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Australian Social Science, Aboriginal Peoples, and Criminal Law

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Sociologists of law and criminologists have not generally paid much attention to the complex patterns of interaction between Native people and western law, a relationship summarized by historian CD Rowley as "the progress of the Aboriginal from tribesman to inmate". This is unfortunate since a whole range of important theoretical questions in the sociology of law come at issue in dealing with Native rights. This is true whether we are concerned with political matters such as tribal sovereignty and land rights, or more common matters such as criminal behavior, and the overcriminalization, indeed by some measures total criminalization, of Native people, or constitutional law, where our concern is with the limitations of theories of equality and rights in a legal context where entire peoples are left out of the social order. In spite of what now amounts to over two hundred years of legal development in the colonial settler societies, these issues are now as far as from resolution than they were in the past.

Australian social scientists and lawyers have generated a unique and a very extensive literature on the interrelationships between Aboriginal peoples and Australian state law. This Australian literature is more extensive in its range and quality of analysis than the comparable literature in any other country. While, for example, the United States has a sizeable literature on "federal Indian law", most of this work is very narrowly concerned with the evolution of federal court decisions on tribal rights. This "Indian law", as it is often

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misidentified, is a cottage industry producing hundreds of federal cases a year and consistently making tribal issues among the major concerns of the United States Supreme Court. But the larger social issues have drawn little attention from scholars and there is no body of sociological research on Native Americans comparable to either the volume or quality of parallel work in Australia. While native questions in the United States have been primarily resolved within a legal framework, Australia has kept parallel issues within a policy-oriented social science framework.

The recent and on-going work of the Royal Commission on Aboriginal Deaths in Custody\(^2\) with its controversial reference to report on the "underlying issues" has provided a political mechanism to take stock of the vast volume of previous research and, at the same time, provide an impetus to additional research under the aegis of the Commission.

Beyond these simple questions of research and criminological theory the Royal Commission’s investigations have put these concerns on the front pages of Australia’s major newspapers. Thus the stories of David Gundy, Malcolm Smith, and Edward Murray have passed from routine criminal justice matters to issues of national political significance. The almost invisible "deaths in custody" of these and more than a hundred other Aboriginal people have been documented, along with the full range of criminological, legal, and political issues that inform the "underlying issues" behind these deaths. Since any study of these underlying issues goes, at least, in part, to the whole operation of the criminal justice system, and more broadly the entire legal system, the scope of the Commission’s inquiry is sweeping and, quite possibly, politically unmanageable.

**Fear, Favor or Affection: Aboriginal Peoples in Australian Law**

The volume of Australian literature in the area of the relationship of Aboriginal peoples with criminal law began with Elizabeth Eggleston’s, *Fear, Favor or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia.*\(^3\) Although published twenty five years ago

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\(^3\) E Eggleston, *Fear, Favor or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*, Australian National University Press, Canberra, 1976.

Literature following in Eggleston’s tradition include: K Hazlehurst, *Ivory Scales: Black
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document this work is still unique in criminological literature. A study of the racism and ethnocentrism of all aspects of the administration of criminal law against Aboriginal peoples, Eggleston documents more than the racist and inequitable administration of justice. Her work describes the criminalization of a people: the massive use of criminal justice institutions to destroy Aboriginal culture and isolate and control Aboriginal people.

Eggleston’s work uses the mode of analysis of traditional sociology of law: she observed all aspects of criminal justice in Aboriginal areas, gathered official statistics, and did comparative research, primarily in the United States, leading to a devastating indictment of the treatment of Aboriginal peoples under Australian law. Her data clearly show racial discrimination in every area of criminal justice: police discrimination in arrest patterns, judicial discrimination in the trial process, racial discrimination in prison, and special law that both criminalized and infantilized Native people. The magnitude of the discrimination emerges in simple statistics: for Western Australian Aborigines, while 2.5% of the population were defendants in 11% of criminal charges brought, and constituted 22% of prison inmates. Of an Aboriginal population of 21,890, 7,357 were convicted of crimes, 33% of the total population. Since small children and old persons seldom are arrested, it is apparent that the oppression of police, trials, and prison is part of the daily lives of virtually all Aboriginal families. For Eggleston the solution to these problems was not liberal reforms of existing criminal justice institutions and processes: rather, she urged that Aboriginal peoples be given the right to self government, including the right to maintain their own forms of law.

But Eggleston did not limit her analysis to a liberal argument for simple reform: for example, the kind of training programs that might reduce the level of racism in criminal justice processes, or the abolition of racist laws. Influenced by American law and policy, she urged the recognition of tribal law and the legitimation of the native institutions that implement tribal law. Moreover, this was not part of a reformist strategy to remove Aboriginal

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4 Eggleston, above, n 3, pp 13-16.
5 Eggleston, above, n 3, pp 277-305.

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legal problems to "local courts", but part of a larger agenda that recognized tribal sovereignty as being the foundation of the modern relationship between Native peoples and the colonial-settler state. Eggleston did not develop this larger agenda in her book: her focus was kept narrow and empirical. Thus, the political relationship between Aborigines and the state does not appear as the central issue in this overcriminalization of native people.

Volumes have followed, a literature so voluminous it fills a 271 page bibliography.\textsuperscript{6} Most of this literature broadly follows Eggleston's model in being highly empirical and liberal reformist, pointing out the continuation of the problems Eggleston first described. Yet, the failure of those liberal models to have any significant policy impact is evident in any of the individual reports issued by the Royal Commission. Most scholars did not find their ultimate solutions in tribal sovereignty. These political differences divide scholarship in the area of Native affairs in most countries, and, at the same time, have divided liberal and radical traditions in criminology and law.

The centrality of empiricism of Australian research into issues concerned with Aboriginal crime and law, and the avoidance of broader theoretical issues, even to the extent of following up Eggleston's inquiry, clearly reflects a theoretical blindness of scholars doing this work. Yet, this empiricism also provides us with a rich opportunity in criminological research. At a time when most research in criminology and sociology of law has moved away from the lengthy, detailed field descriptions that characterized early work in both fields, the research in Aboriginal crime and Australian law is richly empirical. Case studies are described in great detail, field observations of communities continue, comparative analyses of different types of communities, all contribute to a rich description of the cultural context that both Aboriginal behavior and state repression occurs within. Much of this work is financed by various governmental agencies and is very pragmatic and policy oriented. This lack of theoretical focus limits the usefulness of much of this research, but its rich empirical core makes the work available for more theoretical approaches.

Greta Bird, acknowledging the influence of Eggleston's work, reinterpreted the theoretical context of this research using the work of Marx and Weber, but returned to the field to study the status of Eggleston's observations after

\footnote{K Hazlehurst, \textit{Aboriginal Criminal Justice: A Bibliographical Guide}, Australian Institute of Criminology, 1986.}
almost twenty years.\textsuperscript{7} Not surprisingly, virtually all of the issues Eggleston identified were still operant. The importance of this emphasis on description is that it reminds us of the complex cultural context within which both crime and criminal justice occur, a cultural complexity always intricate, but much greater when dealing with Native people. For, as all observers make clear, Native people have largely refused to acculturate. While this makes cultural differences particularly large and significant, there can be no question that given complex ethnic, racial, and class differences in modern society, cultural factors, in interaction with other social forces, structure a great deal of criminal behavior, as well as the reactive behavior of the criminal justice system and the larger political order.

The Overcriminalization of Racial Minorities

It is clearly not a coincidence that virtually all of the research on Aboriginal peoples and Australian law concerns criminal law. It is the criminal law that has always been used to define the relationship between Native peoples and imposed colonial law. This colonial relationship has continued as Native people have never participated in the colonial settler states that evolved from these colonies. The limited participation of Native people in the social, economic, and political affairs of these societies has also limited the impact of most state law in Aboriginal society: there are few contract disputes involving Natives, the western laws of property make no sense in Native society, major Constitutional issues often do not apply, and the poverty and isolation of Native people cut off their access to the courts for redress of the full range of injuries they suffer. Thus, the criminal law, the legal structuring of state violence, marks the meeting place of western state law and Native people. The jail becomes a primary socialization institution in Native society, a tragedy in human terms, and one that structures Native relationships with the law.\textsuperscript{8}

The literature of liberal criminology has paid little attention to the problem of overcriminalization, yet the fact that racial minorities fill the jails of most countries proves an obvious point. Conventional theories of crime and

\textsuperscript{7} G Bird, above, n 3.

\textsuperscript{8} For a study of one Aboriginal community with an arrest rate of over 100\% see B Rosser, \textit{This is Palm Island}, Australian Institute of Aboriginal Studies, Canberra, 1978. From my own research in progress I can say that there are at least ten American Indian reservations in the United States with arrest rates of 100\% or above, with rates as high as 200\%, that 200 arrests for every 100 inhabitants, officially reported. These are the highest measured arrest rates in the world.
criminal justice policy makers go to great lengths to avoid dealing with the implications of this fact. Racial minorities in this view, are overcriminalized, not because of systemic racism of the legal system, but because they engage disproportionately in criminal behavior. Yet, the statistics of Aboriginal crime are so grossly out of proportion that they routinely get left out of both the textbooks and the theories. Aboriginal peoples are not only "overcriminalized", they are often totally criminalized, facing the highest arrest rates in the world. Arrest statistics approaching or even exceeding 100% are not uncommon with Native villages in Australia, Canada, and the United States rising to this level. Such statistics belie any liberal mythology of "law enforcement" or of the importance of maintaining law and order in a civilized society. No society can prosecute whole peoples and maintain legitimacy. Yet, this is routinely the case with Native people, a fact known to policy makers since the 1950s and 1960s. Clearly, rather than a focus on the criminal behavior of Native people, this reflects a very different reality with very different theoretical implications: it represents the use of law to impose the social and political values of one society on other peoples. This process if not only an unequal one, with the majority culture possessing almost unlimited resources and a monopoly on state violence, but it is a pervasive and destructive one: there are virtually no areas of Aboriginal society that the Australian criminal justice system lacks the capacity to reach. Families can be ripped apart by prison and civil institutions, tribal government can be disrupted by rendering its decision making powers impotent, property can be seized and its native defenders jailed, even sacred ceremonies can be disrupted by the jailing of elders and the scattering of bands.

Much of this disruption of Aboriginal life by police, judges, and prisons is effectively for nothing. The research makes it clear that most native "crime"

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9 S L Harring, "Native American Crime in the United States" in Indians and Criminal Justice, L French, Allenheld Osman, Totowa, New Jersey, 1982. The Bureau of Indian Affairs has collected an immense amount of data on Native American crime rates but this data has never been subject to systematic analysis. For example, it holds data on arrests by offence, by reservation for over 160 reservations covering at least thirty years. One possible reason for this lack of research is that the data reveal an arrest rate so high that it is embarrassing to policymakers.

10 H Reynolds, The Other Side of the Frontier, Penguin, Sydney, 1981; B Atwood, "The Making of the Aborigines, chapter 5" White Mans Laws, Allen and Unwin, Sydney, 1989. See also CD Rowley, above, n 1. C Cuneen, "Policing and Aboriginal Communities: Is the Concept of Over-Policing Useful" in Aboriginal Perspectives on Criminal Justice, C Cuneen, University of Sydney, Sydney, Institute of Criminology analyzes the use of the concept "overpolicing" in relation to aboriginal crime. I use "overcriminalization" in the same way, preferring this term because it defines the problem as a much broader one than the misuse of police discretion.
represents public order offenses: drinking, fighting and generally "carrying on". Liberal criminologists, narrowly concerned with public order and anti-social behavior, use a "social disorganization" framework to deal with these crimes. The issue is not the overcriminalization of native people nor the racist and selective enforcement practices of police institutions, rather this behavior is evidence of the social decay of native communities. This decay is lamented, alternatives even proposed, but no one seriously offers the simplest solution: the police can stop making routine public order arrests of Aboriginal people. This would prevent most Aboriginal deaths in custody. Although this simple conclusion follows from the work of two recent commissions (work discussed in more detail later), it is simply not on the policy agenda.

It is obvious this behavior, drinking, minor violence, and petty property crimes, has culturally different meanings in different societies. Therefore, the choice to criminalize it has less to do with Aboriginal behavior than it does with deliberate policy choices on the part of state institutions: criminologists now recognize all decisions in the criminal justice system are highly selective. The sociological literature on police, courts, lawyers, judges, and prisons shows a wide variety of factors that influence decisions to invoke the formal process of criminal justice. The research of Chris Cureen is not cast in liberal terms, and clearly shows law enforcement policy choices around Aborigines are racist and cannot be rationally explained as part of a neutral law enforcement framework. Because of this work, and perhaps the work of the Royal Commission on Aboriginal Deaths in Custody, few would doubt many of these factors are consciously or unconsciously racist, a clear advance over prevailing views at the time of Eggleston’s work. To an extent all of this research and writing activity on the part of Australian sociologists and lawyers has been convincing. As the Australian jurist, Mr Justice Michael Kirby writes of Kayleen Hazlehurst’s Ivory Scales: Black Australia and the Law: "Any fair reader of these pages will put this book down with a sense of disquiet and even shame, at the way of Australian legal system has operated in relationship to Aboriginal Australia".


The classic study of the centrality of discretion in understanding a criminal justice institutions is J Skolnick, Justice Without Trial, John Wiley and Sons, New York, 1967.

Mr Justice Kirby’s quotation is on the back cover of K Hazlehurst’s, 1986, book.
The concept of overcriminalization carries within it both broad and narrow meanings. While it can be approached on a purely empirical level, analyzing the disproportionate rate of criminal convictions of Native people, and opening up a wide enquiry into social structural factors. Native patterns of behavior, and institutional factors, the focus has been largely a focus on narrow institutional concerns. Somehow, the police, courts, and prisons could do a better job.

This is a fallacious assumption, implying that, with enough due process, less racist police work, and better prisons the problem of overcriminalization of Native people would disappear. In fact, the opposite might well be the case: the liberal and humane criminal justice system might well "serve" a large proportion of Native people. The concept of due process, a fundamental ideal of our legal system, is currently an important issue: Natives get none: the police arrest them, write up routine police reports which are turned into equally routine pleas of "guilty", which lead to routine jail sentences, with a total lapsed time of five minutes or less. Every legal worker knows this, yet, again, this escapes critical analysis because "they are all guilty anyway". The underlying discrimination in enforcement patterns, as well as the deliberately overbroad language used in the drafting of public order statutes so as to not only permit but actually encourage selective enforcement is well established in critical research on the day to day operation of criminal justice institutions. But a perfect criminal justice system would still produce the patterns of overcriminalization we see today. The solutions are structural and lie in Eggleston's call for Native self-determination.

Legal Pluralism : The Right of Native Peoples to their Own Laws

The assumption one law serves all people, justifying and perpetuating overcriminalization, can only be resolved by changing the underlying law. This was one of the major contributions of radical criminology to both criminology and legal education in the 1960s and 1970s. Yet, this critical approach to the substantive law had limited policy effectiveness because so much of the substantive criminal law - the laws prohibiting murder, rape, robbery, burglary - is deeply ingrained in the social values of a majority of the people. Similarly, critical criminologists and legal scholars talked of "alternatives" to incarceration, to community based rehabilitation, to popular courts sitting in neighbourhoods, but these programs, in the face of high levels of fear and media-popularized "crime waves" were also often seen as utopian, impractical in a dangerous modern world.
The political claims made by Native peoples around the world, claims for the right to self-determination, create the political infra-structure to make laws highly responsible to the needs of diverse communities of peoples. Of all the issues arising from Native groups, these claims to the right to self-government, coupled with the claims to a land base to be self-governing in, have provoked the strongest reaction on the part of modern nation-states, because the issue of self government raises a fundamental challenge to existing political and economic interests.\textsuperscript{14} There can be no question that Native self-determination represents a substantial opportunity to make criminal law more responsible to the diverse needs of human communities, and a solution to the narrow problem of overcriminalization as well as to broader consequences of racism in the criminal justice system. This is true even if, as it may turn out, that some Native communities do no better than the current criminal justice system at processing these cases.\textsuperscript{15} Given the current state of criminal justice in Australia, the United States, and other colonial settler societies, there is not a lot at risk. Perhaps, put more crudely, after local Aboriginal legal mechanisms are responsible for more than a hundred "accidental" deaths in custody one might make an argument to reassess this position, but the record of Australian criminal justice at protecting victims, humanely rehabilitating criminals, and integrating communities into functioning wholes is very poor.

Some progressive criminologists have long recognized that an argument for legal pluralism for Aboriginal peoples has progressive implications for changing the criminal justice system on a broader basis. But others are wary of the right wing tendencies of small nationalist movements and see legal pluralism as a trap, undermining broader and more important issues of class unity. This position deserves great respect, but a society composed of free peoples giving great weight to self determination on local matters, especially in such important matters as the day to day control of the small scale deviance of members of the community, provides a basis for building a unified, classless society, with much less use of the state violence that we now accept as routine.

\textsuperscript{14} The Aborigine claim to self determination is stronger under both the common law and international law than most scholars believed ten years ago. Two recent Australian books make this clear. See B Hocking, \textit{International Law and Aboriginal Rights}, The Law Book Company Ltd, Sydney, 1988 and J Crawford \textit{The Rights of People}, Oxford University Press, Oxford, 1988.

\textsuperscript{15} J Wright, \textit{We Call for a Treaty}, Fontana, Sydney, 1985.
Similarly, while Native claims to self-determination have a legal and historical basis to them that many other political claims lack, it is important to see that among the root causes of both crime and repressive criminal law is political alienation. Class society alienates political power from most of its citizens and uses the criminal justice system to coercively maintain an order that it cannot organically maintain.\(^{16}\) Thus, there are clear theoretical parallels between the alienation of Native people and the racism and alienation behind modern urban crime problems, problems that we are understanding in the 1990s to be insoluble within any traditional theoretical or policy framework. Once again, there is a window in this theoretical work on Aboriginal crime and state law that provides an opportunity to break through some of the poverty of current theory and policy.

The strength and legitimacy of Native claims to self government, including the right to maintain their own systems of criminal justice, have been the subject of major research in Australia. The Australian Law Reform Commission did a major study of Aboriginal customary laws ending in a detailed report by Professor James Crawford and others *The Recognition of Aboriginal Customary Laws*, that urges both that Australian state law take more notice of Aboriginal customary law and that Aboriginal communities be given some rights of self-government in applying their customary law internally. The research of the Commission was extensive, leading to more than a dozen interim reports covering in much detail many aspects of Aboriginal law: criminal law, self-government, family relations, fish and game law, traditional inheritance law. It is clear from this work that Native peoples adhere strongly to that law in a variety of contexts. The next step for policy makers should have been an easy and obvious one: a broad recognition of customary law and a broad devolution of the people of criminal justice institutions to Aboriginal communities. But the work of the Commission has largely been ignored by the policy-makers.\(^{17}\)

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\(^{16}\) Some critics raise issues of possible injustices meted out by various native institutions. We simply lack adequate research, but this possibility merely puts native justice institutions on a par with western institutions. This is a central theme in radical criminology. See the various essays in D F Greenberg, *Crime and Capitalism*, Palo Alto, Mayfield, 1981.

\(^{17}\) The United States has long had a system of reservation police and courts, originally administered by Indian Agents, but now mostly under reservation control. Many of them arrest, convict, and jail Native Americans at the same rate as local state courts. There are a number of reasons for this, some turning on high levels of criminal behavior, but others turning on political factors having to do with continued governmental control of reservation politics and finances, and the conservation political leadership of many reservations. Other reservations have very low arrest rates and a low incidence of imprisonment, together with an emphasis on traditional approaches to the resolution of social problems.
The failure of this extensive research and the moderate recommendations of the Crawford commission to have any impact on judges or legislative policy makers must be seen as a massive failure on the part of the Australian political process to come to terms with even minimal reform to change the legal and political oppression of Aboriginal people. Professor Crawford attributed the refusal of policymakers to implement the report to a number of factors, including the incompetence of the then Department of Aboriginal Affairs, state resistance, and the clear linkages between legal recognition of Aboriginal law and self government and the political loaded (and then still unsettled) land claims issues. There can be no question that the same problems plague reform of the ways in which Australian criminal law are applied to Aborigines. In particular, the resistance of the states to reforms of their criminal justice agencies is very powerful, and these institutions, particularly in rural areas, are heavily committed to traditional policies of over-criminalization in order to protect the interests of small town white people.

Race and Crime

Sociologists of law have never grasped the complex range of issues that intertwine race and crime. Yet, if anything, all of these connections have become much clearer in the twenty years since the late 1960s. Crime has increased, the overcriminalization of all minorities has increased, and prison commitments have increased. It is important to note that the Australian literature on Aboriginal crime exceeds the American literature on black crime, illustrating the degree that the United States has fallen into a perverse acceptance of routinized racism in its criminal justice system. In contrast, the Australian literature consistently aims in one direction: the overcriminalization of Aboriginals is a significant social problem that requires major attention on the part of the Australian legal system. This agreement


19 This is no more graphically illustrated than in the United States Supreme Courts repeated refusal to look at social science data that clearly shows massive racism in the imposition of the death penalty. See McCleskey v Kemp (1987) 107 Supreme Court 1756. Probably the most extensive amount of social science research ever mustered in any area of law reform has been the effort in the United States to show the racist nature of the death penalty. The Supreme Court has consistently rejected this data, holding that showings of "mere racial disparity" alone do not prove racism, but requiring instead direct showing of racist intent on the part of the state. Besides filling the cells on death row, Blacks, Hispanics and Native Americans fill prisons in the United States by five times their proportion of the population.
on the need for reform opens some clear opportunities for sociologists of law to conduct serious investigations of these relationships. This is not to deny high levels of racism in Australian criminal justice institutions and in the society generally, but it does show a significant difference in the range and quality of research into the problem of racism in the criminal justice system.

In turning to the substantive issues raised by these investigations into the relationship between race and crime and criminal justice a number of questions arise. Among the complex issues now little understood is the relationship of economic factors to race and crime. Work with Native peoples tends to de-emphasize economic factors in favor of cultural and political factors. A leading historian of American Indian peoples, Nancy Lurie, characterized the phenomenon of Indian drinking as "the world's longest on-going protest demonstration". Similarly, anybody who has ever been drunk knows that the reeling drunken mind connects with the world in wild and wonderful ways not possible for a sober, careful mind. These drunken visions clearly have unique cultural meanings to different peoples. There is no question that cultural factors literally leap-out at investigators when studying Native communities. The mere survival of these communities in the face of genocide is testimony to their deep adherence to cultural traditions.

Aboriginal peoples have clearly been changed by twentieth century Australian society through forces that are essentially economic in nature. The expanding late nineteenth century agricultural economy swept across Aboriginal lands. Native people either had to move or to participate in this new economy as menial laborers. Their current poverty is the product of this economic transformation. Their villages have been relocated, whole peoples murdered (most often because many Native refused to do wage labor), new communities composed of mixed clans and tribes created, new economies have developed. Poverty is a fact of life for Aboriginal peoples and many other racial minorities. While the debate over whether poverty causes crime is simplistic and denies the humanity of poor people, poverty does structure the social worlds in which many people live, and structures the social choices that they make.

In the late twentieth century sociologists are recognizing the development of an "underclass", perhaps better described as dozens of almost unrelated underclasses with one thing in common: large numbers of people are surplus

20 B Attwood, above, n 10.
to current forms of capitalist development.\textsuperscript{21} Probably no groups have been surplus longer than the Aboriginal populations of developed countries, but other major groupings, very often delineated by race, are not far behind. Blacks in Europe and America clearly fit this category, along with tribal peoples on all continents, as well as a number of other racial minorities. This use of the criminal justice system to permanently control these communities is a key element of modern western public policy in the 1990s. Yet, Australian research on the relationship between Aborigines and the law makes it clear that this result is not inevitable, autonomy and meaningful lives, they can solve many of the problems that are passed to the criminal law. This is an elementary position taken by "radical criminologists" in the 1960s and 1970s, but rejected because it was "utopian".

**Anthropology and Aboriginal Law**

The right of Native people to self determination cannot be a principle without substance. The anthropology of law, afield offering a great deal of promise in the law and society movement in the 1960s and 1970s, has contributed relatively little to scholarship about law and society in the 1980s. There has been a great deal of anthropological research on Aborigines and other Native peoples. Virtually all of the field work describing the impact of Australian law on Aboriginal communities has been informed with anthropological methodology as well as anthropological theory. The reasons for this are obvious: the importance of the understanding of Aboriginal culture in the context of the destructive impact of Australian law is critical. This is true, not only for explaining Aboriginal crime patterns, drinking patterns, and the seemingly "disorganized" state of Aboriginal society, but also for explaining the overinvolvement of police agencies in internal community matters, the seeming inability of Aborigines to protect their rights in the face of police action, and the passivity of Native people in court; all misconceptions based on simplistic and racist "observations" of Aboriginal behavior.

The use of anthropology in the above context was limited, designed to show how white misconceptions were shaped, and to refute common liberal rationalizations for heavily punitive legal policies directed against Aborigines. An anthropology of Aboriginal law also reserves a much more positive

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purpose: it shows that there are clear alternatives to the racist, excessively punitive and ineffective white criminal justice system that was imposed on Native people. Study after study clearly shows that Aboriginal communities have effective systems of dispute resolution and social control that were ignored, buried, and weakened but most often not destroyed by imposed western law. Nancy Williams; Two Laws: Managing Disputes in a Contemporary Aboriginal Community is among the best and most recent of these studies, but there have been several dozen others. Much of these works was used by the Law Reform Commission in its report on the recognition of customary law. This work does more than dispel the racist and ethnocentric western notion that the Aboriginal people have no law and therefore need western law to protect them from the barbarism of their traditional law. It begins to develop models of dispute resolution and social control that, true to the original promise of the legal anthropology of the 1960s, offers an approach to alterative dispute resolution that is not an empty theoretical exercise but deals with the concrete history and current needs of living peoples.

This is true even though Australian Aborigines offer a classic "hard case" in the field of legal anthropology. Like such groups as the Inuit, of the Arctic, and the Bushmen of Southern Africa, Aborigines lived in very small clan groupings with very minimal levels of what western social scientists would call formal political organizations. Legal and political functions were not highly differentiated from family, work, and religious functions. Yet, legal anthropologists can separate out legal functions. Williams makes clear that Aboriginal law is not static but has evolved with the needs of Aboriginal society. Thus the social and property relations that evolved from contact with modern society impact on the settlement of disputes by current clan leaders. Indeed, much of the decay and disorder in Aboriginal communities can be attributed to the forcible destruction of their traditional legal order. As Stanley Diamond observed what officials call "law and order" is often its opposite a destructive social process that undermines customary legal order.

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The use of the tools of anthropology in showing both how current law negatively impacts on Aboriginal society, as well as in showing how Aboriginal society is capable of regulating its own social relations as a necessary element of their right to self-determination, has much broader implications for other research in criminology and the sociology of law. If it is true law operates uniquely in culturally defined situations, then the methodology of anthropology is one way to define the interaction between the formal law and the diverse human communities the law impacts on.

Ironically, as in other areas of this enquiry, the use of anthropological research on Aboriginal customary norms in relationship to a modern legal order opens up the same questions in the rest of the criminal justice system. For example, is it not clear that the criminal justice system also defies many norms of the white working class, creating a complex relationship between the "law and order" politics of many whites and the fact that many of their children are also in jail, for drugs, drinking and fighting, and various kinds of thefts.

The Royal Commission on Aboriginal Deaths in Custody

The controversial "underlying issues" language in the letters patent that launched the Royal Commission on Aboriginal Deaths in Custody open up the full range of issues underlying the racism of the criminal justice system, the overcriminalization of Native people, and the political powerlessness of Aboriginal communities addressed here.25 It is clear this enquiry has documented untold human suffering and death routinely visited on Aboriginal peoples by the ordinary operation of the Australian criminal justice system. The individual reports, published in book form by the Australian Government Publishing Service, and widely available (at high cost), are powerful and moving documents. The scale of the tragedy is only beginning to be known: the more than one hundred Aboriginal people who die represent only a small proportion of those suffering in white institutions, or, as in the case of David Gundy, shot by mistake in his own bedroom because he happened to be the friend of a friend of another person of color sought by the police.26

25 Royal Commission into Aboriginal Deaths in Custody, above, n 2.
The various reports are stunning in their simplicity: they document, for the most part, depressingly routine criminal justice practices, applied without much thought on the lives of ordinary Aboriginal people, not, by and large, serious criminal offenders, but people caught up in the vicious and racist patterns that characterize white treatment Natives in Australia.

The "underlying issues" reference represents a significant political opportunity to finally recognize the full scope of the injustice that Fear, Favor, or Affection documented. Yet, it must be clear that for a liberal nation-state to officially recognize a hundred years of racism, class violence, dispossession of lands, and the smashing of native communities as "underlying causes" carries a political price tag that few liberal governments will pay. For this reason, the impact of the Royal Commission's work will be very limited. In the commissions published reports much of its work represents a broad range of petty issues, from building better jails with more physical precautions against suicide and painting jail cells less depressing colors than prison green, to standard recommendations of improved police/community relations.  

This provides policy makers with band-aid type solutions that do not fundamentally reach any of the major issues. There is a high likelihood the recommendations of this Commission will go the way of the Commission on the Recognition of Aboriginal Customary Laws.

Conclusion

One way to measure the significance of this Australian literature on Aborigines and law is to remind ourselves of the recent existence both of a major series of studies on Aboriginal customary law by the Australian Law Reform Commission, as well as the Royal Commission on Aboriginal Deaths in Custody. No one needs to remind critical sociologists of law that the creation of such commissions serves liberal political functions that often are directly intended to defuse effective criticism that has put criminal justice institutions on the defensive.  

There is no question this has occurred in Australia, testimony to the effectiveness of all the research effort, but also a challenge to keep up this research effort and not let it end in a few liberal

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27 Many of the Commission's recommendations tend toward the banal, simplistic band-aid type remedies. The most obscene of these is simply providing windows in the cells so that observers can watch to make sure that suicides do not occur. Royal Commission on Aboriginal Deaths in Custody, Interim Report, pp 36 and 37.

reforms. Doubtlessly, some would like to devise more humane methods of keeping Aborigines in prison, somehow reducing "deaths in custody", a liberal term of what would be murder under the laws of some traditional people. It is a principle of many of the customary laws of Native peoples that, when one is a guest of another person, his life is in their hands and they are strictly responsible for his death.\textsuperscript{29} This principle is one example of what is lost to Australian law by not recognizing the legal traditions of its Native people, one concrete example of the importance of a legal order that fully incorporates a broad vision of legal pluralism.

For scholars, together with Native people, to keep up this pressure may not be much, as the limitations of the end products of both commissions has revealed (and will yet reveal), but given the general lack of impact of all the work of radical criminology and critical sociology of law, we can see that this particular mass of scholarship has had an impact. The effectiveness of the intervention of criminal justice institutions in the Aboriginal community has been discredited and many people educated about the functions of the police, courts, prisons and other state institutions. Aboriginal people have moved closer to some measure of self-determination, and the idea of Aboriginal control of their dispute resolution mechanisms, beyond even the imagination of policy-makers only ten years ago, has now been introduced in the policy agenda. Beyond this, individual victories have been won on a case by case basis. While such victories are statistically illusory - the numbers of Native people in jail are nowhere declining - each individual's freedom is a victory that counts.

To the extent that one can argue that these successes have been achieved, the real cause of that success has to be laid solidly on the increases political activity of Native people. The lawyers and social scientists that did this research took leadership from a Aboriginal grass roots movement. Without that connection there clearly would have been less impact, if any at all. One has only to look at the ineffectiveness of research on race and law in the United States to understand this.

\textsuperscript{29} Under the traditional law of the Tlingit of Alaskia, those with custody of another person were responsible for his safety. In the event of death in custody, the death was treated as a culpable killing, with those responsible owing a debt in blood to the clan of the dead man. If we might step back from our common law heritage, we can see that such a law makes good sense, for it places a high value on taking very good care of a person that you assume responsibility for. The United States, of course, had no use of such jurisprudence. See S L Harring, "The Incorporation of Alaskan Natives Under American Law: United States and Tlingit Sovereignty 1867-1900" (1989) 31 Arizona Law Review 279.
The work of Australian scholars is an important model for scholars in other countries to carry on. Without sweeping the limitations of academic work under the proverbial rug, this research has had an impact exemplary in the sociology of law, a relatively rare model of a large number of activists, lawyers, and scholars working with an oppressed racial group to take on some of the concrete manifestations of that oppression in the world of ideas and make an impact on social policy. Perhaps ironically, many of the central tenets of the "radical criminology" of the 1960s and 1970s, once dismissed as "utopian" become important frameworks for analysis within these debates about the meaning of Aboriginal crime. Existing liberal paradigms seem trivial, ranging from painting prison cells a mellow pastel color to the "decriminalization" of public drunkenness offenses. This clear recognition of the hollowness of liberal approaches to social problems creates an opportunity for an aggressive and creative range of more radical approaches. And here as well, the same theoretical framework bankrupt in the area of Aboriginal rights and state violence to Native peoples is equally bankrupt in dealing with the violence and inequity done to all people by criminal justice institutions.