Comparative Perspectives on Australian-American Policing

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Australia shares much in common with the United States. Policing in both countries has been influenced by the British constabulary model which is based on a professional civilian force sworn to uphold the law, prevent crime and keep the peace. A significant difference between the two systems, however, is that Australian policing is more centralized with law enforcement agencies exercising jurisdiction on a state-wide rather than municipal basis, and often policing across vast territories. For example, the Queensland Police Service


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is a state-based force comprised of 10,458 sworn police and 4109 other staff (Queensland Police Service, 2011), operating within a land mass and coastal area nearly seven times larger than Britain, and into which the state of Texas (second largest in the United States) would fit comfortably!

Policing in Australia, in relation to both structure and function, is a product of its history and in particular its colonial past. The east coast of Australia was claimed first for the British Crown in 1770 by Captain James Cook. The colony of New South Wales was founded in 1788 as a penal settlement, providing an alternative destination for convict transportation following the American War of Independence. Although founded as a penal settlement, New South Wales inherited the common law and statutes of England, which were administered through civil and criminal courts. The responsibility for law enforcement was assumed first by military officers exercising civil jurisdiction, and then by magistrates or justices of the peace, aided by constables conscripted from the better-behaved convicts and free settlers (Neal, 1995).

Newly arrived settlers and emancipated convicts (who had been granted their ‘ticket-of-leave’) migrated westwards, an exercise that proved costly for the Aboriginal inhabitants whose lands and laws they displaced, assisted by colonial administration and its imperial ‘civilizing project’ (Ford, 2010). Much like the suffering of Native Americans during the westward expansion of settlement in the nineteenth century, Australian Aborigines were increasingly displaced from their own lands, pressed into confined territories and placed under the authority of the ‘protectorates’ which severely diminished indigenous autonomy. In this process of dispossession, colonial police were obliged to play a frontline role, sometime forcibly removing Aboriginal people from their traditional lands, families and communities. In some colonies Native Police were established, employing Aboriginal trackers who were placed under the control of white officers drawn from a military background, policing crime and Indigenous-settler violence on the frontier. This paramilitary style of policing, associated with many fatalities in frontier conflicts, had long-lasting impacts on relations between police and Aboriginal people (Richards, 2008).

The population of Australia grew significantly over the course of the 19th century with the establishment of further colonies. Penal migration continued in large numbers to the 1860s, bolstered by free settlers (mostly British and Irish) drawn by the prospect of agricultural wealth and periodic gold rushes. The new Australian colonies were characterized by centralized government, a tradition that necessarily shaped the organization of its policing. In contrast with the localized (and relatively small) police forces in the United States and United Kingdom, Australian police forces were organized on a colony-wide basis. Modeled on both the London Metropolitan and Royal Irish Constabularies, these forces administered vast inland territories, ranging from the capital cities located on the coast to remote frontier settlements. Policing functions included crime prevention and detection, as well as routine policing of the cities, towns and rural populations. Police were also charged with a wide range of administrative and local government functions,
attending to the needs of the ever-expanding bureaucratic colonial state (Finnane, 1994). Those roles included acting as ‘protectors’ in the Aboriginal Protectorates, meaning police had both conventional law enforcement as well as welfare roles in their relation to Australia’s indigenous peoples.

In spite of the convict origins of Australian settlement, violent crime decreased markedly throughout the nineteenth century. The generally peaceful character of Australian urban life owed much to the country’s prosperity, uneven though that was, but may also be attributed to the effects of constant policing and surveillance over its ‘suspect populations’. Outside the cities and towns, colonial life was notoriously vulnerable during the mid-nineteenth century to armed robbery and banditry at the hands of “bushrangers”. In the early colonial period these outlaws were typically escaped convicts, though in the later decades, the outlaw life attracted young men, often from poor rural communities, epitomized by the most famous, Ned Kelly and his gang. Police forces in both New South Wales and especially Victoria struggled to deal with bushranging, and police powers and practices were shaped by the demand to meet that challenge.

At the close of the 19th century, the strong political push toward Australian nationhood resulted in the federation of the six independent colonies of New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia into the “Commonwealth of Australia”. Coming into existence on January 1, 1901, the Commonwealth incorporated 6 States (from the original colonies) adding further territories including the Australian Capital Territory (in which the nation’s capital, Canberra, was located) and the Northern Territory. The Australian Constitution, which drew its inspiration in part from the US Constitution, could only enact laws directly supported or incidental to an enumerated constitutional head of power, or where the States expressly referred these powers to the federal parliament, which is a rare occurrence. The effect was that responsibility for criminal law and policing remained at the State rather than federal level.

Fast forward to 1986. Nearly two centuries after the arrival of the First Fleet in Botany Bay, Australia severs the remaining constitutional ties with the United Kingdom. As a result of this constitutional separation, achieved through legislative reform rather than by revolution, Australia asserts its status an independent nation-state, albeit with close legal, political and cultural, ties to the United Kingdom, expressed above all in the country’s enduring status as a constitutional monarchy. The British head of State, Queen Elizabeth II, remains the Queen of Australia.

As in the United States, the story of Australian law enforcement in the 20th century tracks the growing expansion of federal power. Using constitutional powers relating to customs and external affairs, the newly created federal parliament enacted the *Customs Act 1901*, which provided the legal basis to criminalize a wide range of drugs. The fact that ‘crime knows no borders’ requires Commonwealth agencies, including the Australian Federal Police and Australian Crime Commission, to work alongside State police forces, though in some tension with them. The gradual creep of federal power in Australia shadows the similar expansion of
federal law enforcement achieved under the leadership of the FBI by J Edgar Hoover. In both systems this expansion necessarily came at the expense of State law enforcement, generating conflicts over jurisdiction and between agencies. In both Australia and the US, a further boost to federal power was driven by the “War on Drugs” from the 1960s onwards, with United Nations treaties relating to the suppression of drugs providing the catalyst for the creation of new drug offences, law enforcement and confiscation powers. The external affairs power in the Australian Constitution (which permits ratification of treaties) has also provided the constitutional basis for enacting a range of international crimes into federal law, including war crimes, terrorism, and organized crime. Post 9/11, federal terrorism offences were enacted using the ‘defence power’ in the Constitution, as well as the States referring its powers to the Commonwealth. In the investigative arena, federal parliament used its powers in 1979 to regulate “postal, telegraphic, telephonic, and other like services”, to grant wiretap powers to a wide range of Australian law enforcement agencies. Initially limited to federal crime and the Australian Federal Police, interception powers have been extended to all State law enforcement and anti-corruption agencies, and extend to stored electronic communications, such as email and SMS.

The mish-mash of overlapping laws at the federal, State and territory level in Australia promotes high levels of diversity in law enforcement, though some aid to uniform approaches has been exercised for more than a century by the regular Conference of Police Commissioners. The courts have also played a significant role in promoting uniformity, especially the High Court of Australia (equivalent to the US Supreme Court). As the final appeal court in federal, State and territory law, the High Court has final say on the common law and matters of statutory interpretation. Most significantly, the High Court has developed a unified legal model - “the common law of Australia” - that applies uniformly across every Australian jurisdiction. This contrasts with the United States Supreme Court’s approach that recognizes that each individual State has its own separate and distinct system of common law. In the United States, it has been constitutional law rather than common law that has been the more powerful tool for promoting uniformity in American criminal law and procedure, particularly through the Supreme Court’s use of the Bill of Rights to declare State law to be unconstitutional. By contrast, and somewhat anomalously, Australia lacks an entrenched constitutional Bill of Rights. As a result, due process is protected largely through local State rather than federal law.

Judicial efforts to promote uniformity have been bolstered further by the Model Criminal Code project. In the 1990s, a Model Criminal Code was drafted for Australia. Implementation however has been patchy, with most up-take at the federal rather than State level. This is yet another striking parallel and contrast with the highly regarded and influential US Model Penal Code (MPC) developed by the American Law Institute in the 1960s. The MPC has been more successful than its Australian counterpart, with more than three quarters of US jurisdictions
adopting it wholesale. By contrast, the States in Australia seem to maintain steadfast resistance to uniformity through codification, including notably the most populous States of New South Wales and Victoria, which (together with South Australia) adhere to the British ‘common law’ model where criminal law is found scattered across various consolidation statutes as well as in the decisions of the superior courts. In this respect, Australia is a federal system sharing much in common with the US, though still clinging, albeit to a diminishing degree, to its colonial legal inheritance from Great Britain!

References