and the freedom of the private appropriator of surplus-value.

What needs to be understood and recognised is that just as there is a limit on how far 'free labour' can be restricted before it loses that character, there is also a limit on how much freedom it can be granted before it changes to become liberated labour.[132] So too there is a limit to what can be declared to be a crime.[133]

The requirements as perceived by politicians, to take care of political contingencies are one thing, but whether those requirements are perceived as necessary by those being ruled, is another. Indeed, the question arises of whether the ruled even recognised that the contingencies existed which made it necessary to promulgate the Act. Within certain limits (already discussed) those being ruled over will obey the commands of the ruler, however, this obedience loses its consistency once these limits are transgressed. The Act could be said to have been seen by too many as unnecessary and unacceptable, and outside or beyond the 'contract' between the citizen and those holding office as rulers.

Crime as Perceived Class Interests

A threat to ruling class' interests, to become a crime, does not have to be actual, but rather perceived as a direct or indirect threat. The Act seemed to predominantly fall into a perceived rather than actual threat. The offences contained within the Act addressed themselves more to restricting civil liberties than to preventing direct attacks on private property, the cornerstone of our economic system. What is a crime does not flow from a particular act, but rather from a perception of where or what a particular act will lead to or do if permitted. It follows from this conception of crime that while in many instances what is a crime will have an economic character, it can also be of a political or moral nature.

This understanding of criminality helps to explain why a person with "no visible lawful means of support, or insufficient means of support ...."[134] is guilty of a crime, or similarly a

person who frequents the premises of reputed criminals.[135] It is not so much that they have done anything wrong, as it is anticipated that by virtue of their positions they will probably do something which represents a threat to the existing mode of production.

Alternatively, the offence of using "unseemly words", "within hearing from a public place"[136] finds its rationale, not in any direct threat to private property, but in an indirect threat. The exercise of free speech is a principle the ruling class preaches rather than freely allows or encourages to be practised by opponents.

While the Act cannot be explained solely on the criteria of trying to meet immediate political contingencies, that nonetheless was an important purpose of the Act. For embodied within a number of the offences, was the declaration that activities which were forms of political dissent were criminal.[137] In other words an aim was to restrict political opposition. As one political commentator put it, the Act's "primary objective" was "the suppression of militant protest action."[138]

The other peculiarity of the Act was to widen the forms of criminal acts against property.[139] To take one example, it became a criminal offence to remain on property "without reasonable cause."[140] Previously there was no such criminal offence, the closest offences being those where a person entered enclosed land,[141] and the breaking and entering offence contained in the Crimes Act.[142]

The major differences between these two crimes and the offence created by s.50 of the Act is that the offence under the Enclosed Lands Protection Act was to do with land and it had to be fully enclosed[143] and the offence under s.112 of the Crimes Act covers dwelling houses. While it is not necessary that the residents of the dwelling at the time of the offence are present, it is necessary that it is used as a residency.[144] Further, to make a prima facie case for housebreaking there must be a breaking in, and a felony committed, Unless all these elements are shown or inferred from the evidence there is no case to answer.[145] Clearly such offences were inappropriate for the kind of activity s.50 of the Act was intended to combat. The Minister when introducing the Act for its second reading said that the offence was intended to cover "sit-ins and gate crashers."[146]

What s.50 and other sections related to property offences did, was to remove the necessity for the occupier or owner of premises, for petty infringements of their property rights, to take out a civil action of trespass. The economics of such an action made it virtually useless and unlikely that property owners would lay such a complaint. Indeed, this was recognised by the Act when it prevented a civil action being launched once there was a conviction under the Act.[147]

These changes to the concept of criminality[148] are important, because they show that the ruling class is prepared to transfer some of its own legal property rights to the state in exchange for greater protection. They further lay some of the burden for paying the cost of property protection away from themselves

and allocate it to the backs of the working class. This was a theme that ran right through the Act.[149]

In short, what is criminal is an act against the ruling class' perceived interests which includes both their material possessions and political power. These two elements were the substance of the Act, and that the Act can sometimes be used by the working class to protect their small property holdings for their leisure freedom, is but an unavoidable secondary corollary of the Act. If criminal represents perceived class interests, it follows that the criminal class is, under capitalism, the working class. To be a criminal today more and more means that a person is a potential political opponent of capitalism. (The ruling class have such an abhorrence of the idea of crime and criminality, they prefer to refer to their own criminal deeds as "misfeasance" rather than crime.[150])

It is not surprising that the Act fostered the image of the working class as a criminal class, for no-one seriously expects that a company director will commit the offence of a sit-in, of riotous behaviour, or participating in an unauthorised procession. The less so, being the epitome of virtue and dignity, to use unseemly words etc. The increased police discretionary powers which the Act created made the ruling class feel more secure, because for them it was a "wonderfully soothing power."[151]

Footnotes to Chapter I

41. Moore, Stanley., "Marxian Theories of Law in Primitive Society" in Diamond S., Culture & History, p.642.

42. see also Brodemer, Harry C., "Law as an Integrative Mechanism" in Evan, Willia.M., (ed) Law and Sociology, Free Press of Glencoe, England (1962) pp.73-88.

43. For a brief outline of the functionalist and structuralist view of society see Coulson, M.A. & Riddell, C., Approaching Sociology: a Critical Introduction, Routledge & Kegan Paul: London (1975).

44. see further Lenin, V.I., The State of Revolution, Progress Publishers: Moscow (1972).

45. see a discourse on the question in Hart, H.L.A., The Concept of Law, Ocford University Press: London (1975), Ch.1. See also Carson, W.G., "Conflict, Power and the Emergence of Criminal Laws" in Rock, P. & McIntosh M (eds) Deviance & Social Control (1974).

46. see Engels, F., The Origin of the Family, Private Property and the State, Progress Publishers: Moscow (1972) Ch.IX; Lenin, V.I., op.cit., Ch.1, 2 & 3; Critique of Law: A Marxist Analysis, Critique of Law Collective: Sydney (1978) particularly pp. 6-42; Mair, Lucy., An Introduction to Social Anthropology, Oxford Univ. Press: London (1972), Ch.s 8 & 9.

47. see Marx, K. & Engels,F., The German Ideology, Progress Publishers: Moscow (1976).

48. Ibid., p.99.

49. s.50, Summary Offences Act No.96 1970 (N.S.W.)

50. see dialogue on what is property in Cohen, Felix., "Dialogue on Private Property" (1954), 9 Rutgers Law Review 357; also Sackville, R. & Neave, M.A., Property Law: Cases and Materials, Butterworths: Sydney (1975), Ch.1.

51. see Carson, W.G., "Symbolic & Instrumental Dimensions of Early Factory Legislation" in Hood, R.G., Crime, Criminology and Public Policy, Heineman: England (1974).

52. see New South Wales Budget 1977-78. Government Printers, Sydney.

53. see Tubbs, Mick., "We Pay Through the Nose for Police Repression" Tribune, 14.10.70.

54. Carson, W.G., op.cit., p.136.

55. s.59, Summary Offences Act No.96 1970 (N.S.W.).

56. see R. v. Clift. 52. S.R. 213.

57. Other Acts repealed in toto were: Party Processions Prevention Act 1901; Vagrancy Act 1902; Vagrancy (Amendment Act 1905; Vagrancy (Amendment) Act 1929. There were many other Acts affected by the passing of the Summary Offences Bill into law.

58. Offences which were new either by different wording or by prescription were ss.13, 14, 23, 24, 25, 40(1)(d), 47, 50(1), 50(2), 51(1), 53 and 59.

59. This was certainly the intention of the Government of the day. See New South Wales Parliamentary Debates, Vol.89 1969-70, pp.7964-7920.

60. By 1972 over 10,000 people had been charged with unseemly words alone. see NSW Bureau of Crime Statistics, Report I.I. Nov (1973) Table A.

61. see Report of the Department of Labour & Industry June 1977, Government Printers, New South Wales (1978) pp.10-18.

62. Lord Denning, London Borough of Southwark v. Williams and another, [1971] 2 All E.R. 175.

63. see generally Quinney, Richard., Critique of legal order: crime control in capitalist society, Little, Baron & Comapny: Boston (1974).

64. see "Superstructural Law" in Critique of Law, op.cit.

65. "Any interference with the operation of the natural laws of greed is subversive of liberty", Harlem Fiske Stone in Mason, A.T., Harlem Fiske Stone: Pillar of the Law, Viking Press: New York, (1956) p.380.

66. Where the Act deals with public property i.e. schools and other buildings, these have to be perceived as property that is used in the interest of private property.

67. Quinney, Richard, op.cit., p.16.

68. see Miller, Rathur Selwyn., The Supreme Court and American Capitalism, America Free Press (1968); also Offe, Claude., "The Theory of the Capitalist State and the Problem of Policy Formation" in Lindberg, Leon., Stress and Contradiction in Modern Capitalism, Lexington Books (1975), pp.125-144.

69. Ibid., p.135.

70. Weber, Max., "The Essentials of Bureaucratic Organisation: An Ideal Type of Construction" in Morton, R., Readings in Bureaucracy (1972).

71. Ibid., p.21.

72. see Pearce, Frank., Crimes of the Powerful: Marxism, Crime and Deviance, Pluto Press: London (1976);
also Sutherland, E.H., "White-Collar Criminality" in American Sociological Review, 5 (Feb 1940), pp. 1-22.;
also Geis, Gilbert (ed)., White Collar Criminal, Atherton Books: New York (1968).

73. see Lieberman, Jethro K., How the Government Breaks the Law, Penguin Books: Baltimore (1973).

74. see for an exposure of the D.C.10 disaster, Eddy, Paul., Potter, Elaine & Page, Bruce., Destination Disaster, Granada Publishing:- London (1976).

75. see Chibnall, Steven & Saunders, Peter., "Worlds Apart: notes on the social reality of corruption" in British Journal of Sociology, Vol.28, Number 2, June 1977.

76. The Wisdom of Spiro T Agnew, Ballantine Books: New York, (1969) p.40.
also Pearce, Frank, op.cit., p.77.

77. Marx, K. & Engels F., :The German Ideology" quoted by Taylor, Ian., Walton, Paul & Young, Jock., The New Criminology, Routledge & Kegan Paul: London (1977) pp. 213-214.

78. Marx, K. & Engels F., op.cit., p.68.

79. see generally Bankowski, Zenon & Mungham, Geoff., Images of Law, Routledge & Kegan Paul: London(1976)
also Critique of Law, op.cit., pp.124-132.

80. Bankowski, Zenon & Mungham, Geoff, op.cit.

81. see Steinert, H., "On the functions of Criminal Law" in Contemporary Crises (1978), pp.182-190.

82. see Chambliss, W.J., "A Sociological Analysis of the Law of Vagrancy" in Social Problems, 12 (1964), pp.167-77.

83. McLellan, D., Karl Marx His Life and Thought, Macmillan: London (1973), p.215.

84. see Tubbs, M., "Emergency Powers, Class & State" in Australian Left Review No.57, March 1977, pp.26-36.

85. Ibid., p.28.

86. see Twining, W., "Emergency Powers: A Fresh Start", Fabian Tract, 416, November 1972 (London), p.14.

87. Quinney, Richard, op.cit., pp.15-16.

88. see Marx, K., Contribution to the Critique of Political Economy, Progress Publishers: Moscow (1970), pp.20-23.

89. see Tigar, M.E. & Levy, M.R. Law and the Rise of Capitalism, Monthly Review Press: New York (1977), Ch.16.

90. Arthur, C.J., "Towards a Materialist Theory of Law" in International Journal of Politics, International Arts & Science Press, Inc: New York, Spring (1971) pp. 31-46 at 34.

91. see ibid.

92. Hay, L., "Property, Authority and the Criminal Law; in Hay, Thompson & Winslow, Albion's Fatal Tree (1975),p.18.

93. see Balbus, I., "The Dialectics of Legal Repression" in Reasons, & Rich., The Sociology of Law: A Conflict Perspective (1978), p.73.

94. South Australian Premier, Don Dunstan, quoted by Bowes, L.B., "Worker Participation in Management: The South Australian Developments" in 17 Journal of Industrial Relation p.120.

95. For example Glasbeck & Eggleston claim that "nearly 60% of all strikes have nothing whatever to do with wage claims". Glasbeck, H.J. & Eggleston, E.M., Cases and Materials on Industrial Law in Australia, Butterworths (1973), p.98.
also in 1977-78, 46/2% of all strikes in Australia were those involving managerial decisions: Editorial, Daily Mirror, 2.7.78.
Indeed the jailing of union leader Clarrie O'Shea saw half a million workers strike: Tribune, 21.5.69.

96. see Hyam, Richard, Strikes, Fontana-Collins: London (1974) p.22.

97. Early in January 1971, a Builder's Labourer Union organiser was arrested on a building site and charged under the Summary Offences Act as were ten other builders labourers in a separate incident at Baulkham Hills High School. Both actions resulted in strikes and demonstrations at the court against the Act: see Tribune, 13.1.71. It was claimed that the arrest of the Builders' Labourer's organiser was the first arrest under the Act. See "Interview with Jack Mundey" in A.L.R., No.32, Sept, 1971.

98. see Tribune, 19.8.70.

99. Tappon, Paul, W., "Who is Criminal" in Geis, Gilbert (ed), White Collar Criminal, Atherton Books: New York (1968), p.40.

100. see Lemert, Edwin., Human Deviance, Social Problems and Social Control, Prentice Hall: New York (1967), also Becker, Howard, S., Sociological Work., Allan Lane: London (1971).

101. Schur, Edwin, M., Labelling Deviant Behaviour: its Sociological Implications, Random House: New York (1971), p.29.

102. see Morton, R.K., Social Theory and Social Structure, Free Press: New York (1957) pp.149-155.

103. Ibid., also Taylor, Ian., Walton, Paul & Young, Jack., The New Criminology: For a social theory of deviance, Routledge & Kegan Paul: London (1973) Ch.4.

104. Taylor, Laurie, Deviance & Society, Michael Joseph: London (1971), p.148.
also Ibid., p.101.

105. see Schwendinger, Herman & Julia., "Defenders of Order or Guardians of Human Rights" in Taylor, Walton & Young, Critical Criminology, Routledge & Kegan Paul: London (1975) pp.113-146 at 132.

106. see Marx & Engels (1976) op.cit., p.37.

107. see Tubbs, M., "Has Schooling Something to Hide" Part 1 & 2, in Parent & Citizen, Vols 26 & 27, July & August 1976;
also Goodman, Paul., Compulsory Miseducation, Penguin: Australia (1971);
also Illich, I., Deschooling Society, Penguin: Australia (1974).

108. see Weber, Max., The Theory of Social and Economic Organisation, trans A.M. Henderson & Talcott Parsons, The Free Press: New York (1947), pp.324-86/

109. For an explanation of emergency powers see "A Class Analysis of Emergency Powers"; "Bombing the Sydney Hilton: Politics or Terrorism? The Criminological Response" in Critique of Law, op.cit.,

110. see Tubbs, M., (1977) op.cit., pp.28-29.

111. see Note 88.

112. On this point it is an interesting exercise to try and describe something of which the parts do not already exist. For example, 'Pink elephants', both the colour pink and elephants exist and so can be combined to create fantasies.

113. see Hopkins, Andrew., "Conservative Parties as Managers of the Affairs of the Bourgeoisie: An Analysis of the Trade Practices Act, 1965." (unpublished paper).

114. see Bean, P., "The Mental Health Act (England & Wales) 1959 - Some Issues Concerning Rule Enforcement" (1975), 2 British Journal of Law and Society.

115. see ss. 8, 9, 13, 16 & 18 Summary Offences Act No.96 1970, (N.S.W.).

116. Sir Owen Dixon, 85 C.L.R. at XIV.

117. see South Australia v. Commonwealth (1942) 55 C.L.R.373.

118. For example I am unable to find any information being laid for entering a public fountain (s.13) or for playing a game that causes obstruction (s.16) or for letting off a firework in a school yard (s.17). I recognise that s.20 does provide the defence of "lawful authority" or "with reasonable excuse", but these defences cannot fully explain why the offences have been allowed to lie dormant.

119. see Balbus, I., op.cit., p.4.

120. Ibid.

121. s.45, Summary Offences Act No.96, 1970 (N.S.W.).

122. see "Charges are dropped against 72", S.M.H., 27.1.79/

123. see Marx & Engels (1976) op.cit., p.67.
see also Tubbs, M., "Knowledge, Power & Schooling" in Parent & Citizen, Vol.28, No.1, February 1977. More recently a similar point has been made by Professor Samuel Epstein who believes: "Information is the currency of political power. And what has happened in the United States and elsewhere is that industry has developed a unique control of the total information process." "Workforce", A.B.C. Radio, 28.11.78, quoted by Peacock, Matt., "Work as a Health Hazard" in Legal Service Bulletin (special issue), Jan 1979.

124. Marx & Engels (1976), op.cit., p.42.

125. see Boehringer, Gil H. & Giles, Donna, Criminology and Class Control in the Third World: A case study from Papua New Guinea. (Unpublished paper).

126. For example in the developed socialist countries it is a crime to exploit for personal gain the labour of another;in capitalism it is a legitimate business activity.

127. Surplus-value here refers to new-value which is privately appropriated not by the labourer but by the capitalist.

128. see Marx, K. & Engels, F., (1848) Manifesto of the Communist Party, Progress Publishers: Moscow, 1969, pp. 41-60.

129. see Foucault, Michel., Discipline and Punishment: The Birth of the Prison, Pantheon Books, New York (1977) Part 2.

130. Marx, K., (1867) Capital, Vol.1, Progress Publishers: Moscow, 1974, Ch.VII.

131. Hobsbawn, Eric., "Technology and Anonymity" in Di Biase, Bruno, Terrorism today in Italy and Western Europe, G. Di Vittorio: Sydney (1978) pp.3-13.

132. Toqueville in asserting that the basic threat to social order in the United States was democracy, was really alluding to the contradiction between 'free labour' and the need to restrict its freedom. (see Tocqueville, Alexis de., Democracy in America, Vol.11 ed. Bradley, Philip., Alfred A. Knopf: New York (1945).)

133. To give an extreme example, the legislature of a capitalist system could not declare the ownership of private property, or the making of profit a crime and expect that such a law could be enforced.

134. s.22. Summary Offences Act No.96, 1970 (N.S.W.).

135. s.24. ibid.

136. s.9. ibid.

137. see ss.7, 8, 9, 10, 14, 15, 17, 18, 19, 22, 26, 45, 47, 50 & 53. ibid.

138. Aarons, L., "Wide Angle"., Tribune, 21.10.70.

139. see in particular ss.13, 14, 15, 40, 41 & 50, Summary Offences Act No.96, 1970 (N.S.W.).

140. s.50. ibid.

141. s.4. Enclosed Lands Protection Act 1901 (N.S.W.).

142. see s.112. Crimes Act 1900 (N.S.W.).

143. Re Thompson (1948) 67 W.N. (N.S.W.) 183.

144. see Brett, Peter & Waller, Peter L., Criminal Law: Cases and Text, Butterworths: Sydney (1975).

145. May v. O'Sullivan (1955) 92 C.L.R. 654; Zanetti v. Hill (1962) 108 C.L.R. 433.

146. Hon. E. Willis, M.L.A., New South Wales Parliamentary Debates, 1969-70, Vol.89, p.7870. The Enclosed Lands Act and the Crimes Act offences were hardly meant to apply to demonstrators who walked through the open doors of an office block and then staged a sit-in.

147. see s.62. Summary Offences Act No.96, 1970. (N.S.W.).

148. As Brown puts it the Act created the crime of criminal trespass: Brown, D., "Criminal Justice Reform: a critique", Chappell, Duncan & Wilson, Paul R., The Australian Criminal Justice System, Butterworths: Sydney (1977) p.476.

149. see Tubbs, M., "We Pay Through the Nose for Police Repression" in Tribune, 14.10.70.

150. see Santow, G.F.K., "Regulating Corporate Misfeasance and Maintaining Honest Markets", in 51 A.L.J. 541-582.

151. see Engels, F., The Conditions of the Working Class in England, Progress Publishers: Moscow (1973). p.264.

CHAPTER II

THE STATE

Any study of law which separates the law from the state is like writing a biography on Caesar which fails to mention Brutus. Criminal law is uniquely intertwined with the state, a feature of a society that has dispensed with communal decision-making and replaced it with decision-making by an executive body that is removed from common affairs and practice of life.

It seems that not all societies have a superstructure that has formed into a state.[152] In simple tribal societies, "force is decentralised, legitimately held in severality, the social compact has yet to be drawn, the state non-existent."[153] The state then must have some causation in order to come into existence. Some might say it is the natural product of civilisation and its desire for order, or "like topsy, it just grew."[154]

Engels explains the existence of the state as -

> a product of society at a certain stage of development, (an) admission that ... society has become entangled in an insoluble contradiction with itself, that it has split into irreconcilable antagonism .... classes with conflicting interests .... [155]

Hence, for Engels, the state is an implicit recognition of the existence of a society divided into classes.

The fundamental difference between state and stateless societies is that in the latter there is a culturally integrated non-

antagonistic social discourse which provides the mechanism to regulate social behaviour and interaction, and power is diversified and fragmented among all the social actors. For example, we are told that with the Walbiri aboriginals "every man was ... a potential warrior always armed ready to defend" himself or his belongings. Their society "did not function as a political or administrative entity. There were no tribal leaders, headmen or chiefs, nor was there any controlling or ruling class where power extended through society."[156]

In all state societies it is different: land has become property and privately held (which forms the main basis for the division of society into antagonistic classes) and there is the formation of a centralised instrument of force; the state.[157] Property, state and class are synonymous with each other. Property has to have a class (of property owners) that need a means of enforcing their ownership. It is possible to show many variations in the mode of life in societies with states, but one thing no one has yet shown is a state society in which there was no exploitation of one group of people by another. A state without exploitation is as impossible as a society without people.[158] However, this does not explain what the state is and most importantly what are the connections between the citizen and the state.

There are differing views even among Marxists of what exactly the state is. Some see it as an "institution" and that this has all occurred in the last one hundred years.[158a] Another concept is the instrumentalist one, where the state is perceived as an instrument of suppression which functions in the interests

of the ruling class.[158b] And a variation on this concept is to understand the state as an institution set up as a 'directorship' to administer the total capitalist system.[158c] There is also a view that the state is but a relation[159] between the capitalist mode of production and the capital relation of exploitation. Poulantzas sees the state as the reflection of economic and social relations and that these relations and not the ruling class constitute the state's internal unity. For a Marxist this gets dangerously close to the functionalist theory of the state.

The state mirrors the productive base relations however, it would be ignoring the role of consciousness and ideology to attribute the formation of the state and its activities to merely that of economic and social relations. After all, a state cannot think and neither can it act, only people can do those things.

Another concept of the state sees as a structural imperative which is determined by the very system itself and not by a ruling class consious of the need for an instrument of oppression.[160] I submit that the state can incorporate all of the features outlined above, there is no strict dichotomy, it is not one or the other. The structural imperatives exert pressures which dictate the need for instrumental agencies which will be yielded ultimately in the dominant class' interest and be wielded so as to retain the existing relations between the mode of production and the relation of exploitation.[161] The state is a mechanism for system maintenance, even though it

may reflect within its adminsitration all the societal class antagonism and contradictions.

Ideological Relations of the State

While material conditions provided for its original existence, the state's existence seems to be maintained by the ideological beliefs in its operational importance. The state is not wholly a material structure or thing or, for that matter, an instrument of physical force. The state also represents an abstraction of power, ruling class power. The citizen knows that in the state lies a power which can crush them, even though the citizen cannot immediately see or feel the power. The state exists equally as a conception of the mind as it does as a material thing. The state is not merely the totality of instrumental forces of administration and coercion The very fact that the state cannot be either drawn or made into model form suggests that there is in the state a non-material component.

If this is so the most important element or thing about the state is the ideological relation between it and the populace at large and it could be argued that the main single connection of this relation is that of law. Can there be a state without law? It would appear not. If the state grew out of class divisions over the notion of private property[162] then it would seem to follow that law gives rationality to the state. Indeed a fundamental function of the state today is to provide a mechanism for settling disputes.[163]

Viewed in this light, a law (in this case criminal law) which

is inconsistent with or does not reflect the ideological function of the state fails to make the appropriate connection between the state and the citizenry. Thus it may lead to ideological alienation from the state. In real life it can be said that much of the fragmented opposition to the state is generated by particular laws.[164]

Laws covering social services and criminal laws when used arbitrarily are good examples of this process of alienation. In the instant case the manner in which the Act was passed and the content of it led not to stability and order but rather to opposition to both the governnment and the state. It was a counter-productive exercise in legal repression and thus to repeal the Act could restore more faith in the state.

A qualitative new development in criminal law has arisen over the last century or so. The main function of criminal law previous to this, was to protect personal and property rights.[165] However, because of the 'institutional', 'instrumental', 'directorship', and 'relation' characteristics of the state,[166] combined with its ideological existence and function, it has necessarily resulted in the criminal law becoming protective of the state itself.

In fact this element of criminal law was recognised by a member of the judiciary when he said, "The supreme and fundamental purpose of the law, (is) to conserve not only the safety and order, but also the moral welfare of the state ..."[167] It is not being argued here that criminal law has never, until recently, had a function of protecting the state, but rather

that this function is becoming increasingly more important than its function of protecting people and property. The Act is a good example of this phenomena being only marginally concerned with property protection; hardly concerned at all with the protection of the person; but substantially oriented in the direction of control over political dissent.

It would appear that the economic base which provides the original purpose for the existence of the state must at the same time provide its operational terms of reference. The state's needs can never supplant those of its economic base, and if the criminal law were turned into its opposite, i.e., attacked or threatened the base structure of society, it would destabilise the social system.

The question to be asked is, "Did the Act do this?" One pillar of the establishment can be said to have thought so when he said (in reference to the proposed law), the -

> State Government has done well to postpone a decision on proposed amendments to the Police Offences Act and the Vagrancy Act. (The law) is a dragnet ... which would certainly catch others besides the 'professional agitators and rabid communists.'[168]

This was not the main objection to the proposed new Act. The one section that received specific mention was the section referring to the powers of the police to stop and search any motor vehicle and vessel.[169] This proposal was found to be "thoroughly objectionable".[170] Whatever the motives behind the above statement, the reception to the Act was to say the least rather cool. The way the Act stood in its form, its content, can be said to have broken the state's operational

terms of reference as determined by its infrastructural base, and thus did not help very much in stabilising society.[171] As the anti-march regulation in Queensland and the attack (in 1978) on two homosexual demonstrations in Sydney tend to suggest, such laws can cause more disorder than order. Of course what is 'order' cam mean different things to different people, even so, à criminal system that bases its idea of order on the number of arrests it makes as against the actual convictions recorded, paddles in a millpond with all of its dangerous traps. That idea of order has led one writer, after studying American law and order to succinctly draw its parallel in the following way -

> Can there be greater disorder, internal or external than that created by the modern industrial state in the pursuit of its lawful interests? Have the Vietnamese reason to be grateful that we spared them the horrors of a civil war? Could anarchy result in more filth, pollution and degradation than normal social development has imposed on our cities and countryside? If Spiro Agnew has become the face of Western civilisation, would not the regularity of its features be improved by taking a Cleaver to it? 172

What kind of order is intended from criminal law which can be used to outlaw free speech; the right of assembly; the right of association; the right to live a communal subsistence life-style; the right to mutually live with the person of one's choice?[173]

The difference between social order and social control can be quite dramatic and what Friedenberg seems to point out is that what passes as being social order is in reality its direct opposite. Taking this analysis further, it seems to suggest with its class bias, that social chaos may be the direct result

of a mechanism above society (like the state), trying to impose social order on its subjects below. In other words social disorder is the product of class antagonisms where the state under certain conditions responds in a particular way which is iniminal to the interests of the majority of people.

We are told that law has "four major functional processes ... adaptation, goal pursuance, pattern maintenance and integration."[174] And that "Law is the primary norm which stipulates and sanctions."[175]

At a micro level of analysis there is a substantial amount of truth in the afore-stated functions and aims of law. However, a deeper analysis would appear to show that what at first seems to be a process for social order turns out to be a systematic striving for social control.

Broadly speaking, societies can be divided into two basic types: those that can be categorised as 'social order' and those that can be termed 'social control' societies. The social order society is one where cultural integration provides the mechanism for social regulation and stability.[176] What Durkheim calls a "mechanical" society.[177] A social control society is one where social regulation is imposed and stability enforced by special centralised institutional bodies and processes. Where the individual is by the rule of law alienated from the authority of the law,[178] and where legal domination "depends upon ignorance of its specification."[179]

This systematic striving for social control is not confined to criminal law (although being founded on force, it seems to be more apparent in criminal law), but exists with law in general.[180] The Act seems to be a codification for the systematic control of one class in society for the benefit of another. For example, what class benefits from the control of vagrants, prostitutes, reputed cheats and reputed drug offenders?[181] Which class is likely to be forced into "gathering alms" or "fortune telling?"[182] Is it not those from working class stock and background? With a substantial portion of the Act incorporating these kinds of offences, it is reasonable to conclude that the primary purpose of the Act was that of social control. Even if in its application there was the appearance of social order. In this sense it is not what is manifest that is important, but that which is latent.[183]

This dimension of law appropriately allows social control to take the form, but not substance, of social order. The model from which this is fashioned is found at the point of production: the relations that exist at the economic base. The difference being that in the domain of production there are no defined laws, only relationships that give one party a right to regulate and dictate.[184] Thus when a stranger walks into a busy factory or office where each is doing their allotted task, what appears to confront the stranger is the epitome of order. It is only if the stranger is told that the workers must not interefere with the effective working of the management in the working establishment[185] that the stranger suddenly appreciates that what he is witnessing is not order but the ultimate in social class control.

Whenever workers are employed and at work they are at one and the same time under the control of their employer. The problem arises when they leave their place of occupation each day. Indeed, this view was held as a reason against shortening the length of the working day when it was said:

> a person constantly under the eye of his master twelve hours ... cannot commit a crime..., they may be bad in heart, but they cannot commit those acts. 186

It was considered to be one of the virtues of a 14, 16 or even 18 hour working day that it gave little time for drinking and gamestering.[187]

From what has been said above it can be argued that a function of criminal law generally and the Act in particular is to reproduce in society at large the kind of order that exists within the domain of production. There can be no doubt that the law brings about social order, but the question is "What kind of order?" or more correctly, "Whose concept of order results from its application?"

Superstructural and Infrastructural Purposes of Law

It can be argued that law serves only one purpose: that of social order or social control. However, whichever of these two is selected, it becomes apparent upon closer examination that within these broad objectives are other priorities.[188]

The materialist conception of society sees it divided into two distinct parts: its productive activity and more generally its social activity. It is upon the productive base (infrastructure) that social institutions arise[189] (superstructure).

Among the most important institutions of the superstructure are the legal institutions, of which law is part.

By strict materialist theory there is no such thing as infrastructural law as all laws are products of the superstructural institutions and their purpose is to defend, sanction and extend the operation of the social infrastructure. However, to let the matter lie there can and does lead to crude economic determinism and deprives the law of a large degree of its functional complexities. Thus while the division of laws into infrastructural and superstructural may be a false dichotomy, its value is to gain a greater appreciation of the different social purposes of the lawss. Ultimately, materialists belive that "by understanding the world humans will be able to change it into a more rational, human place in which to live,"[190] and that aim alone justifies a departure from what my be strict theoretical concepts, particularly if by so doing it leads to a new understanding of social processes. Like the instrumental and symbolic dimensions, laws are never absolutely either infrastructural or superstructural, both elements will usually exist and can be identified.

Infrastructural laws are those whose purpose is directed towards regulation and facilitation of the processes in the economic base, e.g., the removal of unwanted restrictions.[191] Laws like the Companies Act, Industrial Arbitration Act, Contract Law and Sale of Goods are examples of insfrastructural laws.

Superstructural laws are those that are essentially concerned

with the regulation of social behaviour (as distinct from industrial) and consciousness,[192] i.e., the Crimes Act, Mental Health Act, Education Act and Motor Traffic Act. It follows then that the Act was a superstructural law, that was basically concerned with the regulation and control of social behaviour.[193]

Although some sections, like s.50[194] could be used to regulate industrial behaviour, an analysis will show that the thrust of the legislation was not aimed directly at the processes or the economic regulations of the infrastructure. The importance of perceiving the Act in this manner is that it helps to appreciate its class character. Without superstructural laws (and this is particularly so with criminal law) the infrastructure itself could not be sustained.

The above does not necessarily mean that the drafters of 'superstructural' bills are conscious of their ultimate connection with the economic base, although in relation to the Act it would appear that members of the Government understood there was some relationship. Indeed, the Minister responsible for introducing the Bill said of s.50 that it was intended to cover "sit-ins" and "persons (who) enter or remain in or upon any part of a building or structure or any land..."[195] The Minister made it clear that State Parliament would "crack down on occupations" and "sit-ins"[196] in an announcement three days after his own political party's headquarters had been occupied by demonstrators.[197]

The Infrastructural Connections of the Act

There is abundant evidence to show that certain sections of the Act were intended to be used to control industrial behaviour or action which was of a political character. Government premises were occupied in both Sydney and Adelaide in March 1969;[198] a railway line sit-down occurred in Wollongong a few weeks later;[199] in May the NSW branch of the Builders' Labourers launched a campaign for "safe, civilised standards" in their industry;[200] in August (soon after the announcement of a workers' control seminar[201] attended by over 200[202]) a sit-in occurred at the Newcastle plant of the Sulphide Corporation.[203] In March 1970 GMH experienced its first sit-in when the production line workers used the tactic to back up their demand for control over the speed of the line;[204] while in April members of the Miscellaneous Workers' Union occupied the offices of the South Australian Brush Company.[205] And in May 1970 the community first heard of the Builders' Labourers Vigilantes when the Union went on strike for five weeks.[206] The Sydney Morning Herald reported student sit-ins and squatters refusing to be evicted[207] and that 150 conservationists had taken over the Annual General Meeting of Associated Portland Cement Manufacturers.[208]

These samples from the media of both industrial and social behaviour which are directly threatening class economic and political power make it most unlikely that the Government made trespass a criminal offence because of the incidence of people "gate-crashing"[209] parties.[210]

The inadequacy of the law as it stood is best exemplified by

what happened to six members of the Builders' Labourers who were alleged to have occupied a building site during the May statewide strike. They were charged under a section of the Crimes Act,[211] which covers intimidation or annoyance by violence or otherwise to person or property.[212] A rather cumbersome law which carried a penalty of six months imprisonment or a fine of $500 or both. Indeed, the Minister virtually admitted this inadequacy when he said that with the "present" state of the law "the occupier must rely on the common law of trespass" for their remedy.[213]

While most of the offences contained in the Act were more appropriately fitted to control social behaviour there were certain circumstances when some of the offences could have been applicable to various forms of industrial action. This was certainly the opinion of one union official who considered the Act to be partly a response to the redundancy of the penal provisions contained in the Conciliation and Arbitration Act 1904[214] as well as to the new activities of militant unionists.[215]

It is not the intention to argue here that the Act was solely a response to the immediate industrial and political requirements, as that would be an over-simplification, but simply to state that those needs were recognised and catered for in the Act.[216]

Superstructural laws also have another peculiarity - as a rule they are instrumental in their character. Witness the power given to the police under the Act to stop, search and detain and to take out search warrants,[217] and compare these with

police powers under the Factories Shops and Industries Act (NSW), which being a 'symbolic' law, rigidly restricts the police in allowing them to enter a factory to enforce that act only with the Minister's written authorisation.[218] Similar restrictions are placed on police in relation to the Companies Act[219] another infrastructural law.

That superstructural laws are generally instrumental laws is understandable when viewed in the context of legal repression and the political economy of legal rights. The oppressed class is dominated by their relations within the infrastructure and a particular function of superstructural law is to retain or maintain those class relations during social activities. As has been pointed out, the historical development of criminal law in particular, contrary to what we are taught to believe, does not represent a community consensus[220] but rather reflects the interests of an economically powerful class.[221] Those in power by virtue of their "ideological dispositions" are "committed" to "the maintenance and defence of the structure of power and privilege inherent in advanced capitalism."[222]

Indeed, such a committment was acknowledged by no less an authority than Lord Devlin (a judge of the final court of appeal in England) when he said, on a television program -

> Judges are, inevitably, part of the establishment, and the establishment's ways are those which are operating in our minds..... I think the law has to be part of the establishment. 223

Hence, infrastructural laws regulate behaviour at the economic base and in order to ensure that social activities do not

unduly endanger that economic structure, instrumental superstructural laws like the Act become a crucial necessity.

Footnotes to Chapter II

152. see Gluckman, Max., Politics, Law and Ritual in Tribal Society, Basil Blackwell: Oxford (1967) Ch.3; Main, Lucy., op.cit., Ch.7.

153. see Sahlins, Marshall, Stone Age Economics, Tavistock Publications,,: London (1974), pp.186-187.

154. Coulson, M.A. & Riddell, C., op.cit., p.47.

155. Engels, F. (1972), op.cit., p.166.

156. see Meggitt, M.J., Desert People, Angus & Robertson: Sydney (1975), pp.242-246.

157. see Engels, F. (1972), op.cit.

158. see Oppenheimer, Franz, The State, New York (1922), pp.22-25.

158a. see Kats, Michael., "Institutional State" in Marxist Perspectives, No.4 (1978), pp.6-22.

158b. see Lenin, V.I., (1972) op.cit.

158c. see Carrillo, Santiago., Eurocommunication and the State (1978).
see also D. McNight's review in Tribune, 5.4.78.

159. see Poulantzas, W., Political Power and Social Classes, N.L.B: (1973) pp.25-28.
see also Hollowway, J. & Picciotto, S., "Capital Crisis and the State" in Capital and Class No.2, 1977, pp.76-101.

160. see Esping-Anderson, G. et.al., "Modes of Class Struggle and the Capitalist State" in Kapitalistate No.4/5 (1976) pp.186-220.
Also, Critique of Law, op.cit., pp.17-31.

161. see Tubbs, M., "Law & Capitalism" in Arena No.51 1978 pp.162-166.

162. See Marx, K. & Engels F (1976), op.cit.;
Engels, F. (1972), op.cit.

163. Krugman, "Filling the Void: Judicial Power and Jurisdictional Attacks on Judgements" (1977) 87 Yale LJ 164, pp.182-187.

164. A good example of the importance of subverting the laws to undermine the state in order to pave the way for revolution is provided by Tigar, M. & Levy, M., op.cit.

165. Fleming observes that trespass always had a semi-criminal character and emerged in the 13th century for"wrongs involving breaches of the peace." see Fleming, John G., The Law of Torts, 5th edition, Law Book Company: Sydney, Ch.2.
For a discourse on the growth of criminal law and its relationship to preoperty rights see Rusche & Kirchenheimer., Punishment and Social Structure, Columbia Univ. Press: New York (1939).

166. see Critique of Law: A Marxist Analysis, NSW Critique of Law Society (1978)

167. Lord Simonds in Shaw v. D.P.P. [1962] A.C. 220.

168. see "Editorial", S.M.H. 10.7.70.

169. ss.58, 59, Summary Offences Act No.96 1970 (N.S.W.).

170. "Editorial", S.M.H. 10.7.70. One could be cynical and say the Herald was simply waving the flag of private property knowing full well that ss.58 & 59 were not intended to be used against those with their twelve metre yachts or Mercedes Benz cars.

171. This may have been an additional reason for the announcement by the Government of its intention to repeal the Act.

172. Friedenberg, Edgar Z., "Ths Side Effects of Legal Process", in Wolff, R.P., The Rule of Law (1972) pp. 43-44.

173. ss.9, 22, 24, 25, 31 & 45, Summary Offences Act No.96. 1970 (N.S.W.).

174. see Bredemer, Harry C., "Law as an Integrative Mechanism", in Evan, William M (ed.) Law and Sociology, Free Press of Glencoe: New York (1962) pp.73-88.

175. Kelson, H., General Theory of Law and State London (1940), p.61.

176. see Bourdieu, Pierre, Outline of a Theory of Practice. Cambridge Uni. Press, London (1977).

177. see Durkheim, Emil, The Divisions of Labour in Society, Macmillan, New York (1933).
see also Schwartz, Richard D., "Legal Evolution and the Durkheim Hypothesis: A Reply to Professor Baxi", Law & Society Review, Summer (1974) pp.653-667.

178. see Najda, Wilhaly., "Law Ethics & Interests" in Telos, 34, Winter, 1977-78, pp.172-180.

179. see Diamond, Stanley, "The Rule of Law Versus the Order of Custom" in Reasons & Rich, op.cit., pp. 239-262 at 241.

180. see "Towards an Understanding of Historical Development in the Law of Torts"; "Torts: Towards a Marxist Framework of Analysis"; "Towards an Understanding of Contract Law"; "Trade Practices and Labour Regulations": in Critique of Law, op.cit., pp.47-77.
also Boehringer, G.H. & Tubbs, Michael "The Law's history; A Materialist Perspective" (of Factory Laws) in Legal Services Bulletin (special issue) January 1979, pp.30-35.

181. see ss.22, 23, 24, 25, 28, 29, 30, 31, 32 & 37, Summary Offences Act No.96 1970 (N.S.W.).

182. see ss. 26 & 39, ibid.

183. This feature of law is a common one. see Gunningham, Neil., Pollution Social Interest and the Law, Martin Robertson: London (1974).
The English Poor Law while appearing to be for the purpose of giving relief to the poor, was really for the purpose of controlling them and arose from the fear of the elite that "such discontents might be used by their political opponents." see Rose, Michael, E., The English Poor Law 1780-1930. David & Charles (Publishers) London (1971).
The Factory Laws while having the appearance of being for the purpose of protecting the health of factory children was more importantly concerned with the reproduction of a more disciplined morally suitable working class. see Boehringer, G.H. & Tubbs, Michael., op.cit.

184. see Renner, Karl., "The Development of Capitalist Property and the Legal Institutions Complementary to the Property Norm", in Aubert, C. (ed)., Sociology of Law, Penguin: Australia (1973), pp. 33-45.

185. see The Cairns Meat Export Co P/L v. Australian Meat Industry Employees Union (1962) 17.I.I.B. 876.

186. Theodore Price a cotton manufacturer, before a Parliamentary Commission looking into factory conditions and their effects on children in British Parliamentary Papers, Vol.111, p.65.

187. see Ward, J.T., The Factory System, Vol.1, David & Charles(Publishers): London(1970), p.60;
see also Hutchins, B.L.,& Harrison, A., A History of Factory Legislation, P.S. King & Sons: London (1911), p.28.

188. see "Infrastructural and Superstructural Laws: Directions for Analysis" in Critique of Law, op.cit., pp. 42-47;
Tubbs, Mick., "Law and Capitalism" Arena 51, 1978, pp.162-166.

189. see Marx, K., "A Contribution to the Critique of Political Economy" in Tucker, R.C. (ed) The Marx-Engels Reader, W.W. Norton & Company: New York (1972), pp.3-6.

190. Critique of Law, op.cit., p.8.

191. Ibid., p.44.

192. Ibid., p.45.

193. see ss. 6-19, 22-26, 28-31, 35, 37-41, 45, 47, 50-54 of the Summary Offences Act No.96 1970 (N.S.W.).

194. Entering or remaining in or upon buildings etc., without reasonable cause.

195. Mr E.A. Willis, M.L.A., New South Wales Parliamentary Debates, Vol. 89 (1969-70) p.7870.

196. see report in S.M.H. 8.7.70;
and "Drastic curbs planned on Street Protestors" S.M.H. 8.7.70.

197. see "Students occupy Liberal H.Q." S.M.H. 4.7.70.

198. see Tribune, 16.4.69.

199. see "Railway sit-down in Wollongong" Tribune, 30.4.69.

200. see Thomas, Pete "All they want is to know they'll get home allright" Tribune, 14.5.69.

201. see Tribune, 16.7.69: Tribune 13.8.69.

202. see Tribune, 27.8.69.

203. see Tribune, 20.8.69. The S.M.H. does not appear to have reported these events (Footnotes 199-203). However, while Tribune is not a widely read newspaper it is known that politicians from both sides of the political spectrum obtain copies. Presumably to be informed of sctivities which other parts of the media have failed to cover.

204. see Tribune, 25.3.70.

205. see Tribune, 29.4.70.

206. see Thomas, Pete, "The B.L.F. Office is where the Action is these days", Tribune, 20.5.70.

207. see "Students Routed from University", S.M.H. 20.1.69; "Student Ire Sweeps five Nations", The Sun-Herald, 26.1.69; Jones Margaret., "House Squatters defy Eviction", S.M.H., 15.1.69; "Pupils Stage Sit-down Protest", S.M.H., 26.3.69; "Sit-down by Students" S.M.H., 1.4.69; "Cutler Warns on School Sit-ins", S.M.H., 2.4.69; "12 Students charged after sit-in", S.M.H., 9.4.69.

208. see "Colong protest at company meeting", S.M.H., 17.4.69.

209. see New South Wales Parliamentary Debates Vo.89, 1969-70, p.7870.

210. It is interesting to note that incidences of gate-crashing were so unimportant that the S.M.H. does not appear to have reported such happenings in the preceding 12 months to the passing of the Bill.

211. see Thomas, Pete., "Occupation", Tribune, 3.6.70.

212. see s.545(B)(1) Crimes Act 1900 (N.S.W.).

213. see New South Wales Parliamentary Debate, Vol.89,op,cit.

214. see particularly s.109 of that Act.

215. see Mundey, Jack., "Interview with Jack Mundey" in Australian Left Review, No.32, Sept. 1971.

216. A government would have had to be blind to the political realities not to see that a new attack on property rights involving industrial actions was gathering pace. In particular the idea of workers' control was being projected and supported by the Communist Party of Australia in publications they controlled or influenced.
see McFarland Bruce., "Theories and Practice of Workers' Control" and Taft, Bernie, "Communists and Workers' Control" in A.L.R. No.6, Dec 1969; Nord, Stella., "New Conditions: New Demands" A.L.R., No.5, Oct 1969; Palmada, Joe, "Industrial Perspectives" and Freney, Denise, "Discussion" A.L.R. No.3, June-July 1969; "Workers' Control" A.L.R. April-May 1969. Every issue of the A.L.R. in 1969 had material dealing with the debate on workers' control.

217. see ss. 33, 42, 57, 58 & 59, Summary Offences Act 1970 No. 96, (N.S.W.).

218. Section 7(2) Factories Shops and Industries Act 1962 (N.S.W.). states "A member of the police force may, if so authorised in writing by the Minister, exercise and perform all powers, authorities, duties and functions of an inspector." I have been unable to find an occasion when such an authorisation has ever been given.

219. see ss. 171-172 Companies Act No.71 1961.

220. In relation to the Act with only one week's debate in Parliament one wonders whether the community was ever intended to be consulted.

221. see Brown, D., op.cit., p.476.

222. Miliband, Ralph., The State in Capitalist Society, Basic Books: New York (1969) pp.128-129.

223. Thames Television's The Judges, broadcast on 12.10.71; also British Journal of Law & Society, Vol.1, No.2, WINTER, 1974, p.135.

CHAPTER III

AN HISTORICAL BACKGROUND

On the surface it would appear that the Act had a short history growing out of the Police Offences Act and the Vagrancy Act. If that were the case then the materialist explanation for the Act would have to be found in the social conditions existing during the period of its drafting and passage as a Bill through Parliament. However, offences in the Act such as gathering alms and fortune telling could hardly at the time be said to be existing matters of social concern. Neither could the extension of the summary dispensing of criminal justice have its impetus purely from the existing social conditions. Hence, although material conditions are a final determinant of the substance of a law, what the law states and the social conditions do not have to faithfully coincide and a law may appear to be inconsistent with certain contemporary conditions.

Laws, while primarily being a product of specific existing conditions, carry with them the ghosts of past generations. They cannot be totally situated in the conditions of the living, because being a product of human activities laws, like humans, have historical roots which took hold in past generations.[224]

How is such a repressive Act to be explained? How does one explain the emphasis of the Act on summary police powers, summary hearing and summary penalty? Why did the legislature respond in such a reactionary way to temporary political and industrial difficulties? It is my contention that only part

of the answers to those questions can be provided by studying the conditions which were operating at the time of the Act, and that fuller answers to those questions can be given by combining those conditions with our historical past. The study of law is often conducted in circumstances so that it is completely divorced from any historical context.[225]

Our Arbitrary Past

Arbitrariness has never been very far from the practice of lawmakers and enforcers and therefore spasmodically breaks out.[226] The Act tended to engender the likelihood of police and judicial arbitrariness which is unsatisfactorily rationalised in terms of human weaknesses of individual police. Such explanations ignore Australian criminal law history which shows that the forces for 'law and order' have always had an inherent inclination for dictatorial abuse of human rights and liberties. The Colony's first constabulary had to be disbanded because even though it tried to select the most trustworthy of convicts they proved themselves untrustworthy.[227] However, the arbitrariness of the police has little relationship to this first attempt to have some kind of police patrol operating (as it did then) during the night, but in the very foundation of the colony itself.

Of recent years there has arisen a great deal of controversy in respect to the motivation and objectives of that foundation: whether it was intended to be a penal colony, a trading post, or to supply England with flax and naval timber.[228] There can be no disputing the fact that a penal colony was established when the First Fleet arrived in 1788 with its contingent of

1,035[229] - it "was a military encampment in a beautiful but very wild natural setting."[230] What Clark was to later describe as an "unnatural form of society"[231] which "created wealth ... on a moral dunghill."[232] Founded as a penal colony and backed up by military authority, there was little in the way of civil justice.

> The Governor's powers were practically supreme. He was not only supreme lawmaker, having power to issue any orders he might deem necessary for the good government of the colony, and to promulgate any punishment even to the death penalty; he was also supreme head of the administration of these laws. 233

The colony was thus established with the powers of lawmaker, administrator, judge and executioner residing in a single military commander. It can be said then that the birth of our laws were themselves the result of arbitrariness. All of the early governors were military men, all trained in military ways; who would tolerate no questioning of their wisdom which would be expressed in the form of proclamations, orders or decrees. It has been said of Philip, Hunter, King, Bligh and Macquarie that they all -

> assumed ... the powers of an absolute monarch ... subject not to constitutional and statutory limitations but only what (they) believed to be the necessities of the situation in hand. 234

It has been noted that "military justice is to justice (what) military music is to music"[235] and so it was to be with the birth of the colony of New South Wales. The first Judge Advocate (Capt. Collins) had no legal training whatever and hence carried out his tasks with "military simplicity" in a court which "partook of much of the nature of a court martial."[236] Eldershaw concludes that the -

> administration of justice in the settlement was obviously intended to be founded on principles of expediency rather than on those of abstract justice or legal exactitude. 237

Historically military rulers have rarely made good civilian rulers and on many occasions have shown themselves to be despotic, brutal and authoritarian. This is probably because their training is fundamentally for the purpose of war with all of its inevitable emergencies, to handle the abnormal instead of the tranquillity which comprises the larger part of a nation's life.

All the early governors generated opposition to themselves from the population at large, culminating in Australia's only two rebellions.[238] An indication of 'the simplicity' of military justice was the method used to determine which of the Irish convicts in the 1804 rebellion would hang: lots were drawn from a hat with every third one taken to the gallows.[239]

The absoluteness of military justice did not change or wane until 1812 when steps were taken to improve civil court judicature in line with the existing English civil court. Such liberalism did not go far as the "Criminal Court was to be left unaltered."[240] The Colonial Secretary, Lord Bathurst gave the reason when he wrote, "Would it be prudent to allow convicts to act as jurymen? Would their admission satisfy free settlers?"[241] It was "the conditions of the colony (which) forced their shape on the system of justice."[242] The reality was that neither a 13 year old boy, chained in double irons weighing 12 lbs for his sea voyage to New South Wales,[243]

nor another convict sentenced to 14 years banishment for circulating the seditious and inflammatory writings of Thomas Paine[244] were, on arrival, about to be guaranteed bourgeois civil liberties. As has already been discussed, the political economy of repression necessitates that the mode of exploitation determines the substance of civil liberties. A slave can have no rights and in the colony convicts were placed in roughly the same position; their labour formed the very core of acquiring wealth and thus it was not surprising that a public meeting in 1839 accepted that the "material" "well-being" of the colony depended on continuing transportation.[245]

Australian rulers' propensity to dictate summary punitive punishment in their laws is firmly rooted in the practices of early colonial life when the two main forms of violence were those that were officially administered against the convicts and that unofficial violence by the 'free settlers' against the aboriginals who were said at the time to be "people little higher in the scale of creation than monkeys."[246]

In a population of 44,588 in 1830, there were 18,593 convicts (41.7%.[247] However, many of the non-convicts were children of convicts. It is easy to imagine that with such a large proportion of the settlement comprised of convicts, ruthless and rigid control were seen by the authorities as a necessity.

In 1835 there were 326,738 lashes administered during 7,103 floggings among 27,340 male convicts.[248] The criminal jurisdiction which meted out this sort of harsh punishment was established by the English Parliament when it passed the Criminal Court Act 1787.[249]

Being a military establishment run along military lines and applying military concepts of order, it is understandable that the main offences were neglected work and insubordination and that the penalty for such infractions was the lash. Governed by what seems to be a philosophy of 'spare the rod and spoil the child' history records that convicts were sentenced to as many as 2,000 lashes for a single offence.[250]

Social control meant convict control and that was to be achieved by making their life in the settlement "an object of real terror."[251] The genesis for the Act can be found in this period of Australia's history, with a penal colony conceived as a place of repression, born and nurtured on oppression as a 'legitimate' response to acts of dissent. The promulgation of the Act was a continuation of the practices of past Australian rulers. As Clark notes, our penal history has stamped its mark on our country[252] and, one might add, moulded the character and thinking of our national and state rulers.

Suffice it to note that official terror is still a method of rule and the Act was part of an official campaign of terrorising those among the working class who failed to conform. And let it not be forgotten that the offence of using "unseemly words" (an offence under the Act) led to the death in the past of at least one person so charged.[253]

Military authoritarianism lay at the centre of the dispute between the Colony's first civilian judge, advocate Ellis Bent, and its first supreme court judge, Jeffrey Hart Bent and Governor Macquarie.[254]

It was not until 1824 (36 years after the founding of the colony) that military administration started to give way to some form of civilian administration when the first legislative council was appointed,[255] and not until 1843 that the first (Limited Franchise) election for that body occurred.[256]

As a reflection of the thinking of the 1824 body, the first recommended law it carried on public order was in 1825 when it passed "An Act to Prevent Harbouring of Runaway Convicts and the Encouraging of Convicts Tippling or Gambling." Criminal law and its interconnection with the economic base is well mirrored in this, the colony's first exercise in law-making. A runaway convict was in reality a loss to free settlers, this being the reality of an economic system of exploitation based on bonded cheap convict labour, and convicts free to gamble could lead to more trouble.

In respect to the exploiters of convict labour Macquarie's official instructions stated -

> It is our Will and Pleasure that .... you assign each Grantee (of Land) the Service of any number (of convicts) that you may judge sufficient to answer their purpose on condition of their maintaining, feeding, and clothing such Convicts. 257

Not long after Macquarie had taken up duties as Governor he complained to the Colonial Office of the shortage of male convicts saying that "the prosperity of the Colony depended on their numbers."[258] While the convicts were said to be the cause of the colony's immorality, it was the accumulation of wealth and not the moral standards of the colony which was the determinant for the support of continued transportation. Is

not immorality the substance of wealth when to acquire it necessitates that some must be slaves or paupers?

As for the free settlers, the military had little more trust in them than they did in the convicts. All of the early Governors severely restricted Public Meetings and Associations and for a meeting to take place as a lawful gathering it had to be authorised by the Governor and could only be held if the Provost Marshall was in attendance and presiding over the meeting.[259] Even petitions to the Governor were seen to be"seditious" and for "destructive purposes."[260]

The First Offensive Behaviour and Prostitution Laws

The new settlement's first public disorder was on the 6th February 1788, when the female convicts were first let ashore.[261]

The first law dealing with offensive behaviour was proclaimed in a decree by Governor King in 1806 when he proscribed the use of abusive or insulting language by convicts to the military personnel, and loitering after sunset.[262] Hence the origin of Part II of the Act was not the Police Offences Act but Governor King in Old Sydney Town in 1806[263] and s.9 of the Act (the using of unseemly words) was but a direct descendant of Governor King's proclamation.

The first proclamation against prostitution was on the 27th February 1910 by Governor Macquarie.[264] That it tok 22 years to proclaim prostitution as an offence is probably best explained by Summers:[265] in the early days of the penal settlement women were convicts and a small minority and thus "all women were categorised as whores - or damned whores."[266]

Indeed the colony itself was described as an "extensive brothel."[267] With three men to each woman and nothing for the women convicts to do, their social role became one for sexual gratification and to be at the disposal of the males in the colony. All women were regarded as prostitutes but there is little evidence that they were prostitutes by trade or profession. What is known is that the Colonial Office made it increasingly clear that it favoured the married family as a model for future colonisation.[268] And to hasten such a development and transformation of the settlement, the Colony advertised in English newspapers in 1835 for single women, offering them free passage to come to New South Wales.[269]

It is possible that the reason why prostitution took 22 years to be declared an offence was because the first women convicts were sent out to the colony to become whores (when the female convicts were let ashore from the First Fleet two days of 'debauchery' ensued[270]) and the fact that for the first two decades there was "no freedom of trade, internal or external"[271] would have seemed to have made prostitution as a profession impossible.[272]

Hence with the advent of trade and the need with it to maintain an adequate supply of 'free labour', anti-abortion and prostitution laws were proclaimed in 1810, suggesting once again the connection between the economic base and the law; and that it is society which makes the law and not the law which makes society.

Making prostitution a criminal offence was never done with the intention of eradicating prostitution, but much rather

to deprive working class females of a potential for their own economic independence, something which in a male dominated society would have been anathema. The offence of prostitution has to be understood in its economic, class and social context. Such an offence not only deprived the female of her independence, it also manifested that the family was the preferred model of male-female sexual relations and that sexual relations outside marriage would be subject to state intervention. The creation of prostitution as an offence symbolised the right of the state to regulate sexual acts and at the same time justified the state declaring standards of social morality and the introduction of censorship.

The crime of prostitution only has meaning in a social system of exploitation where labour is bought for a price less than its true value. The working class, having been dispossessed of the ownership of any means to produce their own subsistence were prevented from obtaining their subsistence by means other than selling their labour power to the capitalist. Prostitution as a means of earning a living represented a manifestation of independence which was considered by the ruling class to be undesirable and thus not to be tolerated. This conclusion is substantiated by a prostitute who said that the relationship between herself and the client is from the start "an economic one" because the "only commodity she sells is (her) body."[273]

The potential economic independence of workers is the major reason for laws against such things as alms gathering, gambling and begging, as well as prostitution. Therefore the prescribing of prostitution as a criminal offence is a reflection of class

conflict. It mirrors the fact that one class has been dispossessed of the means to produce their subsistence as well as the fact that males are dominant in society.

In fact there was little justification in 1970 for the widening of police powers to control prostitution,[274] particularly as arrests for prostitution declined from 15,436 in 1964 to 2,411 in 1969, the year before the passing of the Act.[275] Unless the rationale was to push the total number of arrests up and with the convictions following,to increase government revenue from the fines which usually follow as a traditional penalty.

Prostitution laws, like those of vagrancy, are not unrelated to the capitalist need for labour power and hence their application will have some correlation with the economic fluctuations of capitalism. An explanation which best explains the large drop between 1964 and 1969 and the drop from 4,288 prostitution informations in 1972 to only 2,098 in 1977.[276] It would seem that the more depressed the capitalist economy is with its consequent lack of employment opportunities, the more tolerant are the authorities in their application of the soliciting laws.

The Politics of Vagrancy Laws

Chambliss[277] has shown that vagrancy laws have been used over the centuries (since 1349) in England to control the labouring class by either forcing them to work or curtailing their movements. As wealth is a vital virtue of the social system of capitalism it makes it impossible for the vagrancy sections

of the Act to be used against the capitalist class. The rationalisation for continuing to promulgate vagrancy laws must therefore be found in the need of the capitalist class to have social control over the working class. One commissioner of the NSW Police Force said virtually as much when in 1930 he stated that the vagrancy laws were responsible for the police "ridding the city and streets of undesirables."[278]

Vagrancy laws clearly express a social conflict between a property owning class and those who have been historically dispossessed of any property. A law making poverty a crime naturally provides the means for controlling such criminals.

Vagrancy laws originally were used to force the labourer into a contract of employment with the capitalist, and are today the laws which remind society that it is divided into classes. Such laws reflect the existence of a dominant wealthy class with its mores and values which correspond to the material discourse of society and thus should be followed and upheld. Vagrancy statutes provide a means of imposing ruling class ideals on the labouring class. The significance of the current operation of such laws is that they can act as a mechanism by which non-conforming social behaviour can be contained and even squashed without the necessity of explicitly having to proscribe such behaviour by law. The victims of vagrancy laws quickly come to learn that it is their non-conforming behaviour which attracts the attention of the police and not its illegality.

The political economy of the vagrancy laws operates quite

independently of those who enforce them. Both the policeman and the sentencing magistrate can be quite unconscious of the political economy resulting in the implementation of the law. All they need is to have a belief that people who won't work should be punished by being made to work in prison. It then becomes a matter of course that upon conviction the person charged will be sent to prison to do essential work for the state, at less than 'normal' costs to the state. (State budget papers show that the prison industries make a steady 10% profit.[279]) Vagrancy laws clearly benefit in the first place the buyer of labour power and secondly, the class on behalf of whom the state exists. They serve the requirements of both the productive base and the superstructural state's supervisory and administrative requirements.

The extent of the use of vagrancy laws for the needs of the state and in the suppression of working class movements, can be assessed by the fact that in 1972 in NSW 38.2% of all people imprisoned were charged with the offence of vagrancy and 87.5% of those convicted were incarcerated in jail.[280] These figures I submit, substantiate that vagrancy laws are now used not to force people to work as much as they are used for the purpose of imposing control over their wanderings and behaviour. It is of interest to note that wheras NSW had 3,712 persons charged with vagrancy in 1972, Victoria only had 687. The explanation for the great difference is that the Victorian police prefer to deal with such persons by charging them with drunk and disorderly behaviour[281], thus successfully obscuring poverty as a crime.

Possibly of greater significance (and bearing out Chambliss in his study of vagrancy laws) is the fact that compared with that figure of 3,712 prosecutions for vagrancy in NSW in 1972, the figure had dropped to 918 by 1977.[282] While other factors could be involved in such a dramatic difference, the most likely reasons seems to be that in 1972 there was almost full employment and thus anybody without visible means of support were seen per se to be idlers, wheras in 1977 the economy had deteriorated, there was mass unemployment and hence to arrest too many people because they had no visible means of support would have highlighted existing capitalist economic problems to the detriment of that class' interests. It is submitted that it is not the purpose of the criminal law to expose the conflict in society between the ruling and dominated classes, but rather to appear to act for the 'common good'. And in order to succeed in that objective different criminal laws are used interchangably. The above figures merely manifest the flexibility in the application of criminal law by law enforcement bodies.

Australia commenced as a divided society, its first ruling elite being the military made its history unique and its early laws and criminal processes reflected military mentality. The first social division was between convict and military jailor, a division that formed the model for future social relations. The nation's first class divisions were between landholder and labourer in which a relationship and social order developed which had many of the characteristics of a feudal society. When the squattocracy replaced the army as rulers a new ruling class arose in which the merging of feudal

notions and military notions of social order occurred. Criminal laws commenced by the military were hardly amended and where they were, the modification was often regressive rather than progressive.

The aim of the landed aristocracy was, like the military before them, to have dominion and hegemony over the labouring class, the remnants of the early convicts. They rapidly passed criminal statutes which were more relevant to the needs of an agrarian and commercial economy where the lash as the main means of punishment would be replaced by fines and imprisonment.[283] Perpetuating repressive laws the landed class outdid the military when one of their statutes was rejected by the Home Government for being too "repressive."[284] Industrialisation resulted in a new social division, between the capitalist and working class. A new ruling class emerged with old ruling ideas, growth of the police force quickened and new additional criminal laws were passed. The deification of property in the form of factories and offices etc., meant that those who were non-owners must work and vagabons and would-be idlers harrassed to conform.

The First Vagrancy Laws

It was not until just before convict transportation was abolished that the first Vagrancy Act was passed in 1835.[285] Prior to that persons who would be likely to fall within the embraces of vagrancy laws were controlled by an Act assented to in 1828.[286] This statute was recognised as "an effective instrument for the subordination of the convict and the ticket-of-leave

holder."[287] Therefore, the history of the vagrancy section of the Act did not commence with the 1902 Act or even the 1835 Act but in the Master and Servant Act of 1828, particularly as it was an offence under this Act (with a maximum penalty of 6 months imprisonment) to be absent from work.

In the Vagrancy Act of 1851[288] only s.2 deals with the actual offence of vagrancy, the rest of that Act covers such offences as gathering alms, carrying weapons and lotering(s.3); escaping from custody(s.4); using obscene language (s.5); using threatening or abusive language (s.6); neglect of duty by a constable (s.7); issuing warrants for arrest (s.8); search and seizure of a suspect and the selling of effects found on offenders against that Act (s.9) etc.

The passing of vagrancy laws (not unlike prostitution laws) only have meaning in a society where there is a labouring class which has to sell its labour power to a purchasing dominant class. And that happens when there is internal and external trade, some form of commodity production and market exchange. Therefore with the placing onto the statute books of the Vagrancy Act 1835,was the recognition that these economic and social activities were an established feature of colonial life and the recognition that 'free labourer' was to replace slave or convict labour, an admittance that the colony was no longer segmented between felons and free settlers, but between labouring and ruling classes. Such a change is a good example of how the mode of production is the final determinant in the form of the law.

Vagrancy laws in Australian criminal history have played a

somewhat lesser part than in the criminal history of England. In England they were forerunners to modern criminal law, wheras in Australia, because of a different social history, vagrancy laws grew with criminal law and have never been more than supplementary to the Police Offences Acts. Indeed the political economy of vagrancy laws in NSW has been one to provide cheap labour for the Government's prison industries rather than to force disinclined members of the working class to work for 'private enterprise.'

Vagrancy Laws as a Method of Social Control

The criminal law in providing the means for social control must respond to changes in material conditions, vagrancy laws have historically reflected such changes,[289] and these changes are quickly represented by legal definitions of what constitutes vagrancy. The dropping of the words "idle and disorderly" (used in the repealed 1902 Vagrancy Act) did not in itself alter the offence of vagrancy under s.22 of the 1970 Act, as being idle and disorderly did not constitute the offence.[290]

Actually, as with the repealed law, s.22 of the Act created two offences: that of "insufficient lawful means of support" and "no visible means of support". In other words one can have visible means of support but if a member of the police force "reasonably suspects" that it is unlawful, the person can be lawfully arrested. Hence while the courts have criticised the police for using the vagrancy law merely on suspicion of a crime without legal evidence to establish it,[291] as the Act stood the power was given to the police to do precisely

that, and from there to force the person who had been charged to prove what means of support they had, was lawful.[292] It seems something of a contradiction that a prostitute who had just been paid a fee would have unlawful means of support, but that if she accumulated savings from the proceeds of prostitution then they would be lawful means of support.[293] The vagrancy laws have been used to imprison an offender who was before the court on some other charge, or as a witness or bystander in the court, when they have been required to account for the means of support or lack of it,[294] and s.22 of the Act would not protect a person from such an arbitrary use of the law.

The political power placed in the hands of the police was quite extensive when it is realised that policemen only had to reasonably suspect, which is a much lower requirement than 'believes' in order to make lawful arrest. This change in wording from s.4(1) of the Vagrancy Act 1902 was probably intended to circumvent the decision of the Appeals Court which held that in s.27 of the Police Offences Act 1901, it was the court that had to reasonably suspect and <u>not</u> the police officer.[295]

The capitalist system which fosters the idolisation of wealth has not abolished vagrancy laws as a mark of respect to poverty but rather as a concession to the growing sophistication of the electorate. It may not be a crime to be poor any more but it is still sufficient to attract some other criminal charge by the police.

The First Legislative Laws Against Gambling, Loitering, Larceny, etc.

The first law against betting was carried in 1825[296] and against loitering in 1806.[297] Historically, such laws have been used to invade the privacy and leisure time of the labouring masses. Convicts were not supposed to have anything to gamble with and hence to allow them to gamble was seen as encouraging them in further crime, particularly drunkenness. (It has been said that rum gave the colony "an air of permanent intoxication",[298] which would correspond to what others have said about the early colony, that virtually the only form of relaxation was the drinking of spirits,[299] and according to Government records since the birth of the colony until the present, drunkenness has accounted for about one-third of all arrests).

Loitering, like gambling, was perceived to be an evil which caused more serious evils,[300] the worst of these being to conspire to rebellion. In the early settlement the most prevalent serious crime was that of larceny,[301] and by the 1820's house-breaking, robbery and bush-ranging were becoming major forms of property crime,[302] but petty crime, especially crimes of public disorder, were still the major proportion of all crime. Of 9,950 arrests made in NSW in 1841, 8,958 were for such offences as prostitution, indecent exposure, disorderliness and drunkenness.[303]

Here again we can see that s.35 of the Act had origins which went right back to some of the first laws of white Australia.[304]

The First Police Offences Act and Australia's Social Transformation

The First Police Offences Act was promulgated on 6th August 1833,[305] its preamble claimed its provisions were "for the maintenance of the public peace and good order....". It is of interest to note that the statute was passed at a time when the colony was going through a period of economic restructuring and political transformation from military to civil rule. Thus we see a transformation from penal to free colony. Within the colony at the time there were some 27,000 convicts.[306] By 1833 the penal sector of the colony existed as a general support for the civilian sector of the ecomomy by providing much of the productive labour and by constructing and providing public amenities, utilities and services. Much of the available labour was by this time, ticket-of-leave, ex-convicts, or 'emancipists'.

The quantity of wool exported increased from 1,401,284 lbs in 1831 to 8,610,775lbs in 1840 with a total value of £566,112 ($1,132,224) and the population increased from 77,096 to 130,856 between 1836-1841.[307] Transportation of convicts was to cease in 1841 changing once and for all the conception of the settlement as only a penal colony. The great change in this period was "from the use of semi-slave to free labour",[308] and as has been discussed earlier, free labour requires rights and liberties as well as social control mechanisms. In this period there were a spate of Acts passed to reflect the changing form and composition of colonial society, not the least of which was a new Master and Servant Act[309] to replace the 1828 Act.

The Police Act (Sydney) 1833, was perceived to be necessary

by virtue of these social changes, particularly as the new 'freedoms' of the convict led the establishment in the 1830's to fear that "the institution of private property, the family and the laws of God were being set at defiance or laughed to scorn."[310] (some of the same fears which led in 1970 to a new Act[311]).

Thus the 1833 Act symbolised a new set of social and economic relations, it formulated new crimes and offences against those with political and economic power and introduced a new type of law and order. For it is indisputable that the statute was, as the preamble states, passed for reasons of "public peace and good order"; a 'peace' for the new ruling class and an 'order' over the labouring class. The statute very quickly got to the kernel of the peace and order intended and for whom,when it empowered the Justices to "suppress all tumults, riots, affrays" and for them to "discipline ... convicts."[312] They were to prevent "robberies and felonies", by appointing constables to enforce the statute.[313] The police were given power to "apprehend" "drunks"in public places;"all loose, idle ... and disorderly persons" who did not give a "satisfactory account of themselves" to the constable.[314]

It is clear from these few extracts from the statute that those who were intended to fall within its ambit were the propertyless labourers and convicts. It is inconceivable that the legislation was meant to cover 'tumults and riots' by the squatters and grantee landowners or to prevent them from committing robbery, or that the ruling squattocray were 'loose, idle and disorderly.' From its commencement, New South Wales criminal law has mirrored a conflict of class interests. The 1833 Police

Offences Act was the statutory ancestor of parts of the new Act and like the Act it was blatantly discriminatory in substance (as well as in practice).

The new police powers under the Act[315] have their statutory origins in s.6 of the 1833 Act. The offence of drunkenness in the Act (s.6) arose out of the same section in the 1833 Act. Indecent exposure of the person and obscene exposure in the 1970 Act[316] were given their statutory birth in the 1833 Act when it said:

> And it be further enacted, that any individual who shall offend against decency by the exposure of his or her person in any street or public place with the said town or in the view thereof shall on conviction ... pay for every such offence a sum not exceeding ten nor less than five pounds. 317

The offence in the Act of defacing walls by affixing posters and writing or painting on them,[318] is a carryover from s.43 of the 1833 Act which stated it was unlawful to "paste" or "affix" any "placard" on a wall or to in any other way "deface" such a wall. Damaging shrines and monuments or statues[319] can be identified to have had its beginning in s.12 of the 1833 Act which stated, "That any person who shall damage any public building, wall, parapet, sluice, bridge..." commits an offence. The offence of damaging fountains[320] was in the 1833 Act the offence of injuring "public fountains, pump cocks, or water pipe,"[321] Causing obstruction and annoyance in a public place which could endanger or damage property and person[322] (though new forms of obstruction have been introduced) finds its analogy in s.16 of the 1833 Act which made it an offence to place any "timber, stones, bricks" etc on a carriage or footway.

The statutory offence of letting off fireworks and lighting fires in a public place or school[323] are only modifications of the first such statutory offence covered by ss.19 & 20 of the 1833 Act which proscribed the letting off of firearms, fireworks (s.19) and burning any matter (s.20) in the street or public place.

The 1833 Act basically mirrored changes in the economic, political and class structure of NSW thus reflecting the material reality of that society. It was not a statute that dealt only with the social control of the labouring class, as it also dealt with what might be termed as socially useful regulative functions. In this respect it differed from the twentieth century Act in that it provided for the rudimentary regulation of such things as Sunday trading,[324] Sunday entertainment,[325] traffic regulations and road safety,[326] building and structural specifications and approval,[327] health, sanitation and safety,[328] and licensing of trade and regulation of marketing,[329] to list a few.

Whether the 1833 rulers were more sophisticated in colouring the political intention of the laws they made is questionable, the fact remains that the 1833 statute would have been more presentable as a law for "peace and good order" than was the 1970 Act which was crudely abrasive and politically biased which made it offensive to the 'conception of right.'

A comparison of the titles of the 1833 Act and the 1970 Act serves to make the point,[330] the essence of the former is the prevention of nuisance and obstruction and that of the latter summary punishment. As Carson shows, the symbolic

characteristics of the law are more important than the instrumental in terms of long range stability and normality.[331] And the main symbolism embodied in the 1970 Act was that the police would be increasingly used to crush political dissent, particularly dissent that became active opposition.

Later police acts reflected the trend towards separating order and regulation from what is the fundamental concern of all ruling classes: the class control of the subordinate class, While it is possibly true that as New South Wales developed, there was a need for the State to become segmentised into departments for specific administrative purposes, that factor does not seem to entirely explain why to a large extent the police force was virtually excluded from administrative functions that had little to do with the control of the working masses. It seems to be an inescapable reality that the police exist primarily to control social behaviour in its widest sense, and not so much 'criminal' activities. The police seem to have been gradually set aside and separated from other administrative law functions, as an instrumental reserve body of persons whose special task is to control the social behaviour of those who have little material wealth: the working class. With the developing sophistication of the state administration there occurred an emerging specialisation of agencies separate from the police, leaving that body to specialise in the more important task of controlling the activities of the working class: in political oppression.[332]

The first amendment to the 1833 Act reflected the future direction for the police in the application of 'law and order' type criminal statutes. The amendment was intended to strengthen

s.43 of the 1833 Act[333] so as to give more implicit protection to private property owners having their wall used for placards, posters and chalk-ups.[334]

The 1853 Amendments

The amendments to the Police Act in 1853 were even more significant in that every new offence was confined to the narrow area of 'law and order' or social behaviour.[335] In the 1853 amendments other offences and powers of the Act have their origin, or were more clearly spelt out. For example, being in possession of stolen goods (s.40 of the Act) was in the 1853 legislation, persons receiving ships'stores from seamen,[336] Framing a false invoive (s.41 of the Act) was the descendant of "framing a false bill of parcels to escape detection."[337] The offence of being in custody or having in possession house-breaking implements (s.51 of the Act) arose from the offence of "possessing instruments for unlawfully procuring and carrying away wine etc."[338] The power to stop and board a vessel (ss.57 & 58 of the Act) was even more specifically authorised in the 1853 amendments[339] than it was in the 1833 statute, and so too were the police powers to regulate traffic and control processions[340](ss.44-48 of the Act).

The 1853 amendment in respect to processions has an important difference with ss.44-48 of the Act in that the police were given no power to prevent them. The power they were given was "to make regulations for preventing obstructions in the streets during public processions."[341] Evidently processions were respectable in 1853. As one author has observed, it was only

the end "of the nineteenth century (which) saw the emergence of large-scale labour protests,"[342] in which the streets were used as a working-class venue of protest.

Other new offences created by the 1853 amendments were supplying liquor to a minor; cock-fighting; busking; using a carriage without the permission of the owner; failure to give name and address to a constable.[343]

These examples of the amendments suggest that the ruling authorities had already conceptualised the future daily function of the police force and set it firmly on a path of confrontation with the labour movement and political opponents of the capitalist system.

The development of the police as protectors of private property and ruling class power increased with the passing of the next Act in 1855.[344] This statute made it an offence to convey stolen goods and gave additional power to thepolice in relation to detecting stolen goods. Although the statute continued the use of police in other administrative functions, they were generally functions which were associated with "preserving order and good conduct."[345]

The 1901 Act[346] did little more than to bring together under a single statute many of the general statutory powers of the police in relation to 'law and order' and social control.

The Connection Between Political Dissent and New Criminal Offences

It is a feature of criminal law that once a power is given to the police there is an apparent extreme reluctance to later take it away. Each offence prescribed under criminal law automatically grants an added power of state intervention through its police force, and this could partially explain why 'obsolete' laws remain on the statute books.[347]

The 1970 Act, while repealing a number of offences did it in such a way as to increase the powers of the police in terms of maintaining social control. Indeed the history of law and order type statutes has been to increase police powers in the first place by creating new offences and then at a later date to consolidate those powers into statutes even after the offence which necessitated them has been abolished or decriminalised. This feature of criminal law tends to substantiate the claim of the class conflict theorists of law: that criminal law is primarily about retaining political and economic power in the hands of the ruling class and only secondarily (or even marginally) about crime prevention and apprehension.

Upsurges in industrial and political activities are reflected more in the public order type criminal laws than in any others. For example, the great depression led to greater use of the streets for political communication and agitation, and to meet that situation s.8 of the 1901 Act was amended[348] so that a person who "wilfully or by negligence or misbehaviour prevents in any manner the free passage of any person or vehicle" was guilty of an offence.[349] This amendment would have been

useful against demonstrators, picketeers, anti-eviction groups and the like who were active in that period.

Likewise, the first major alteration to s.11 of the 1853 Police Act dealing with public processions occurred in 1929[350] which brought in the offence of "taking part in an unauthorised procession",[351] and of course with the rise in public demonstrations against conscription and the Vietnam War the 1970 Act resulted in a further substantive amendment when it required that "An application for the consent of a prescribed authority to hold a procession shall be made" to the Commissioner of Police.[352] The very fact that a refusal to grant a permit had to be approved by the minister in charge of the police[353] is indicative of the political motivation behind this provision in the Act.

Consider the position when police have to divert traffic because of a road accident or for road repair. For such unforseen disruptions to the flow of traffic no one would expect that the police should have to gain the permission of the Minister, so why for a procession?

The 1929 amendments and the 1970 Act had the effect of turning what was in the 1853 Act, a virtual statutory right to demonstrate, into a qualified and restricted privilege, or as one member of Parliament put it, "the only place you can go in freedom, other than to war, is to a funeral."[354] Indeed s.44 made it mandatory for the consent to be in writing and the police had the power to grant consent on "such other conditions as the prescribed authority thinks fit...".[355] Neither of these statutory requirements previously existed. The conditions

the Police Commissioner may prescribe are likely to be unchallengable, by being non-justiciable.[356]

Another amendment to the 1901 Police Offences Act which can be identified with political change was the introduction of a series of new offences dealing with firearms in 1936.[357] These amendments seem to have had their political connections with the growth in New South Wales of the New Guard during the early thirties, plus the political turmoil in Europe with the rise of fascism and the crisis of capitalism in that period. Right from the start of the penal colony, the ruling class have shown a degree of nervousness over the subjugated class having too ready access to weapons.

One can only reiterate, the difference between the earlier Police Act and the 1970 Act was that the earlier statutes (with their additional duties imposed upon the police) were more difficult to identify as politically repressive, more difficult to associate with the interests of the ruling class and this factor may help to explain why there does not appear to have been the same degree of political opposition to them.

The history of summary offences laws, is a history of class conflict, a history of changing class forces and activities of political opposition to the dominant ruling elite, a history of changing economic and social conditions and a history of the centralisation of state political power into a structure reflecting the methodology for social control as practised by the rulers. It is for these reasons that the Act of 1970 cannot be fully or adequately rationalised in terms of the social and material conditioning then prevailing. The mentality

which the Act reflects is the mental ghost of past generations of rulers which still today (as was always the case) weigh heavily on the minds of the living.[358]

There is a major difference between the growth and development of English and Australian state power. In the former the state was perceived to be the protector of civil and political rights wheras in the latter the rulers and administrators of the state never had to contend with such theories. The Australian state having grown out of a military dicatorship has been able to play the role of an allocator of political rights rather than a protector. This background has made it easier for legislators to promulgate statutes which restrict political activities. The 1970 Act is but a continuation of the legislative practices which seek to minimise in an arbitrary way political opposition. The theoretical 'rights of Englishmen' have been more of a myth in Australia than they were in England. This is but another example of how a country's own historical and cultural conditions will make their presence felt in the final form of the law and processes.

Footnotes to Chapter III

224. For a history of the rise of capitalist commercial law see: Tigar, M.E. & Levy, M.R., (1977) op.cit.; see Rose, M.E. (1971) op.cit., for a history of the English Poor Laws; see Chambliss, W.J. "A Sociological Analysis of the Law of Vagrancy" in Social Problems No.12, 67-77; and for contract law see: Horwitz, Morton J., "The Historical Foundations of Modern Contract Law" in Harvard Law Review, Vol.87, No.5, March 1974, pp.917-956.

225. Critique of Law, op.cit., p.80.

226. see S.M.H. 2,10.77 for complaints about police arbitrariness during the Bathurst Motor Races; The Australian 21.8.76 for a report of the abuse of citizens rights by the police in the Nimbin commune raid.
see also the reported talk given by the then Detective Sergeant Longbottom of the NSW "Special Branch" of the police force in "Students Laugh with police and at them", S.M.H. 5.3.69;
see"Editorial" The Australian 11.9.70 which noted that in preparation for the 1970 moratorium "Police (had) been highly provocative in (their) announced decisions."
see further "Woman's arrest a 'human error': Fingerprinted, held over fines mix-up." S.M.H.22.2.79. The Daily Mirror 26.1.79 report of the alleged social welfare fraud involving some of the Greek community and the collapse of the Government's case, also assertion that "The police had .... committed gross breaches of civil rights.";
also, Wilkinson, Marian., "New Crown Moves in Greek conpiracy case" in The National Times 24.2.79.

227. see King, H., "Some Aspects of Police Administration in New South Wales, 1825-1851", Royal Australian Historical Society, Journal and Proceedings XL11, p.215.

228. For further readings on these and other theories see Martin, Ged (ed.) The Founding of Australia: The Argument about Australia's Origin, Hale & Ironmonger, Sydney (1978).

229. For example, 69.2% of the first settlers in 1788 were convicts. See Historical Records of Australia: N.S.W. Colonial Secretary, Returns of the Colony; also Grabosky, Peter N., Sydney in Ferment: Crime Dissent and Official Reaction 1788-1973. Australian National University Press, Canberra (1977).

230. Grabosky, Peter, N., op.cit., p.4.

231. Clark, C.M.H., A History of Australia, Vol.3, Melbourne University Press: Melbourne (1973), p.103.

232. Ibid., p.42.

233. Eldershaw, M.B., Phillip of Australia, Angus & Robertson, Sydney (1972) p.225.

234. Ellis, M.H., Lachlan Macquarie: His Life, Adventures & Times, Dymock's Book Arcade: Sydney (1947), p.210.

235. see Sherrill, Robert., Military Justice is to Justice as Military Music is to Music, Harper & Row, New York (1970).

236. see Eldershaw, M.B. (1972) op.cit., pp.228-230.

237. Ibid., p.238.

238. The Irish Rebellion in 1804 at Castle Hill. see Clark, C.M.H., A History of Australia, op.cit., pp.171-173; and the Rum Rebellion in 1808, see Evatt, H.V., Rum Rebellion, Angus & Robertson: Sydney (1965).

239. Gilchrist, J.T. & Murray, W.J., (eds) Eye-Witness: Selected Documents from Australia's Past, Rigby Limited: Sydney (1968), p.20.

240. Phillips, Marian, A Colonial Autocracy, Sydney University Press: Sydney (1909) pp.191-193.

241. Ibid., p.193.

242. Ibid., p.244.

243. see Ellis, M.H., (1947) op.cit., p.178.

244. Ibid., Leg irons for restraining prisoners was not entirely abolished until 1917. see Grabosky, Peter, N., (1977) op.cit., p.117.

245. Clark, C.M.H. (1973), op.cit., p.158.

246. Ibid., p.107.

247. see Historical Records of Australia. NSW Col.Sec, op.cit., see Grabosky, Peter N. op.cit.

248. Historical Records of Australia, series 1, Vol.19, p.654. also see Grabosky, op.cit.

249. 87. Geo 111., CAP.11.

250. Grabosky, Peter N., op.cit., p.45.

251. Hewison, Anthony, op.cit., p.155.

252. see Clark, C.M.H (1962), op.cit., pp.171-173.

253. see "Bilbao: two policemen to face charges" in S.M.H. 2/11/79.

254. Hewison, Anthony (1972), op.cit., pp.114-132.

255. see Grabosky, Peter N (1977), op.cit., p.10.

256. Ibid., p.14.

257. Hewison, Anthony., The Macquarie Decade, Cassell Australia Ltd: Sydney (1972), p.16.

258. Ibid., p.62.

259. Phillip, Marion (1909) op.cit., pp.85-87.

260. Ibid.

261. see Clark, C.M.H., (1962) op.cit., p.88; also Grabosky, op.cit.

262. see McQueen, H., "Convicts & Rebels", Labour History, No.15, Nove (1968) pp.8-9; also Grabosky, op.cit., p.49.

263. Part II of the Act deals with "Offences relating to public places." s.9 deals with unseemly words which the Act defines as being in part "abusive or insulting."

264. Hewison, Anthony., op.cit., p.22.

265. Summers, Anne, Damned Whores & God's Police, Penguin Books: Australia (1975) Ch.8.

266. Ibid., p.267.

267. Ibid., p.269.

268. Ibid.

269. see Australian Background, Government Printing Office, Sydney (1960), p.3.

270. Summers, Anne, op.cit., p.269.

271. Phillips, Marion, op.cit., p.15.

272. see Rolph, C.H. (ed) Woman of the Streets: Sociological Study of Common Prostitution, The New English Library Limited: London (1955).

273. Ibid., pp.82-83.

274. Compare the differences in wording of s.28 of the Act with s.4(1)(i) of the Vagrancy Act 1902 where the word importune has been deleted. In Smith v. Hughes [1960] 2 All E.R.859 it was held that solicits covered a situation where a prostitute plied her trade from her balcony or window. And the adding of the word "near" to s.28 would certainly encompass such a situation. Section 29 of the Act also increased police powers of control as it meant a place only had to be "reasonably suspected" of being "habitually used" for purposes of prostitution. Other changes are the word "known" for the word "reported." (Vagrancy Act s.8(b).

275. see New South Wales Police Department Annual Reports, 1964-1969.

276. see Court Statistics, Department of the Attorney-General and Justice, N.S.W. Bureau of Crime Statistics and Research.

277. see Chambliss, W.J., "A Sociological Analysis of the Law of Vagrancy" in Social Problems No.12, pp.67-77.

278. S.M.H, 6.3.30., also Grabosky, op.cit.

279. see Tubbs, M., Tribune 14.10.70., op.cit.

280. see Law and Poverty Cries, in Homeless People and the Law, Australian Government Publishing Service: Canberra (1976), p.27.

281. Ibid.

282. see Court Statistics 1977, Department of the Attorney General & of Justice, N.S.W. Bureau of Crime Statistics & Research, Report 9, series 2.

283. The 1851 Vagrancy Act provided that a vagrant, a person found lodging or wandering with aboriginals, a common prostitute, a person intoxicated, a person behaving in an indecent manner, the holder of a house frequented by reputed thieves, and a person who begged and gathered alms were liable to two year's imprisonment.

284. "An Act for the further and better Regulations and Government of Seamen within the Colony of New South Wales and its Dependencies and for establishing a Water Police 1840."
see also Grabosky, op.cit., p.73.

285. "An Act for the Prevention of Vagrancy and for the Punishment of Idle and Disorderly Perons, Rogues and Vagabonds and Incorrigible Rougues in the Colony of New South Wales 1835."

286. "An Act for the Better Regulation of Servants, Labourers, and Work People -1828". (9 GEO.IV., No.9)

287. Clark, C.M.H (1973)., op.cit., p.180.

288. "An Act for the more effectual prevention of Vagrancy and for the punishment of idle and disorderly persons Rogues and Vagabonds and incorrigible Rogues in the Colony of New South Wales" (December 1851).

289. see Chamblis, W.J., op.cit.

290. see Blackburn J. in Daniel v. Belton 12 F.L.R. 101 at 103.

291. see Ex Parte Harris 53 W.N. 87.

292. see Woolley v. Bomford [1969] TAS. S.R. 127. also Daniel v. Belton.

293. see Raap v. Owens [1972-73] A.L.R. 1300.

294. see Barton J, in Lee Fan v. Dempsey 5 C.L.R. at 318.

295. see Ex Parte Patmay Re Jack 44 N.S.W.S.R.351.

296. "An Act to Prevent Harbouring of Runaway Convicts and the encouraging of Convicts Tippling or Gambling 1825."

297. see footnote 262.

298. Ellis, M.H, op.cit., p.175.

299. see Campbell, Walter S., "The Use and Abuse of Stimulants in the Early Days of Settlement in N.S.W." Royal Australian Historical Society Journal and Proceedings, Vol.18 (1932).

300. Even today this view is still held where things like gambling and prostitution are seen to lead to worse crimes. see Marks, Sir Robert., In the Office of Constable, Collins: London (1979).

301. Grabosky, Peter N, op.cit., p.6.

302. Ibid., p.11.

303. see New South Wales Legislative Council, Report of the Select Committee on the Insecurity of Life and Property (1844).

304. s.35 deals with the offence of betting and loitering for betting purposes.

305. "An Act for regulation the Police in the Town and Port of Sydney and for removing and preventing Nuisances and Obstructions therein 1833". (4WN. IV No.7.)

306. see Historical Records of Australia, NSW Col.Sec op.cit. also Grabosky, Peter N, op.cit.

307. see Clark, C.M.H. (1973), op.cit., p.186.

308. Ibid., p.199.

309. "An Act to Ensure the Fulfilment of Engagements and to Provide for the Adjustment of Disputes between Master and Servants in New South Wales and its Dependencies 1840". (4 VIC., No.23.)

310. Clark, C.M.H (1973), op.cit., p.157.

311. The Hon. E.D. Darby, M.L.A. expressed these fears when he commented about the Act "he said: On the one hadn we have such reprehensible conduct as vandalism, robbery, assault, mass rape and drug addictions, while on the other the organisation of sit-ins, demonstrations and even riots. Honesty virtue, dignity and the rule of law are in discard." S.M.H. 22.4.69, also Grabosky, Peter N, op.cit.

312. s.3 Police Act (Sydney) 1833.

313. s.4., ibid.

314. s.6., ibid.

315. ss.56-59., Summary Offences Act No.96 1970 (N.S.W.).

316. ss. 11 & 12., ibid.

317. s.22., Police Act (Sydney) 1833.

318. s.15., Summary Offences Act No.96 1970 (N.S.W.).

319. s.14., ibid.

320. s.13., ibid.

321. s.14., Police Act (Sydney) 1833.

322. s.16., Summary Offences Act No.96 1970 (N.S.W.).

323. s.17., ibid.

324. s.10 Police Act (Sydney) 1833 stated that on the "Lord's Day" no "house or shop ir store" shall "trade."

325. s.11., ibid stated that the owner or occupier of a "public place of amusement" shall not "permit" and "play in his house or premises or any game on Sunday" and proscribed and "gathering together on Sunday in any public or open place" within "five miles" of Sydney for the "purpose of gambling or playing at any game."

326. see ss. 15, 16, 17, 40, 41, 49, 50, 51, ibid.

327. see ss., 18, 32, 35, ibid.

328. see ss. 23-26, 28-31, 33, 34, 37 & 38, ibid.

329. see ss. 57, 60-65, ibid.

330. The full tile of the 1833 Act was "An Act for regulating the Police in the Town and Port of Sydney and for removing and preventing Nuisances and Obstructions therein." The full title of the 1970 Act was "An Act to make provisions with respect to certain offences to be made punishable in a summary manner; to repeal the Vagrancy Act, 1902, and certain provisions of the Police Offences Act 1901, and certain other enactments; and for purposes connected therewith."

331. see Carson, W.G. (1974), op.cit.

332. see Quinney, Richard, op.cit.

333. "Affixing placards on walls and chalking theron."

334. "An Act to alter and amend an Act instituted An Act for regulating the Police in the Town and Port of Sydney and for removing and preventing Nuisances and Obstructions therein 1838."

335. "An Act to make Police Regulations for the City Port and Hamlets of Sydney" (24 October 1853).

336. s.1., ibid.

337. s.2., ibid.

338. s.3., ibid.

339. s.6 & 7., ibid.

340. ss. 11 & 12, ibid.

341. s.11., ibid. The first Trade Union Congress was held in Sydney in October 1879; see Equity, Sept 1979.

342. Grabosky, Peter,N op.cit., p.35.

343. ss. 8, 10, 14, 16, 17., ibid.

344. "An Act to make further Police Regulations for the City Port and Hamlets of Sydney and other Towns and Places in the Colony of New South Wales" (31 October 1855).

345. Preamble, ibid.

346. "An Act to consolidate the Statutes relating to Police Offences" (3rd October 1901), Police Offences Act No.5, 1901.

347. For example, the offence of possessing instruments for unlawfully procuring and carrying away wine, which was relevant in the early eighteen hundreds, and keeping a place used for cockfighting, remained on the statute books until 1970.

348. s.8 dealt with offences in public places of annoyance and obstruction.

349. Act No.31, 1929, s.3(a).

350. Act No.31, 1929, s.3(b).

351. a.18(3) Police Offences Act 1901-1957 (N.S.W.).

352. s.44(1) Summary Offences Act No.96 1970 (N.S.W.). There were under the Motor Traffic Act 1900, ss.7 & 14 similar requirements, however, the difference was that the application was for traffic regulative purposes.

353. s.44(6)., ibid.

354. Mr Neilly, the Member for Cessnock: New South Wales Parliamentary Debates 1969-70, p.8020.

355. s.43(3)(a) Summary Offences Act No.96 1970 (N.S.W.).

356. see Kerr, J. Wright v. McQualter 17 F.L.R. 305.

357. Act No.30, 1936.

358. "The traditions of all dead generations weigh like a nightmare on the brain of the living." Marx, K., "The Eighteenth Brummaire of Louis Bonaparte" in Marx-Engels Slected Works, Vol.1, Moscow (1950) p.225.

CHAPTER V

THE POLICE

There are a number of ways in which the police have been conceptualised. Some conceive them to be "servants of the public."[359] However, that is no more than a reiteration of bourgeois ideology and like most ideologies, it is a false representation of reality. For never before has a 'servant' been given so much power, never before has the servant regulated the 'master'. It is a contradication of terms to give "The shabbiest police servant .... more 'authority' than all the organs of gentile society put together,"[360] and then to maintain that they are merely servants. The police are not servants of the general public, they are the masters, a fact that can be a worry to the ruling class (whom they really serve) when they abuse their granted authority.[361]

To successfully carry out their function in society (the implementation of class motivated laws) does not allow the police to be servants of the public. It is a peculiar servant that stops a member of the public when driving a car, gives them an on-the-spot fine, calls at their home in the early hours of the morning to issue them with a summons, gets into the witness box and claims they did things they know they never did, and when they don't pay the fine, wake them up in the night to arrest them.[362]

The Secretary of the NSW Police Association exploded the myth of police being servants of the public when he lodged an application on behalf of the association's membership for extra

pay because their occupation resulted in "social alienation."[363]

Prior to the modern police force there existed in a number of capitalist countries a local constabulary.[364] This constabulary were not a specialised body of trained law enforcers but rather able-bodied males appointed by the community to keep the peace. They only acted upon a complaint, unlike the police who are vested with the responsibility of acting to 'prevent' a crime. It is this authority to act to prevent a crime being committed which made it possible for the police force to become an instrument of social control and it is this change in the police from defensive to offensive action that makes it possible to assert that effectively the real "history of social control... is the, history of (the) transition from 'constabulary' to 'police society'."[365]

It was not until midway through the 19th century in England that class antagonisms had reached the degree that necessitated the formation of a specially trained body to protect property and to control working class rebellions and riots.[366] The introduction of the police force in 19th century England was not readily accepted, particularly in working class areas, they won their acceptance in such communities gradually, using a great deal of patients and stealth. Their approach was to minimise as far as possible the physical takeover of the depressed working class suburbs, but having gained by consent their acceptance in the community, the police changed, particularly in this century, more and more into an open coersive force.[367] The 'community cop' gave way to the 'state cop' image.

Hence those like Banton[368] (who argued that the police are

representatives and servants of the community) find such an analysis hard to sustain as more and more of the history and operations of the police are uncovered. There is an implied admittance by the ruling class that the police are not servants of the public when the law requires that a citizen must go to the assistance of a police constable if called upon to do so.

The century and a half of experience of the modern police force simply makes the traditional ideological concept of the police untenable. Established as a "special body"[369] of people to protect property interests, it was unavoidable that, like the state itself, they would appear to stand above society.[370]

The materialist concept of the police is generally one of seeing them as an instrumental coersive force. The police themselves tend to substantiate the instrumentalist nature of the state, because they are probably the most objective example of such a theory of the state. In the instrumentalist sense, the police provide blood to the empty veins of the law as without that blood the law is a hollow shell devoid of life. No matter how influential the ideological power of law is, without a physically coersive body of people standing by, the law would eventually be innocuous.

The very name "Police Force" epitomises the fact that violence is the very core of the police. Hence it would seem that it is what the police are and what they represent that determines their role and leads to their social alienation. And contrary to what one scribe has written, that the remedy for their

alienation lies in "improving public appreciation ... of the work they have to perform for society."[371], their alienation does not arise from the image the public has of them, but rather from the class role they play in society. Hence whilever there is a need for a special body of physically coersive people like the police, they will be socially alienated.

Formed to protect property and its political interests,[372] the police were automatically posed against those who were propertyless, to repress them. Although originally thrust into the role of overseer or opponent of political actions in opposition to the capitalist system they have, on numerous occasions, assumed the position of political tactician for meeting and crushing political dissent.[373]

Historically this role of the police in Australia can be seen clearly to have arisen out of the confrontations with large scale labour protests in the 1880's and 1890's.[374] The capitalist state having oriented police functions in the direction of political 'commissars' then had to promulgate laws to suit that role. For although the state has the whole of the criminal law at its disposal to be used against political opposition,[375] this can be inadequate because in the main it was originally passed to deal with traditional criminal behaviour.

To overcome this kind of weakness,overtly and covertly political statutes were passed which effectively created political offences. The Act was one such example of that process. Take for example the sections dealing with public assemblies in the

Act (ss.43-48). While there were supposed to be adequate safeguards to prevent the police from making political decisions,[376] it would inevitably be police authorities who would have had to advise politicians on the decisions they should make. Irrespective of whether this is true or not the police had the power to determine the route, time and other requirements of a procession.[377] And even after consent for a procession had been granted the police had at anytime during it the power to disband it and declare it unlawful.[378]

Under Common Law everybody had a right of peaceful assembly for lawful purposes. However, statutory law altered that position and the Act had the effect of abolishing it completely (in relation to public thoroughfares) because any assembly for which there was no police authority was automatically unlawful.

The composition of the police force is one that lends itself to being organised against a protest movement. After the first failures of trying to recruit 'petty constables' from convicts, proportionately few police are recruited from the bottom end of the socio-economic ladder. Studies overseas show that most of their members are drawn from the elite of the working class or the bottom echelons of the capitalist class.[379] Thus the political ideology of the police also points towards the protection of the elite rather than responsiveness to the working class.[380] This conclusion has its contradiction as a survey of Vienna Police found that its members believed they acted first to protect the small man and the weak over the interests of the wealthy and strong.[381]

This survey probably highlights a contradication which exists in most police forces, between the beliefs of the individual policeman and the role he is required to play.

The police are somewhat like the state. They seem to be a combination of the instrumentalist, agency and relationship theories and it could be said that it is this combination which results in the police doing a number of things that appear to be of a non-class nature.[382] While this writer does not accept that in a strict sense it is possible for the police to act in a non-class manner, I am prepared to accept that 'any truth taken to an extremity becomes an absurdity'. Hence what is being looked at is the state-class-police-community nexus. The police as part of the state are also involved in the reproduction of economic and social relations. This does not occur by design or conspiracy (although conspiracies can and do occur)[383] but rather because what or how the police act and react are the result of an already assimilated ideology and culture. This means that the reproduction of social relations and formations does not have to be consciously (or rarely) applied because, as a matter of course, given the prevailing dominant economic and social relations and the ideology which is the rationale of those relations, the police both individually and collectively will in general, carry out their social and political functions as a matter of normalcy.

It is not so much the ownership of private property that requires that there be in existence a police force, but rather a particular form of commodity production, a state organised

round that mode of production, and an ideology which justifies both. And it is this ideology which gives legitimacy to the existence and practices of the police. But it is the reality of knowing that if there were no protectors of private pre-perty (in capitalist society) it would be damaged or stolen, which justifies their existence.

What mystifies the class origin, purpose and function of the police is that their relationship to the ruling class is interrupted (and thus obscured) by their direct relationship to the state and their apparent nexus with the community.[384] What further complicates an analysis of the police is that they objectively appear to be separated from both the economic and political areans. Hence just as Parliament has a relative autonomy from the dictates of the ruling class, so too do the police have a relative autonomy from the dictates of the legislature once they are established. The nexus is abstract rather than real,or subjective rather than objective. This perspective of the relationship between the police and the ruling class does not preclude at various social gatherings direct contact between the police hierarchy and members of the ruling class.

In a certain sense the police act as, and occupy the position of, the ruling class within the coercive apparatus of the state, and as an undemocratic (even anti-democratic) agency the police force lends itself admirably for that purpose. Compare the arbitrariness of the police with the arbitrariness of the capitalist employer at the point of production, and the similarities will become obvious. This is not because the

authoritarian employer is modelled upon the police, but the opposite. The police are modelled upon the lines of the authoritarian ideology of the master to the servant; upon the hierarchical structure of authority and power that exists at the point of capitalist production within the economic relations.

The increased strength of the police force seems to have little correlation with any decrease in the crime rate, but there does appear to be correspondence with increased industrial and political activities which lends substance to the view that the primary role of the police in modern capitalist systems is the political one of protecting the capitalists and their state from subversion and political attacks. For example, as has already been mentioned, breaches of 'public order' actually declined in the preceding years just efore the passing of the Act, yet the largest increase (both proportionately and absolutely) in the police force occurred some time after the decline, in the years 1966 to 1979.[385] Indeed, to have been logical, the time to have increased the police force was in 1960 as the rate per 1,000 for homicide, serious assault, gambling offences, prostitution and drunkenness was substantially higher in that year than in 1966.

It can thus be concluded that the conservative 50's and early 60's with their resulting political docility gave rise to no political need to substantially increase the numerical strength of the police force even though the rate of serious crime was higher, but that the politically volatile late 60's did. Increases in the police force and increases in the number of political 'crimes' are contingent on each other, so that the

Act was not just an Act which added new offences to the statute book, it also added indirectly to the size of the police force.

It is within the trends of restructuring the modern police force, its politicisation, its class composition and the changes in the primary functions of the police, that the economic, ideological and political rationale of the offences the Act sought to cover finds its main explanation.

As mentioned previously, the police (as a body to enforce the 'rule of law') are a direct result and product of the Industrial Revolution. In 1829 Sir Robert Peel founded the first modern police force in London, England. The formation of such a body of people was in the first instance opposed by the upper class who having witnessed the events of the French Revolution had fears that they (the police) could be used to encroach on property rights and to suppress freedoms which were generally associated with the ownership of property.[386]

It seems somewhat paradoxical that the class who the police were intended to protect were their first opponents, however, while they may have been the early opponents of the police force, it was the working class who resisted them when they started to function and it took to the end of the 19th century in England for the police to penetrate into and be accepted by some working class communities.[387]

Whatever the subjective reasons for the opposition, the material reality showed that in many areas of social activity without such a special force the state was incapable of effective

intervention to protect the emerging capitalist class' interests or to hold back the growing tide of working-class opposition to capitalist exploitation.[388] Old feudal means of class control were inadequate to meet the problems generated by the new economic and social relations established by the capitalist economic system.

Used as shock troops to confront political opponents of the ruling class guarantees that the police become socially alienated. The Act itself ensured this trend would continue, not because it was directly caused by the Act but because the behaviour the Act attempted to control was political behaviour of disaffection and opposition.

The state, through its police force, fills a power vacuum which is created when workers leave their place of work at the end of each day and are no longer under the direct control of their employer. The 'leisure pleasure' of the working class could not be left free from the control of the capitalist class to develop its own cultural alternatives.[389]

None of the above is to say that the police provide no service, it is simply stated to show the contradication and even dilemma that exist in relation to the functioning of the police. Had the police not been seen to have provided a service then it is my contention that a political crisis would have occurred long ago. However, if there is an element of truth in the assertion by the police representative (that the police are alienated) then an extremely fluid, nay volatile political situation is developing. The friendly community cop is no more, today there is instead an anonymous person, loaded to

the gunwale with arms, who exudes authority and generates fear.

There are some indications that this change has been deliberately fostered. The ruling class themselves no longer present the police as simply servants -

> The police ... are the instruments for enforcing the rule of law ... Basically their task is the maintenance of the Queen's peace ... that is, the preservation of law and order. Without this there would be anarchy. 390

Here one fear, the fear of anarchy, is used against the fear of the police themselves, being used as the justification for the existence of the police. The lesser of two evils is the choice for the community; and it is better the devil you know than the one you don't.

The extent of the submerged and deep seated hostility towards the police seems to be exemplified by a series of yet unexplained spontaneous riots over the last couple of years, where hundreds and in some cases thousands of people have vented they anger and fury towards the police.[391] The most recent such riot involved some 5,000 people at the closure of a Newcastle hotel. Before the riot started it is alleged the crowd were shouting out (hours before the police were in the area) "Kill the pigs."[392] An event like this suggests that class oppression by the police is being recognised by a significant section of the working-class and if that is so, then more such eruptions are bound to occur.

Prior to the Newcastle riot, a similar disturbance was sparked off by police arbitrariness at the Bathurst Motor Races in

1977.[393] It would be true to say that the repercussions from the extension of power granted to the police under the Act are finding their manifestations in acts of violence against both the individual policeman and police department property.

The New South Wales Police

The problems and controversies that confronted the formation of the English police did not play any major part in the birth and growth of the police force in Australia, although on occasions the police have proved themselves to be difficult to control, not always acting in accordance with the stated ideals of bourgeois ideology.[394]

As early as 1789 petty constables were appointed,[395] and the first Police Regulations were proclaimed by Governor Macquarie in 1811,[396] a proclamation which arose out of the need to ensure Customs duties were paid on imports, which was the main source of internal revenue.[397] Thus the early police were more like the modern custom force than the police force we know today. About the only characteristic of their past beginnings which is retained today is that of revenue collectors as the police are now the fourth major income earner for the state treasury.[398]

Sydney's first Police Act was in 1840[399] and provided for a continuation of the police role as collectors of customs duties and as guardians of wharves and seafronts.

The lateness and slowness in establishing a proper police force is probably explained by the emphasis, in fact the existence of military control and administration in New South Wales.

The military were, for all real purposes, the police force. The settlement at Sydney had a high ratio of military personnel to other persons. It was not until 1846 when there had been a substantial decline in the proportion of convicts in the general population of the colony that Governor Fitzroy justified the reduction in the size of the military garrison.[400] And it was not until the 1862 Act that all the colony's police were brought under a single centralised body.[401]

The Politicisation of the Police

With the prevailing ruling ideology, the police are presented as a natural and inevitable necessity and it is this assumption which makes it virtually impossible to think of society without them.[402] This in turn leads to theorising about how they should be organised and controlled leaving the more substantive question of their very existence a non-debatable issue. Traditionally one does not question the existence of police, only what they do or what they should be doing.

Ever since the inception of the modern police force their politicisation has been a feature of their evolution. A major function of the police is intelligence gathering and to do this modern police forces have developed "Special Branches" of political police for surveillance and infiltration of dissident political groups.[403]

The 'subversive' receives more attention than the nocturnal criminal and as the Salisbury Affair in South Australia in 1978 reveals, there were as many files on citizens acting within the law as there were on those who broke it.[404]

Protection of the state has replaced protection of persons and property as the justification for police surveillance and prying. This is an inevitable development of a state having to act for the ruling class' overall interests. If this view is correct, then it is inevitable that the guardianship of the state will transgress, over-ride and take precedent over the interests of individual members of the ruling class.

The Minister in charge of the English police, in justifying these kinds of police activities, defined subversion as "activities which threaten the safety or well-being of the state....".[405] The modern police force was born in a period of subversion on a mass scale in the last century,[406] for the stated purpose of protecting life and property and maintaining the 'Queen's peace'. Those in charge of the police quickly recognised that the political agitators who opposed the captalist system were a greater threat to private property than was the pick-pocket, cat-burglar, highwayman or bank-robber and that these same agitators were more menacing to the privileges of property owners than the criminal element.

Indeed, it is the politicisation of the police that has pushed them into a situation where one U.S. study found that 74% of policemen felt their most serious problem was their social alienation.[406a] A situation where they feel "just like hostile troops occupying an enemy country."[407]

The police are socially alienated mainly because their practice contradicts the traditional ideology of the police force. Their ideology of neutrality to the political movement has become more clearly one of opposing the mass political movement

with the development of monopoly capitalism. There is an ideological crisis confronting the modern police force because their contradictory activities are widely recognised. The response by the ruling class to this crisis has been to increase by statutes, police powers, numbers and armaments, and for the police themselves to become more physically aggressive forcing them to try and isolate themselves from the mainstream of social life. Substantial resources are allocated to improve their public image[408] with attempts to build close liaison with the media[409], all to no avail.

The Act and the Police

Bearing in mind that the Act was based on recommendations from a Police Department Committee it is not difficult to read into a number of the offences it contained, the politicisation of the police force. A study of some of the offences will show their ideal adaptability for the new politicised function of the police.

Demonstrations are today one of the few ways open to communicate political opposition publicly, but with the concentration of control of the media in the hand of four major outlets,[410] public demonstrative dissent can be easily misrepresented by the tactics of the police.

Offensive conduct[411] was particularly suited to being used for political purposes because in the first instance for all practical purposes, the person who had to be offended was none other than the 'servant' of the public, the police officer, and secondly, it meets the tactic of discrediting the political

cause of the demonstrators.

Offensive behaviour conveniently deals with behaviour which is "riotous" or "indecent" which to the experts in 'riot control' (the police) is comparatively easy to provoke. The offensive behaviour provision of the Act was commonly used by police as a justification for arresting demonstrators, to either stifle the demonstration or to cast discredit on its participants. As Hall et.al., shows the police are capable of orchestrating 'crime waves' to suit both their own organisational or policy objectives as well as to serve the political strategy of a government of the day.[412]

Indecent has been judicially defined as "anything that is unbecoming or offensive to common propriety,"[413] and "offending the ordinary modesty of the average man."[414] And as the person of 'common propriety' or the 'average man' does not have to be in attendance at the court, it is left to the'average' policeman, when making an arrest, to occupy their shoes.

What is offensive behaviour could be the peace sign or the V for victory sign[415] of the raised hand with the first and second finger open in a V shape. This was held to be an offence under s.7 of the Act even though the offence within the section was considered to be uncertain.[416] A case involving a pig's head in which there was no evidence other than that people were amused was held to be offensive because it was said that the behaviour was calculated to be offensive.[417] To use'calculated' in this manner was tantamount to introducing the offence of 'attempted' offensive behaviour, an offence

which on literal interpretation could not be intended by s.7 of the Act.

Riotous behaviour was that which would cause alarm to a citizen of a reasonably courageous disposition who fears the peace is likely to be breached.[418]

As mentioned earlier, in practice it was the police who in the first instance decided whether behaviour was offensive, particularly as it was not necessary that any member of the public was in fact offended,[419] and neither was it neceesary for the prosecution to show that the accused intended to offend.[420]

Taking these judicial findings, s.7 of the Act became a convenient provision in the hands of the police for containing political demonstrations as well as controlling the working-class in their recreational activities, particularly as the section created 20 separate offences.[421]

Another section of the Act which had political connotations is s.9, using unseemly words. Unseemly words have been held to mean "obscene, indecent, profane, threatening, abusive or insulting words."[422] Obscene means"offensive to chastity and delicacy; impure; expressing or presenting to the mind or view something which delicacy, purity and decency forbid to be exposed;"[423] "causing lewd ideas; offensive; disgusting."[424] Indecent means anything which is "unbecoming or offensive to common propriety."[425] Profane is to be given its ordinary dictionary meaning[426] which i irreverent and disrespectful, blasphemous and sacriligeous about the Deity, God and religious

things. Threatening simply means menacing, intimidating and expressing an intention to do harm to a person in some way. Insulting means treating a person with "contemptuous abuse, (and) outrage;"[427] an attack on a person's moral character by scorn and abuse.[428] Abusive means coarse, insulting, harshly insulting, according to Webster's Dictionary.

Indeed, the statutory interpretations of the words which constitute the offence of unseemly words under the Act made it almost impossible to make a meaningful political speech or statement which did not fall within the ambit of the offence. On the surface it appears that s.9 was concerned with social morality, but a deeper analysis will reveal that the section itself is intended to silence publicly expressed political opposition. It is no coincidence that the offence of unseemly words was created at the height of the opposition to the Vietnam War, a war that was commonly referred to as an "immoral war", and a war which was supported by the N.S.W. State Government.

Taking the above definitions together, 'unseemly words' represented a veritable arsenal in the hands of the police, and as if this was not enough the wording of the section suggests that unlike previous similar offences (where the prosecution had to specify whether the words were obscene, offensive, profane, etc, to avoid duplicity) it would seem that no longer was it necessary for the prosecution to categorise whether the words were obscene, indecent, proface etc., but it could rely on all of the categories listed in s.4.[429]

It would appear that the reason for such a wide sweeping power

in such a loosely worded offence was to overcome the judicial restrictions placed on the previous offences of obscene and offensive language.[430] For example, "fucking boong" was not necessarily obscene, as it had to be taken in regard to the circumstances in which the words were used.[431] And a magistrate who later held that the word "fuck" was always indecent was held to have misdirected himself.[432] It has also been held that the word "cunt" is not necessarily "indecent."[433]

The new offence of unseemly words[434] as defined by the Act had the effect of overcoming the judicial interpretations mentioned above and changed the criteria of the language which would constitute an offence. In practice, when an information was laid under s.9 it usually alleged the language used were words like "fuck" or "fucking", thus making it easier to obtain a conviction.

In order to fully appreciate the powers given to the police by using the term "unseemly words" in s.9 of the Act, it is necessary to realise that, without even the wide range of words which when used could now conceivably be an offence under the section, the section still created four offences.[435] Hence to obtain the total of what could constitute an offence under s.9 it was necessary to multiply the various 'unseemly words' by the figure of four. This may seem a trite point to make, but it is made to show a pattern which flows through the Act, i.e. to grant to the police catch-all powers of arrest. For example, the offence of writing or drawing unseemly words,[436] which is based on s.7 of the repealed Vagrancy Act 1902, widened the offence to include exhibiting or displaying of offending

material, i.e. demonstrator's placards. The addition of unseemly words instead of the more restrictive words like "indecent", "obscene" etc meant that the writing of phrases and slogans could be an offence within the meaning of the provision even though none of the words on their own were unseemly.

These and other offences within the Act,[437] dramatically increased the political role and powers of the police. 'Offensive behaviour' also brings out the class bias of the police, often expressed in their attitude towards anti-social behaviour. As Mankoff notes there is a class difference between "pranks" and "crime", when the youth from the upper class in their anti-social antics will often be viewed by those in authority as nothing more than youthful pranksters, while similar behaviour by the working-class is treated as a criminal offence.[438] This class interpretation of the law by the police leads to the position where for practical purposes criminal behaviour becomes "activities engaged in by the powerless."[439] A recent example of this class discrimination was shown recently by one of the most vociferous opponents of the repeal of the Act. He described the new Offences in Pulic Places Act as a "charter for louts"[440], yet in his own student days he was photo-graphed frolicking in a fountain, a crime under s.13 of the Act, but to him a mere student prank.

The conflict in society between the classes needs some special body to keep the combatants apart, a role that the police serve well. However, in adopting this role it does not mean that they are neutral peacemakers, quite the contrary, they carry out the function of keeping the classes separated in

such a way that it represents the overall interests of the dominant class, thus undermining their neutral posture and with it engendering resistance and opposition to their presence in the community. It has been correctly stated that "any form of hegemony presupposes particular relations of coercion, and vice versa,"[441] and coercion to be really effective must ultimately be able to rely on physical force, on a special body of people kept in reserve for precisely that purpose. The ownership of private property itself would be "unthinkable in the absence of an ultimate police or military backing."[442]

This analysis is not meant to be a complete one of the police but rather a framework from which to proceed, and to make further analysis, nor is the kind of analysis given here that which is apparent, for if it were, then there would be a great deal more open opposition to the police than is occasionally shown or expressed. The complexities of the relationsip of the police to and within society are too extensive to be fully covered in this brief overview. However, with the world-wide trend of the modern police force to increase its size, operations and expenditure, and with it, oppressiveness, there is a need for deeper analysis.[443]

It can confidently be stated that one of the biggest threats to bodily safety and civil liberties is this body of specially trained and armed personnel who paradoxically are often generally supposed to have been founded to guarantee those very things. The class that conceived of and formed the modern police force today are about the only ones who have a measure of protection against its arbitrariness and abuse.[444]

The problem is, having once given power and authority to a body specially trained in the use of force and, with the exception of the army, the only organised and armed agency in society, how to control its activities and to restrict its powers? It is in this respect (the choice and dilemma between having a body to protect perceived class interests and the necessity of ensuring that its actions are not counter-productive) that the Act fell down, by making police abuse more likely and more difficult than ever to control. And just as the Act itself could be too easily identified with the interests of the ruling class and its parliamentary rulers, the powers the Act gave to the police made them more easily recognised as a force which existed to protect those same interests. This perspective of the police helps to explain why there are proportionately more police and petty sessions courts in the working class districts of Sydney and why a worker unless "compelled to do so .... never appeals to the law" for help.[445]

Footnotes to Chapter IV

359. see Friendlander, C.P. & Mitchell E, op.cit., Ch.1.

360. Engels, F (1972), op.cit., p.168.

361. A concern which has its expression in the passing of the Police Regulation (Allegations of Misconduct) Act, 1978.

362. see Fitzgerald, Alan., "Thos Friendly Boys in Blue" S.M.H., 15.2.79.

363. see "Police seek extra for 'alienation'," S.M.H.13.2.79.

364. see Parks, Evelyn, L., "From Constabulary to Police Society" in Chambliss, William & Mankoff, Milton., Whose Law What Order?: A Conflict Approach to Criminology, John Wiley & Sons Inc: New York(1976)

365. see ibid., p.129.

366. see ibid., p.131.

367. see Hogg, Russell, Marxism and a Theoretical Analysis of the Police, an unpublished dissertation submitted in part completion of M.A. in Criminological Studies (1978): University of Sheffield, Faculty of Law.

368. Banton, Michael., The Policeman in the Community, Tavistock Publications: London (1964), pp.1-8.

369. see Lenin, V.I., op.cit.

370. see Engels F (1972), op.cit., Ch.IX.

371. see Editorial "A Policeman's Lot" S.M.H. 14.2.79.

372. see Skolnick "Changing Conceptions of the Police" in The Great Ideas Today, Encyclopaedia Pritannica, (1972), p.41.

373. The Australian:"Editorial"on 11.9.70 on the eve of the Vietnam Moratorium and prior to the violent confrontation between the police and participants in the Moratorium: virtually admitted the confrontation was deliberately planned by the police when they accused the "Police ... (of) highly provocative ,,, decisions" and called for the organisers to abandon the demonstration to avoid the expected violence;
see also an account of how the English police in conjunction with the media, manufactured a crisis about false mugging offences, in Hall, Stewart et.al., Policing the Crisis: Mugging, the State, and Law and Order.MacMillan Press: London (1978).

374. For a coverage of the history of the British Police Force's political orientation, see generally Bunyon, Tony., The History & Practice of the Political Police in Britain, Quartet Books: London (1977).
see also a well documented account of the political activities of the U.S. Police, The Iron Fist and The Velvet Glove, Centre for Research and Criminal Justice: California (1977).

375. Ibid., Ch.1.

376. s.44(6) Summary Offences Act No.96 1970 (N.S.W.). states that the "Commissioner of Police, shall not refuse to grant consent except with the concurrence of the Minister...."

377. see s.44(4), ibid.

378. see ss.45(b), 46 and 47, ibid.

379. see Greer, Edward "The Class Nature of the Urban Police During the Period of Black Municipal Power" in Crime and Social Justice: Issues in Criminology, 9, Spring-Summer (1978) pp.49-50.

380. Ibid., p.51.

381. see Mankoff, Milton., "Introduction" to the "Political Economy of Law Enforcement," in Chambliss, W & Mankoff, Milton, op.cit.

382. see Hogg, Russell, op.cit., Ch.3.

383. Even Adam Smith noted that the capitalist class were given to conspiring in their business activities, when the first thing they did when they got together at business meetings was to work out schemes to raise prices. see Smith, Adam., Wealth of Nations (1779).
Further, it now seems from questions put to respondents by the Morgan Gallup Poll, that the move to block supply in the Australian Senate was being planned as early as Sept-Oct 1974, see Beed, Terence W., "Opinion Polling and the Elections" in Penniman, Howard R (ed.) Australia at the Polls: The National Elections of 1975, American Enterprise Institute for Public Policy Research: Washington (1977) pp.211-256.

384. see Silver, Allan, "The Demand for Order in Civil Society: A Review of Some Themes in the History of Urban Crime, Police & Riots", in Bordua, David J., (ed.) The Police: Six Sociological Essays, John Wiley & Sons Inc: New York (1967), p.12.

385. see New South Wales Police Dept Annual Report 1960-70, see also Grabosky, Peter N., op.cit, p.157. The records show that between 1960 and 1965 the police force increased its numbers by 755, and between then and 1969, by 1,181.

386. see Silver, Allen., "Social and Ideological Bases of British Elite Reactions to Domestic Crisis in 1829-1832" in Politics and Society, Feb 1971, pp.179-201.

387. see Starch, R., "The Plague of Blue Locusts: Police and Popular Resistance in Northern England" in International Review of Social History, Vol.10, Pt.1 (1975).

388. Ibid.

389. see Starch, Robert., "The Policeman as Domestic Missionary: Urban Discipline and Popular Culture in Northern England: 1850-1880", Journal of Social History, Vol.9, 1976.

390. Royal Commission on the Police, H.M.S.O. London (1962), p.21.

391. see "Hundred Storm Police in Hotel War" in Daily Mirror 20.9.79; also "Government to look at causes of riot at Newcastle" in S.M.H. 21.9.79.

392. see "Song Started Star Riot - Police" in Daily Mirror, 25.9.79.

393. see report in S.M.H. 2.10.79; also report of complaints about police behaviour at the races in S.M.H. 10.10.77.

394. As mentioned earlier the first attempts to form a constabulary were not very successful. Later in 1825-26 there appears to have been a problem of 'law and order' in the colony's police force when in an 18 month period there were no fewer than 59 dismissals for misconduct in a force which only averaged 50 members in that period. See Grabosky, Peter N., op.cit., pp.75-76.
see also Rossi, F.N., First Police Magistrates Report 1826, (Mitchell Library).

395. Ibid., p.49.

396. Phillips, Marion, op.cit., p.78.

397. Hewison, Anthony, op.cit., p.33.

398. see Tubbs, M.,Tribune (1970), op.cit.

399. "An Act for the further and better Regulations and Government of Seamen within the Colony of New South Wales and its Dependencies and for establishing a Water Police 1840."

400. see Grabosky, Peter N., op.cit., p.75.

401. see "An Act to consolidate and amend the laws relating to the Police Force: (20 January 1862) (Police Regulation Act 1962).

402. see Hogg, Russell, op.cit.

403. Ibid., Ch.1.

404. In South Australia it was revealed that there were about 130,000 such files, while in New South Wales the Privacy Committee reported to the Premier that the Special Branch had some 80,000 files. see "Wran seeks curb on secret dossiers," S.M.H., 30.3.78.
And in England it is estimated that the main police computer has files and information on 1.5 million people "most of whom have no criminal record", Hogg, Russell, op.cit., p.11.

405. Starch, R (1975), op.cit.

406. see O'Malley, Pat., Political Economy and the Analysis of Social Change: English Libel Laws in the Early 19th century S.A.A.W.Z. Conference Paper, August 1976, La Trobe University.

406a. see Skolnick, Jerome, H., Justice Without Trial, John Wiley & Sons Inc: Sydney (1975), p.50.

407. see McInnes, Colin, Mr Love and Justice New English Labrary, London (1962) p.20., also ibid.

408. see "Projecting the Police" The National Times 3.2.79.

409. see Hogg, Russell, op.cit., Ch.2;
also Hall, Stewart et.al, op.cit.,Part 1.

410. see McQueen, H., Australia's Media Monopolies, Widescope: Melbourne (1977), Ch.2.

411. s.7 Summary Offences Act No.96 1970 (N.S.W.).

412. see Hall, Stuart et.al., op.cit., Ch 1-5.

413. see Purves v. Inglis [1915] N.Z.L.R. 1051 at 1053.

414. Herron, C.J., in Ferguson v. Cee [1967] 1 N.S.W.R.792 at 793. Ex Parte McKay: Re Crowe, 85 W.W. (Pt 1) (N.S.W)438; [1967] 2 N.S.W.R. 207;
see also Mitchell J. in Grivelis v. Horsnell (1974) 8.S.A.S.R.43.

415. see R. v. Smith [1974] 2.N.S.W.L.R. 586.

416. Per Street, C.J., ibid.

417. see Ellis v. Fingleton (1972) 3.S.A.S.R. 437.

418. see Ex Parte; Jackson; Re Dowd (1932) 49 W.W.126.

419. Ibid; Lafitte v. Samuels (1972) 3.S.A.S.R.1.

420. see Normandale v. Brassey [1970] S.A.S.R.177;
Ex Parte Lewis; Re Wales (1970) 91 W.W.(N.S.W.)27.

421. 5 offences of riotous or indecent behaviour in a public place; 5 offences involving riotous or indecent etc., behaviour within view from a school; 5 offences comprising riotous or endecent etc behaviour in a school; 5 offences comprising riotous or indecent etc behaviour within view from a public place.

422. s.4 (1) Summary Offences Act No.96 1970 (N.S.W.).

423. per Martin C.J. Bremner v. Walker [1885] N.S.W.R. 276 at 281.

424. per Fullangar J. R V. Clase [1948] V.L.R.445 ay 463.

425. see Purvis v. Inglis [1915] N.Z.L.R. 1051.

426. see Armstrong v. Moon [1895] 13 N.Z.L.R. 517.

427. per Rich J. Thurley v. Hayes 27 C.L.R. 548 at 550.

428. see Annett v. Brickell [1940] V.L.R. 312.

429. see Windeyer J. in Craw v. Graham, 41 A.L.J.R. 404 at 408.

430. see Vagrancy Act 1901, s.7(a) & (b).

431. see Bradbury v. Staines; Ex Parte Staines [1970] Qd R.76, also Carpenter v. Halsted; Ex Parte Carpenter, [1973] Qd R.35; also A.G. v. Twelth Night Theatre, [1969] Qd R. 319.

432. see Bills v. Brown [1974] TAS S.R. 117.

433. see Dalton v. Bartlett (1972) 3 S.A.S.R. 549 at 555.

434. s.9 Summary Offences Act No. 96 1970 (N.S.W.).

435. Using unseemly words, (1) In a public place; (2) In a school; (3) Within hearing from a public place and (4) Within hearing from a school.

436. s.8, ibid.

437. Particularly s.50, ibid. see R. v. Bacon 1977 2 N.S.W.L.R. 507 (CCA) where it was held that "reasonable cause" could be a reasonable mistake provided that every error or mistake that may be present in the elements leading up to the ultimate were also based on reasonable grounds.

438. see Mankoff, Milton (1976) op.cit.

439. Ibid., p.126.

440. see "Short Memory" in The Sun-Herald, 4.11.79.

441. Gray, Robert., "Bourgeois Hegemony in Victorian England" in Bloomfield (ed.), Class, Hegemony and Party, Lawrence and Wishart: London (1977), p.83.

442. Harris, Marvin., Culture, Man and Nature, Thomas Crowell Co: New York (1972), p.373.

443. see Hogg, Russell, op.cit.

444. see "Introduction" The Iron Fist and the Velvet Glove (1977), op.cit.

445. Engels, F. (1973), op.cit., p.264.

CHAPTER V

PENALTIES, PUNISHMENTS AND THE ACT

Punishment has always had a central place in the administration of criminal law. Traditionally bourgeois legal theorists have tended to see punishment as a form of social condemnation or a deterrent, "the emphatic denunciation by the community,"[446] and "a precaution against future offences of the same kind."[447]

Punishment, when viewed this way, is seen to have a purpose rather than a causation and because of this the material connection between the forms of punishment and the social system they serve is rarely considered. In fact today the courts still perpetuate the purpose rather than the reason or cause of the punishment when they say, in imposing sentence, that the judge must give consideration to three factors, namely, retribution, rehabilitation and deterrence.[448] Such an ideological explanation for punishment corresponds to the existing level of understanding and this plays the important political function of satisfying the mass of society that justice has been done on their behalf. It further reinforces the validity of the punishment, the existence of the offence, and the importance of condemnation and deterrence as punishment objectives.

However, punishment, or the system of punishments can and have been shown to relate to "systems of production" within which they operate,[449] and that there is such a thing as the political "economy of punishment."[450]

Punishment of the Body

In feudal societies where serfs essentially belonged to their masters, as their property to do with as they saw fit, the "body" was the "major target of penal repression."[451] The punishment had therefore to be directed at the one thing which remained a 'possession' of the serf - their own feelings, their desire to live. Torture and other forms of inflicting suffering were the common form of punishment. Trial by torture resulted in justice and punishment being integrated together. Indeed, justice was in the punishment and not in the trial. It was the "confession" that amounted to the truth so that the accused "judged and condemned themselves."[452]

The political economy of this form of punishment lay in the fact that the serf belonged to the manor lord for the purpose of providing services and the better the services provided the more valuable as a belonging was the serf. The feudal mode of production with its specific form of economic and social relationships left little room for any other form of rational punishment. In general those few who were imprisoned in the dungeons or towers of the manor lord were more likely to be those who laid claim to his title. Imprisonment was a 'luxury' reserved more for members of the ruling class than for the labouring class. The body form of punishment was nearly always a public spectacle, emphasising the symbolic function of punishment. The intended deterrence of the punishment to other wrongdoers can be understood to be in the spectacle and the screams of pain coming from the victim.

Incarceration

It was not until the rise of the commodity production system, the emergence of the capitalist mode of production with its change in the economic relations that the prison form of punishment began to develop as the major form of punishment even though there still remained "a trace of torture" in the prison system.[453]

The 'trace of torture' in imprisonment, to attack the body, was well put by a 16th century judge when pronouncing penalty on a debtor he said -

> If one be in execution he ought to live of his own, and neither the plaintiff nor the sheriff is bound to give him meat or drink ..... And if he have no goods, he shall live off the charity of others, and if others will give him nothing, let him die, in the name of God, if he will, and impute the cause of it to his own fault, for his presumption and ill behaviour brought him to that imprisonment. [454]

The reformers of the 18th and 19th century argued that punishment must have "humanity" as its "measure."[455] However, it is equally arguable that the reason for the changes in forms of punishment arose from the fact that with capitalism the serf was freed from the bondage of the manor lord and entered into the market as a 'freelabourer', the owner of power which the capitalist purchased. If labourers cannot enter the market to sell their labour power they are effectively deprived of their property rights. Incarceration attacks not the body but the soul, it deprives persons of their liberties, i.e. their property rights. This aspect of imprisonment is borne out and emphasised by common law which holds that a prisoner cannot sue in a civil court until his sentence expires.[456] The

debtors prison, like all prisons, has a role "of holding the person and his body as security."[457] Early institutions of imprisonment also were used on the "idlers" and "beggars" for "the acquisition of habits and skills of work."[458]

Imprisonment has been called the penalty of "civilised societies,"[459] but in reality imprisonment has little to do with the word civilised. For by depriving the person of their liberty, they give to those incarcerated the meaning of death in its living form. Prison inmates have, during their sentence, a life without meaning and an existence without purpose, having no identity and stripped of dignity. The economics of state administered incarceral forms of punishment are constrained and limited by the mode of capitalist production, the private ownership of the means of production for the purpose of making profit. The 'free labourer' when imprisoned is also withdrawn from the market where labour power is purchased, thus effectively depriving the capitalist of a certain amount of profit which potentially could have been extracted from such labour. Hence, during the 19th and 20th centuries there has been a continuing decline in the use of imprisonment as a form of punishment, and the introduction instead of the use of monetary fines which are more appropriately related to the capitalist system of production.

Fines as a Penalty

Punishment by fine leaves the labourer 'free' to circulate within the profit system of commodity production but still attacks the property of the labourer in a different way than

did the debtors prison. The labourer must sell their labour power to be able to pay the fine, making the dependence or necessity of selling their labour power even greater. As has been recognised before, "a fine reduces wealth."[460]

By 1861 in England criminal legislation authorised the courts to inflict fines for certain felonies, but it was not until 1948 in England that the courts were given a general power to impose fines as a punishment on those guilty of committing a felony.[461] With civil law a series of reforms in the 19th century saw the abolition of the debtors prison in 1869 with the passing of the Debtors Act in that year.[462]

The English Summary Jurisdiction Act 1879 gave magistrates a general power to impose fines. The fine, as a type of penalty "far from costing society anything, it provides a credit balance for the Exchequer,"[463] which is derived not from surplus value, as is the case with imprisonment costs, but from the socially necessary labour value paid as wages to the worker. For the first time, the cost of a system of punishment was diverted from the punisher to the punished.

Another advantage of fines as a form of penalty is that it maintains the social inequality of people by the imposition of equal fines. People of differing incomes receive the same fines but with vastly unequal effects.[464] In the words of one writer, "there is nothing so unequal as the equal treatment of unequals."[465] Hence the capitalist commodity production system which is necessarily based upon inequality in property holdings, inevitably had to introduce the penalty of fines

because it more appropriately corresponded to the actual relations existing at the productive base.

Fines only "reduce" the "wealth" of the poor, having little if any deterrent effect on the rich and, as Duggan implies, a fine can make crime pay for the wealthy because their profit is usually guaranteed.[466] In fact, when a court says, in passing sentence for a breach of a provision under the Trade Practices Act 1974-78, that the fine should "not be so high as to be oppressive,"[467] it is virtually saying that criminal punishment has different standards for different classes.

Summary Punishment

The first Police Act 1833 did not specifically provide for a single penal penalty for any of the offences created by that Act. Nearly all of the punishment was in the form of fines and forfeitures. In this regard later Police Offences Acts (and the Summary Offences Act) were retrograde in re-introducing imprisonment as an alternative to or combined with a fine. The possible explanation for such regression is that political public dissent action was viewed by the ruling class as a serious threat if allowed to escalate and hence had to be more punitively deterred.

The political economy of the penalties contained in the Act stand out when it is realised that in 1967 under the Vagrancy Act the penalty for writing words on walls was $10 and under the new Act in 1970 the equivalent offence was $200 or three months imprisonment.[468] And for defacing walls the fine increased from $2 to $50.[469]

Such major increases cannot be completely or satisfactorily explained by adverting to the 'seriousness' of the offence or to inflation. Indeed, in respect to the latter, in 1969-1970 inflation ran at a normal stable 5%. I submit a more satisfactory explanation is the theory of the political economy of fines. Fines are an effective way of making the working class pay for their own oppression.

In 1968-69 income to consolidated revenue from fines and forfeiture was $9,740,000,[470] and by 1972-73 after the first full 12 months application of the Act, the figure had jumped to $19,768,000,[471] and the following year to $24,916,620.[472] In relation to the last given figure the cost of administering the Courts of Summary Jurisdiction and the Coroners Court for the same financial year was $9,726,689,[473] leaving a handsome $15.1 million surplus after costs. This escalation of revenue raising via fines has continued so that by 1978-79 it is estimated that $40.3 million will be paid in fines to the coffers of the state, which makes this category of finance raising (non-taxable) second only to the State Lotteries.[474] In 1977 fines as a penalty for breaching criminal law were imposed on 69% of those convicted.[475]

The above figures suffice to indicate that commodity production requires a commodity form of penalty as punishment and fines represent a certain period of labour time, remembering that labour is itself a commodity. Indeed, this method of punishment was first introduced in the Industrial Revolution by the entreprenurs when they used to make deductions from workers wages for minor infractions of discipline and

unsatisfactory work.[476] While not denying the possibility of punishment acting as a deterrent against future wrongdoings or potential wrongdoers, or that punishment is a "political tactic,"[477] or that there is some element of community "denunciation" in the reasons for criminal punishment, none of these constitute the major determinant on the form that punishment takes.

The capitalist commodity production system means that rather than the 'penalty fitting the crime' it is a question of the fine (penalty) fitting the system of production. Theoretically it would be more correct to say that 'the crime fits the penalty.' The Act with its emphasis on substantial fines for committing minor prescribed offences, reached a new level in the form of commodity punishment and in doing so acted in part as a method of taxing demonstrative political opposition and dissent, as the figures I have given demonstrate.

Hence the Act represented a merging of the political economy of law with the political economy of punishment into a single political economy of oppression system. The fact that fines are imposed in lieu of so many days of hard labour is an indication of the connection between this form of punishment and the capitalist mode of production.

In a society where workers' consumption becomes the motivation for their labour, less of the consumption of goods and services by a worker can be hurtful to them. As consumption grows in importance as a satisfier of leisure, fines become

a hedonistic form of vengeance as they deprive the offender of an amount of pleasure which would have otherwise have been obtained. Hence the fine as punishment serves admirably the capitalist mode of production with its inequalities and consumerist ethics. The pain of the punishment changes from physical to psychological with the result that the worker retains the physical capacity to labour and (theoretically) the mental desire to labour.

Footnotes to Chapter V

446. Lord Denning in Report of the Royal Commission on Capital Punishment, quoted by Honderich, Ted., Punishment: The Supposed Justification, Hutchinson & Co.Ltd: London (1969), p.36.

447. Blackstone, William, Commentaries: on the Laws of England of Public Wrongs, Beacon Press: Boston (1962), p.10.

448. see R. v. Quinn (1953) 53 S.R. (N.S.W.) 21.

449. see generally Rusche, Georg & Kirchheimer, Otto., Punishment and Social Structure, Columbia University Pres: New York (1939).

450. Foucault, Michel., Discipline and Punishment: The Birth of the Prison, Pantheon Books: New York (1977).

451. Ibid., p.8.

452. Ibid., p.44.

453. Ibid., p.16.

454. Dive v. Manningham (1557) 1 Plowd. 60 at 68.

455. Ibid.

456. see Dugan v. Mirror Newspapers Ltd [1976] 1 N.S.W.L.R.403.

457. Ibid., p.118.

458. Ibid., p.122.

459. Ibid., p.232.

460. Ibid., p.13.

461. see Fitzgerald, P.J., Criminal Law and Punishment, Clarendon Press: London (1962), pp.246-253.

462. see Kelly, David, St.L., Debt Recovery In Australia, Australian Government Printing Services, Canberra (1977).

463. Ibid., p.253.

464. see Daunton-Fear., "The Fine as a Criminal Sanction" (1971) 4 Adel.L.R. 307.

465. see Brandwein, Parl, F., The Permanent Agenda of Man: The Humanities, Harcourt, Brace Jovanovich Inc: New York (1971), p.5.

466. see Duggan, A.J., "Criminal Sanction for Misleading Advertising: The Pnealty of Fine and Related Matters," in 50 A.L.J.625.

467. see Trade Practices Commission v. Stihl Chain Saws, (Aust) Pty Ltd (1978) ATPR 40-091 at p.17,896.

468. see s.8 Summary Offences Act No.96 1970 (N.S.W.).

469. s.15., ibid.

470. New South Wales Budget Papers 1969-70., Government Printers: Sydney (1969) I should state that not all fines are as a result of breaches of the Act. It is doubtful whether an exact figure is available.

471. Ibid., 1972-73.

472. Ibid., 1974-75.

473. Ibid.

474. see New South Wales Budget Papers, Consolidated Revenue Fund Receipts, Government Printers: Sydney (1978)

475. see Court Statistics 1977, Department of the Attorney-General and of Justice N.S.W.

476. see Thomas, M.W., The Early Factory Legislation, The Thomas Bank Publishing Company Limited: London (1948).

477. Foucault, Michel., op.cit., p.24.

CHAPTER VI

THE CHANGING OF THE ACT

On the 11th May 1979 a new Act[478] was assented to that replaced the Summary Offences Act, that Act having been repealed at an earlier sitting of Parliament. The new Act has but fourteen sections and six offences. The main offence is contained in s.5 of the new Act and has been referred to as a "general offence."[479] The section states that a "person shall not without reasonable excuse ... behave in such a manner as would be likely to cause reasonable persons justifiably in all the circumstances to be seriously alarmed or seriously affronted." It would appear that the intention of such wording is to guard against the section being used arbitrarily by the police as a 'catch-all' by throwing the onus on the informant to show that in all the circumstances reasonable persons would be seriously alarmed or affronted. However, the intention of the legislature has often been frustrated by the judiciary when interpreting legislation. It will be interesting to see whether the judiciary interprets the new Act in a way that accords with the wishes of the police or that of the legislature. For the purposes of the new Act, the 'reasonable' person can only be the magistrate or justice hearing a charge.

The offence of vagrancy contained in the old Act has been repealed, hopefully saving many persons a year being convicted and jailed[480] of a crime because they are workers who either because of sickness, alienation or lack of work, do not wish to or are unable to sell their labour power.

The offence of soliciting has also been repealed although the offence of 'living off the earnings' has been retained by re-enactment in another Act.[481] This raises an absurdity and contradiction in law when a person can earn a lawful income but somebody other than that person (with the exception of their children) cannot benefit from that income, an anomaly that seems hard to justify.[482]

The abolition of these two offences and some alteration in wording to other offences previously contained in the old Act, has quickly been attacked by the Police Association in the editorial of their journal, claiming that the police have lost "any semblance of control over many common street offences".[483] The secretary of the organisation is quoted as having said that prostitutes up at Kings Cross are standing "shoulder to shoulder."[484]

Indeed, there is a concerted campaign by the Police Association and other conservative forces[485] to restore the status-quo that existed under the repealed Act. For the police to talk about loss of control in the streets and the "right of arrest"[486] is to expose the true nature of the role of the police force. The police have never been granted (by statute) control of the streets. The police are supposed to have nothing more than a regulative role over the use of the streets, which in turn are supposed to belong to the people. Regulation and control are two vastly different concepts, one is limited, the other is absolute. Similarly, the police have never had a "right" to arrest, what they have is a delegated power to arrest for a threatened or specific breach of the law.

This kind of thinking by the police reveals that they perceive themselves as rulers rather than servants of the community. This mentality of the modern police force poses them as one of the most real and immediate threats to democratic and political rights.

Effectively, the Summary Offences Act has only been partially repealed, as many of its offences have been re-enacted in some sixteen other statutes. The new Act has not in any fundamental way deprived the police of their powers to arrest and search in spite of their claims to the contrary.

The class character of the new Act, while not so abrasive as the old Act is nevertheless still there. It will be a demonstrator rather than a company director who will be more likely to seriously alarm and affront, to obstruct traffic, to deface walls etc. The new Act has generally corrected the mistakes of the old Act by diversifying and obscuring the most offensive powers of the police in a myriad of other statutes, instead of accumulating them together in a single offensive Act.

The Police Association claims that it would have been a "commonsense approach" to "let (it) put forward" a "point of view" on "law enforcement"[487] before the old Act was repealed. However, the old Act which has been the focus of so much opposition was substantially the result of the Police Department's own recommendations. It makes more "commonsense" not to consult with them on matters of civil liberties because history shows that the police as a force are opponents of civil liberties.

The repeal of the old Act is not a denial of our history, but rather a reiteration of it, as from the start of the Sydney Cove convict settlement, there has been a struggle for civil liberties and against arbitrary powers of rulers, a struggle which has had its lulls and storms and the Summary Offences Act expressed a storm in the continuation of that struggle.

The laws of our society are not only the expression of the capitalist mode of production with its class oppression, they are also expressions of our authoritarian history and reflect the medieval ghosts of past generations of rulers. The repeal of the Act does not alter the offensive character of the summary judicial process, that question still remains unresolved. In the application of the law there is still what Balbus calls "the systematic application of an equal scale to systematically unequal individuals" so as to "reinforce those inequalities."[488]

The new Act, like its predecessor, is a measure of the value of labour reproduced as property rights, masquerading as democratic rights and liberties. Nothing in the new Act represents any alteration in the class structure and power of society, but rather a compromise and a concession to the working class and their allies who are in continuous conflict with that structure and power. The "burp" may have been "decriminalised"[489] but many other acts of traditional demonstrative political opposition are still capable of being suppressed by the use of the new Act and other criminal statutes. The fundamental social causes which underlaid the old Act are still active.

The conflict between class objectives has sharpened with the still developing dominance of the capitalist class corporate elite, and criminal law must correspondingly with subtrude and sophistication, reflect that sharpening conflict by declaring as criminal, activities which threaten and challenge the domination of the corporate elite. The repeal of the Act was a way of retaining corporate dominance whilst compromising with popular sentiment.

The state grows in importance rivalling that of the class that spawned it but is nevertheless still bound by an invisible link ideologically to automatically react to that class' needs. Public order in a general sense can only be perceived by rulers as an order where the 'normal' practice and activities of the corporation can function and flourish. Actually and symbolically no other order can have relevance or meaning as the repealed Act aptly demonstrated. Systems of production, ruling class ideological hegemony, class conflict and societal heritage all combine to mould the law into its final shape.

The law, the police and punishment, are in the final analysis governed by the independent and cold laws of political economy. The commodity form in production has its analogy in a commodity form of law. Rulers, judges and police do not necessarily conspire with the ruling class or among themselves to further that class' interests, indeed many of them would not recognise the existence of the ruling class. The interests of the ruling class are generally met by the law because those interests are rooted in the material discourse of society and have been reproduced, inculcated and adopted by individual members of

society as the common interests of both society and rulers: judges and police merely act out those perceived common interests.

The Act was the amalgam of all these things, which has driven New South Wales from a penal colony to a society with summary arrest, summary conviction and summary penalty.[490] The offensive character of the past application of the criminal process cannot be changed, and while its ghosts will weigh heavily on the minds of the living generation, there is no rule which stipulates that Australian society must, for the foreseeable future, continue to relive its history.

It seems appropriate, as an epitaph for the Act, to close with a quote from the same philosopher as the opening quote -

> The true legislator should fear nothing but wrongs, but the legislative interest knows only fear of the consequences of rights .... Cruelty is a characteristic feature of laws dictated by cowardice, for cowardice can be energetic only by being cruel. Private interest, however, is always cowardly, for its heart, its soul, is an eternal object which can always be wrenched away and injured, and who has not trembled at the danger of losing heart and soul? How could the selfish legislator be human when something inhuman, an alien material essence, is his supreme essence? 'Quand il a peur, il est terrible.' ..... These words could be inscribed as a motto over all <u>legislation inspired by self-interest</u>, and therefore by <u>cowardice</u>. [491]

Footnotes to Chapter VI

478. Offences in Public Places Act 1979 No.63.

479. see "Repeal of the Summary Offences Act" Legal Service Bulletin, Vol.4, No.3, June 1979.

480. Legal Resources Book, Redfern Legal Centre, 1978, 16.96.

481. see Prostitution Act 1979, s.5.

482. see Scutt, Jocelynne, "Current Topics" in 53 A.L.J.606.

483. see "Police lose control under new law" in S.M.H. 16.7.79.

484. Ibid.

485. see "Louts taking advantage of new laws, Judge told" in S.M.H., 12.9.79.

486. see "Would these acts offend?" in S.M.H., 31.8.79.

487. see Footnote 483.

488. Balbus, Isaac D.,"Commodity Form and Legal Form" in Reasons, Charles E & Rich, Robert M., The Sociology of Law, Butterworths, Toronto (1978), p.79.

489. see "Burp costs man $50" in S.M.H., 3.3.79 and "The cost of a burp" in Letters to the Editor, S.M.H. 7.3.79; where a person was convicted for offensive behaviour for burping in a policeman's face.

490. 98% of all criminal prosecutions are dealt with summarily by magistrates, see Statistical Report 9 Series 2 Court Statistics 1977., Department of the Attorney-General and of Justice, N.S.W. Bureau of Crime Statistics and Research, p.5.

491. Marx, Karl, quoted by Cain, Maureen & Hunt, Alan., Marx and Engels on Law, Academic Press: New York (1979), p.24.

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