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Title:

Police powers in South Australia: an address to the S.A. Council of Civil Liberties

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TITLE: "POLICE POWERS IN SOUTH AUSTRALIA"

An Address by Don Dunstan to the S.A. Council
of Civil Liberties - 23rd April, 1970.

Before one can begin talking of Police Powers in our kind of society, one really needs to define the proper role of the Police. We have Police organizations to ensure that our criminal laws are enforced and, this being so, it is thus necessary in an argument concerning their powers to discuss the areas of human activity with which the criminal law should deal. I believe that the prime function of the criminal law is to protect our persons and our property. As Professor Norval Morris and Mr. Gordon Hawkins say in their recent book on Crime Control :-

"The criminal law is now engulfed as a mass of distracting, inefficiently performed legislative duties. When the criminal law invades the spheres of private morality and social welfare, it exceeds its proper limits at the cost of neglecting its primary tasks. This unwarranted procedure is expensive, ineffective and criminogenic."

They go on :-

"For the criminal law at least, man has an unalienable right to go to hell in his own fashion, provided he does not directly injure the person or property of another on the way".

Very few intelligent people these days would argue that our criminal law is an efficient instrument for imposing the good life on others. Any simple criminological study would prove quite the opposite. In fact in many areas the criminal law as it now stands creates quite distinct human and social damage. But in particular, at the moment we find under our

laws that police officers are required to care for the private morals and welfare of citizens in matters on which those citizens are harming no-one else and on which they have the right and the ability to decide whether they are harming themselves. The State does the deciding for them. For instance, if a man decides to get drunk and harms no-one else, if he is not offensive in his behaviour or violent, if he is not creating a nuisance to other people, the criminal law really should have no proper right to deal with him. It certainly can be argued on the other hand that the State should provide adequate welfare services to assist people who, for instance, might be chronically alcoholic, but, even then, it has been shown repeatedly that where someone is in the grip of alcoholism, compulsory treatment achieves nothing. Unless the alcoholic wishes to make a change, no change is effected. But for simple drunkenness, the only real objection could be an aesthetic one, and no-one would surely hold that the criminal law should concern itself with aesthetics. It is clearly an intrusion upon the rights of citizens for the State to hold the drunks parades in the courts that we now have almost daily - it is clearly also an intrusion into private citizens' rights to have Police paddy wagons touring cities, or to have our policemen asking citizens to step outside a bar with the object being to test out the drinker's uprightness. If the poor man weaves or stumbles across the bar room floor, he is arrested for drunkenness in a public place. He has not interfered with anybody. He has not been a nuisance. The whole operation in this matter is a gross waste of public monies and Police time.

Then to the matter of gambling. My personal view, and I stress this is a personal one, is that if people wish to gamble then the law should not intervene. As we all know, both illegal and legal forms of gambling take place very widely in the community now. In fact, the occasional poker party

where more than matches are swapped, is well known even within the hallowed halls of this learned university, and yet were a police officer to discover it, the citizens concerned would be hauled before the courts because the State would say that it was the duty of the Police to protect these unfortunate miscreants from themselves. People should have the right to lose their own money.

Then again, there is the matter of citizens' rights to read or watch what they choose. If people want to read material which is shocking and offensive to others, or to observe actions which may be shocking or offensive to others, why should they not do so? The point is that they should be able to so long as they do not force on others what to others would be shocking and offensive. The law has no business in the matter. What an extraordinary spectacle we had recently in Adelaide in this regard. In order for Adelaide to see a play that has been running for several years in major centres of the English-speaking world, the actors prior to the public performance of the play had to perform it for the sole convenience of the South Australian Attorney-General. Seated in the theatre, script and torch in hand, our South Australian version of the Lord Chamberlain - a position now abolished in England - apparently considered that he himself was strong enough to withstand any temptations which the language of the play might put in his way, but decided that the Police would have had to take action if there were not removed from the script four-letter words meaning "excretion". On the other hand, he felt that the community, as well as he, could quite easily withstand the depraving influence of four-letter words meaning "copulation". Accordingly, one must now presume that the community is being protected from dangerous anal fixations -

despite the fact that the word in question is one of the oldest in the language, and one of the commonest in bars across the land. The case is Mother Grundyism rampant. Now what business have the Police in this matter? They should have none. Our criminal law as a whole is a series of illogical and inconsistent provisions that were the product of 19th Century repressions, and have no place on the statute books. Take as another example the laws which restrict the private sexual behaviour of consenting adults, including forms of sexual activity between husband and wife. The Canadian Prime Minister, Mr. Trudeau, has aptly described the situation when he said "The State has no business in the bedrooms of the people". When reported by the press as having been seen dining with an attractive lady in a London restaurant, he went further, "The people have no business in the bedrooms of the State" he said. But that is another matter. But in consequence of all this, I believe that there is a very considerable area of the present criminal law which is a hangover from attempts made in the past two centuries to use the criminal law not to protect persons or property, but to enforce quite particular rules of private conduct that do not in any way involve other persons or the property of other persons. And we should make a clear distinction here. Members of society may pass judgement upon the morality of other people's behaviour. But they have no right to enforce rules upon others which do not involve the protection of person or property from harm by others. If in fact the criminal law were revised in a way that made its proper job the protection of persons and property the social advantages would be considerable. In particular, we would have our present Police Force released from a good deal of activity which is now ineffective. It would be able to pursue its prime function of guarding us from physical harm much more efficiently than it can now.

But it is not only the substance of the criminal law which ought to be altered and thereby, of course, what the Police do. The methods of law enforcement need revision. We should ensure that private citizens are free from unwarranted intrusion. At the moment, sophisticated bugging and visual intrusion devices can be lawfully used by the Police without any control whatever. The most private thoughts and expressions of people in their own home, and not involving others, can be monitored by Law Enforcement Officers and filed regardless of whether those thoughts had anything at all to do with criminal matters. An enormous amount of data can now be collected on file about citizens, simply to enable the Police to pass judgement on the character and private behaviour of people and to thus concern themselves with matters that are none of their business. Files do already exist on actions of citizens which have not involved breaches of the law. I have seen them. Furthermore, South Australia unfortunately and to our shame, still retains in the Police Offences Act provisions for the use of general warrants. These allow Police Officers to whom these warrants have been given to enter and search any building or vehicle and to search any person. The Police are not required to show cause for this intrusion before they obtain the necessary authority. General warrants are directly in opposition to the principles of the British Law that hold that Police Officers should first have cause to suspect that there is evidence obtainable relating to a serious crime before they apply for a warrant to search, and then ^{that} they should be required to obtain a warrant by evidence on oath to an independent judicial authority. Then there is the matter of Police questioning. Again in South Australia justice and civil liberties are at a disadvantage. In South Australia, no-one is obliged to answer Police questions other than by giving one's

name and address and truthfully answering who was driving a particular motor vehicle.

But in contrast the present practice in relation to Police questioning is most unsatisfactory. It is certainly not in accord and with the normal practice of British Law. In this State, a Police Officer may request that a citizen accompany him to a Police Station. Having heard the request the average citizen does not realise that he does not have to comply unless the policeman has actually formally arrested him on a particular charge. If the policeman says: "I want you to come with me", the average citizen thinks this is a command rather than a request and usually goes. At the Police Station, he is questioned on a variety of matters, but until the Police Officer actually makes a charge against the citizen, the officer does not have to caution the defendant or tell him he need not answer questions. Even if a defendant is cautioned in a Police Station, he normally does not appreciate entirely his freedom in the matter and his words and caution are thrown to the winds. The citizen in these circumstances in South Australia is often then subjected to lengthy cross-questioning. He has stories allegedly told to the Police in his absence put to him without knowing whether he has been told the truth or not. The statements he then makes to the Police are not usually in South Australia produced in writing and put before him to check and sign afterwards. In effect, after lengthy questioning, he is put in a cell, remanded in Court next day, and the first he hears of the Police account of what he had said is when a Police Officer goes into the box and is allowed by the Court to read from a brief which may well have been written and typed sometime after the accused had left the officer's office. There is no means of the defendant's checking on the account which is given of his statement or the language he is alleged to have used. And this, of course, is entirely contrary to the

provisions laid down by the English Judges as to the rules to be followed in fair questioning by Police. While those rules are generally followed elsewhere in the British-speaking world, they are not in Australia. From my experience of the law, this is a most unsatisfactory situation even when a Police Officer is endeavouring to be objective. If an officer had formed an opinion about the guilt of the accused, his object is to get a conviction. And unfortunately, and even understandably, his own unconscious motives may lead him to suppress or construe the statements of the accused in such a way that the bias is heavily and perhaps wrongly weighted in favour of conviction. Conviction can often hang on a word. There is a further matter on which Police have rights of intrusion upon the ordinary citizen which, in South Australia, go far too far. If a citizen is obstructing a public way preventing other people from moving along it - if he is committing an offence, harming other people or their property - if in fact he is gathering with other people so that it appears that harm to citizens or property is likely to occur - then it is reasonable for a Police Officer to have power to require a citizen to move along.

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But the Police powers in South Australia are much wider than this. Under the provisions of the Lottery and Gaming Act, which was designed to allow policemen to remove nitkeepers from S.P. Bookie establishments, a policeman may say to any citizen "Move along". He does not have to give a reason for the command. He does not have to have one. In South Australia, refusal to move on when a policeman orders you to do so, even 'though the moving on may prevent you from going about the quiet and orderly conduct of your private business is an offence. This power exists so far as I know only in South Australia of all the Australian

States and is far too wide for the needs of proper Police control for obstruction or riot. In all these ways, then, I believe the law should be amended. We need to have in South Australia a complete revision of the substance of our criminal law and this should follow a public enquiry on the recommendations of a Commissioner. At the same time we should alter the laws relating to Police activity and powers, to ensure that the rights of private citizens are maintained. We must ensure that Police are able to do their job properly and if all these things are done then Police activity will be effective in its proper role.

There is one other point I would like to make in relation to the matters I have discussed tonight. Organisations such as the Council for Civil Liberties are, I believe, important in a community such as ours, because they indicate that there is a body of people who have specifically concerned themselves with questions that are fundamental to the community's health and vitality. They are questions that involve and should concern all politicians - they are questions that lie at the core of democratic ideals. Many of the changes that are needed in our society can only take place in a social atmosphere marked by intelligence, calm, and rational discussion, and it is such organisations as yours that can help to create such an atmosphere. Therefore I thank you for giving me the opportunity of speaking to you tonight. Police powers are essential in an ordered society - essential to preserve and defend people's rights to their property and from physical harm. They should be framed in relation to principles of common justice and humanity - it is every citizen's task to see that this is so.
