ROYAL COMMISSION INTO PRISONS

ROYAL COMMISSIONER: MR. JUSTICE NAGLE

# PRISONERS ACTION GROUP SUBMISSION ON THE KNOWLEDGE OF CRIME AND ITS CAUSES

## SECTION I

## INTRODUCTION

### 1. Crime is, both formally and in a real sense the product of legislative and judicial definition.

Certain forms of social harm, for example pollution, industrial disease and injury, are not defined as criminal whereas other demonstrably less injurious forms of social behaviour are defined as criminal, for example offensive behaviour and unseemly words under Sections 7 and 9 of the New South Wales Summary Offences Act, 1970. Similarly the makers, marketers and suppliers of some dangerous pharmaceutical drugs (for example analgesics causing kidney damage and thalidomide causing gross physical deformation and retardation of newborn children) are not subject to criminal sanctions despite the fact that the dangers, particularly of thalidomide, were well known and documented some considerable time before sales were finally banned; and yet daily the suppliers and more especially the users of certain other far less damaging drugs such as marijuana are criminally prosecuted in New South Wales Courts. Certain other forms of conduct (the victimless crimes) are defined as criminal even though no harm is sustained massively to a third party or to property. Much socially injurious conduct is defined as private rather than public, and thus kept within the civil law (nuisance).

Again, corporate price fixing conspiracies generally do not fall within the ambit of the criminal laws despite the fact that they probably involve, with little or no social justification, greater sums being extracted from consumers than are extracted annually from citizens by all the various acts against property that are defined as criminal combined Ramsey Clark, former U.S. Attorney

General noted that -

> "one corporate price fixing conspiracy converted more money each year it continued than all of the hundreds of thousands of burglaries, larcenies or thefts in the entire nation during those same years": Clarke, Crime in America 1970 - page 8.

In short, in all societies crime is politically defined and its context varies according to the economic social and political nature of the particular society engaged in defining crime. While moral, philosophical and other reasons may be put forward by the legislature and judiciary as justifications or rationalisations for prescribing certain conduct as 'criminal', the only difference between criminal and non-criminal behaviour in an absolute sense is the fact of definition. There is no innately or absolutely criminal conduct. In certain societies what would perhaps in our society be regarded as a most natural form of human activity: a formal socially recognized marriage between a man and a woman, can be declared illegal. This is the case, for example, in South Africa, in situations in which the couple's skin colour varies. Even deliberate homicide is non-criminal in a variety of circumstances. Thus, the killing of Phillip Western by police, the near killing of unarmed prisoners at Bathurst, killing in wars, and the implementation of death sentences, are all regarded as forms of justifiable homicide.

2. Crime is a social phenomenon, therefore an understanding of it must be grounded in an understanding of the aggregate of social relationships within which it occurs: society. The foundation stone of a society on which its social relationships rest is its system of economic organisation. Australian society is based on an advanced capitalist economy.

The hallmark of capitalist economic organisation is the extraction of surplus value or profit from labour power. This surplus value or profit is converted into capital which in turn determines and controls the use of labour. Thus, whilst all profit and social production originally derives from the labour force the right to work and the availability of work is controlled by those who have ownership over the means of production.

A major result of this process is that Australian society can be seen essentially as dualistic, it is divided into those who have enormous power and wealth, and those who do not. Competitiveness and inequality are a feature of day to day life, as an objective and demonstrable factual reality.

Later on, in our analysis of the causes of crime, we quote from the growing body of empirical evidence, much of it from governmental sources. At this stage the considerable degree of inequality, the dualistic nature of Australian society, can be illustrated by referring to the Australian Government Commission of Inquiry into Poverty. In the words of the report:

> "Our overall measure of poverty, in terms of adult income units, shows that on an annual income basis, 10-20% were 'very poor' (below 100% of the poverty line) and 7.7% were 'rather poor' (between 100% and 120% of the poverty line". First Main Poverty Report. Henderson - Page 14.

In a society with the 5th ranking GNP in the world (1972/73) nearly one-fifth of the population are poor, are deprived of the proper means to live free from want, are deprived of essential goods and services, are deprived of the ability to fulfil their potentialities. At the same time, as a study of ownership patterns reveals a minority of citizens enjoy massive wealth, indeed 11% of the population own 40% of the wealth.: P. Groenewegen 'Consumer Capitalism' in Playford & Kirsner (Eds) Australian Capitalism. Pelican 1972 p.105

The state, far from being an intervener or umpire of the conflict naturally arising from this duality, itself arose historically as a pseudo umpire, its real task being to perpetuate the duality and to promote and protect the interests of the rich and powerful.

3. The Criminal Law functions as one means of asserting the social control and power of the socio-economic elites of a society and the hegemony of their values.

In Australian society where the activities of the citizens and its dominant cultural values are characterized by the struggle for wealth property and economic self-aggrandisement, the State defines certain forms of acquisitive behaviour as criminal whilst actively supporting and promoting other forms of acquisitive behaviour.

Thus, the extraction of profit from labour power by entrepreneurial activity is culturally defined as desirable and its most successful exponents are rewarded with massive wealth, prestige and honours. Such extraction of profit essentially by the theft of the labour power of others is legally facilitated in a variety of ways, for example by the notion of the incorporated limited liability company. And yet, in the same society the non-possession of property is defined as criminal under the vagrancy laws.

As revealed by the Prices Justification Tribunal in October, 1976 Sir Reginald Reed, Managing Director of James Patrick Company Pty. Ltd. had been paid $1.14 million in the last three years, over and above his directors salary. (See National Press, October 20, 1976) Sir Reginald picked up a cool $613,650 last year. Patricks operating profit for 1974/75 was 88.3% compared with the operating profit of Australian industry as a whole of 12.1% for the same year. And Patricks was appealing for a price rise.

At the same time people can legally be thrown out of employment as a deliberate economic strategy, and then defined as criminals if they take unto themselves goods which the whole cultural ethos, notably by advertising on a blitz scale,

informs them are essential to a good life and which the society has, quite legally, prevented them from acquiring in any other way.

This proposition holds good in respect of behaviour not directed at the acquisition of property. Consider, for example, the toleration or maintenance of the techniques of the ongoing consumer society. There is no criminal sanction against the deliberate design and supply of cars which are road hazards and which cause massive destruction of life and limb. The savagery of the criminal law against those whose isolated personal acts cause an infinitely smaller amount of death and maiming is from any viewpoint that does not wholeheartedly embrace the legitimacy of the consumerist ethos, difficult to understand. Again, the bias of the criminal law and the way it so readily entraps individual acts of neligence causing loss of life when the tool or instrument involved is a gun or a knife stands in stark contrast to the wholly legal maintenance of many forms of dangerous equipment and methods of work employed throughout industry, which accounts for a quite staggering degree of injury and death - injury and death sustained as the sacrifice for the level of profit for the providers of capital and for shareholders in that industry.

In each of the 20th century wars in which Australian troops have participated, with the possible exception of the Second World War, there have been widespread and bitter divisions among Australian citizens as to the propriety of Australian participation, yet, in effect, homicide by large numbers of Australian troops has been lawful; indeed a failure to engage in the lawful destruction of life was a serious crime while the wars lasted. Thus, behaviour otherwise criminal has been decriminalized in the interests of very powerful propagandizing groups in resisting what was seen as threats to their values and their well-being. (Consider, for example, the 1916 Referendum on Conscription and the gaoling of prominent politicians such as Arthur Calwell and John Curtin.)

The examples given above indicate that the determination of which forms of behaviour are defined as criminal is not guided by any principles of absolute rationality or morality. Such a decision is essentially guided by the values of the powerful groups. The social function of those values is to protect the privilege and wealth of the powerful and to protect also the system that allows the powerful to acquire and maintain such advantages.

Thus, the Criminal Law and its definitions tend to be aimed at such of the acquisitive means available to and at so much of the behaviour and culture of people short of wealth and privilege which, it is assumed, would, if allowed to go unchecked, threaten the privileges, wealth and congenial system of the ruling elite.

The social conduct of the sons and daughters of the wealthy with access to exclusive and convivial social and sporting facilities such as school, lodges and private clubs is not subjected to "legal" harassment. They can be drunk, behave offensively, swear, engage in sexual exhibitionism (for example by nude bathing in a private swimming pool), enjoy noisy bands whereas precisely the same conduct under part II of the Summary Offences Act, 1970 is criminal if indulged in in public places. The reality is that people who cannot afford access to and/or who are not socially acceptable in attractive private places, are compelled to resort to public places for their entertainment and amusement. Thus, the impact of the criminal law is to proscribe the place where the activity takes place, as opposed to the behaviour per se. The argument should be considered further in the extent of the criminalisation of marijuana supply and use compared with the merely licensing approach towards alcohol. People who have a deal of power and influence in our society tend to be older. The use of the drug alcohol is widespread among the old. One need not be a temperance lobbyist to admit that much social havoc is caused or aggravated by its overuse. When, for a variety of reasons the young adopted certain cultural innovations of dress and style, among them indulgence in marijuana, the old and powerful felt their way

of life and its maintenance threatened and cruelly and criminally proscribed its use.

A study of the historical development of specific criminal laws suggests that many of them, far from reflecting a general community consensus, reflect the predominance of a particular (usually economically) powerful interest group over less powerful groups. Chambliss's famous analysis of the Vagrancy Laws (Sociological Analysis of the Laws of Vagrancy: Social Problems: Volume 12 pages 66/67) demonstrated that the Laws emerged in order to provide powerful landowners with a ready supply of cheap labour during a period when serfdom was breaking down and the pool of available labour was depleted. A modern example of this process is the attempt to control the activities and functions of Trade Unions through the penal clauses introduced into the Conciliation and Arbitration Act (Commonwealth) 1969-1972. This was taken to its logical conclusion in New Zealand this year when vaguely defined "political strikes" were made illegal and in Victoria in November, 1976 where actions against Victoria's interest were made illegal - Melbourne Age Editorial - 18th November, 1976.

Another example is the crime of "criminal trespass" in the Summary Offences Act, 1970. This section was justified by its proponents as protecting private party givers from "gate crashers". It was at the time criticized by its opponents as a potentially oppressive instrument which would be used against dissident minorities. And, so, indeed, it appears to have been used. Unionists in conflict with their employers, the homeless and their supporters squatting on vacant property of developers, blacks pressing their legitimate claims, powerless students in conflict with powerful administrators and people generally exercising their freedom of speech in a non-violent way would doubtless account for most convictions under Section 50, rather than gate crashers, the supposed social threat. Such a law, as is the case with many other laws, was not the creation of enlightened legislators representing a broad community consensus but rather that of the conscious or unconscious agents of powerful interest groups operating under a "law and order" banner and concerned to maintain their dominance

and control over private property and public institutions.

The formal legitimacy of parliament is used to stifle or rebut criticisms of criminal laws as sectarian or class biased but it is doubtful whether the most powerful parliamentarian in the Country really has as much power to influence the general course of events and indirectly the expression of values in the criminal law as has, say, a newspaper magnate or a controller of a large manufacturing company.

It may be said that the foregoing is somewhat of an overstatement of the case. It may, for example, be argued that whereas there is no absolutely criminal act there are in fact some acts which are more or less "universally" criminal. Such a critical allegation glosses over the distinction between disapproval of certain conduct and the imposition of sanctions for such conduct. There is an assumption that the sanction is necessarily punitive. Most societies in some way or other criminalize theft and private murder but the logic of and motivation behind singling out some, usually small scale, offences for treatment as "criminal" (with punitive consequences) is only apparent if the concepts of breach of a code of behaviour and punishment are fused. For example, the probable loss in our society of consumer durables from private property by theft need not necessarily be dealt with (nor is it efficiently dealt with) by treating the thieves as criminals and making such treatment virtually the whole societal response to a more or less predictable and fairly generalized phenomenon. A system of compulsory insurance of such items by their owners complete with no claim bonuses and insurance rates and possibly deductions from the benefits of claims for contributory negligence might well be argued to be an equally efficient societal response to a phenomenon the continued existence of which is assured whilever the disparity in economic power between groups in our society is entrenched and institutionally supported.

Societies of a different socio-economic nature tend to have a rather different content in their criminal law. To

the extent that they single out for a punitive result, the small scale acts of individuals, the explanation is also that those in power perceive the acts thus singled out as a threat to their interests in precisely the same way as it has been argued that the content of the criminal law is determined in our Society. Logic in dealing with the perceived anti-social behaviour is undoubtedly not the preserve of any yet established social order.

The foregoing discussion is by no means a mere empty philosophizing of doubtful relevance to the Royal Commission. To the extent that the Commission perceives that the classes of activity in respect of which people have become prisoners are selected arbitrarily, unfairly, without any regard to the relative quality of their anti-social nature and often for the mere purpose of preserving the power of the powerful, it will have served its purpose.

Though it is our view that imprisonment is dysfunctional in any society, it is suggested that this Commission can hardly countenance imprisonment as a punishment process (with the attendant cruelty that this entails) when this punishment is linked to the criteria we have outlined above and is administered in a discriminatory fashion to an oppressed group in the manner detailed below.

Crime must also be looked at from the viewpoint of the process by which people who have committed defined "criminal" acts are convicted of them. In short, a second cause of crime is the selective manner in which the Criminal Law is applied in practice.

> Criminal behaviour is general but the incidence of conviction is controlled in part by chance and in part by the social processes which divide society into (more or less susceptible and immune categories), the former corresponding roughly to the poor and underprivileged.

See Chapman D., "Stereotype of the Criminal" Tavistock 1968

A moment's reflection will suggest that, for example, theft, tax evasion, fraudulent claims on insurance companies, the various forms of sexual conduct which have been criminalised are widespread and generalized among all classes in the society.

The Australian Commission of Inquiry into Poverty States:-

> "Overseas researchers, began to reveal the extent of criminal activity among the general population and to cast doubt on the assumption that people who are convicted of criminal offences accurately reflect those who actually commit offences. A number of self-report studies, mainly involving juveniles, have shown that most respondents committed at least one act for which they could have been arrested and charged, although a low proportion admitted persistent mis-behaviour. A similar study of adults in New York found that 91% admitted to one or more offences (other than traffic violations) for which they might have received prison sentences had they been caught and charged. In addition, a growing body of overseas researchers suggest that the number of criminal offences committed is several times that officially reported - one leading British criminologist (Leon Radzinowicz) has estimated that only about 15% of all crime committed in England is officially reported.
>
> (L. Radzinowicz. The Criminal In Society. J. Royal Soc. Arts. 112 (1964) 916-29)

These findings are supported by a study conducted in Sydney in 1973 which revealed that victims reported only one half of the burglaries and larcenies actually committed and less than one quarter of the robberies. Fraud, rape and assault were recorded even less often. (A Congalton and J. Najman Unreported Crime - New South Wales Bureau of Criminal Statistics and Research Statistical Report No. 12, Sydney 1974).

| Crime | (a) Our sample: Rate per 100,000 (1972/1973) | (b) Official: Rate per 100,000 (1972) | (c) How many times (a) is larger than (b) |
|---|---|---|---|
| Burglary | 1904.1 | 906.4 | x 2.10 |
| Car theft | 785.9 | 427.3 | x 1.84 |
| Robbery | 211.6 | 49.6 | x 4.27 |
| Larceny | 2962.2 | 1649.2 | x 1.80 |
| Mischief, arson | 1027.7 | 131.4 | x 7.82 |
| Fraud | 1209.0 | 189.9 | x 6.37 |
| Sex offences other than rape | 846.3 | 95.9 | x 8.82 |
| Assault | 1027.7 | 78.0 | x13.18 |

All these studies are important, not only in providing evidence of the extent to which the general population engages in criminal activity but in suggesting the extent to which the system may be geared to catching some offenders rather than others. It is clear that the crimes dealt with by the Police and the Courts is only part of the total criminal activity in the community and that there is an unknown dark figure of crime of quite substantial proportions". (Australian Commission of Enquiry into Poverty - Crime and Poor People PP195-196).

"Crime control in (Australian Society is accomplished) or sought to be, through a variety of institutions and agencies established and administered in the interests of powerful groups for the purpose of establishing and maintaining domestic order." (Quinney "Critique of the Legal Order" Little Brown and Company, 1974 Page 16.

4. The poor, the uneducated, the unskilled and the socially disadvantaged are in practice the primary target group for the application of the Criminal Law i.e. they are the most susceptible to conviction.

"In Britain and the U.S.A. studies have demonstrated that the poor and disadvantaged people are disproportionately represented among those who remain at the end of the criminal justice process. The evidence suggests that the situation is no

different in Australia. For example, one recent study, comprising a 40% sample of all male prisoners in New South Wales serving sentences of 12 months or more revealed that 90% came from the two lowest occupational categories and nearly 67% of the prisoners were unskilled compared with about 20% of the Sydney Metropolitan Population. This highlights the over-representation of people from low status jobs in New South Wales Prisons. The Prisoners were also educationally disadvantaged (twice as many people in the general population had reached intermediate/school certificate levels of education) and more than a third had spent some time in an orphanage or childrens' home. An earlier study which examined the pre-sentence reports of 3,700 men appearing before Higher Courts in New South Wales from 1960 to 1964, found that 73.4% were unskilled or semi-skilled manual workers.

While poor people are the victims of the criminal justice system it does not necessarily follow that poor people commit most crime ..... In the face of this mounting evidence, that criminal activity is generally more widespread than previously recognised, the question that inevitably follows is why those in prison - the end of the criminal justice process - are poor and disadvantaged. One of the major problems in criminological studies has been the common assumption, referred to earlier, that crime is reported and criminals who are caught are representative of all crime and all criminals. This assumption requires a searching re-examination in the light of increasing evidence that the system operates selectively against poor and and disadvantaged people" Australian Commission of Enquiry Into Poverty - Crime and Poor People pp 195/6

One of the few specific offence studies showing occupational backgrounds of offenders carried out by the New South Wales Bureau of Crime Statistics, the Drug Offences series, shows that in 1974 occupational categories C and D, "semi-skilled and unskilled, workers, accounted for 95.7% of drug convictions: N.S.W. Bureau of Crime Statistics and Research. Statistical Report 3. Series 2 Drug Offences 1974 p.11.

Moreover, this proportion has been amazingly constant since the inception of the drug series reports in 1971 (1971: 94.4%, 1972: 95.5%, 1973: 94.8% N.S.W. Bureau of Crime Statistics Report 15)

The unskilled group are represented five and a half times more than their numbers in the population would warrant; as the report put it, they were "grossly over-represented". Those in occupational categories A "professional/managerial" however, constituted one fortieth the representation that per capita numbers would warrant.

Moreover, the available evidence suggests that the actual use of illegal drugs, and in particular marijuana, (which accounts for 85% of the total drug convictions in N.S.W. annually) by different occupational groups in the community at large is precisely the opposite. Windschuttle analyses the N.S.W. Health Commission Statistics and notes:

> "If you look at the occupational background of people who smoke marijuana, the social group with the heaviest proportion of users is that of "professional/managerial." The N.S.W. Health Commission found that 17.7% of young people whose father have such jobs smoke marijuana. Of the children of semi-skilled or unskilled labourers only 12.1% are marijuana users." (K. Windschuttle - The Rich Get Stoned and the Poor Get Busted)(Unpublished Paper, 1976 p.2)

An as yet unpublished survey of drug use amongst law students at all three (3) Sydney Law Schools showed that 50% of all law students in the large sample have used marijuana and that 28% continually use it on a regular basis. (See forthcoming article by R. Brown in Biles (Ed) Australian Journal of Drug Issues). Many of these students will go on to become solicitors, barristers, judges, politicians, people of power and influence. It is interesting to note that of those 43 users who came into contact with the police, no action was taken in 18 cases, warnings were received in 13, parents were contacted in 3, and only in 8 cases were prosecutions initiated.

Windschuttle notes succinctly -

> "there is a quite reverse relationship between the social backgrounds of the users and the convicted. People with high social status occupation backgrounds use illicit drugs the most. But the great majority of convictions fall amongst the lower classes. The rich get stoned and the poor get busted" (P.2 op cit).

A number of other statistical analyses are illustrative of the point that the Criminal Justice System is biased against the poor: Bureau of Crime Statistics: Stat.Report 1000 prisoners.

Breathalyzer offences - unksilled workers are grossly over-represented among those convicted of offences found proven. A 1971 Bureau of Crime Statistics, Statistical Report No. 4 Page 8, indicated that 25% of cases involving professional people were dismissed under Section 556A of the Crimes Act whereas only 3.9% of unskilled workers received similar beneficial treatment.

Aborigines - in New South Wales, in 1971-1972 Aborigines incurred sixteen times more convictions than might have been expected on a per capita basis. (Statistical report, No. 11, Petty Sessions, Page 31, Bureau of Crime Statistics). Further, a Defendant charged with offensive behaviour before the Court serving a town with a large Aboriginal population, is seven times more likely to receive a prison sentence than a Defendant in another country town and six times more likely to receive a prison sentence than his counter-part in Sydney. (Statistical report No. 18, Minor Offences, City and Country - Page 5).

5. Corporate and Organized Crime:

Criminal activity is pervasive in the areas of corporate organized and white collar crime. Such crime is much more costly in economic terms (and in social terms in many cases) to the community than the sorts of crimes committed

by the individuals usually brought before the courts. However, the punishments for such crime do not reflect relatively the economic and social cost sustained and attempts to enforce the law against it are merely token.

Frank Pearce in his book Crimes of the Powerful: Pluto Press London, 1976, exposes the soft underbelly of the criminal justice system in the U.S.A. when he juxtaposes the law and order rhetoric of politicians with the facts about corporate and organized crime. This study indicates a huge amount of money being illegally extracted out of the American people by criminals who never come before the court. One is forced to question the legitimacy of the allocation of police resources and the severity of the sanctions imposed. The most economically significant crimes (those of the wealthy) are de-emphasized at all levels. There is little publicity, little prosecution and little or no punishment.

We suggest that Frank Pearce's analysis is applicable in a relative way to Australia and other capitalist countries -

> "The general public in most western countries has been made very conscious of the crime problem, of the need for law and order. There is little doubt that the 1968 Republican Campaign in America centred on this issue:

In September of that year Vice President Spiro T. Agnew said:

> 'When I talk about troublemakers I am talking about muggers and criminals in the streets, assassins of political leaders, draft evaders and flag burners, campus militants, demonstrators against candidates for public office and polluters and burners of cities.'

In 1965 J. Edgar Hoover then Head of the Federal Bureau of Investigation, after abusing communists, turned to the crime problem which he defined in terms of the citizens

exposure to violence and theft:-

> 'Today, the onslaught continues - with five offences being recorded every minute. There is a vicious crime of violence - a murder, forceable rape or assault to kill - every two and a half minutes; a robbery each five minutes; a burglary every 28 seconds; and fifty two automobiles are stolen every hour.'

Crime is seen as the province of young lower class males, particularly blacks. That this view is misleading soon becomes clear when facts bypassed or played down by opinion formers are taken into account.

Although there is a strong emphasis placed on crimes of violence, they constituted only 13% of the F.B.I.'s "Index Crimes" in the Uniform Crime Report of 1965. The other "Index Crimes" were thefts of various kinds. Of these, burglary was the most lucrative: In 1965 involving sums of 284 million according to the F.B.I. As against this, the President's Commission on Law Enforcement in 1967 estimated that organized crime made a profit of 7 billion dollars from gambling yet the fight against organized crime has attracted little of the F.B.I.'s resources and even recent legislation purportedly aimed at it has as a major target political radicals.

Of more immediate interest in this discussion, crimes by white collar groups are ignored by the F.B.I., despite the fact that the President's Commission itself said:

> 'There is no knowing how much embezzlement, fraud, loan sharking and other forms of thievery from individuals or commercial institutions there is, or how much price rigging, tax evasion, bribery, and other forms of thievery from the public at large there is. The Commission's study indicates that the economic losses of those crimes caused are far greater than those caused by the three index crimes against property.

Senator Warren Magnuson named deceptive selling as today's most serious form of theft, accounting for more dollars lost each year than robbery, larceny, auto thefts, embezzlement and forgery combined'.

Kolko, in his scholarly study of the distribution of wealth in American society, has shown that in 1957 at least 27.7 billion was unreported on tax returns: most of this illegal saving was kept by the richest 10% of the population. Moreover, at least 11 billion of this was retained by the wealthiest 1% of the American population, which owns 80% of the corporate wealth. This unreported income would have been taxed at a rate of 90 cents to every dollar - which would mean that on an income of 11 billion well over 9 billion would be owed to the taxation department. The richest one percent of the American people defrauded the majority of more than 9 billion in 1 year alone.

Violation in the anti-trust laws are even more important. These laws are supposed to ensure that competition keeps prices at the lowest level possible, by outlawing monopolies and by stopping firms colluding to fix prices. Profits over and above those that should be made within efficient competitive industries are illegal. The occasional prosecution under these Acts lays bare a volume of illegal excess profits that is staggering. In one famous case in 1961, the heavy electrical equipment cases, General Electric alone made at least 50 million excess profits in this one market alone. Such 'business activity' is typical not only for General Electric but of large corporations in America generally. The corporations provide the most efficient and largest examples of organized crime in America.

The evidence shows how inaccurate are Hoover's and Agnew's accounts of America's crime problem. Using the Government's own criteria of the cost of crime to the community, burglary, an index crime for the F.B.I. is surprisingly insignificant. The $284 million worth of goods stolen in 1965 represents only 3% of the estimated annual profits of organized crime (conventionally defined) and only 3% of the money gained by the tax frauds of the wealthiest 1% in 1957.

This alone calls into question the justification given for the mode and distribution of police enforcement activity and for the severity of sanctions imposed by the Court. Bourgeois ideologues would answer this by talking of the "common good" yet the most economically significant crimes, those of the wealthy, are the least publicized, investigated and if punished there is little stigma attached to the known offenders. This discrepancy between theory and practice cannot be explained in terms of the unavoidable ignorance of those responsible for dealing with crime, since the figures quoted above are derived in large part from Government publications. Such sources of information have been deliberately chosen and the argument has focused initially on a very legalistically defined subject matter in order to demonstrate that the U.S.A. (and capitalist society generally) do not even abide by their own criteria of reasonableness. Thereby, there is a contradiction between the way things are supposed to happen and what actually occurs. The major aim is to explain why there is a discrepancy between the world (legitimate as well as criminal) portrayed by official agencies and the mass media and that revealed by more sophisticated analysis of capitalist society. This analysis is restricted to America although similar points can be made about other capitalist societies." Pearce 1976 PP 77-80.

The following statistics from the New South Wales Bureau of Crimes Statistics Petty Sessions Report 1972 illustrate the token nature of penalties inflicted on corporate bodies convicted of criminal offences: Of the three companies prosecuted under the Navigable Waters (Anti-Pollution) Regulations, two were fined $100.00 and $40.00 respectively; of the nine persons prosecuted under the Port Authority (Smoke Control) Regulations, the total fines imposed were $275.00; prosecutions for depositing rubbish into the harbour under the Port of Sydney Regulations, resulted in one fine of $25.00 in 1972 and two Section 556A dismissals: Prosecutions under the prevention of oil pollution regulations pursuant to the Navigable Waters Act resulted in 16 persons and 2 companies

being convicted and fined a combined total of $3,320.00; of the six companies prosecuted under the Clean Air Act, the three companies convicted were fined a combined total of $450.00. By contrast, in the same year in New South Wales Courts of Petty Sessions, 3,394 people were charged with indecent behaviour, 3,797 people were charged with using unseemly words and 3,712 people were charged with vagrancy. While no breakdown of such people by occupational categories is available (as it is in the case of drug offences which is referred to above), common experience suggests that even apart from the vagrants (unlikely to include many professionals) the vast bulk of the other people referred to would have come from the two lowest occupational categories used in the drug series i.e. semi-skilled and unskilled workers. Again whilst no figures as to the fines imposed upon such people are available, it is inconceivable that they would not have totalled many times the total fines meted out to the corporate criminals mentioned above (the New South Wales Bureau of Crime Statistics and Research Statistical Report No. 6 Series II 'Court Statistics' 1974) shows (Page 42-43) that in 1974, some 74% of people convicted of unseemly words and offensive behaviour were fined and indeed 11.7% were gaoled for over three months for such monstrous depradations upon the social fabric.

6. Thus, the impact of the criminal law is deflected as are its definitions, away from those whose interests it serves to re-inforce and protect. This deflection process is carried out through a highly selective criminal justice system. The selective application of the criminal law to the susceptible can be demonstrated by considering the various points at which a person who engages in criminal activity or who is thought to have done so, may avoid conviction.

Official cognisance of crime:

The "dark figure" of unreported crime has been referred to above in an extract from an Australian Poverty Commission report. The source of the Poverty Commission's reference was table V of Statistical Report No. 12 of the New South Wales Bureau of Crime Statistics and Research. Given

the oft presumed necessity for prisons to exist in some way to cope with crimes of violence it is instructive to note that the report mentioned shows that for every assault reported over 13 are not. If such private anti-social conduct really were destructive of society and if the maintenance of the prison system were our only "bulwark" against it then surely the annihilation of more or less orderly society must have come long ago. By implication too, if all serving prisoners were simply released and again committed the offences for which they were imprisoned the increase in the amount of total, that is compared with reported crime, would be merely marginal. In fact, there is no reason whatsoever, to think that the release of all prisoners at one time would be accompanied by any greater recidivism on their part than if they were released under present Prison Programs of parole or upon the expiration of their sentences. The probability is that any increase in crime as a result of releasing all prisoners would be entirely minimal.

Official congisance of some crime does not depend upon reporting of it to law enforcement agencies but by their direct observation of it.

Visibility:

> "People who choose (or are forced) to resort to extensive use of public space (streets, parks etc.) are much more susceptible to police notice and therefore police action".
> The New Criminology - Taylor Walton & Young, Routledge Paul Kegan 1973 Page .

The "public place provisions" of the New South Wales Summary Offences Act have been noted above as more or less class biased definitions of the Criminal Law, but even in the implementation they are obviously convenient devices for the highly selective control of "suspicious" or

"deviant" persons who resort in fact frequently to public space. At its simplest a drunk staggering from the Wentworth Hotel or from one of the (illegal) gambling clubs frequented by people of wealth is scarcely likely to attract the same police interest as a black drunk in Walgett or outside the Empress Hotel, Redfern.

7. Arrest.

The police decision to arrest is the next step following official cognizance of a crime. It is a highly selective process based on situational and offence characteristics. The basis of the decision to arrest militates against minority and disadvantaged groups in society. There appear to be no Australian studies of arrest discretion. Wilson in the U.S.A.

> "in his comparative study of police handling of suspected juveniles, found that the proportion arrested ranged from 16% of white juvenile suspects in Eastern City to 51% of negro suspects in Western City".
> Bottomley P. 52.

Wilson, and Black and Reiss show:

> "that in some American cities the proportion of Negro suspects who are arrested is two or three times greater than the proportion of White suspects receiving the same disposition": Bottomley P.57.

The decision to arrest and/or to charge a person particularly in a situation of ambivalence and particularly where minor offences or offences not involving gross violence are concerned may be influenced by an articulate rejection by the potential Defendant. For example, Westley in an interview survey of police attitudes to the use of force in the arrest situation found that the highest proportion of

respondents gave 'disrespectful behaviour' as the reason for force being thought to be necessary in the situation directed particularly against the 'wise guy' who thinks he knows more than they do, who talks back, or insults the policeman". Bottomley: Decisions in the Penal Process P. 48.

Similarly, in a study by Piliavin and Briar, the police patrolmen questioned

> "considered the 'demeanour' of the juvenile to be the major factor in 50-60% (per cent) of their dispositions": Bottomley P.53

The high arrest rates amongst aboriginals and working class youth in Australia on minor street and disorderly offences is testimony to the relevance of such empirical studies to the Australian context. The characteristics which probably influence the police decision to arrest where minor or non-violent offences are at issue would include the presumed "moral character", the "attitude" of the offender; random suppositions as to the suspect's personal characteristics generally and previous criminal record. All these factors operate to the advantage of the middle or upper class offender who is educated, articulate and affluent, capable of calling upon the skills of a legal adviser etc. and correspondingly work disproportionate misfortune on the poor, the inarticulate and minority groups.

Quite simply, much 'on the street' police discretion is exercised on the basis of blatant stereotypes. As Skolnick states:

> "ethnic stereotypes, like the modus operandi of criminals, become part of the armoury of investigation": Bottomley P.55.

The self-fulfilling nature of this process is obvious. Arrests based on police stereotypes e.g. of blacks, long haired working class youths, ethnic minorities, have the effect of allocating further police resources to these allegedly problem areas, thus initiating increased visibility of those thus stereotyped and the likelihood of further arrests. The increased arrest rate appears then to justify,

and indeed feeds, the original stereotype. In short "a vicious circle of self-fulfilling prophecies" (Bottomley P.58) is created.

Of course, such a process is not confined in the police sphere, purely to the discretion to arrest. With the increasing emphasis on diversionary strategies in the pre-trial as well as sentencing stage, police and courts are being given powers of formal caution, and here again we see the same factors at work. Goldman in the U.S.A. found that -

> "34% of white juveniles were referred to the juvenile court, whereas 65% of negroes arrested were similarly referred to Court": Bottomley P. 66.

Here again, despite the lack of Australian studies, there are no good reasons for assuming that similar processes do not occur in Australia.

8. Bail

> The refusal of bail or a defendant's inability to raise bail when granted has direct consequences on the Defendant's subsequent likelihood of conviction and the nature of his sentence: in addition of course, the immediate consequences of the refusal of bail is a period of imprisonment before trial which is of vital significance in personal and social terms and needs serious justification irrespective of any other impact it may have with the Defendant's later progress through the stages of the penal process.

In England, the Home Office Research Unit study in 1956 showed that 40% of persons committed for trial on bail to higher Courts were given custodial sentences compared to 78% of those committed for trial in custody. In summary cases 14% of those remanded on bail were given custodial sentences compared to 39% of those remanded in custody.

Whilst the stated overriding principle for the granting or non-granting of bail is said to be whether the accused will appear at Trial, the criteria usually taken into account go far beyond this and socio-economic factors such as roots in the community, financial position, ability to raise surety or bond money etc. and similar indicators of "appearance" operate to the advantage of the middle and upper classes in society whilst disadvantaging the poor, the ignorant and the unemployed. Whilst this is unsatisfactory, in light of the correlation between refusal to grant bail and ultimate conviction and custodial sentence, it is even more disturbing when bail is granted but it is granted in such an amount that the accused is unable to raise bail and is thus defacto refused bail for purely economic reasons.

Thus the courts are able to take a seemingly humane attitude to bail but by setting bail outside the economic capacity of the accused in practical terms, they deny the accused bail. Inability to raise bail moneys effectively leads to a pre-trial punishment of the accused. This situation is brutally draconian when the ultimate penalty is non-custodial. Pre-trial custody, in practice, prevents proper access to legal advice and diminishes the prospects of proper presentation of a person's case.

9. <u>In the Court Room.</u>
<u>In the court room inequality continues unabated.</u>
<u>The entire structural and linguistic apparatus exacerbates existing disadvantages</u>.

Legal representation is not an advantage towards but a pre-requisite of, receiving humane treatment by the courts. The manifest inadequacy of current legal aid programs in Courts of Petty Sessions (where well over 90% of criminal cases are determined) makes even lip-service to the notion of equality before the law a farce. Poor, uneducated or national minority accused/defendants are less likely to have legal representation and less likely to have the appropriate education to enable them to comprehend fully what is happening in the court room. Even where legal aid is provided the

Legal Aid Lawyer is usually confronted with a record of interview allegedly taken from a person unaware of his basic legal rights.

Superior court judges are substantially drawn from the middle and upper classes of society, and if not actually born into them have come to belong to these classes by the time they reach the bench. Ample authority for this proposition is provided in the work of Encel (Equality and Authority, Cheshire, Melbourne 1970 P. 76) R.N. Douglass ('Courts in the Political System: Melbourne Journal of Politics Vol. 1 1968 P.47) and Eddy Neumann (The High Court of Australia: A Collective Portrait 1903-1970. Occasional Monograph No. 5 Department of Government. University of Sydney 1971).

The same is not true of many magistrates, but, as Playford states,

> "this does not affect their role as defenders of the existing power structure": Playford Who Rules Australia, in Playford & Kirsner (Eds) Australian Capitalism P. 141.

The adoption by magistrates of the social mores of the middle and upper classes of society is manifest. Their training and close association with the police tend to narrow their perspectives. As Buckley states:

> "they tend to adopt the value judgements of ruling authority and to assume in favour of the testimony of policemen" : Playford P.141.

In short, the perception of the criminal process and indeed of the court room process as experienced by the disadvantaged on the part of the judiciary at all levels is distorted. Thus, as every criminal advocate realizes, the middle class offender tends to be regarded as a "redeemable deviant" and correspondingly alternatives to imprisonment tend to be the more readily and fully considered

and exploited in dealing with such a person. For the judiciary the real criminals tend to be those at the bottom of the social hierarchy, the "social failures". The evenhanded imposition of fines without regard to capacity to pay and dictated by the myth of equality before the law clearly discriminates against the poor. Often lawyers believe a monetary penalty is imposed by magistrates in the knowledge that an offender cannot pay and with prison well in mind as the ultimate sanction. A prison term, had it been directly imposed, may well have been regarded as too severe on appeal.

The effect of such a process, and an illustration of the way in which the burdens of imprisonment generally are borne by the poor is provided in the dramatic answer to a parliamentary question, provided on Wednesday, 3rd September, 1975.

Mr. Maher asked the Minister for Police and Services -

> "What number of persons have been gaoled for the non-payment of fines in each of the last five years?"

The answer:

1970 ..... 4786
1971 ..... 5746
1972 ..... 5471
1973 ..... 4333
1974 ..... 3086

Hansard N.S.W. Legislative Assembly Wednesday, 3rd September, 1976. Prod. 105 No. 9

Perhaps no single fact so brutally illustrates and supports our whole argument thus far than that over the period 1970-1974 New South Wales prisons were the repositories for 23,462 of its citizens purely for non-payment of fines, in other words for being poor. The myth of equality before the law lies exposed in all its nakedness. Shakespeare's rejoinder to the "Look how your justice rails at you thief", "Which is the justice and which the thief" may be apposite here.

10. Prison.

The differential class based treatment of the "offender" is even transported into the prison system itself.

The result is that the poor, uneducated or minority group offender is likely to be relegated to the scrap heap in prison whereas the white collar criminal or professional class criminal, even in gaol, will be able to manipulate the system to his/her advantage and well being.

The pre-requisites for outside courses offered at Malabar Training Centre, for example, are all of the type that work to the advantage of prisoners who come from middle or upper class backgrounds and to the disadvantage of those who come from poor backgrounds. Such things as the opportunity to study at technical college has as a pre-requisite: the necessary formal qualifications of either school or higher school certificate or intermediate or leaving certificate qualifications. The evidence before the Royal Commission given by Mr. Bob Jewson is in point here.

The classification procedure in prison is such that aptitude and educational qualifications are key criteria in gaining admission to certain minimum security institutions (e.g. MTC) to do courses. Defaulting solicitors and other white collar criminals with tertiary qualifications gain easy access to further educational opportunities in this manner (see the figures from Silverwater Works Release Centre.) Not only are educationally disadvantaged persons more likely to be the selective target of the criminal process but the institutional structures within prisons are geared to exacerbate this situation. Prisoners from working class backgrounds who do demonstrate an aptitude for tertiary studies are penalized if they attempt to utilize their knowledge in a political way to gain improvements in the living conditions and rights of fellow prisoners. An example of this is the harassment of P.A.G. prisoner, Brett Collins, who was prevented from continuing his tertiary studies by

prison authorities because of his activities in organising prisoners to an awareness of the Royal Commission itself, and awareness of the opportunity provided to them to put their grievances before the Royal Commission. This is only one of the many blatant examples of the way in practice education and other resources are seen as privileges to be withdrawn from so called troublesome or uppity prisoners. At the very least remedial educational opportunities should be available. The irony is that the selective law enforcement process and the discriminatory oppression of prisoners is (according to the authorities) supposed to be beneficial and rehabilitative for the prisoner.

11. Conclusion.

Crime is therefore a composite of:

(a) A legislative or judicial definition of some forms of behaviour as criminal, this definition being dependent on the political process.
(b) An act offending against or capable of being seen as failing within that definition.
(c) The selection and processing of a person committing that act by agencies of social control.

Our contention is that this composite process is both arbitrary and highly selective. Arbitrary in the sense that there is no fundamental moral social or religious frame work by which it can be justified and highly selective in the sense that in practice it operates in a clear cut way against certain groups and more particularly against working class and certain minorities.

The group thus selected and held up as criminals are a small unrepresentative, highly selected group who in general pose no more real dangers to society than any other group and considerably less than some "non-criminal" groups.