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THE DELINQUENCY OF THE AMERICAN INDIAN

Hans von Hentig

Dr. Hans von Hentig, University of Puerto Rico, was Professor of Criminal Law and Criminology at the University of Bonn during some years before he came to the United States nine years ago.

He became Expert Assistant to the Attorney General in Washington, Director of the Colorado Crime Survey, taught at Yale and the Universities of California, Iowa and Oregon. Dr. von Hentig will re-assume his chair in Bonn and the Editorship of the *Monatsschrift fuer Kriminal-Psychologie* that he edited 1925-1935 together with Professor Gustav Aschaffenburg, recently deceased.

In this article the author continues studies on the delinquency of racial minorities. This *Journal* published one of them in 1940. Others will follow.—EDITOR.

The last Census registered 333,964 Indians with a ratio of 105.5 males per 100 females.¹ This is the remnant of a once large population. When the Senate Committee investigating conditions of the Indians came to California they were told that there were still between 20,000 and 25,000 Indians in the State.² Eighty years before there were 210,000 Indians in California.³ After a period of continual decline there was a slight increase between 1930 and 1940⁴ which seems to defy the theory that the days of the race are numbered.

Arrests and Punishment

The statistical material on Indian delinquency is not abundant. The Uniform Crime Reports ceased to give arrest figures by race and sex in 1941; yet whilst the arrests of the white

TABLE I

ARRESTS OF INDIANS

1935	1.699	1940	3.647
1936	2.592	1941	3.624
1937	2.787	1942	4.688
1938	2.651	1943	5.438
1939	3.029	1944	6.084

race slipped off under the influence of the draft and war prosperity the Indian figures rose sharply.

It is not easy to explain the upswing of arrests, in spite of mobilization and plenty of war work.⁵ The distinct rise in 1942

¹ *Population*. United States Summary. 16th Census. Washington 1943, p. 13.

² *Survey of Conditions of the Indians in the United States* Part 29. Washington 1934, p. 15, 549.

³ *Ibid.*

⁴ *Uniform Crime Reports 1935-1944*. pp. 42, 167, 233, 177, 221, 224, 209, 93, 96, 100.

⁵ We learn of the Osage tribe in Oklahoma with a total population of 4,361: "It is estimated that 500 members of the tribe are now employed in war industries and 400 in the Armed forces." *Survey of Conditions of the Indians in the United States*. Part 41. Washington 1944, p. 22, 770.

coincides with the outbreak of the Asiatic war and the removal of the Japanese section of the population from the West coast. It is likely that the Mongoloid features⁶ of the Indian drew him into the orbit of war-born antipathies. We have computed comparative arrest figures for a pre-war period in Table II:

TABLE II
ARRESTS, INDIANS AND WHITES⁷

Per 100,000 of each group, 15 years old and over five year average, 1936-1940		
	Indian	White
Male	2510.3	835.5
Female	596.0	57.0

The discrepancy between the two races is enormous. It shrinks, yet remains very large when we proceed to prison statistics:

TABLE III
PRISON ADMISSIONS FOR FELONY, INDIANS AND WHITES⁸

Per 100,000 of each group, 15 years old and over five year average, 1937-1941		
	Indian	White
Male	487.7	94.2
Female	28.8	2.9

These figures although reduced to the adult age level and covering five year averages require further qualifications. When we are told, for instance, by a clerk of the district court at Nome that "about 80 per cent of the criminal business was due or had to do with cases in which natives were involved,"⁹ the numerical conditions do not tell the whole story. There is French and Russian blood on the Indian side.¹⁰ The white population is more than double as large as the native group. The considerable foreign-born section consists about half of Norwegians, Swedes, Danes and Finns,¹¹ peoples noted for their law-abiding habits. Both races differ widely according to the age-distribution,¹² sex-ratio and economic status.

⁶ "The assumption of an original yellow race is fully justified." Clark Wissler: *The American Indian*. An Introduction to the Anthropology of the New World. Oxford Univ. Press, New York, 1922, p. 325. Mary L. Davis says of her friend, the city Eskimo Muk-pi: "Though a full blooded Eskimo, she might well have posed as an oriental girl any place in the United States." *Uncle Sam's Attic: The intimate story of Alaska*. W. A. Wilde. Boston, 1930, p. 158.

⁷ Arrest figures computed from data in *Uniform Crime Reports 1936-1940*, pp. 167, 168; 235, 236; 177, 178; 221, 222; 224. Indian population figures computed from *Population, Characteristics of the non-white population by race*. Washington 1943, p. 9.

⁸ Admission figures computed from data in *Prisoners 1937-1941*, pp. 12, 12, 11, 18 and 16. The 1942 figures were not used on account of the disturbing war factors.

⁹ *Survey of conditions*, p. 20, 055.

¹⁰ "Quite a large percentage of natives now living near old Russian settlements show traces of this ancestry." Mary Davis, *ibid.* p. 237.

¹¹ *Population, Alaska*, Washington 1943, p. 10.

¹² 16.7 per cent of the male whites in Alaska and 43.1 per cent of the natives were under the age of 15. *Population Alaska*. Washington 1943, p. 5.

A major handicap for the student of Indian delinquency is the multiplicity of jurisdictions which defeats the mere statistical approach. Indians in the United States are subject to three types of jurisdictions: federal courts, state courts and Indian courts. Although the main crimes¹³ have been brought under Federal jurisdiction few offenses committed at the reservation come to the attention of the Federal or state prosecutors, except by the report of the superintendent. His distinction between rape and fornication prevails; he decides what is a "dangerous weapon" and whether there was or not "intent to kill." The great distances between Indian agencies and county seats render the presence of witnesses expensive. Indians are reluctant to speak; they stick together and do not recognize a strange white custom, called judicial oath.¹⁴ State and Federal prosecutors are therefore "not particularly eager to concern themselves with the prosecution of Indian cases."¹⁵

The persons put down by the enumerator as "Indian" are by no means all full-bloods. They may even be well-nigh white. When the Senate Committee came to the Shoshone Reservation this query developed:¹⁶

Question: "What percentage of blood do they have in order to be enrolled?"

Answer: "As long as they affiliated with the tribe, there is no degree of blood required."

Question: "How small a degree of blood do you recognize, one thirty-second, or one sixty-fourth?"

Answer: "Some of them are one sixty-fourth here."

The rate of mixed-bloods varies. It was 35 per cent with the Fort Hall Indians of Idaho,¹⁷ 40 per cent with the Shoshone and Araphoe tribes,¹⁸ 77 with the Western Shoshones¹⁹ and 87 per cent with the Osages of Oklahoma.²⁰ It is not only the degree of blood which should be considered, but the personality and descent of the partner. Mixed bloods of Norwegian or Swedish stock we met in Alaska will differ from persons who have Indian and Mexican, or Indian and south-European blood as it happens in California. There is a widespread opinion that mixed bloods are more delinquent than full-bloods,²¹ a

¹³ Murder, manslaughter, arson, rape, burglary, larceny, assault with intent to kill by Act of March 3, 1885 and somewhat later robbery, incest and assault with a dangerous weapon. Felix C. Cohen: *Handbook of Federal Indian Law*, Washington 1942, p. 363.

¹⁴ *Survey of conditions* p. 14, 200.

¹⁵ *Ibid.* p. 14, 201.

¹⁶ *Survey of the conditions*, p. 14, 430.

¹⁷ *Ibid.* p. 14, 635.

¹⁸ *Ibid.* p. 14, 460.

¹⁹ *Ibid.* p. 14, 911.

²⁰ *Ibid.* p. 22, 770.

²¹ "As one veteran Major said: "Give me the full-blood every time. He drinks less, tells the truth, has moral principles by which he stands, and a mind you can reason with. On the other hand the 'breed' has no such qualities, he is a trouble maker without morals or principles. He respects neither white nor red." Clark Wissler: *Indian Cavalcade. Life on the Old Time Indian Reservations*. Sheridan House, New York 1938, p. 232.

notion apparently not applied to females.²² Some superintendents on reservations point at the fact that outlaws from white society have for generations sought the frontier and mingled with the Indians.²³ Many "breeds," of course, are illegitimate children and grew up under a double handicap.

It appears that there is little conscious discrimination against the Indian in court.²⁴ That he is often victimized can not be denied.²⁵ The superintendents of the Indian reservations have assumed a sort of pardoning power which is said to be exercised in mitigating the decisions of the Indian courts;²⁶ there is no legal basis for this privilege. Once introduced it can be exerted both ways. The supreme court may decide whether the haircut imposed on the arrested man was a cruel and unusual punishment. "Long hair," reports Wissler,²⁷ stood before the white mind as defiance of paganism against Christianity." He does not say whether the rule is still in force.

The treatment of delinquent children in Alaska springs from ignorance and not from a discriminative intent. "Delinquent children," complains the Chamber of Commerce, "are now sent to correctional institutions in the States; this, because of climatic differences, is often a death sentence."²⁸ The problem of language and interpretation is, of course, an eternal source of misunderstandings and difficulties, that complicate the diversity of thinking and feeling. The Indian court is from this point of view an instrumentality of great psychological importance. It is regrettable that criminology has not been concerned about the institution.

Types of Offenses

Digging through the forty volumes of the "Survey of Conditions of Indians in the United States" we are rewarded by a few figures which cast light on the operations of the Indian courts. They refer to Indians in seven states,²⁹ to groups of

²² "I never heard an official raise his voice against the female 'breed.'" *Ibid.*

²³ *Survey of conditions*, p. 14, 150.

²⁴ "Little evidence of discrimination in the courts against Indians was found. Their sufferings at the hands of the law come from inattention to their needs rather than from undue prosecution." *Survey*, p. 14, 204.

²⁵ "Undoubtedly the Indian is often cheated and mistreated both by whites and fellow members of his race and lacks the money, influence and knowledge by which to obtain redress from the courts of justice." p. 14, 204. After the gold rush in California, robbers donned Indian costume in the Shasta Butte Mountains. The Times and Transcript of Sacramento reports in November 1851: "It is supposed that the greater part of the stealing done in that section is by whites, who assume the Indian garb, even to wearing moccasins." Neill C. Wilson: *Treasure Express*, Epic days of the Wells Fargo, Macmillan, New York 1938, p. 53.

²⁶ *Ibid.* p. 14, 223.

²⁷ *Indian cavalcade*, p. 167.

²⁸ *Survey*, p. 20, 042.

²⁹ Wisconsin, Minnesota, the Dakotas, Montana, Washington and Oregon.

offenses and the judicial outcome of the cases in Indian courts and regularly constituted courts. We learn that more than a third of all offenses are handled by Indian courts—exactly 37 per cent in this section of the country. A glance at the types of delinquency is instructive:

TABLE IV
PERCENTAGE OF INDIAN OFFENDERS³⁰ BY TYPE OF COURT AND
OFFENSES CHARGED 1929

	Indian court	Regular court
Charged with drunkenness	58.0	53.2
Charged with offense against property.....	4.0	13.2
Charged with offense against persons.....	7.7	8.1
Charged with offense against sex and domestic relations	10.4	2.4
Charged with all other offenses.....	12.3	6.0

Drunkenness, a minor offense, tops the list. Indians have learned to make a home brew that is sometimes fortified by aspirin.³¹ If liquor is not available they drink "canned heat,"³² rubbing alcohol,³³ or hair tonic.³⁴ "Some Indians will drain and drink the contents of auto radiators."³⁵ In one case three Indian boys died from drinking Prestone.³⁶ The general belief is that the nervous system of the Indian has less stability, some experienced doctors maintain that the craving and the susceptibility to liquor is due to malnutrition.³⁷ Many more offenses against property come before the regular than the Indian courts. A Superintendent told the Senate Committee:³⁸

"The typical Indian crime is cattle-stealing. It is not so long ago that the Plain Indians were teaching their boys to steal cattle and horses from other tribes. Stealing livestock was an art requiring much skill and cunning, the respect for which lingers. Cattle stealing involves the changing of brands, at which some Indians are very skillfull.

"Running off" horses was the plague of the trading companies that went first over the Santa Fe Trail.³⁹ There was a tendency and a habit, pendulating between hunting and taking, to which our Roman law notion of larceny does not quite ap-

³⁰ *Survey*, p. 14, 153.

³¹ p. 14, 402 "Aspirin seems to cause an ugly kick and adds to wife beating and other violences of drunken carousal." *Ibid.*

³² *Ibid.* 14, 338. The paraffin has to be strained out.

³³ *Ibid.* p. 14, 362.

³⁴ *Ibid.* p. 14, 402.

³⁵ *Ibid.* p. 14, 363.

³⁶ *Ibid.* p. 14, 360.

³⁷ "How the population would react after a well-established habit of three good nourishing meals a day no one knows. *Ibid.* p. 14 165.

³⁸ *Survey*, p. 14, 149.

³⁹ See R. L. Duffus: *The Santa Fe Trail*. Longmans, Green and Co., London 1930, p. 80.

ply.⁴⁰ Wissler tells us that the Indian's folk-lore "dinned into his soul the feeling that about the only heroic deed was to get away with a stranger's horse."⁴¹ It is a phase of moral evolution which recalls the thievish practices in ancient Sparta, some Indian mores⁴² and the standards of many juvenile gangs in our great cities. Forgery, fraud, embezzlement, all slick crimes are supposed to be typical offenses of mixed-bloods⁴³ as are all serious property crimes. Much pilfering is found. Some articles mentioned are chickens, potatoes, a halter, a rope, a hand bag, a shawl, a blanket, a pair of trousers, a beaver skin, a sled, a revolver, fish nets, timber and liquor.⁴⁴

Assault is a frequent charge. The range of the offense is discreetly described as more serious than "drunk and disorderly" and less serious than homicide.⁴⁵ A lenient interpretation prevails; "Got drunk and shot at some fellow," constitutes assault on the reservation and brings the delinquent into the Indian court.⁴⁶ The Indian sex offenses, dealt with largely in Indian courts are mostly fornication and adultery. Indian ideas on marriage differ from ours. During the Senate investigation these questions and answers were exchanged between a Senator and an Indian:⁴⁷

Senator Frazier: "Are your children going to school?"

Mr. Mesket: "I am not married and have no children. I am living with my mother. She is kind of crippled up."

Senator: "Can you not find a wife around here some place?"

Mr. Mesket: "I find them sometimes but somebody else wants her, so I let them have her."

Of 631 children under 18 on the San Diego county reservation 78 were reported to be born out of wedlock.⁴⁸ That is 12.4 per cent. Since the mortality is not considered the rate of illegitimacy at this reservation is equal or higher than the illegitimacy of the colored population.⁴⁹ We are told that "no social stigma attaches itself to the child or its mother."⁵⁰ There

⁴⁰ Wissler likens the Indian to a bibliophile: ". . . He so loved horses in general that as soon as he laid eyes upon one he wanted to steal it." *Indian Cavalcade*, p. 77. There may be another element: the short-circuit-like intensity of the avidity that links hunter and prey. The first Russian explorers watching the hunting passion of the Aleuts reported that when one of them saw the head of a sea otter on the sea he trembled with excitement as a setter dog trembles at the scent of a bird." C. L. Andrews: *Story of Alaska*, Caxton Printers, Caldwell, 1938, p. 60.

⁴¹ *Indian Cavalcade*, p. 77.

⁴² On the practice of "licensed thievery" by Indian societies of boys see Paul Radin: *The Story of the American Indian*, Boni and Liveright, New York 1927, p. 300.

⁴³ *Survey*, p. 14, 150.

⁴⁴ *Ibid.*

⁴⁵ Among 229 offenses against the person there were 13 cases of murder and 5 of manslaughter. *Ibid.* p. 14, 153.

⁴⁶ *Ibid.* p. 14, 152.

⁴⁷ *Survey*, p. 15, 549.

⁴⁸ *Ibid.* p. 15, 793.

⁴⁹ See *Negroes in the United States 1926-1932*, Washington 1935, p. 365.

⁵⁰ *Survey*, p. 15, 793: "She laughs when she reports the situation; so do other Indians speaking of it."

appears to be a vicious circle between what is called restricted diet,⁵¹ overcrowding, a high tuberculosis⁵² rate and promiscuity. We have pointed to the possibility of such connections in a previous paper.⁵³ The stimulating effects of alcohol are added. It must be kept in mind, however, that these are minor forms of sex delinquency and that the white population contributes its share.⁵⁴

With violations of game laws we reach a most controversial sphere. The superintendents admit that "game wardens often go to extremes in attempting to discourage the Indian hunter and fisherman."⁵⁵ It is said that "the Indians . . . often feel that they have a moral justification in treaty provisions that grant them hunting and fishing rights forever."⁵⁶ It is maintained that white people in the Middle West take into account the malnutrition of the Indians and are not too strict, but that

TABLE V
TYPES OF SENTENCES, PERCENTAGES.
1929 in Seven States.

	Indian court	Regular court
Prison	5.2
Jail ⁶¹	50.1	11.6
Jail and fine	6.1	10.2
Fine	7.1	61.0
Suspended sentence probation	7.5	10.5
Other dispositions ⁶²	29.2	1.5
Total	100.0	100.0

in the Rockies and on the Pacific coast the attitude of the whites toward the Indians is in some places rather "severe, inconsiderate and selfish;"⁵⁷ instances were given during the hearings of the Senate Committee.⁵⁸ Alaska has a regulation in the game laws that gives an Indian the right to take a moose or any

⁵¹ *Ibid.* p. 14, 400.

⁵² The percentage of tuberculosis mortality is 4.7 with whites and 35.5 with natives. *Ibid.* p. 19, 875.

⁵³ A statistical test of causal significance, *Am. Sociological Review* 1940, p. 933.

⁵⁴ The Children's Bureau of Minnesota states that "In one of the worst localities it is said that the white lumberjacks regard the little Indian girls as fair game and few girls escape them." *Survey*, p. 14 360.

⁵⁵ *Survey*, p. 14, 205.

⁵⁶ "Some of the Indians claim that their treaties with the United States give them perpetual hunting and fishing rights and being international agreements take precedence over state laws, while State officials claim that as citizens the Indians must obey State laws. No case involving these points has ever been carried to the Supreme Court of the United States and no county is eager to incur the expense." *Ibid.* pp. 14, 151 and 14, 364.

⁵⁷ *Ibid.* p. 14, 151.

⁵⁸ McCarty, a Hopa Indian: "They (the white people around the Klamath River) took that stream and they are selling licenses to fishermen and they are making money by selling those licenses and they are even selling licenses to the Indians to fish on their own property."

Sen. Wheeler: "We will have that looked into for you." *Survey*, p. 15, 673.

game whenever he is in need of food.⁵⁹ There is no such provision in the States.

There is considerable diversity in the types of sentences imposed on Indians in the different courts. The subject matter is condensed in Table V above.⁶⁰

The Indian court applies jail sentences and "other dispositions;" the regular court appears to be extremely fond of fines. The Survey gives the following explanation:⁶¹ "Fines for seven out of every ten convicted persons representing a population as poverty stricken as any in the United States would at first thought seem inhuman, but . . . over two-thirds of these fines were imposed by the courts in the vicinity of Klamath, Yakima and Umatilla, the reservation where Indians with fair unearned incomes are handled in the State courts." The dislike of jail sentences is ascribed to the limited jail capacity, the expensiveness of the punishment and the doubt of many officials whether a jail sentence is really punishment. "They do not want to run a boarding-house for non-tax paying Indians."⁶² Other reports speak of "clubby jails" in the reservations meaning that they are often warmer and more comfortable than the Indian's own poverty stricken home.⁶³ When life is harder than the hardships of our penalties social control has reached an impasse.

Conclusions

Indian delinquency differs from the criminality of other racial groups.⁶⁴ There are, of course, similarities, the low economic status, the high mortality, the minority situation. The most characteristic distinguishing mark is the heavy tempo of adjustment,⁶⁵ the autonomy of standards which have been handed down from their ancestors and better times. That many Indians of the older generation believe their values are superior

⁵⁹ *Ibid.* p. 19, 975.

⁶⁰ Computed from figures in *Survey*, p. 14, 221 and 14, 164.

⁶¹ including "jail and other."

⁶² includes dispositions as "labor", "admonished", "ordered off reservation", "transferred to another court", finally dismissed, acquitted, pending, no sentence . . . We learn that the regulations of the Indian Office supposedly confine sentences of the Court of Indian offenses to 3 months in jail, "but a number of longer sentences are met with." *Ibid.* p. 14, 221.

⁶³ *Ibid.* p. 14, 165.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* p. 14, 223: "At one reservation it was even reported that the chief of police joined his prisoners in their card games."

⁶⁶ See my papers: *The Criminality of the Negro*. This *Journal* 1940, pp. 662-680 and *The criminality of the colored woman*. University of Colorado Studies, 1942, pp. 231-260.

⁶⁷ But there is some slow adaptation. The food excursions against the buffalo, for instance, around which their material existence and their happiness centered have been replaced by the yearly exodus in the berry, hop and potato fields, the fruit orchards, blueberry patches and cranberry marshes. Here they make some money, enjoy the absence from home and are exploited by the bootleggers who follow them. *Survey*, p. 14, 178.

to ours, in the midst of biological and national defeat, of hunger and cold, is a phenomenon affecting even the treatment of delinquency. We learn, for instance, that no particular disgrace is attached to an arrest or conviction; "not infrequently those who suffer the penalties of the law are looked upon as more or less notable characters."⁶⁸ We can enforce our laws, but not acceptance of those mightier enforcers, our moral codes.

Indian delinquency seems to be limited to a few stocks and groups of chronic violators. There are small clusters of repeaters. Ninety to 98 per cent are declared to be law abiding.⁶⁹ A very few Indians continually get into trouble. Their community status remains unaffected by a penitentiary term.

The economic conditions have completely changed during the last hundred years. The turn came from outside. "In the days of the fur trade," we read,⁷⁰ "the white man was a customer who bought their furs, a store-keeper who sold them powder, whiskey and blankets, sometimes he was an associate who hunted and trapped with them and married their women. It was the trapper's interest that the Indians should keep to their old modes of life and be protected in their old hunting grounds. He did not want their land." Margaret Mead⁷¹ has ably pointed at the Indian woman who was not too much "displaced" socially. "With the men, however, it was different. All their old techniques were abandoned." They had strong technical interests and abilities. In order to turn them into farmers⁷² they were coralled in rural slums.

Overcrowding has as much to do with specific Indian habits and mores as with their economic status. The first element is the traditional virtue of hospitality, the second the custom of sleeping on the floor.⁷³ Tuberculosis, trachoma, syphilis and alcoholism aggravate the social handicaps. The death rate of natives from tuberculosis was 6.55 in Alaska,⁷⁴ of white people

⁶⁸ *Ibid.* p. 14, 163.

⁶⁹ *Ibid.* p. 14, 161 and 14, 162.

⁷⁰ Duffus: *Santa Fe Trail*, p. 114.

⁷¹ Margaret Mead: *The changing culture of an Indian Tribe*, Columbia Univ. Press, New York 1926, p. 26.

⁷² "They had been encouraged to farm, but this new activity had no old base upon which it could be grafted. The settled routine of farm life conflicted with all their habits. Besides, it was woman's work. It presented no opportunity for adventure, for sudden display of skill, for personal distinction." *Ibid.*

On the working of the Allotment Act of 1887 see Oliver La Farge: *As long as the grass shall grow*. Alliance Book Corporation, New York 1940, pp. 26-30. There were 150,000,000 acres of Indian land in 1873; by 1933, only 47,000,000 acres remained. *Ibid.* p. 30. The Indian Reorganization Act of 1934 started a new and better policy.

⁷³ *Survey*, p. 14, 412. A nurse reports of the Chippewas: "The typical Indian family of today consists of 6-10 members—often including one with chronic tuberculosis . . . living in a low, one-room, tar paper shack." *Ibid.* p. 14, 346.

⁷⁴ *Ibid.* p. 19, 866 (1926-30).

only 0.56. The suicide rate, on the other hand, is much lower than that of the Alaskan white.⁷⁵ Yet, deadly as want and the exigencies of the machine age may be, abundance is still more fatal.⁷⁶ "Diabetes," we are told of the Osage tribe in oil-rich Oklahoma, is a major health problem . . . "from 10-15 per cent of the tribe over 40 years of age is affected compared to one-half of 1 per cent for the entire United States."⁷⁷ Death and crime are caused by both extreme misery and extreme luxury.

⁷⁵ Figures *Ibid.* p. 19, 875.

⁷⁶ The higher Indian arrest figures may point in the same direction, although the issue remains to be studied and could be partly explained otherwise.

⁷⁷ *Survey*, p. 22, 778. For the etiology compare the note: "October 18, 1897 the first oil well was brought in . . . beginning an era of unparalleled wealth for the Osage people." *Ibid.* p. 22, 769.