URBAN INDIANS IN CRIMINAL COURTS

Indians in Cities

The urban migration of American Indians has accelerated in recent years. Oklahoma City now has an Indian population of 7360; there are 6575 Indians living in Chicago and another 5893 in Phoenix.[1] According to the 1970 census these cities rank fourth, fifth and sixth in Indian population.

The situation of Indians differs in each of these three cities. While they form a distinct minority in each city, they have a somewhat larger share of the population in Oklahoma City and Phoenix than in Chicago. In Oklahoma City Indians represent 2% of the total population; in Phoenix they make up 1% of the city population but in Chicago they are only 0.19% of the city's people.

Oklahoma has the largest Indian population of any state, distributed amongst more than sixty tribes. Most of these tribes were removed here from other states as pressure from white settlers moved the frontier westward. Oklahoma is known as the state without reservations and today most rural Indians reside in areas classified as 'former reservations'. Nevertheless there is Indian trust land in Oklahoma and the Bureau of Indian Affairs[2] has always recognized an obligation to provide services to tribes in that state. The Indian population of Oklahoma City is drawn from a variety of tribes but there is no detailed information about its tribal composition.

Most Indians in the state of Illinois live in Chicago. There are no Reservations in the state and no substantial rural Indian population. Most Indians have migrated to Chicago from other states. A survey by St. Augustine's Centre for American Indians showed that its 1968 clients were drawn predominantly from the Chippewa,

---

1 Bureau of Indian Affairs Statistics Division. Indian Population—1970 Census —States, Counties and Places. Unofficial estimates made by local Indians and others working in Indian communities put the totals at a higher figure in each city:

Oklahoma City	12,000
Chicago	From 10,000 to 16,000
Phoenix	11,000

2 Hereafter referred to as the Bureau.

Menominee and Sioux (Dakota) tribes. Places of birth reflected this tribal distribution: 46.6% were born in Wisconsin, 8.5% in Minnesota and 6.9% in South Dakota.[3]

Phoenix is the largest city in Arizona, the state with the second largest Indian population. There are twenty-one reservations in the state, including the home of the largest Indian tribe, the Navajo. The Salt River reservation (Pima-Maricopa tribe) immediately adjoins the cities of Scottsdale, Mesa and Tempe, which are in effect suburbs of Phoenix. The Gila River reservation, where other Pimas live, is also not far from Phoenix. Although no precise information is available it appears that most Indians in Phoenix belong to the Pima and Papago tribes; there are also some Navajos.

The Bureau operates an employment assistance programme (formerly called 'relocation') under which Indians are brought from reservations to certain cities for training and employment. But most Indians have come to the urban areas on their own initiatives, seeking job opportunities and a better life for their children.

The Bureau generally refuses services to urban Indians unless they are participants in the employment assistance programme. The legality of this practice is doubtful. The Ninth Circuit Court of Appeals held recently in *Ruiz v Morton*[4] that the Bureau was legally obliged to provide general assistance benefits to off-reservation Indians. The suit was brought by Papago Indians living in Ajo, Arizona about fifteen miles from the reservation. The decision has had little effect on practices of the Bureau. The government is currently taking it on appeal to the US Supreme Court.

Where the Bureau does not supply a needed service to an Indian, he must rely on services available to any citizen. The extent to which these general services are adequate for the special needs of Indians will appear.

Jurisdiction of the Courts over Indians

Law school courses on Indian Law are largely preoccupied with problems of jurisdiction. Certainly the question of which court has jurisdiction raises complex issues where reservation Indians are concerned. The appropriate answer may be a state court, a federal district court or a tribal court, depending on the circumstances of the case.

---

3 P Neog, R G Woods and A M Harkins, CHICAGO INDIANS: THE EFFECTS OF URBAN MIGRATION (University of Minnesota, 1970. Mimeographed) 6.

4 462 F 2d 818 (1972).

When city Indians are charged with criminal offences, however, there is generally no doubt that a state court has jurisdiction. Complex jurisdictional questions are largely irrelevant to this study, which focusses on the experience of Indian defendants brought before courts in Oklahoma City, Chicago and Phoenix. Selected aspects of the administration of criminal justice in those cities are examined and an attempt is made to compare the treatment of Indians with that of Aborigines in Australian courts.[5]

The hierarchy of state courts exhibits local variations. Oklahoma has separate district (county) and municipal courts whose respective jurisdiction depends on the nature of the offence charged. The courts which function in Oklahoma City are the three divisions of the municipal court and the district courts of Oklahoma County.

In Arizona there is an integrated statewide judiciary for courts of record only. The Supreme Court, Superior Courts and the Court of Appeals are courts of record, unlike the justice courts. Justice of the peace courts can hear cases involving traffic violations, petty theft, assaults (not amounting to a felony), breaches of the peace and misdemeanours.[6]

Illinois has a fully integrated court system. The Illinois Judicial Article, which became effective on January 1, 1964, abolished a myriad of pre-existing courts. The Circuit Court of Cook County (the county in which Chicago is located) operates at two levels—the municipal department and the county department. The city of Chicago comprises the first district of the municipal department. Chicago has an unusual system in that 'the practice, except in petty cases, is to take the prisoner not to the nearest judge, but to the judge to whom cases of that sort are normally assigned'.[7] Branch courts in Chicago thus are generally specialised courts rather than neighbourhood courts.

In each state there are, of course, appellate courts in which criminal appeals can be brought. This study focusses on the courts of original

---

5 Australian data is taken from E M Eggleston, ABORIGINES AND THE ADMINISTRATION OF JUSTICE, unpublished Ph.D. thesis, Monash University, 1970. In both the Australian and the United States studies information was obtained by searching original police and court records, supplemented by published statistics and interviews with a variety of people involved in the criminal justice process.

6 INTRODUCTORY MEMORANDA OF LAW FOR STUDENT INTERNS IN POVERTY LAW, Maricopa County Legal Aid Society, 1971. Chapters 1 and 2.

7 D H Oaks and W Lehman, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT: A STUDY OF CHICAGO AND COOK COUNTY (Chicago, University of Chicago Press, 1968) 13. Chapter 1 contains a good description of the Chicago court system.

jurisdiction, particularly the inferior courts, because of the nature of Indian involvement with the criminal law.

The Pattern of Indian Arrests

The high rate of involvement of Indians with the criminal justice system is not immediately obvious because the absolute figures are small. In 1970, for example, Indian arrests as shown in the Uniform Crime Reports amounted to 130,981 which was equal to only 2.1% of total arrests for all races.[8] When account is taken of the small size of the Indian population however, its disproportionate share of arrests becomes apparent.

In Illinois in 1970 Indians were responsible for 4,632 arrests representing 1.1% of total arrests, yet they make up only 0.1% of the population of the state. Expressed another way, Indians had a rate of 40,585 arrests per 100,000 population, compared with 2,204 for whites and 12,311 for blacks.[9]

Statistics available from other states also show that Indians are arrested far more often than their population size would warrant. In Phoenix Indians are about 1% of the population but they account for almost 20% of total arrests by the Phoenix police. In Oklahoma City there were 4,771 Indian arrests out of a city total of 27,287.[10]

The other striking feature of Indian arrest figures is the overwhelming importance of drunkenness as the occasion for an arrest. The Uniform Crime Reports record drunkenness as the most frequent offence for whites, blacks and Indians but for whites that offence represents a little over a quarter of all arrests, while it is responsible for over half (67%) of the Indian arrests.[11] Similarly in Phoenix in 1971 drunkenness was the most frequent offence for both whites and

---

8 CRIME IN THE UNITED STATES: Uniform Crime Reports 1970. (Issued by J Edgar Hoover, Director, FBI 1971) 131.

9 CRIME IN ILLINOIS 1970 (Illinois Department of Law Enforcement) 83, 86. The arrest rate per 100,000 population for Indians was calculated from total arrest figures in this publication and population figures derived from the 1970 Census. Other studies have similarly pointed out the very high Indian arrest rate. See Omer Stewart, *Questions Regarding American Indian Criminality, 23* HUMAN ORGANISATION, 61 (1964); C E Reasons, *Crime and the Native American* in C E Reasons and J L Kuykendall (eds) RACE, CRIME AND JUSTICE (Goodyear Publishing Coy 1972) 79.

10 Joseph E Trible, AN INDEX OF THE SOCIAL INDICATORS OF THE AMERICAN INDIAN IN OKLAHOMA. (Office of Community Affairs and Planning, State of Oklahoma 1972) 255.

11 CRIME IN THE UNITED STATES, Uniform Crime Reports 1970. (Issued by J Edgar Hoover, Director, FBI (1971) 131.

Indians. For whites that offence represented a little over half the offences for which arrests were made while for Indians that offence alone accounted for 87% of arrests (5,060 out of a total of 5,793 Indian arrests).[12]

The extremely high rate of Indian arrests suggests that a study of the treatment of Indians in the criminal justice system is overdue. The predominance of drunkenness as the offence most often charged justifies the concentration of this study on the lower courts where that charge is heard.

Police, Sheriffs and Indians

The initiation of criminal prosecutions rests in most cases in the hands of the police or sheriff's officers, rather than with private citizens. In practice the police have considerable discretion in the institution of prosecutions. Thus they play a key role in bringing individuals into contact with the criminal justice system and in subjecting them to all its processes and the ultimate sanctions it can impose.

The very high rate of Indian arrests may be due to true criminality in the sense that Indians really do commit more criminal acts than other racial groups. Alternatively it might be explained by greater susceptibility of Indians to prosecution, either because of prejudice on the part of police officers who single them out for discriminatory treatment or because their life style makes them peculiarly liable to be arrested. They would share this latter disability with members of other poverty-stricken groups.

Complaints have been made that the police do discriminate against Indians as a racial minority. The American Indian Center in Chicago made a formal complaint to the Police Department that Indians were being arrested when white participants in the same activity were allowed to go free. It is also alleged that proper police protection is not being provided to the victims of white vigilante groups in the Uptown area, where most Indians live. These complaints are still under investigation by the police Internal Affairs Division.

Allegations have been made that Indians are arrested when a labour force is needed. It was the opinion of an informant in Phoenix

---

12 Statistics supplied by the Phoenix City Police Department. Traffic offences are not included. In the Australian study it was found that the whites committed traffic offences more frequently than any other offence. Inclusion of traffic offences in the US statistics might well increase the disproportionate arrest rate of Indians with respect to the 'crime' of public drunkenness.

that the city budget depended on public works labour being supplied by prisoners, many of whom were Indian. When the supply of prisoners fell short of labour needs, the instruction went out to arrest more and sweeps were made of the 'deuce' district, the local Skid Row. A senior police official in Phoenix informed me that prisoners who are 'trusties' working around police headquarters (about twenty men) are always Indians. (This, of course, is not an admission that Indians are discriminatorily prosecuted but is an indication of their usefulness to the police force.)

On the other hand, the general consensus was that police mistreatment of Indians was far worse in towns bordering reservations in Arizona than it was Phoenix. Similarly, there were few complaints about police conduct in Oklahoma City while many persons interviewed referred to severe discrimination by law enforcement agents in rural towns, particularly in western Oklahoma. The Indian leader of an activist social welfare group in Chicago said that he did not regard the area of police activity as having high priority for his organization whereas he would have felt bound to monitor the police in near-reservation towns in other states.

It is always difficult to assess the validity of complaints against the police and this is particularly true when the claim is made that police mistreatment results from racial prejudice rather than from the general tendency of the criminal law system to subject poor people to its workings in disproportionate numbers. What is clear is that Indians do share that disadvantage of poverty and of a lifestyle which involves drinking in public in the poorer areas of the city. These are the areas where arrests for public intoxication are made. Certain middle class whites may drink just as heavily as those Indians arrested for drunkenness but the former are more often allowed to return home even though found drunk in public; other affluent whites drink at home or in other private surroundings and thus avoid committing any 'crime' even though they may become extremely intoxicated.

An experienced attorney and part-time city magistrate gave the following testimony to the US Commission on Civil Rights sitting in Phoenix. 'Why are they arrested? I think the major reason is that the Indians generally are of an economic level that they can't afford memberships in country clubs or other private places, and as a result they tend to congregate in the downtown bars, and after they have been drinking for a while they come out and the police are standing right there with the wagon, and they just go from the bar to the

wagon to the police station. As to why they are arrested they are obviously intoxicated'.[13]

He did not agree that the police were influenced by racial prejudice in making so many arrests of Indians.

Whether or not all the allegations of police misconduct could be established by an impartial investigator, their mere existence has some significance. They represent a breakdown in relationships between the police and the Indian communities which have made the complaints.

The black community has pressed for more job opportunities for blacks on police forces, not just for the sake of the individuals employed but also to improve relations between the police and the black community. Real efforts have been made in recent years to increase the number of black police officers but the Indian community has not benefited from these attempts to increase 'minority' representation.

In Phoenix there is only one Indian policeman on the city police force.[14] Information is available for some Oklahoma state agencies which have police functions. The Department of Public Safety employs 9 Indians representing 1% of its work force; the Bureau of Investigation employs no Indians—its work force is entitrely white.[15]

A study of the Chicago Police Department found that 5 Indians were employed in a total work force of over 16,000 (less than 0.1%).[16] This study concentrated almost entirely on the position of blacks as employees and potential employees of the department, apparently a because it was initiated in response to a complaint by the Afro-American Patrolmen's League. The fact that the report was able to ignore the question of Indian representation on the police force to such a marked extent is symptomatic of the general attitude to Indian problems. The Indian has been called the 'forgotten American' and this label is even more apt when applied to urban Indians than to reservation Indians. Urban Indian communities are so small when

13 Testimony of Wallace Baker, Attorney-at-Law and part-time magistrate, City of Phoenix. US Commission on Civil Rights, transcript of hearing, Phoenix, Arizona, November 17 1972, 294.

14 Total police employees number 1387. City of Phoenix Employment Progress Report 1971-1972. Prepared by Phoenix Human Relations Department (1972) (Mimeographed).

15 Oklahoma Human Rights Commission. Survey and study: RACIAL AND ETHNIC COMPOSITION OF THE MERIT SYSTEM WORK FORCE (1971) 7, 9.

16 THE CHICAGO POLICE DEPARTMENT: AN EVALUATION OF PERSONNEL PRACTICES. Prepared for the Law Enforcement Assistance Administration, US Department of Justice by P M Whisenand, R E Hoffman and L Sealy (1972) (Mimeographed).

compared with total big city populations that they carry very little political weight. It may be also that authorities generally make the assumption that Indians in the cities have assimilated into the dominant population and are not aware of the extent to which they belong to separate communities with their own culture and system of values and therefore with different needs from other groups.

If more Indian policemen were employed relationships between police and Indians would surely improve even if, as must be anticipated, certain individuals turned out to be unsympathetic to their erring brothers.[17] Another suggestion for improving police-Indian relationships is to include race relations training in the police curriculum.[18] Another reform would benefit not only members of minority groups but all private citizens. The proposal is that complaints against the police should be investigated and reviewed by an independent, outside body rather than by the internal mechanisms of the police force itself.

Bail

After arrest, most defendants have a right to be released on bail. In Australia, police may fix the amount of bail initially. Statistics derived from a sample of 4,000 cases heard in ten Western Australian country towns in 1965 show that the percentage of Aborigines released on bail was smaller than the percentage of whites who regained liberty before trial (14.3% of Aborigines; 33.6% of whites[19]). This discrepancy was mainly due to the poverty of the Aborigines who were unable to raise the amount of bail required. But in some towns the police had a definite policy of not releasing Aborigines on bail. A blanket policy of not releasing Aborigines prior to trial is clearly contrary to law, since each individual case should be examined on its merits.

It was anticipated that Indians would also find it difficult to raise bail if they were required to deposit cash. Indians are undoubtedly

17 This reservation is included following my experience of offering a similar suggestion to an Aboriginal group in Australia. The president challenged my assumption that employing Aborigines as policemen would necessarily be an improvement. He said that the Aborigines already in the Victorian police force were most harsh in their treatment of Aboriginal defendants.

18 Here also caution is needed. An experiment in improving relationships between white and black policemen in Detroit misfired and produced a white backlash. Washington Post 27 March 1973, A17. There are alternative methods of race relations training available and care must be taken in selecting amongst them.

19 Eggleston, unpublished PhD thesis, 83.

the most impoverished minority group in American society.[20] But there has been a strong movement for bail reform in the United States aimed at reducing inequalities of treatment for rich and poor defendants. The Vera Institute in New York pioneered a project to increase the number of defendants released on their own recognizance without the need to produce cash or other assets.[21]

In Phoenix the city Human Relations Commission is conducting an experimental own recognizance programme based on the Vera Institute project. Statistics compiled by the Commission show that few Indians were released on their own recognizance under this programme, but of those who were, a high percentage appeared in court when required for the hearing. In the year from July 1970 to July 1971 only 19 Indians were interviewed by the programme. Programme interviewers believed that the fact that they saw only this small fraction of the total number processed through the courts was due to many Indians pleading guilty at arraignment. Therefore their cases were finalised before the recognizance programme could swing into action.

Examination of the records of the Phoenix Municipal Court does not confirm the information supplied by the Human Relations Commission. In a sample of 312 arrest records for the period 15 February to 2 March 1972 there were 31 Indian defendants. Of these 30 were charged with public intoxication and one was charged with 3 traffic offences. Indians were released on their own recognizance in relation to 27 of the charges of public intoxication. All were released within one day of arrest. In the remaining three cases bail was set (one at $72 and two at $79). All three defendants were released on bail and only one had to wait as long as two days from arrest before he was at liberty. The traffic offender was also released on a recognizance bond.

In the same sample there were 90 charges of public intoxication against non-Indians (not including some cases in which public intoxication was one of multiple charges laid against the same defendant). Of these 90 cases, bail was set (at either $72 or $79) for 21 defendants and the rest were released on their own recognizance. In all cases (except one which shows a delay of 11 days) release on bond occurred within 2 days of arrest.

On the evidence of this sample of public intoxication cases it appears that Indians are now treated favourably in relation to bail

20 'The Indian's yearly income average $1,500, is half the national poverty level'. Edgar S Cahn (ed), OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA (New Community Press, Washington, 1969), viii.

21 John V Ryan, *The Last Days of Bail*. 58 Journal of Criminal Law, Criminology and Police Science 542 (1967).

practice since release on own recognizance occurred in a larger percentage of cases for them than it did for other races. Their difficulty in raising cash bail appears to have been taken into account by the judges. But, though there is no evidence of racial discrimination, bail practice in Phoenix could still do with some improvement in relation to public intoxication cases. There should be no need to detain a defendant charged with this offence even as long as 2 days before trial.

It is difficult to explain the discrepancy between the Human Relations Commission figures and the court records. Persons interviewed who were familiar with the operation of the municipal court expressed surprise that the records showed many Indians released on recognizance bonds. It may be that these are bonds associated with suspended sentences rather than recognizances in lieu of bail.

The country Public Defender in Oklahoma City considers that the district court takes an unduly restrictive position regarding the setting of bail. Most indigents cannot afford to use bail bondsmen for the high amounts of bail set and few are released on their own recognizance. Another informant referred to a case in which a young Indian had $10,000 bail set on a relatively minor charge; a charge which the prosecution later dropped. Nevertheless, there is no evidence that this practice is aimed in discriminatory fashion at Indian defendants; it may affect them disproportionately because of the general poverty of the Indian community. The Public Defender does not appear for his client at the initial appearance at which bond is set.

Vista volunteers conduct their own recognizance programme in the municipal court. They interview defendants about their community ties and make recommendations to the judge that certain individuals should be released on recognizance bonds. There is no similar programme in the district court where bail practice depends entirely on the judge's discretion. One judge in that court handles all bail-setting functions.

In Chicago a sample of 282 cases heard in court branch 29 (a general misdemeanour court) showed that the majority of charges were for disorderly conduct.[22] These charges were laid under Chapter 193 Section 1 of the Municipal Code which covers public drunkenness

22 The original sample was of 350 consecutive file numbers of cases heard in September 1972. 68 records were unusable either because the file was missing or because the race of the defendant was not shown (some of these were commenced by summons rather than arrest). The 282 cases treated in the text constitutes the balance of the sample.

and other forms of disorderly conduct. Of the 143 white defendants prosecuted on that charge, 60 were released on cash bail; the remaining 83 were held in custody before the hearing. Of the 56 blacks charged with disorderly conduct, 23 were released on bail and the other 33 were held in custody. 15 Indians in this sample were charged with disorderly conduct; one was released on bail, the other 14 were held in custody. There were 21 charges against Puerto Ricans and Mexicans for this offence; 14 were released on bail, the remaining 7 were held in custody. Thus Indians had the lowest rate of release on bail for this offence.

For those held in custody before trial, the waiting period was not long. All Indians had their cases heard at the latest on the date following the date on which they were arrested. But no deprivation of liberty for however brief a period should be regarded as insignificant. In the case of public drunkenness there is a strong argument for taking matters out of the criminal courts completely. Deprivations of liberty would then only be justifiable on medical grounds and the period of custody would occur in some place other than a police cell. This question is discussed further below.

In the same sample there were 47 charges for other offences. As no Indian was charged with any offence other than disorderly conduct, an extended analysis of these other offences will not be undertaken. But it is worth noting that on these generally more serious charges 43 defendants were released on bail, often on the date of arrest. Only 4 defendants on charges other than disorderly conduct remained in custody throughout the pretrial period. Only one defendant incurred a substantial period of pretrial detention—a black who was held in custody for 48 days before trial. Thus the public drunkenness offender who poses the least criminal threat to the community often remains longer in custody than the person charged with a more serious offence. Even remaining overnight in a police jail is not a pleasant experience.[23]

Volunteer attorneys and law students operate the Cook County Special Bail Project in one of the Chicago courts at weekends. The criteria which are used for recommending release on own recognizance are similar to those established by the Vera project. A participant in the Chicago venture states there has been a marked increase in the number of defendants released on their own recognizance since the programme began. Even judges whose personal views are unsympathetic to the idea of releasing defendants on recognizance bonds under-

23 For a graphic description of the Seattle city jail see J P Spradley, YOU OWE YOURSELF A DRUNK (Little, Brown and Company, Boston, 1970), 148-170. Jails in other cities probably do not differ markedly from the Seattle jail.

stand that the law demands this action if there is a reasonable prospect that the defendant will later appear for trial. The presence of advocates who monitor the proceedings and compile statistics provides a strong incentive for a judge to overcome his personal prejudices and comply with the law.

This project does not operate in branch 28 or branch 29, courts through which many Indians pass, nor is a Public Defender assigned there. Bail decisions there are less controlled by the adversary process. This brief survey of bail practice in three cities is inconclusive on the question of whether the system discriminates against Indians. In Phoenix no such discrimination is apparent. In Oklahoma City the district court has not yet caught up with developments allowing a greater pre-trial freedom to defendants; the result is that most indigent defendants, including Indians, are unfairly detained before trial. Similarly in Chicago the Special Bail Project has insufficient manpower to cover all courts where its intervention would be useful.

Any deprivation of liberty before trial requires strict justification. The presumption of innocence leads to a presumption that a suspect should be free at least until he is convicted. His right to liberty can only be overridden by the interest of the state in having him available for trial and there must be strong evidence that he is likely to abscond before his detention can be justified. The doctrine of equal protection forbids the use of money bail as the sole means of ensuring the appearance of a defendant. Own recognizance bonds offer indigent defendants an alternative method of gaining freedom before trial. Programmes which encourage judges to make greater use of recognizance bonds are clearly in accord with the law regulating bail. It is equally clear that some judges will not change old habits of setting unnecessarily high bail unless they face a sustained campaign of education and advocacy. Education of indigents about recognizance bonds should also help them to stand up for their rights. Indians will benefit along with other poor people for many changes which occur in the way bail is administered.

There is an additional consideration in the case of persons arrested for public drunkenness. Here the purpose of pre-trial detention is often really detoxification and protection of the alcoholic defendant from harm which might befall him if he were not taken into custody. Such detention might well be justified, at least on social grounds if not according to strict legal theory. But the provision of detoxification centres as alternatives to police jails appears to make more sense in terms of social needs and legal principles.

Alcoholism: criminal offence or health problem?

So far the situation of the Indian charged with public drunkenness has been examined within narrow limits, as if it is an immutable fact that appearing drunk in public will continue to entail subjection to the criminal process. The only reforms suggested have aimed at improving the operation of that process. But a more fundamental issue needs to be faced: should public drunkenness be dealt with by the criminal law at all? A negative answer to this question if put into effect would immediately substantially reduce the criminality of Indians.

A description of the current system as experienced by the alcoholic defendant might help make the issue clearer. The Monroe Street court (branch 28) in Chicago holds a 'Skid Row court call' at 8.30 a.m.[24] About 105 men are seated in the courtroom before the judge arrives. The defendants include 7 American Indians. The judge takes his seat, the clerk begins to read the names of the men who have all been arrested for public drunkenness. They step forward to stand in batches of 9 men at a time before the bench. There is no pretence of following the normal procedure of a court of law. The charge is not read to the defendants, nor are they asked to plead nor are they informed of any constitutional rights. The judge looks over the group, insisting on seeing any men who are hidden from his view, then asks if anyone wants help. A few men ask to see the social worker, who is attached to the court. Most are simply released by the judge and the court records will show that permission to file a complaint was denied. On its face this appears to be a denial that these men were subjected to the criminal process at all but, of course, they have spent at least a few hours if not overnight in police custody. In a few instances the judge asks the social worker to interview a defendant, even though he himself has not requested help. Sometimes the judge refers a man for psychiatric examination, which means he will be held for three weeks.

Of 105 men present in court on the day I observed proceedings, about 15 were seen by the social workers. Most of the others were sent away from court without any further action being taken. All the Indians were discharged. Indian defendants rarely ask to see the social worker and he has found it difficult to get to know any of them. In this they differ from the other racial groups brought before the court.

---

24 From fieldwork notes. The court session was observed in March, 1973.

The entire Skid Row court call took about one hour. Although it was held in a court room and was presided over by a judge, it had few of the usual trappings of the administration of justice. One might object to it as a perversion of justice since the men were not given any opportunity to plead not guilty, nor was there any suggestion of any adversary process in which evidence was led against them and they were given an opportunity to rebut it. But such objections miss the point. The proceedings can instead be seen as a frank recognition that the problem of Skid Row men is not appropriately dealt with under the criminal law. It is rather a medical problem (as witness those men referred for psychiatric or medical examination) or a social problem (the remaining men were presumably locked up the previous night to remove them from the affronted gaze of the public or to provide helpless alcoholics with protection from the weather or other danger).[25] If these are the real reasons why Skid Row men are arrested it might well be asked why any vestiges of criminal procedure remain. Why are not the men approached through a procedure which tackles their problems more directly and avoids entirely the necessity of holding them in police jails? If the men have medical problems a hospital setting is more suitable for treatment than a jail; if they are removed from the street for the protection of the aesthetic sensibilities of the public, they need not be regarded as criminals who must be locked up; if they are taken into custody for their own protection, it does not follow that protection must be provided in a police setting.

The Monroe Street court is typical of courts throughout the country in its assembly line processing of alcoholic derelicts. It is extreme in its rejection of legal forms; in most courts an attempt is made to keep up appearances by dealing with defendants on an individual basis and reading them their rights (though in most cases the defendants well know that they are not expected to assert those rights).[26] Monroe Street

---

25 Compare Nimmer's description of two Skid Row areas in Chicago, Madison Street (from which cases are taken to the Monroe Street court) and State Street. Police motivations for arrest differ in the two areas. 'On Madison Street, the public drunkenness problem might better be labelled "derelict and helpless" while on State Street, the appropriate label would be "derelict and unsightly".' Raymond T Nimmer, Two MILLION UNNECESSARY ARRESTS. (American Bar Foundation, Chicago, 1971), 56.

26 See the description of Seattle court procedure in James P Spradley YOU OWE YOURSELF A DRUNK (Little, Brown and Company, Boston, 1970), 173-175. Spradley points out the risks run by men who plead not guilty (181). In theory they have the 'right' to plead not guilty but assertion of this right frequently entails more disagreeable consequences than a passive plea of guilty.

is more benevolent than many courts in certain respects; most defendants are not detained in custody beyond the first court appearance. The Chief Judge has advised Chicago judges to adopt a policy of not incarcerating alcoholics. By contrast, Spradley reports that in Seattle, 'as recently as 1966, men were receiving sentences of six months for drunk convictions.'[27] The fact that a social worker is always available at the Monroe Street court also means that an effort is being made to deal with the men's real needs. There is no longer a social worker at branch 29, the Chicago Avenue court, another court which processes many alcoholics, including Indians. No Public Defender is stationed at either court. Since these men do not run any real risk of imprisonment there may be no obligation on the state to provide them with free legal representation.[28] Nevertheless the services of an advocate would be useful in challenging any abuses of the men's rights which occur in the arrest and pre-trial detention stages of proceedings. A social worker is not in a position to take effective action when men complain that they have been beaten by the police or that the police have stolen their pension cheques.

The validity of any particular complaint of police mistreatment is difficult to assess. The persistence of similar complaints by Skid Row men in different parts of the country (in Chicago as in Seattle)[29] suggests that there will always be some policemen ready to take advantage of the powerlessness of Skid Row alcoholics.

The objections to existing pre-trial practices in Chicago rest on the unnecessary humiliation and abuses imposed on men against whom the only allegation of 'crime' is that they appeared drunk in public. Society's response seems inappropriate and excessive. In Chicago there is no serious problem of post-trial treatment since most of these men leave the courtroom without a conviction having been recorded against them. But in other cities where prison sentences are imposed on public drunkenness offenders other injustices occur.

A private attorney in Phoenix filed writs of *habeas corpus* on behalf of two Indian clients challenging police practices in the local jail. His male client had escaped from custody by walking away from his outside job while employed as a trusty. After his later arrest he was placed in the 'rabbit tank' (the communal cell where escapees are

---

27 James P Spradley, op cit, 176.

28 Technically imprisonment cannot be imposed for this offence in Chicago.

29 There were many reports of police theft and brutality in Seattle. James P Spradley, op cit, 144-5, 148-9.

confined). The rabbit tank was even more uncomfortable than other cells in the jail. Its inmates were forced to sleep on the cold concrete floor. They were not eligible to serve as trusties but were rquired to spend the entire length of their sentence within the rabbit tank. The attorney's argument for the Indian prisoners rested on the idea that public drunkenness is a status offence; that offenders are being punished for 'being' alcoholics rather than for 'doing' anything wrong. This argument failed and his clients remained in jail. But the legal action was followed by an improvement in conditions in the city jail.

There is general agreement in the literature that public drunkennness should cease to be a criminal offence and some other method of dealing with Skid Row men should be adopted. Often the alternative takes the form of setting up a detoxification centre to which the police can take men instead of arresting them and placing them in police cells. Chicago had such a facility for a period until its federal grant came to an end. It operated quite well and the police were generally in favour of it. Although it had the effect of reducing the Skid Row court call by only about five men per day it was successful in diverting those men most urgently in need of medical treatment. Arizona has now accepted the philosophy of decriminalizing public intoxication. The relevant legislation will come into effect on 1 January 1974.[30] Detoxification facilities (known as Local Alcoholism Reception Centers) are now being set up and there is already apparent in the courts a new approach to the public drunkenness offender. The Chief Judge of the Oklahoma City municipal court would personally like to see a change in the law so that public drunkenness is no longer a criminal offence but so far there is no concerted move in that direction in that city.

Some writers have emphasized that the Skid Row problem should not be defined only in terms of alcoholism. The current practice of arresting men under that rubric tends to lead to the conclusion that we are dealing with people who are unable to control their drinking; hence the focus on detoxification in proposals for reform. Spradley demonstrates convincingly that, though 'drinking in public, or drunkenness, is illegal . . . the real crime of these men is that they do not work regular hours, they dress in old clothes, they bathe less frequently than most other people, and they sleep under bridges and in alleys'.[31]

30 Arizona Laws 1972, Chapter 162.
31 James P Spradley, op cit, 121.

Nimmer argues that Skid Row arrests may properly be terminated before alternative services are provided to the men; when alternative services are provided they should respond to the real needs of the men, including but not confined to their need for detoxification.[32]

This discussion of the Skid Row defendant has so far made little reference to the specific position of Indians charged with public drunkenness. But it is very relevant to the whole question of the administration of criminal justice as it affects urban Indians. It has been shown that the overwhelming majority of Indian arrests are for public drunkenness. It is true that only some of these Indian defendants may properly be characterized as belonging to a Skid Row community. But the way they are treated by the legal system shares the general features of the treatment of Skid Row men. Spradley believes that Skid Row Indians in Seattle in many ways are considered beneath others. 'The worst threats and discrediting labels appear to be reserved for those who have a racial identity which is sometimes not respected in American culture'.[33]

He shows that one of the main strategies used by tramps to avoid landing in jail is to make themselves 'invisible'.[34] It is even more difficult for Indians to lose their visibility than it is for poor whites.

Many Indians display the typical recidivism pattern of the chronic public drunkenness offender. They are frequently processed through the 'revolving door' of arrest, court appearance, jail, release, arrest and so on. Some individuals have compiled unenviable records of arrests. One Indian in Phoenix, for example, has been arrested more than 200 times and appears to the police to be more at home in the jail than outside. Oklahoma City municipal court statistics demonstrate that more Indians than members of other races fall into the recidivistic class. In January 1973 there were 1,095 whites arrested once and 17 arrested twice or more within the month. There were 322 blacks arrested once and 11 arrested more than once. But the Indian figures show 182 men arrested once and 27 arrested more than once.[35] In a sense this reduces the dimensions of the Indian alcoholism problem since it means that relatively few individuals are responsible for the massive arrest statistics.

---

32 Raymond T Nimmer, Two MILLION UNNECESSARY ARRESTS (American Bar Foundation, Chicago, 1971), 153-4.

33 James P Spradley, op cit, 142.

34 Ibid 127.

35 These figures cover males arrested for all offences.

Are Indians really more alcoholic than the members of other racial groups? It can be argued with some plausibility that arrest figures are not an accurate measure of the incidence of alcoholism but are rather a reflection of the visibility of particular defendants and their susceptibility to law enforcement officials. I have taken this approach to the question of Aboriginal drunkenness, arguing that no precise statistics are available as to the relative incidence of alcoholism in the Aboriginal and white communities.[36] Other writers have emphasized the Indian custom of drinking in company and in public. But this does not adequately explain the fact that Indian arrest rates for drunkenness are significantly higher than those for other minorities. Blacks are equally visible and are also victims of police harassment. They may not make their drinking so obviously public as Indians do, so that, as with whites, there is probably a degree of concealed black alcoholism. Nevertheless, it does seem that a gap remains between the rate of Indian heavy drinking and that of other racial groups. Gerard Littman has had long experience with alcoholics and now works at St. Augustine's Center. He considers that 'alcoholism is a severe and extensive problem among American Indians and is so regarded by most of them'.[37]

Indians face special problems which may account for the high rate of alcoholism. They suffer from severe material poverty which clearly often leads to feelings of anxiety and insecurity. City Indians face the difficulties of adjusting to a world very different from the reservation which they regard as home. Their alienation from the dominant culture can produce inner conflict.

Yet Ferguson describes two basic types of Indian alcoholics whose motivations for excessive drinking differ markedly.[38] In contrast to the 'anxiety drinkers' are 'recreation drinkers', for whom drinking is a means of expressing conviviality and group solidarity. They are not suffering from acculturation problems since they have no particular desire to join the dominant society. They respond better to treatment than the other group.

---

36 Paper presented to seminar on Aboriginal Health held at Monash University in 1972.

37 Gerard Littman, *Alcoholism, Illness and Social Pathology Among American Indians in Transition* 60 American Journal of Public Health 1769, 1771 (1970). After reading this article I have modified my views about Aboriginal alcoholism and believe I probably underestimated its extent.

38 F N Ferguson, *Navaho Drinking: Some Tentative Hypotheses,* 27 Human Organization 159 (1968).

Ferguson's study is confined to a group of Navajos involved in a treatment programme at Gallup, New Mexico. It may very well be applicable to other Indian groups. Even if all its findings are not directly transferable to Indians living in large urban centres, it does emphasize that different individuals drink excessively for very different reasons and these differences should be taken into account in any treatment programme.

Concern about Indian alcoholism has led to the initiation of a number of programmes. The American Indian Commission on Alcoholism and Drug Abuse in Arvada, Colorado, now coordinates programmes funded by the Office of Economic Opportunity and the National Institute of Alcohol Abuse and Alcoholism. These programmes have not been in operation long enough for any assessment of success to be possible. In spite of their short life they are already facing funding difficulties due to President Nixon's decision to abolish the Office of Economic Opportunity and generally to cut the social welfare budget.

In the three cities of Phoenix, Oklahoma City and Chicago little impact has yet been made on the problem of Indian alcoholism. In Phoenix none of the established alcoholism programmes or halfway houses is designed specifically for Indians. One halfway house was at one time even unwilling to accept Indian inmates because it had little success with Indians in the past. The Phoenix Indian Center conducts an alcoholism programme as one of its many activities. Without an Indian halfway house its referral options are limited. It also suffers from lack of funds.

The Native American Center was established in Oklahoma City as recently as December 1972. One staff member is an Indian expert on alcoholism and is conducting a programme mainly for young people. Another major feature of this Centre will be its medical clinic.

In Chicago official agencies have established no alcoholism programmes specifically for Indians. St. Augustine's Center, a social agency of the Episcopal Church, provides social services including alcoholism counselling to uptown Indians. The Centre serves over 1,000 persons per year. Many of its clients have alcoholism problems but few request help in changing their drinking habits.

Indian groups in Chicago have also taken the initiative in setting up alcoholism programmes but they are limited in the numbers of people they are able to reach. The American Indian Center's ADAPT programme survives recent internal disputes at the Centre. During 1972 it made contact with 330 individuals with a success rate of about 6%. Twenty-nine people were 'stabilized' (defined as gainfully employed

and no longer in need of services and maintaining that position for at least 90 days). The ADAPT director plans a meeting in the near future with court social workers to discuss expansion of the programme. He accepts the status quo as far as existing arrest and court procedures are concerned. All that he proposed is a method by which treatment can be offered to more Indians arrested for public drunkenness *after* their appearance in court.

The history of the Chicago American Indian Center has been marred by faction-fighting rooted in ideological differences. One of the breakaway groups formed the Native American Committee. This Committee operates the Native American Outpost which deals with alcoholism amongst other mental health problems. Staff members each have a small caseload and work intensively with their clients. They go out looking for clients since their information network within the Indian community lets them know who is in the deepest trouble. The Committee has a small staff; its funds are limited because it has deliberately avoided accepting government grants with strings attached.

No attempt has been made here to assess the qualitative success of these programmes. Information was not available to enable such an assessment to be made. No doubt in some cases the intervention of a programme has made considerable difference to an individual alcoholic. What is clear is that on a quantitative basis, existing programmes are inadequate. The large Indian alcoholism problem is not being met by any corresponding commitment of treatment resources. There is a large expenditure on law enforcement but it has been shown that concentration on this method of dealing with alcoholics is inhumane, inefficient and therefore wasteful of community resources. Alternative measures must be adopted and adequately funded.

The assumption of this discussion of treatment programmes has been that special programmes are needed for Indian alcoholics, that they should not just be left to take their chances in general alcoholic programmes. The justification for its view is that Indians are generally distrustful of whites and will open up only when they can relax in an Indian group. Ideally programmes should not only be targeted at an Indian group but should also be controlled and staffed by Indians. Indian staff are better able to understand the different cultural attitudes and values of the participants.

Indian residents at the Cheyenne-Arapaho Lodge (Rehabilitation Center) in Bessie, Oklahoma, agreed that they preferred this type of programme. It is conducted by the Cheyenne and Arapaho tribes at this small town about 90 miles west of Oklahoma City. Its director

and staff are all Indians. I visited the Centre with a non-Indian psychiatrist who avoids frequent visits as she believes the Indian community should run the programme to the fullest possible extent. In this setting Indian patients freely expressed resentment at instances of white discrimination. An interesting aspect of the programme is its relationship to the Native American Church which uses peyote in its ritual. In the non-Indian community peyote is a prescribed drug but Indians are permitted to use it in religious services under the constitutional guarantee of freedom of religion.[39] At the Cheyenne-Arapaho Lodge residents are encouraged to join in the services of the Native American Church. Evidently the belief is that religion will help to overcome alcoholism. Peyote is not being use as a substitute for the addiction to alcohol since the services are held only at monthly intervals. Although some of the staff of the programme strongly support its religious element, it is certainly not compulsory for patients to attend services.

Another interesting suggestion is made by Gerard Littman. Several tribes have changed from 'dry' to 'wet' reservations in order to exercise more control over community drinking. In the urban setting 'one should . . . explore possibilities for establishing a cooperative bar and grill run by and for Indians, with all the profits going to the Indian community . . . '[40]

Heavy drinking may be a way of coping with what would otherwise be an intolerably stressful life. It may be no kindness to an Indian to 'cure' him of his alcoholism if he still faces a precarious existence as a day labourer. Alcoholism needs to be tackled in a wider context, as a symptom of the material poverty and cultural stress of Indian communities. 'Treatment' would then be directed at reservation economies but within a framework of acceptance of Indian culture, so that Indians are not required to lose their identity as the price for improvement in their economic position.[41]

Indian leaders have demonstrated concern over Indian drinking problems; it is for the non-Indian community to enable them to take effective action by providing funds and moral and technical support without undue interference in the way they conduct programmes.

---

39 People v Woody 61 Cal 2d 716, 40 Cal Rptr 69, 394 P2d 813 (1964). See also 21 CFR E166. 3 (c) (3) and 21 CFR E320.3.

40 Gerard Littman, *Alcoholism, Illness and Social Pathology Among American Indians in Transition.* 60 American Journal of Public Health 1769, 1784 (1970).

41 I am indebted to Gerard Littman for reminding me that if alcoholism is a social problem its 'treament' cannot be conceived in narrowly medical terms.

Legal representation

Australian Aborigines find it difficult to arrange private legal representation because of their poverty. Legal aid programmes provide some representation for Aborigines but general schemes are limited in the services they offer.

Recently there have been strong moves in most Australian states to establish Aboriginal Legal Services. These should change the dismal picture of the study which found that in the majority of cases tried in the court Aboriginal defendants were unrepresented.[42]

The United States Supreme Court in the landmark cases of *Gideon*[43] and *Argersinger*[44] has recognized an extensive right to counsel in criminal cases. Any indigent defendant who faces a possible sentence of imprisonment is entitled to free counsel provided by the state whether the offence with which he is charged is technically a felony or a misdemeanour.

Two basic methods are used by American state courts to implement this right to counsel. In some jurisdictions permanent Public Defender offices are established, staffed by salaried attorneys, in others the appointed Counsel system operates—private attorneys are appointed by the court to represent individual indigent defendants.

Phoenix is served by the Public Defender of Maricopa County with a staff of 18 attorneys. There is also a Federal Defender who practises in the federal district court. His office is particularly important for local reservation Indians since their offences committed on the reservation are tried in federal court. The Federal Defender and his staff of attorneys have represented a number of Indian clients and accumulated some expertise in the filed of Indian law. They are unable to act for Indians accused of off-reservation crimes, however.

Oklahoma City has both a county Public Defender and a municipal Public Defender. The county Public Defender estimates that about 5% of his office's clients are Indian. He is limited to the defence of charges filed by the state for offences committed in Oklahoma County.

The office of the Municipal Public Defender has been in operation for less than a year. Of its first 400 clients, about 65 (16%) were Indians.

In Chicago the Public Defender of Cook County serves both the city and wider county area. There are 21 attorneys assigned to specific

42 Eggleston, unpublished PhD thesis, 173.
43 Gideon v Wainwright 372 US 335 (1963).
44 Argersinger v Hamlin 407 US 25 (1972).

city misdemeanour courts. As in so many other aspects of the city's life, Indians are lost in the crowd of clients. The attorney who heads the Public Defender's office for the city was unable to estimate the number of Indian clients represented by the office.

What does the existence of Public Defender offices mean to the Indian defendant? Does he actually share the benefits of free legal representation which are theoretically guaranteed by *Gideon* and *Argersinger?* One measure of his participation is his share of the Public Defender's caseload.

Even if he is unable to pay for a private attorney of his choice an Indian defendant may have access to sources of representation apart from the Public Defender. In some cases he benefits from the interest of private attorneys. The case challenging Phoenix public jail practices was brought by one such attorney who has a large Indian clientele.

In some cities the Bureau of Indian Affairs has made contracts with private law firms for the supply of a wide range of legal services. The pilot project operated in Los Angeles where the law firm chosen to do the work was Merdler and Gabourie. Gabourie is a Seneca Indian.[45]

Chicago is now the only city where such a contract survives, following Bureau redirection of resources even more emphatically to reservation rather than urban areas. The Chicago attorney employed under the Bureau contract has represented Indian defendants with notable success. An experienced criminal attorney, he spend one day a week at the Bureau office and usually two other days representing Indians in court. The Bureau interprets its mandate as extending only to participants in the relocation programme and refuses to pay for services extended to other urban Indians. The attorney states that he is available for consulation by all Chicago Indians and is willing to give them legal advice but he only appears in court on behalf of those within the Bureau's programme. Doubt about the Bureau's restriction of services has been expressed earlier in this paper but so far no Indian in Chicago has formally challenged its practice in relation to legal services.

Legal aid societies generally offer advice and representation only in civil cases. Some extend their activities to take on criminal cases. Legal aid societies will launch actions for civil rights violations. Thus

45 Fred Whitedeer Gabourie, JUSTICE AND THE URBAN AMERICAN INDIAN. Published by the Law Firm of Merdler and Gabourie (1971), 15.

they may appear for a defendant not on his defence to a criminal charge but when he asserts ill treatment by the criminal justice system.

The Legal Aid Society of Oklahoma County has one Indian attorney on its staff. Most of his clients are Indian. He used to handle some criminal cases in Oklahoma City but now is able to refer them to the municipal Public Defender.

The Northwestern Legal Assistance Clinic in Chicago is funded primarily by Northwestern University and handles both criminal and civil cases. It has represented a number of Indian clients, particularly those charged with what are essentially political crimes. It acted for Indians prosecuted for offences during sit-ins and other demonstrations at the Bureau office, at Nike sites and elsewhere.

A number of specialised Indian Legal Services programmes have been established since 1966 through the Office of Economic Opportunity.[46] These programmes have to function within OEO guidelines, which means that they are prohibited from defending criminal cases except in extraordinary circumstances.[47] Most are located on Reservations and have little relevance for the urban Indian. The Native American Rights Fund is a dynamic national Indian legal programme funded primarily by foundations and private contributions. It concentrates on major litigation of significance to large numbers of Indians.[48] For this reason, though it has no policy against defending criminal cases, it has not been involved in the day-to-day problems of Indian defendants.

The wide variety of sources of free legal services in the United States leads to the expectation that Indians would be more frequently represented than Aborigines are.

An examination of court records does not support this expectation. A sample of cases from Phoenix Municipal Court shows that in each racial group the majority of cases were unrepresented.[49] But the Indians were the group with the lowest rate of legal representation.

---

46 David Getches, *Difficult Beginning for Indian Legal Services* NLADA Briefcase (May 1972), 181.

47 Economic Opportunity Act of 1964 s 222 (a) (3), 42 USC 2809.

48 David Getches, op cit.

49 This sample represents part of the sample used in calculating the bail statistics. Because of difficulties in searching the records in relation to legal representation this item of information was obtained for only a sample of 184 cases. Too much reliance should not be placed on these statistics since court clerks do not always record the presence or absence of counsel. But the general consensus amongst informants is that most defendants are still unrepresented.

In this sample 13% of whites were legally represented; 21% of the black/Chicano group had a lawyer and no Indian had a lawyer. It might be thought that the explanation is that the Indians were all charged with public intoxication, an offence on which it is rare for a defendant to be represented. But 7 non-Indians charged with that offence were legally represented.

Similarly in the Chicago sample 8% of whites were legally represented; 6% of blacks had the benefit of legal representation; 25% of members of other races (Puerto Rican, Mexican and Oriental) had lawyers but no Indian had a lawyer.[50] Again it is fair to confine the sample to the offence of disorderly conduct. 5 whites were represented on that charge; and so was one Mexican but of these cases only one (involving a white defendant) was for the specific offence of 'drunkenness'. All 15 Indians included in the sample were charged with public drunkenness.

The low level of legal representation even after *Argersinger* does not necessarily mean that that case is not being implemented.[51] The decision recognises that the court is justified in trying an unrepresented defendant provided he has intelligently waived counsel.

Why would an indigent waive the right to free legal counsel? In some places, if he pleads not guilty and demands counsel he will have to spend as long as three weeks in custody awaiting trial even on a charge of public drunkenness. It is rarely worthwhile to take this course of action because the maximum sentence of imprisonment he can expect on conviction is often less than that pre-trial detention period. This fact is a strong inducement even to an innocent man to plead guilty.

Many alcoholics probably believe that it is useless to ask for a lawyer: 'what could he do for me anyway?' Many lawyers hold the same view. But experience in New York City shows that the introduction of attorneys into the mass production processing of public drunkenness cases can have a marked effect.[52] There the police are required to prove disorderliness as well as drunkenness and when

50 Until recently the Public Defender did not file an appearance even though he was representing a defendant. The statement in the text that a defendant was unrepresented should more accurately read 'no appearance filed'. It seems reasonable to treat these cases as being unrepresented since the Public Defender does not have an assistant stationed at branch 29.

51 In addition to the question of waiver, the assumption cannot be made that all unrepresented defendants are indigent. But this is a fair assumption in relation to Indian defendants.

52 John M Burtagh, *Arrests for Public Intoxication,* 35 Fordham Law Review, 1, 4-6 (1966).

the presence of defence lawyers gave the proceedings a truly adversary nature, proof was forthcoming in only a few cases. Even where the public drunkenness law is framed in such a way that a successful defence is almost impossible, the presence of lawyers can be a useful monitor of the fairness of the total procedure, including the initial arrest. Or if the better view is that an adversary proceeding is not appropriate in drunkenness cases, it probably follows that it should not be treated as a criminal matter.

Whether the defendant truly makes an intelligent waiver of his right to counsel or whether he is discouraged from asserting his right by subtle pressures, including the obvious expectation that he will not ask for a lawyer, the fact remains that very few defendants charged with public drunkenness do have the benefit of legal representation. Since that is the offence with which Indians are most often charged, the revolution in the provision of free legal assistance has largely passed them by. In Chicago and Oklahoma City it may be argued that *Argersinger* does not entitle the public drunkenness offender to free counsel since the municipal courts there cannot technically impose imprisonment for this offence. But they can produce the effect of confinement for the defendant by ordering him to be detained for psychiatric examination or by sentencing him to pay a fine which will in fact be served as a jail term in defaut of payment. Since the concern of the court in *Argersinger* was that no indigent should be deprived of liberty without the benefit of counsel, its principle should be extended to these situations.

Another factor is that many Indians do not believe the free legal services are designed for them. 'Many felt the city's legal aid agencies were intended to serve poor whites, blacks and Spanish-speaking peoples'.[53] One way to overcome this distrust of legal services would be to employ Indians as lawyers.

The precise number of Indian lawyers in the country is not known[54] but is clear that there is a substantial unmet need for Indian lawyers to work amongst their own people. A Special Scholarship Programme in Law for American Indians is administered by the University of New Mexico. In 1972 there were 115 law students in 40 law schools under this programme. The programme is now fully funded by the Bureau of Indian Affairs.

---

53 Don Burnett, INDIAN COUNTRY IN CHICAGO. Crisis in Law and Leadership. (Mimeographed) 10.

54 Rennard Stickland, *Educating Indian Lawyers is Not Enough.* 17 Student Lawyer Journal 4 (1972). An Indian attorney I met estimated that there

It is designed not only to upgrade the social and economic status of individual Indians by providing them with professional training; it is also intended to enlarge the legal resources available to Indian communities. There is some debate as to how this can best be achieved. The programme demands no commitment from scholarship holders that they will return to work in Indian communities after graduation. It would be unfortunate if such a restriction were to be applied. But it is desirable that preference be given in awarding scholarships to applicants who show some evidence of involvement in Indian affairs and a desire to continue active participation. The director of the programme states that every graduate has returned to work in Indian affairs, mostly in federal government projects.[55] Critics of the programme maintain, however, that working in a federal government office in Washington is not the best way of meeting the needs of Indian people on reservations. They would prefer to see more emphasis on recruiting students who intend to return to reservations after graduation from law school. In view of the findings of this study on the legal needs of urban Indians the suggestion is offered that here is another field in which Indian lawyers can be of service to their own community.

Some Indian groups have made efforts to provide legal services to members of urban communities. In the summer of 1970 the American Indian Center donated office space to enable a second-year student at the University of Chicago Law School to provide legal assistance to Chicago's Indian community under a fellowship he had received.[56] The experiment was most successful. In a four month period 375 cases were handled, including both civil and criminal cases. The location of the service within an existing urban Centre controlled by Indians encouraged local Indians to bring in their legal problems.

---

were about 100 Indians practising law in Oklahoma, a considerably higher estimate than most sources give. However, he said that few of them had a distinctively Indian clientele and few were willing to provide free legal services to poor Indians.

55 An evaluation team was able to contact 14 out of approximately 25 lawyers from the scholarship programme. It found that in their professional lives these lawyers were almost exclusively concerned with Indian problems. 'Each of the graduates expressed strong interest in professional activities addressing Indian concerns, rather than personal advancement or enhancement . . . With respect to the "concept of law" as related to professional law people of Indian descent, the program seems to be a considerable success.' Evaluation Report, *Special Scholarship in Law for American Indians* (Bureau of Indian Affairs, 1972 Mimeographed), 3.

56 Don Burnett, INDIAN COUNTRY IN CHICAGO. Crisis in Law and Leadership. (October, 1970 Mimeographed.)

The law student was able to make use of the auxiliary services of the Centre to support his client in a number of ways while legal action was being taken. Legal services also strengthened other programmes of the Centre since Indians who came in simply for legal aid often became aware of other services offered by the Centre. The law student who conducted the programme also claimed that it seemed to unite divisive factions within the Indian community. If this claim is justified then the location of such a programme within the offices of an Indian organization (even one representing only one faction of the urban Indian community) would seem to be ideal. Where factions are deeply divided, though, it might be preferable to treat legal services as an independent unit and locate it in a separate office convenient to the offices of as many competing Indian organizations as possible. Unfortunately this promising programme was short-lived. Attempts to establish a full-time legal aid office to carry on the work of the summer programme were unsuccessful. The only programme which continued to function at the American Indian Center was that a local attorney established interviewing hours there.

An ambitious programme to provide legal assistance has been started by an Indian group in Oklahoma. The Oklahoma Indian Rights Association was founded in December 1970 with the aim of providing adequate legal representation for all Indians in Oklahoma. It has a board of directors representing all the regions of Oklahoma, including the major urban centres of Oklahoma City and Tulsa. It has won support, including financial support, from all tribes in the state. All members of the board of directors are Indians. The president is an Indian attorney as is the executive director. In 1972 the Association handled over 200 cases of which about 70% were criminal and 30% were civil. It employs two field coordinators, one for western Oklahoma and one for eastern Oklahoma. They investigate complaints from Indians to determine whether the Association should provide legal representation. At present reliance is placed on volunteer lawyers, both Indian and non-Indian. The Association is in the process of obtaining funds to hire a full-time Indian lawyer who will travel throughout western Oklahoma. As a matter of policy the Association will not provide representation where one Indian is suing another Indian. This means that no help will be provided to an individual wishing to sue a tribal government. The Association believes it would be dangerous for it to become involved in any tribal faction-fighting and refuses aid in all such cases. This organization clearly has great potential and might well provide a useful model for other states with

large Indian populations, particularly as more Indian lawyers become trained and available for such work.

The most promising developments in Indian legal services are those programmes which are under Indian control and involve a substantial degree of Indian attorney participation. Indian directors will have more sympathy and understanding of the special needs of Indians; Indian attorneys will give Indian clients more confidence in the service being offered. The failure of programmes directed by non-Indians effectively to reach out into the Indian community may be exemplified by one Legal Services programme in New Mexico: an evaluation team in 1970 found that although over half of the people eligible for legal services in the county were Indians, only 10% of its clients were Indian.[57]

Other OEO legal services programmes have specialized in Indian problems, as we have seen, but these have been restricted in the criminal field. The extent of the need which urban Indians have for legal aid in criminal cases has not been recognized. It appears that existing programmes do not fully meet this need and that there is justification for programmes specifically directed towards urban Indians. In Australia, Aboriginal Legal Services have concentrated on representing urban Aborigines in criminal cases as the most pressing legal problem. In this area perhaps the United States has something to learn from Australia.

Juries

The Australian study found some cases in which Aboriginal names were included on jury panels (including one case in which a woman's name was originally included in the panel for her own trial for murder). But in general, though accurate information is difficult to obtain, it is probably fair to say that Aborigines are under-represented on juries.

In the United States, jury panels in some areas have not been properly drawn to adequately represent the Indian population. In *State of South Dakota v Adolph Plentyhorse*[58] the evidence of Indian exclusion was so strong that the Supreme Court of South Dakota had no difficulty in deciding that the defendant's motion to quash the jury

[57] Report to Office of Economic Opportunity. Information is not available as to whether the programme later increased its services to Indians as recommended by the evaluators.

[58] 184 NW 2d 654 (1971). See also the successful challenge to the jury in Alvarada v Alaska (No 704 Alaska Sup Ct July 6 1971) (Reported in Akwesasne Notes Vol 3, No 8, 45).

panel should have been granted and a new panel ordered. The defendant was entitled to a new trial. There was evidence that Indians constituted 29.9% of the total population of the county in which the Indian defendant was tried but that only about 8% were represented on the county jury list for a three-year period.

A recent study of Maricopa County in Arizona showed that while Indians made up 1.10% of the county population they accounted for only 0.20% of jurors. Similarly underrepresentation of Indians was found in a study of grand jury service in California.[59] On the other hand, I met an Indian woman who has served on the federal grand jury in Oklahoma and attributed her selection to the legislative amendments which liberalised qualifications for federal grand jury service.[60] The method of selection for state court juries in Oklahoma is only now changing from the property tax list to the registered voter list.

Too often capricious methods of jury selection have been used which effectively excluded Indians from the panel. Even where voter registration lists are used the result may be underrepresentation of the Indian minority since it appears that many Indians choose not to register to vote.

The Supreme Court of South Dakota held that the law does not entitle a defendant in a criminal case to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. All that the doctrine of equal protection requires is that members of his race have not been intentionally excluded from the jury because of race or colour.[61] The federal Act appears to go further than this in specifying a jury 'selected at random from a fair cross section of the community'[62] Voter lists may not suffice to satisfy this requirement.[63] But even if this more demanding requirement were accepted in all courts a problem would remain: if Indians are a numerically small minority in a particular area, an Indian defandant still may be subject to

---

59 Arizona study by Peggy Tinsley and Ruth McGregor to be published in a forthcoming issue of Law and Social Order, California study in C E Reasons and J L Kukendall (eds) RACE, CRIME AND JUSTICE. (Goodyear Publishing Coy 1972) 324-339.

60 Jury Selection and Service Act of 1968. 28 USCA E1861 (Supp 1969).

61 State of South Dakota v Adolph Plentyhorse 184 NW 2d 654, 656 (1971).

62 28 USCA E1861.

63 28 USCA E1863 (b) (2). For a discussion of the jury selection procedures required in federal and state courts see comment, *Indictment under the Major Crimes Act—an Exercise in Unfairness and Unconstitutionality.* 10 Arizona Law Review 691 (1968).

prejudice from a white jury at his trial, yet he will not be able to claim a denial of equal protection even if there were few Indians on the panel from which the jury was selected. There is also nothing to stop the prosecutor from excluding Indians from the jury by the use of challenges.

The only way in which an Indian defendant could be guaranteed trial by his 'peers' (given that racial prejudice does exist) would be for the Supreme Court to hold that equal protection does require the presence of a member of the defendant's race on the jury which tries him or for that requirement to be incorporated in legislation. Neither development is likely to occur. Once again the Indian suffers from being such a very small numerical minority.

Sentencing

In Western Australia proportionately more Aborigines than whites are sentenced to imprisonment. The imbalance is so great that in 1965 Aborigines made up almost a quarter of the prison population although they were only responsible for 11% of total convictions.[64] The discrepancy is partly explained by the fact that Aborigines are charged with a different pattern of offences than whites and some offences draw prison sentences more than others. But even within each offence category Aborigines were more likely to be sentenced to imprisonment, which seemed to be clear evidence of racial discrimination.

Indians also are disproportionately represented in some prison populations. In Arizona Indians make up 20% of the population of the State Penitentiary but only 5.3% of the total population of the state.[65] In the Oklahoma State Penitentiary in 1973 7% of the population were Indians and in the State Reformatory they represened 8% of the population.[66] Yet Indians were only 3.8% of the total population of the state. In Illinois records of the state Department of Corrections show only 2 Indians in the adult institutional population. This is an underrepresentation of Indians since they make up only about 0.04% of the correctional population while they are 0.1% of the total population of the state. It is possible that the racial origin of

64 Eggleston, unpublished PhD thesis, 15-16.

65 The Penitentiary population figure is unofficial but derived from reliable sources.

66 Prison Population Projections for the Years 1980 and 1990. (Planning and Research Division, Oklahoma Department of Corrections, December 1971) 12-13.

some Indian prisoners has not been recorded and that this partly accounts for the small toal.[67]

Indians are also not overrepresented in federal prisons. In fiscal year 1970 there were 202 Indian prisoners in federal institutions out of a total of 11,060 prisoners.[68] This figure is equivalent to 1.8% of the total. One federal institution does have a large Indian population. Englewood Youth Center, Colorado, has 83 Indian inmates out of a total population of 344 (its inmates are drawn from western and mid-western states). Thus Indians form almost a quarter of the population of this institution.[69]

The level at which it might be expected that Indians would be overrepresented is in city and county jails since this is where minor alcoholic offenders are confined. In Phoenix there are usually about 40 convicted Indian prisoners in city custody. Half of them are held in the city jail and work as trusties at police headquarters; the others are held at the police compound. As the total number of city prisoners is about 220, Indians account for about 18% of those in custody, which is well in excess of their proportion in the general population.[70]

In the Oklahoma County Jail in January 1872 there were 21 Indians out of a total population of 665. This figure represented 3.1% of the jail population and is not markedly different from the Indian representation in the county as a whole (1.9%).[71] No statistics are available for the municipal jail in Oklahoma City. Nor are they available for police lock-ups and local jails in Chicago but it is likely that the population of Indian sentenced prisoners is not large. The time at

---

67 Figures were supplied by Dr Russell Levy, Director, Division of Research and Long Range Planning, Illinois Department of Corrections. It appears that some correctional officers making out intake records use only two categories, 'black' and 'white'. Indians are then classified as 'white'.

68 Federal Bureau of Prisons Statistical Report, Fiscal Years 1969 and 1970. (US Department of Justice, Bureau of Prisons, Washington DC), 68.

69 Unpublished figures for January 1973 supplied by the Federal Bureau of Prisons. It is difficult to obtain statistics on Indian prisoners. Racial breakdowns are either not published or are treated in only two categories: white/nonwhite. Statistics available for one federal institution in Oklahoma (El Reno Reformatory) and one in Arizona (Safford Work Camp) reveal relatively low Indian populations (3% and 4% respectively).

70 Calculated from estimated figures supplied by the Phoenix Police Department. Numbers in the city jail will fall as detoxification centres are used more.

71 Figures supplied through the courtesy of Mr D Anderson, County Public Defender. This represents a decrease since 1971 when Indians represented 11.1% of confinements in Oklahoma County Jail. J E Trimble, An Index of the Social Indicators of the American Indian in Oklahoma (Office of Community Affairs and Planning, State of Oklahoma 1972) 263.

which Indians are held in police custody in Chicago is during the pre-trial period.

The high rates of Indian imprisonment particularly in Arizona require some explanation. They may be due to discriminatory sentencing by the court or they may reflect an appropriate judicial response to the offences proved to have been committed by the Indian defendants.[72] There is some anecdotal evidence of leniency by Illinois judges which would account for the low rate of Indian imprisonment in that state. It appears that, at least where the Indian defendant has an advocate, judges are inclined to take the hardships of Indian existence into account and impose relatively light sentences. One attorney stated that Indians convicted of 'political crimes' drew lenient sentences. This could be partly due to a belief that Indians pose no serious political threat. Another Chicago attorney who has defended hundreds of Indian clients has not had an Indian client jailed for a single day by a court. He has obtained probation for Indians on quite serious charges. His success rate is not due solely to judicial leniency; in a number of cases he has won a complete acquittal for an Indian client who should never have been arrested in the first place.

Another factor which might lead to varying Indian imprisonment rates is a difference in parole practices. It may not be so much the length of sentence fixed by the judge as the failure by a parole board to release an Indian prisoner within a reasonable period which leads to disproportionate Indian prison populations.

Indians in the Arizona State Prison have complained that they find it difficult to obtain release on parole because of their difficulties in finding employment. It is unrealistic for a parole board to require that an Indian have a firm job to go to before release, considering the high rate of unemployment in Indian communities. It is difficult to obtain information which would enable an objective determination to be made of whether racial discrimination is occuring in the parole process. Such statistics as are available do not demonstrate any obvious racial discrimination. For the year ending 30 June 1971 figures are available on the number of inmates released either by expiration of sentence or by parole from the Arizona State Prison. Of all the whites released in either of these ways, 65.3% were paroled. The comparable percentage of blacks was 60.9%, for Indians 63.1% and for Mexicans

---

72 Analysis of court records may provide a basis for choosing between these alternative explanations. This analysis is not yet complete.

53.8%.[73] Calculating parole rates in this way does not take into account prisoners released to other institutions nor those remaining within the prison. A more meaningful measure of parole rates would be to analyse the length of time spent in prison before release particularly in relation to the total length of sentence imposed by the court and to the offence committed. But data is not available to enable such an analysis to be made.

The Bureau of Indian Affairs is funding an Indian Offender Rehabilitation Program which has been effective in reducing the number of Indians held in prison. It operates on a small scale in Arizona; there in the first quarter of fiscal year 1973 2 Indians were released on parole under the programme from the Federal Work Camp at Stafford and another 3 were released on probation from a local jail. These 5 released under the programme have clearly not made a great difference to the Indian prison population in the state. In Oklahoma, by contrast, a very active programme is operated by the Committee of Concern. In the same quarterly period 28 Indians were released on parole under the programme from a variety of correctional institutions. In the following quarter a further 33 Indian inmates were released under the programme, 16 from the Oklahoma State Penitentiary, 12 from the State Reformatory and 5 from El Reno Federal Reformatory. Two coordinators (both Indians) are employed under the programme to visit these institutions and assist any Indian due to be released, whether on parole or otherwise, in formulating a release plan. The coordinator helps him to find a job or entry into a training programme and also helps to contact a parole adviser (a volunteer) to whom he can report during the parole period. The programme has been successful in reducing the Indian inmate population and recidivism. Its intervention has enabled more Indians to obtain parole.[74] The programme also refers matters requiring legal advice to the Oklahoma Indian Rights Association and pays legal costs on behalf of Indian inmates. In the period from August to December 1972 10 cases were

73 Calculated from statistics of inmates released. Arizona State Prison, Annual Report for fiscal year 1970-1971. (Arizona Department of Corrections), 13.

74 At the end of 1972 there were 32 Indian inmates in the State Reformatory, according to the Committee of Concern. The Indian population of the institution for calendar year 1972 was 54 and for the previous year 60. Prison Population Projections for the Years 1980 and 1990. (Planning and Research Division, Oklahoma Department of Corrections, December 1972), 13. Information on the programme was obtained from Lawrence Hart, Project Director, Committee of Concern and from Eugene Snarez, Chief, Division of Judicial, Prevention and Enforcement Services, Bureau of Indian Affairs.

referred and handled by the Indian Rights Association at moderate cost.

This programme is clearly an important development in improving the relationship between the Indian offender and the criminal justice system. It deserves continued support from the Bureau of Indian Affairs as it appears to be one of its more constructive activities.

For those Indians remaining in prison, life will be eased by taking accout of their Indianness. In some prisons, including El Reno Federal Reformatory, Indian culture groups have been established and function with the blessing of the authorities. The formation of such a group is forbidden at the Oklahoma State Penitentiary and the one at the Arizona State Prison is barely tolerated. It is hard to reconcile discouragement of such groups with correctional authorities' professed aim of rehabilitation.

Criminal Justice for the Indian?

This survey has shown that the pattern of Indian involvement with the criminal law is depressingly similar to the Aboriginal pattern. The typical urban Indian criminal is an alcoholic, living on or visiting Skid Row, being processed through the lower court mass production line, serving a life sentence on the instalment plan.

Though there have been many advances in United States law protecting constitutional rights of criminal defendants, these developments have largely bypassed the lowest courts. As due process and equal protection guarantees have extended more and more benefits to other offenders, the public drunkenness offender has been left further behind. The right of an indigent to obtain legal counsel paid for by the State has in practice meant little to the man charged with drunkenness.

What improvements can be hoped for in this situation? How can constructive change be brought about-? Indians are beginning to learn that they must organize and exert political pressure where it will be felt. As one young Indian leader in Phoenix said: the reason Indians are treated as they are is not so much racial discrimination as their lack of political power; in the cities they have not made their presence felt politically. He was a member of an Indian coalition which undertook detailed research and submitted a documented presentation to the Phoenix City Council. As a result, the city modified its planned distribution of revenue-sharing funds to include a grant to the Indian community.

In the past urban Indians have been weak politically because they have not asserted themselves and because their small numbers made

it easy to ignore their special interests. The Bureau of Indian Affairs has concentrated its attention on the reservations. Tribal leaders have, in general, rarely looked beyond the boundaries of their own reservation. Even urban Indians themselves have contributed to the neglect of urban problems; many consider themselves to be merely transient residents in the city, no matter how long their stay; they still look toward the reservation as home. But there are clearly urgent problems in urban Indian communities and the best hope of finding solutions rests on Indian involvement.

A new mood of militancy is abroad amongst Indians. It finds its most vocal expression in the American Indian Movement. 'Things won't ever quite be the same again—and that's what the American Indian Movement is all about. They are respected by many and hated by some—but they are never ignored. They are the shock troops of Indian Sovereignty . . . AIM is . . . a rebirth of Indian dignity'.[75] AIM grew out of the Indian experience of police brutality and the injustice of the legal system in the courts of Minneapolis. Amongst its early activities was a project to monitor police behaviour in that city; it also helped to arrange legal representation for Indian defendants. But it has not followed up that early promise with other specific programmes showing immediate results at a local level. Its role now appears to be one of keeping Indian grievances in the public eye by shock tactics. It does appear to have had some success in making the non-Indian population aware that something needs to be done about the Indian situation. But it will be up to other Indian groups, including local chapters of AIM, to press for specific reforms taking advantage of this new awareness.

What specific reforms should they work towards in the field of criminal justice? While it is important that Indian groups should set their own priorities and formulate their own projects, it is hoped that this paper has offered some suggestions of directions in which they could move.

In those states where public drunkenness continues to be treated as a criminal offence, action can be taken to bring about repeal of that legislation. Where the philosophy of decriminalization of public intoxication has been accepted, as in Arizona, Indian groups can press for adequate alternative facilities to provide shelter for alcoholics and can educate non-Indians to the view that Indians need to be treated as a separate group.

---

75 THE MEANING OF AIM by Kills Straight, Oglala Sioux, Pine Ridge, South Dakota (Mimeographed).

At numerous other points in the criminal justice process Indian input would be valuable. It should come not only from voluntary Indian organizations but from Indian employees in police and correctional departments. Indian groups organized to provide legal services to Indian defendants can also have considerable effect in turning an unjust system into one in which justice is the rule.

It is vital that Indians control as many programmes as possible and that Indian power become a reality. Is there then any place for non-Indians in Indian affairs? It is inevitable that Indians, particularly in the cities, will be involved in the institutions of the dominant non-Indian society. Non-Indians who genuinely want to see Indian conditions improve can help by educating themselves to an understanding of the unique Indian cultural values and worldview and thus to an appreciation that programmes designed for other groups will not necessarily be suitable for Indians. They can support self-determination for Indian communities to the fullest limit consistent with the rights of other groups in a culturally pluralistic society.

ELIZABETH EGGLESTON*

* Senior Lecturer in Law, Monash University.