North Dakota Law Review

Volume 51 | Number 1 Article 15

1974

Book Reviews

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Recommended Citation

Holm, John (1974) "Book Reviews," *North Dakota Law Review*: Vol. 51 : No. 1 , Article 15.
Available at: https://commons.und.edu/ndlr/vol51/iss1/15

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BOOK REVIEWS

AMERICAN INDIAN LAW: NEW PUBLICATIONS SINCE 1970

I. *Court Decisions*

The Native American Rights Fund and the National Indian Law Library (both located at 1506 Broadway; Boulder, Colorado 80302) since 1973 have jointly published an annual *Catalogue: An Index to Indian Legal Materials and Resources*. It is an access source to the holdings of the National Indian Law Library and includes court cases often found in the *Indian Law Reporter,* a project of the American Indian Lawyer Training Program of Washington, D. C. The *Reporter* uses the *Catalogue's* subject index to categorize reported cases. Thus, both titles are primary sources of Indian case law. Also the U.S. Interior's Board of Indian Appeals started publishing their own *Decisions* in 1972.

II. *Studies*

The National American Indian Court Judges Association [Suite 501; 1000 Connecticut Avenue, N.W.; Washington, D.C. 20036; (202) 296-0685] has published a five volume work titled *Justice and the American Indian* which is directed to the improvement of tribal legislation, courts and administration. This publication is more than a restatement of current law. Alternatives for tribal, state and federal action are included.

Many of the alternatives presented are applicable both to Indian and non-Indian legal institutions and conclusions are made as to the political atmosphere affecting the possible adoption of the alternatives. *Volume 4: Examinations of the Basis of Tribal Law and Order Authority* attempts to fulfill three purposes: (1) to identify the problems in the area of Indian jurisdictional authority; (2) to present a documented background for the specific legislative illustrations which are included in the study; and (3) to stimulate discussion of the general subject area so that whatever changes may be recommended in this field will be practical and beneficial to the Indian community. Sixty pages are devoted to a fresh discussion of defini-

tions of "Indian" and "Indian Country." Of peculiar interest in *Volume 5: Federal Prosecution of Crime Committed on Indian Reservations* is a twenty page questionnaire distributed to Federal prosecution agencies.

III. *Federal Policy*

Your Right to Indian Welfare (December 1973, Clearinghouse Publication No. 45) is a publication of the United States Commission on Civil Rights. This 49 page publication informs Native Americans and attorneys of the welfare procedures of the Bureau of Indian Affairs. There are frequent citations to the *Bureau of Indian Affairs Manual* (cited IAM).

Among the Bureau's publications is the title *Federal Indian Policies . . . from the Colonial period through the early 1970's.* For a more expansive treatment of Federal policy toward Native Americans the Bureau has published *A History of Indian Policy* (Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, $4.25, stock number 2402-00031, 1973). This 328 page publication with a comprehensive index, bibliography, and footnotes draws upon a wide range of government documents and is invaluable for an academic understanding of Federal policy.

IV. *Treaties*

The institute for the Development of Indian Law [927 15 Street, N.W. Suite 612; Washington, D.C. 20005; (202) 638-2287] has compiled among other titles the following: *Treaties and Agreements of the Chippewa Indians* ($5.00) and *Treaties and Agreements and the Proceedings of the Treaties and Agreements of the Tribes and Bands of the Sioux Nation* ($5.00) including the Turtle Mountain Tribe.

The Chippewa title traces Chippewa treaties back to their original Wyandotte and Ottawa notations and, thus, contains a comprehensive historical chronology of treaties. Treaties are arranged by date and in the later years when Chippewa bands began signing treaties by those existing bands and their reservations. Thus, some of the treaties printed are not traced to the existing bands of today. Also there is no index of signatories.

V. *Codes*

The United States Commission of Civil Rights (Superintendent of Documents; U.S. Government Printing Office; Washington, D.C.) has published the *American Indian Civil Rights Handbook* ($.55; March, 1972; Clearinghouse Publication No. 33). This 96 page publication is "A Guide to Rights and Liberties, Under Federal Law, of

Native Americans Living On and Off Reservations" and was written to inform Native Americans of their constitutional rights. Title 25 of *The United States Code, United States Code Service, United States Code Annotated,* and *The Code of Federal Regulations* are, in essence, such guides. More information as to specific legal problems is found in various tribal codes. These codes usually deal with both criminal and civil matters and spell out procedural, evidentary and other matters of legal process.

The Indian Civil Rights Task Force of the United States Department of Interior is publishing a tentative draft of a proposed *Model Criminal Code* in the fall of 1974. The Task Force is also issuing two new volumes to Kappler's five volume *Compilation of Federal Statutes, Executive Orders, Presidential Proclamations and Treaties Relating to Indian Affairs up to June* 29, 1938. The new volumes will update the Kappler *Compilation* through December, 1970. The two new volumes will also contain all executive and secretarial orders relating to American Indians appearing in the *Federal Register* from 1936 through 1970, a subject index and a table of statutes repealed, amended, or otherwise affected.

VI. *Miscellaneous*

Also in the fall of 1974 the Task Force will publish a *Compilation of Solicitor's Opinions.* This is a collection of 2,500 opinions, published and unpublished, with tables of authorities cited, tables of opinions overruled or modified, and subject index. The Task Force is also working on a *Comprehensive Treatise of Indian Law.* The completion date for the treatise is undetermined.

United States congressional publications concerning American Indians, can be easily located through the *Congressional Information Service Index* and *Abstract* volumes.

ROGER BECKER*

LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES. By Monroe E. Price, Bobbs-Merrill Company, Inc., 1973. Pp. 807. $16.50.

Professor Price's book is a welcome addition to legal education. It is the first Indian Law text that is suitable for a law school coursebook. The only other two Indian Law treatises are Felix

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Cohen's monumental work *Handbook of Federal Indian Law* published in 1942 and its successor *Federal Indian Law* published in 1958 by the U.S. Solicitor for the Department of Interior. The Interior Department's book purports to supplement and update Cohen's work, but it in fact emasculates many of Cohen's views on Indian sovereignty. Fortunately Cohen's *Handbook* has been republished and is once again available. However,neither Cohen's treatise nor its more recent imposter is useful as a law school text. For those law school instructors who refrained from offering an Indian Law course because of a lack of a text or an organized set of materials—the excuse is gone. Professor Price's book is an excellent law school text. This writer used it for a law school seminar in Indian Law in the 1974 spring semester. Both the instructor and the students were satisfied with it. It is not an easy book, but it is not an easy course. This review will concentrate on *Law and the American Indian* as a law school text. However, it should be noted that the book will also be a very useful tool for practicing attorneys to begin their acquaintance with Indian Law.

The subject matter of Indian Law is not what many might think. Indian Law is not the study of rules of conduct for Indians, enacted by Indians, and enforced by Indians. It does not deal with treaties between Indian nations, constitutions of Indian nations, statutes and ordinances of Indian tribes, or an Indian tribe's dispute resolution machinery. Instead, Indian Law deals with constitutional, treaty, statutory, and case law and administrative regulation of white governments which control the lives of Indian Americans. Indian Law is white man's law that has particular application to the red man. Perhaps Professor Price chose the more accurate title, *Law and the American Indian*, to make it clear that it does not deal with the Indian tribal law.

As Professor Price makes clear in the Preface, the main theme running throughout his book is "Cultural Pluralism." He states in the first paragraph of the Preface:

> The search within our past for the remnants of cultural pluralism has intensified within the last few years. But there has been little in the exploration which asks how law and the legal system have contributed to the support or destruction of separatist tendencies. This book is an attempt to ask such questions in a context where there has been a rather formal debate on the precise issues of assimilation and preservation of cultural identity.[1]

Perhaps the most important thing that Americanized Anglo-Saxon jurisprudence has yet to prove is whether it can accommodate signi-

1. M. PRICE, LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES, vii (1973).

ifcant cultural differences. Can our legal system adequately resolve disputes between cultural values? Can two cultures coexist within the same legal framework when they have value systems which are basically different—such as individual and societal rights and obligations, individualism versus collectivism, separation of church and state, and property ownership? To this writer, the answer is not yet clear. The reader will be confronted with this question throughout the book. It is a useful confrontation for both the law student, who may not have been explosed to cultural problems earlier in his law school career, and for the practitioner, who needs occasionally to view the legal system's operation from a new perspective.

The book is rich in historical and cultural materials, which are necessary for an understanding of what law is, why it is, and how it is likely to develop. It is impossible to grapple with the material in the book and not realize how much law is intertwined with cultural and social values. But once law becomes involved, it creates its own legacy. The special consideration which law has long given both the Indian tribe and the individual Indian person has contributed to the unique status of the Indian American and the problems, both legal and social, that currently face this nation.

Indian tribes and individual Indian persons have legal attributes not possessed by any other racial or ethnic group or individuals. The Indian tribe can control the conduct of its members in ways that would violate the United States Constitution if the action were taken by the national, state, or local government. In addition, in states not having Public Law 280 jurisdiction,[2] most state laws do not apply within Indian reservations.

Both the instructor and the students will notice immediately that Indian Law is conceptually difficult. It is not an area that can be quickly skimmed for principles of black letter law. Questions of external and internal sovereignty, territorial and subject matter jurisdication are neither simple nor strictly legal. Which proscriptions of the United States Constitution apply to relations between an Indian tribe and its individual members, is an elementary question that will remain unanswered despite the enactment of the Indian Civil Rights Act of 1968.[3] The question of which governmental unit—federal, state, or Indian tribe—has jurisdiction of a crime committed on an Indian reservation will perplex the student as much as it perplexes law enforcement officials and tribal leaders. The reader will discover, however, the important role that economic,

2. 67 Stat. 588, *as amended* 25 U.S.C. §§ 1321-26 (1970) confers upon named states civil and criminal jurisdiction over selected Indian reservations, and through an enabling clause permits states, with the consent of the tribe affected, to assume by proper legislative and constitutional action, such jurisdiction over other Indian lands. For a discussion of the provisions of Public Law 280, refer to M. PRICE, *supra* note 1, at 210-18.

3. 25 U.S.C. § 1301 *et seq.* (1970).

political, and social policy has played in the unique legal status of Indian tribes and individuals. The flow of power among federal, state, and tribal governments is as political as it is jurisprudential.

Within the area of Indian Law, one is confronted by substantial legal concepts from constitutional law, international law, federal jurisdiction, administrative law, conflict of laws, and state and local government. The book does not attempt to give answers to legal problems. In fact, many of the questions presented in the notes are the typical "unanswerable" questions traditionally found in law casebooks. Students will not find the book an easy one. However, no student can seriously read the book without being forced to wrestle with the concepts and issues involved.

State power over Indian tribes and individual Indian persons, the topic of Chapter 2, is currently the most important area in Indian Law. Although this is a present day problem, its proper resolution cannot be understood without an understanding of the historical development of the legal relationships between the white immigrants and the Native Americans. Historically, the questions of external and internal Indian sovereignty arose in the context of disputes between the Federal Government and Indians. These issues are set forth in Chapter 1. Today, however, the important questions of sovereignty are arising in the context of disputes between State Governments and Indians. While Chapter 1 is essential for the historical and cultural background necessary to analyze the present legal doctrines, Chapter 2 presents today's important legal questions. State power to tax and impose zoning and environmental controls, state control of water, minerals, fish and game, children, conduct on highways, and consumer relationships are now raising difficult conceptual questions when the object of state power is an Indian tribe or individual.

The paradox is that although Indian Americans are citizens of the United States and therefore citizens of the state in which they live, they are not subject to most state laws when they are within their reservation. Thus, increased Indian demand for benefits of state citizenship, creates increased state claims for imposing burdens on the Indian tribe and individuals. The Indians' quest for political rights—voting, state welfare services, and public education—are being met by political pressure for the state to impose burdens—especially taxes—on the Indians.

In presenting this area in class, this writer found it beneficial to cover the matter in section D of Chapter 2—the state's power to tax—directly following section A—judicial solutions. The primary reason for this is that two landmark Supreme Court cases on state taxation of Indian tribes and reservation Indians were decided since

the book's publication. These cases can best be understood when read immediately after the cases presented in section A of Chapter 2—*Williams v. Lee*,[4] *Kake v. Egan*,[5] *Warren Trading Post v. Arizona Tax Commission*,[6] and *Kennerly v. District Court of Montana*.[7] In 1973 in *McClanahan v. State Tax Commission of Arizona*,[8] the Supreme Court of the United States held that Arizona could not apply its state income tax to reservation Indians whose income was derived wholly from reservation sources.[9] On the same date, the companion case of *Mescalero Apache Tribe v. Jones*,[10] held that New Mexico can impose a gross receipts (sales) tax on a ski resort operated by the tribe outside the reservation, but that the Indian Reorganization Act[11] bars imposition of a state use tax on property installed on the resort as a permanent improvement.[12] An understanding of the federal instrumentality, federal preemption, federal supremacy, and infringement tests used in *Williams, Kake, Warren Trading Post, Kennerly, McClanahan,* and *Mescalero* cases is essential for both students and practitioners to cope with the conflicts between state and Indian sovereignty.

One important area is perhaps treated too lightly by Professor Price. Federal statutes and administrative regulations and practices of the Bureau of Indian Affairs permeate the day-to-day life of Indian tribes and individuals. The book, of course, discusses several of the important Federal statutes that exemplify Congress' plenary power in Indian relations. However, it does not fully indicate the complete scope of activities controlled by Title 25 of the United States Code.

The administrative regulations and the actual practices of lower level government officials in implementing those regulations is probably more important than Congressional exercise of its plenary legislative power or landmark decisions of the judiciary. The book does not fully convey the extent of present misuses of governmental power by the Bureau of Indian Affairs. The Indian occupation of the BIA office in Washington, D. C. in 1972 and the subsequent public exposure of BIA files gave documentary proof of the continued BIA neglect and betrayal. Examples of administrative arrogance continue. A recent report by nationally syndicated columnist Jack Anderson exposed the BIA practices of leasing Indian lands containing prime potato acreage to corporate farmers at a return of 2 per cent

4. Williams v. Lee, 358 U.S. 217 (1959).
5. Kake v. Egan, 369 U.S. 60 (1962).
6. Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685 (1965).
7. Kennerly v. District Court, 400 U.S. 423 (1971).
8. McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973).
9. *Id.* at 165.
10. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).
11. 25 U.S.C. §§ 461 *et seq.* (1970).
12. 411 U.S. at 158.

of the harvest to the Indian owners, compared to the 30 to 40 per cent return received by neighboring landowners who lease their land to potato growers.[13] It is this type of federal administrative conduct that attorneys representing Indian tribes and individuals will face every day of their practice.

Unfortunately, there are some mechanical problems that detract from the book. Various parts read like they were drafted independently of other parts of the book. For example, the case of *Arizona ex rel. Merrill v. Turtle*,[14] is presented on pages 120-24. But on pages 188-89, the case is mentioned in a note as if it were the first time that the case had been mentioned in the entire book. Sometimes a case is presented in such an edited version that, without an accompanying explanatory note, it is extremely difficult to discern either its holding or its historical importance. For example, *United States v. Rickert*[15] on page 258 in the basis for the "federal instrumentality" doctrine that exempts from state taxation Indian trust land, attachments, and personal property used on the land. It is impossible to learn this from the edited opinion and the short note following the case.

Despite these minor flaws, Professor Price has made a significant contribution to legal education and the development of law. With the long needed rise in the number of Indian law students, the increased interest by many non-Indian law students, and the admitted lack of background and knowledge by many members of the bar, the arrival of this book should remove the last obstacle to the development of this neglected area of jurisprudence. The text is suitable for lecture classes, seminars, and guided research by individual students. The mechanical problems appearing in this edition can be easily corrected in future editions which, hopefully, will be made necessary by new statutes, cases, and regulations which take into account the rich cultural heritage of those who were here to greet our immigrant ancestors.

LANCE TIBBLES*

13. Anderson, *Bureau Gives Indians Poor Shake*, Bismarck Tribune, July 8, 1974, at 4, cols. 4-5.

14. Arizona *ex rel.* Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969).

15. United States v. Rickert, 188 U.S. 432 (1903).

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NATIVE AMERICAN TRIBALISM INDIAN SURVIVALS AND RENEWALS. By D'Arcy McNickle. New York: Oxford University Press, 1973. Pp. 190. $6.95 cloth.

The greatest source of all our grievances is, that the white men are among us.[1]

Even though a craze towards ethnicity may exist in America today,[2] cultural separateness from the white man's world goes to the very foundation of the Native American's existence. It is not a recent cultural fad, but a way of life that has been vigorously defended against vicious attacks for nearly five hundred years. *Native American Tribalism* was not meant to be a legal treatise on Indian law but a brief historical analysis of attacks upon Indian tribalism by two political bodies: the legislative and the executive branches of the federal government. The author examines the policies of these two branches of government vis-a-vis their effects on Indian tribes by dividing American Indian history into six eras: colonial, formative, attrition, reassessment, negation, and Red power. McNickle's view of these eras is highlighted by the following quotes.

Political philosophy seemed not to affect the white man's penchant for taking what he wanted.[3]

Despite the Pope's and the Spanish monarch's policy of peaceful co-existence and fair dealing, the Spanish colonists in the "New world" inflicted disastrous results upon the Natives. Survival for these settlers was not of primary concern; making a business profit was, even at the expense of the natives.

However, further north where the elements made survival particularly difficult, the white man was able to associate with the Red-man without attempting to annihilate him. This peaceful co-existence lasted but a short while; the white man was soon able to cope effectively with the harsh weather elements. Survival was no longer dependent upon the Red-man's generosity.

I have long viewed treaties with the Indians an absurdity not to be reconciled to the principles of our government.[4]

The infancy of our nation was a formative period, particularly for its Native Americans. These early years were an era of treaties,

1. D. MCNICKLE, NATIVE AMERICAN TRIBALISM INDIAN SURVIVALS AND RENEWALS 35 (1973), *quoting* J. HALKETT, HISTORICAL NOTES RESPECTING THE INDIANS OF NORTH AMERICA 310-12 (1825).

2. VII CENTER FOR THE STUDY OF DEMOCRATIC INSTITUTIONS, CENTER MAGAZINE, No. 4 (1974).

3. D. MCNICKLE, NATIVE AMERICAN TRIBALISM INDIAN SURVIVALS AND RENEWALS 48 (1974).

4. *Id.* at 56, *quoting* 34 Niles Register 11 (March-April 1826).

boundary constrictions, and ideas of the "vanishing Red-man" and social immobilization. Federal policy shifted, as it would do often in later years, from extermination in the Jacksonian era to accommodation in later administrations. Both were aimed at the destruction of the Indian culture as a separate entity. Treaties read of using the "utmost good faith" when dealing with the Indian, while government policy gleemed of brutal backstabbing.

> *[I]t is high time to do away with the farce of treating with Indian Tribes.*[5]

The years of attrition by no mere coincidence coincided with the years of rapid westward expansion. First, the Indians were shuttled beyond the Great Mississippi to live on the land "so long as the grass shall grow." Then knifed apart, some were sent to the north, others to the south to clear the way for the ever plodding, westward marching wagon trains bulging with settlers seeking their riches in the gold mines of California.

Next, under the guise of humanitarianism tribal lands were sliced from the tribal community and forced upon individual Indians, stripped of federal protection. This was an effective "mechanism for separating the Indians from their communal lands and pauperizing them."[6]

> *Like other people the Indian needs at least a germ of political identity, some governmental organization of his own . . . to which his pride in manhood may cling and claim allegiance. . . .*[7]

It was not until 1933 that an administration recognized that the Indian race was not headed for early extinction, that the federal government had the responsibility to enable these people to lead self respecting lives and then reassess federal policies with that in mind.[8] Financial credit was made available, creating opportunities for Indian economic advancement never before experienced. All these were positive gains for native tribalism.

> *A bureaucracy is rarely responsive to a climate of opinion and yields to change only under compulsion. In this instance The Bureau of Indian Affairs . . . persisted in furthering the alienation of Indian land.*[9]

Often bureaucratic inflexibility and insensitivity infests and then

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5. *Id.* at 72, *quoting* Abel, *The History of Events Resulting in Indian Consolidation West of the Mississippi*, ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION (1906).
6. *Id.* at 83.
7. *Id.* at 85.
8. *E.g.*, The Indian Reorganization Act of 1934, 25 U.S.C. § 476 (1970), *as amended*, 25 U.S.C. § 476 (Supp. I, 1971), *as amended*, 25 U.S.C. § 476 (Supp. II, 1972).
9. D. MCNICKLE, NATIVE AMERICAN TRIBALISM INDIAN SURVIVALS AND RENEWALS 112 (1973).

destroys positive action of its leaders and stagnates policy to the detriment of all concerned. The Eisenhower administration was such a victim. Caught up in bureaucratic fumbling and incompetency and influenced by a few vehement critics of Indian culture, the advancements made by the Roosevelt administration were almost totally negated by the Eisenhower regime. Beginning with Public Law 280,[10] that administration expressed a concern for Indian freedom which was in effect a concern to have the United States freed of any legal or moral responsibility for what might happen to Indian people as a consequence of congressional action. Fear of termination permeated every corner of Indian affairs, undermined every meaningful attempt at organizational reform, and created a psychological barrier to Indian socio-economic development.

We must affirm the right of the first Americans to remain Indian while exercising their rights as Americans.[11]

Even though bureaucratic misfeasance may permeate all segments of government, concerned and capable leaders are able to introduce fresh ideas and new working methods. The Kennedy, Johnson and Nixon administrations appeared to be sanctioning an emerging policy of Indian self-determination. Red power became functional not merely descriptive.

Throughout *Native American Tribalism* is the recurrent theme that the Anglo-Indian experience is unique. It's more than a racial conflict but a basic cultural difference. The civil rights movement of the 1960's against segregation did not affect Native tribalism, in the sense that cultural segregation was not seen as a denial of social status by Native Americans. They prefer "to remain distinctive; . . . but they are ready for a functional integration, particularly in an economic sense."[12]

The Indian experiment is in a position to take the white man's horse and gun without surrendering to the dominant society; to become a modern society and do justice to its members within the relaxed and peaceful Indian environment. Unfortunately, McNickle, just as so many tribes, has failed to realize that like the joys of sex, political sovereignty creates additional responsibilities; responsibilities many tribes are incapable of meeting, others simply unwilling.

JOHN HOLM*

10. 25 U.S.C. §§ 1321-26 (1970).
11. D. MCNICKLE, NATIVE AMERICAN TRIBALISM INDIAN SURVIVALS AND RENEWALS 124 (1973).
12. *Id.* at 146-47.
* Third year law student. The reviewer has worked in an Indian Legal Services Project in New Town, N. D. for the past two summers.

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VOLUME 51 WINTER 1974 NUMBER 2

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THE NORTH DAKOTA LAW REVIEW is published four times a year in November, January, March and May by the University of North Dakota School of Law in co-operation with the State Bar Association of North Dakota.

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The large size of this issue was made possible by generous grants from the Farmers Union of North Dakota and the Student Bar Association of the University of North Dakota School of Law.