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Law and the American Indian: Readings, Notes and Cases, Monroe E. Price

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In the preface to *Law and the American Indian*, Professor Price names three disparate audiences for whom the book is meant to be useful: 1) Indian persons and practicing attorneys, as a practical legal research tool; 2) law schools, as a coursebook; and 3) colleges and universities, as a legal history of the relationship between Native American peoples and the United States. Although I am a neophyte with respect to the legal problems of Native American peoples, have not taught a course dealing with the legal problems of Native American peoples, and am a law professor not a historian, my intent is to comment on the book as a research tool, as a coursebook in law school, and as a history book.

### I. Research Tool

Indian persons and practicing attorneys should not look to *Law and the American Indian* as a quick reference to solve their specific legal problem in Indian law. *Law and the American Indian* is not a treatise on Indian law that attempts to give answers to all possible problems. The style and arrangement of the book are designed to make the reader aware of and thoughtful about the legal history and legal problems of Native Americans, rather than to provide definite answers to specific legal questions. Cases, statutes, treaties, and other materials are included in the book not because they are authoritative, but because they provoke thought and illustrate the development of the legal relationship between Native American peoples and the United States.

Although the book is not a treatise, it is valuable as a research tool by which the Indian person and the practicing attorney can gain entry into Indian law. Professor Price has brought together a wide assortment of materials relating to Indian law. He has arranged these materials into the various topics of Indian law. As a result, an individual Indian or a practicing attorney faced with a legal problem in Indian law need not feel hopelessly lost and afraid to undertake its exploration. *Law and the American Indian* can be relied upon to provide initial conceptual orientation and signposts for further study through the numerous citations contained in the book. Particularly helpful in this latter regard is the 12-page bibliography of law review articles relating to Indian affairs.
Indian persons and practicing attorneys should find the four chapters or subchapters relating to topical issues of Indian law especially helpful to their research activities: Chapter II, "The Powers of the States"; Chapter III E, "Indian Property Rights in the Twentieth Century: The Continuing Judicial and Legislative Debate"; Chapter IV E, "The 1960's and 1970's: Economic Development"; and Chapter V B (4), "The Civil Rights Act of 1968."

Chapter II is a thorough consideration of the issue of the relationship between the states, Indian tribes, and Indian persons. The chapter begins with a discussion of the "infringement test," the "federal preemption test," and Public Law 280 as judicial and legislative solutions to the state-tribal jurisdictional dispute. Chapter II then turns to consideration of the claims of Indian persons to citizenship, political rights, welfare services, and public education against the states. The chapter ends with a study of the claims by states against Indian tribes and Indian persons with respect to taxation, the imposition of state zoning and environmental controls, the regulation of natural resources, and the control and adjudication of vehicular and consumer affairs. The jurisdictional dispute between states and tribes is at present the most hotly debated legal dispute in Indian law. Moreover, as the chapter points out, the greater the demands of Indian persons for the benefits of state citizenship, the greater the reciprocal claim of the states for the imposition of the burdens of citizenship upon the tribe and the individual Indian.

Chapter III E concerns claims for compensation for Indian lands under the Fifth Amendment, special jurisdictional acts, and the Indian Claims Commission Act of 1946. The chapter discusses the kinds of claims relating to aboriginal title to land that have been presented, and the kinds of claims that have succeeded. Chapter III E indicates the tension between moralistic and pragmatic considerations which have formed the American conscience with respect to compensation. And most importantly, the chapter indicates how this tension between morality and pragmatism is reflected in the methods of the claims process and the nature of the decrees issued by the courts and claims commission. Chapter III E provides, in my opinion, a very informative discussion of the Indian claims process.

Chapter IV E discusses the meaning of economic development, its probable impact on tribal governments and Indian peoples, and the problems that companies may encounter when engaged in business on a reservation or Indian land. An article by Professor Price, reprinted in this subchapter, is particularly intriguing. He argues for attorneys representing tribal governments to view economic de-
velopment from a perspective of development of resources as opposed to the creation of jobs and income through work. The argument implies that attorneys representing tribal governments should analogize the reservation to a developing country and negotiate in terms of capital investment, participating ownership, and technological and managerial training programs for the Indian people. From the viewpoint of companies interested in investment, the chapter discusses regulation and taxation by the tribe, "sovereign immunity from suit" of the tribe, and questions of secretarial approval of tribal actions.

Chapter V B(4) confronts the jurisdictional and substantive legal issues raised by the passage of the Civil Rights Act of 1968. With respect to the jurisdictional issues, the subchapter raises the question of whether the federal courts have jurisdiction under 28 U.S.C. § 1343 concerning civil rights, or whether jurisdiction exists by virtue of federal question jurisdiction including an amount in controversy requirement. The subchapter then turns to substantive issues to explore the impact of the Act upon tribal control over entry onto the reservation, tribal membership, the tribal political structure, and criminal justice in tribal codes and tribal courts. The discussion of the Civil Rights Act of 1968 in this subchapter, and in other portions of the book, is very helpful in reminding the Indian person and practicing attorney that the impact of the Act extends to many issues in Indian law besides criminal law and criminal procedure.

Although the chapters and subchapters discussed in the previous four paragraphs are probably the most immediately helpful to Indian persons and practicing attorneys, the remainder of the book should not be ignored as a research tool. The other chapters and subchapters adopt a more historical and chronological approach to the relationship between Native American peoples and the United States. An understanding of the historical-chronological development of Indian law would seem essential for a proper understanding of the legal issues of topical concern. Without a historical-chronological understanding, it would be an almost unavoidable error of the Indian person or the practicing attorney to interpret present legal controversies without awareness of their own cultural biases. A creative, insightful handling of Indian legal problems would most likely come about when those involved in the particular dispute know the historical origins of the dispute and their own "instinctive" cultural responses. Hence, for the person engaged in legal research, these historical and chronological materials are as important as the materials of topical concern.

As a research tool, the book does, however, have several weak-
nesses. It is my impression from talking to Indian law students that federal legislation and Bureau of Indian Affairs regulations exist with respect to almost every aspect of Indian affairs. The book does convey the tremendous influence and power of the Secretary of Interior and the Bureau of Indian Affairs, but the book does not give adequate stress to the importance of federal statutes and administrative regulations. Relatively few statutes and regulations are discussed. Throughout the book, judicial decisions are stressed as the predominant law in Indian affairs. The book could possibly mislead the Indian person or practicing attorney into underestimating the importance of federal legislation and administrative regulations.

As a reflection of the emphasis on case law, the book contains a Table of Cases, but no comparable Table of Statutes or Table of Regulations. Inclusion of tables for statutes and regulations would certainly have been helpful for reference purposes. The book is also poorly indexed. Since few topics are indexed, the index is practically useless for reference purposes.

With regard to two topics, the book lacks depth. The Indian Reorganization Act of 1934 and the termination policies of the 1950s are discussed in separate subchapters, but the book fails to develop clearly the meaning and impact of these two policies. On these two topics, the Indian person and practicing attorney will need to look elsewhere for adequate consideration.

One final comment—likely a provincial comment. Oklahoma Indians and Oklahoma practitioners will not find this book to be as much help as will Indian persons and practicing attorneys in other states. The book is oriented toward the legal problems of Indian peoples who come from tribes possessing a recognizable reservation. Except for certain historical material and bibliographic citations, the book does not directly deal with the unique and complex problems of the Indian people of Oklahoma. Possibly Professor Price decided that the problems of Oklahoma Indians are so confused and chaotic as to defy comprehension. More likely he decided that the need for legal scholarship in Indian law is so great that he could concentrate on Indian problems of reservation tribes without detracting from the importance of his work. The unique problems of Oklahoma Indians have been left for another book.

II. Law School Coursebook

To evaluate Law and the American Indian as a coursebook for law schools, it seems appropriate to ask why a course concentrating on the legal relationship between Native American peoples and the
United States should be taught at all. What justifications can be given for including in the curriculum a course in which this book could be used? Three justifications come to mind.

First, legal issues involving Native American peoples are likely to occur more frequently in the years to come. Disputes over the economic and environmental legal issues of the exploration for and the exploitation of mineral resources on Indian reservations seem assuredly to multiply. Witness the Black Mesa power plant and Montana Indian coal disputes. Disputes over water rights between Indian tribes and American society are also bound to increase as population expands into the arid western states. Other examples could also be given.

Similar legal disputes between Native Americans and Americans have existed in the past. But these past legal disputes did not permeate the consciousness of most Americans, lawyers and laymen alike, nor the consciousness of most Native Americans. One suspects that in the past both cultures interacted with one another while simultaneously attempting to ignore each other's existence and legitimacy. Now Native Americans seem much more attuned to the use of legal methods to protect their interests, while at the same time, the increased demands upon natural resources have made Americans very aware of the resources controlled by Indian tribes. Hence, the resolution of these legal disputes is destined to have significant national impact.

Second, American society during the past several years has expressed an increased concern for ethnic pride and ethnic differences. In educational institutions, this increase in ethnic awareness is manifested in the creation of Indian, Chicano, and Black studies programs. In the law schools, the number of minority students has increased. Of even more direct importance, the number of Indian law students has risen substantially. A course concentrating on legal problems of Native Americans, therefore, can be a "relevant" response by the law school to Native American students in particular, and societal preoccupations in general.

Third, a course involving the legal problems of Native Americans can explore basic values and assumptions of the Anglo-American legal system and trace these values and assumptions as applied to the conflict between the United States and Indian nations. The course would be a study of cultural conflict and cultural interchange as viewed, primarily, through the legal system of the dominant society. Professor Price speaks of the "effort to explore the problem of choice of law in a way which exposes the rawer cultural aspects." (p. 1)
The first two justifications presented for a course concentrating on the legal problems of Native Americans imply that the course would be a substantive legal process course entitled “Indian Law.” Although the subject matter would be Indian law, the purpose of the course would not differ from the purpose of other substantive legal process courses. Students would learn substantive Indian law in order to have a foundation in the law as it presently is. Moreover, students would learn the processes of legal reasoning and the trends of legal development in order to comprehend how the law is likely to develop. Under these first two assumptions, the book can be evaluated as a legal process book.

The third justification presented for a course concentrating on the legal problems of Native Americans, however, implies that the course would be a jurisprudential course. The legal problems of Native Americans would be studied not for pragmatic reasons of perceived need and relevance, but because the study of these issues broadens our understanding of the Anglo-American legal system. In a jurisprudential course, the important questions are not what is the law, how is the law likely to develop, or even how ought the law develop, but why has the law developed as it has, and what intellectual concepts have contributed to the basic values and assumptions of the legal system? Under this third justification, the book can be evaluated as a jurisprudential book.

a. Legal Process Book. From the viewpoint of a law professor, “Indian Law” would be a challenging course to teach. To the professor who is unfamiliar with the legal problems of Native Americans, like myself, the book is a challenge because the subject matter of Indian law is conceptually difficult. The legal problems of Native Americans have been resolved under different theories which are contradictory in their impact at present and in the future. Furthermore, these contradictory theories have been expressed in statutes, regulations, and cases with no apparent recognition, in many instances, that the contradictions exist, or at least, no apparent attempt to reconcile or repudiate the contradictions.

Once the subject matter is mastered by the law professor, Law and the American Indian should serve as a very fine teaching book. The book is a comprehensive collection of materials relating to Indian affairs. Students should, therefore, become familiar with most substantive legal problems of Native Americans. The only weaknesses in the substantive materials are the weaknesses discussed in the evaluation of the book as a research tool.

The book contains a topical arrangement with sufficient textual notes to provide conceptual guidance for students and to raise issues...
for consideration, but the book does not attempt to provide answers to legal problems. Moreover, by reliance upon judicial decisions as the primary source of Indian law, the book presents the familiar case method of legal study. Hence, in the effort to provide intellectual coherence to the material, students should gain a good understanding of the processes of legal development and legal reasoning. Students will not find the book easy, but it should provoke the students to rigorous thought and searching questions.

Students will most likely enjoy those four sections of the book previously described as especially helpful to Indian persons and practicing attorneys. Those four chapters or subchapters appear to give the most definite answers and, additionally, deal with the most immediately pressing legal problems of Native American peoples. Chapter I, “Sovereignty and the Flow of Power” (detailing the triangular power struggle between the federal government, state governments, and tribal governments), and the remaining portions of Chapter III, “Concepts of Property in Federal Indian Law,” Chapter IV, “Land Tenure, Land Use, and Economic Development,” and Chapter V, “Strengthening Tribal Government,” may strike students as too theoretical and too concerned with non-authoritative materials, especially historical and anthropological materials.

If the students can be convinced of the importance of the historical and cultural materials for an understanding of what the law is and how it is likely to develop, a substantive legal process course in Indian law taught from Law and the American Indian should be an excellent course. The book permits both legal process and substantive law to be imparted in a combination that should be satisfactory to both professor and students.

b. Jurisprudential Book. An evaluation of Law and the American Indian as a jurisprudential book is an evaluation of how well the book presents and develops themes which permit the professor and the student to gain a broader perspective on the Anglo-American legal system. For Professor Price, the jurisprudential quest of Law and the American Indian is an exploration of the concept of sovereignty:

What is needed for understanding is that the reader search for the dramatic differences which are observable depending on who governs. This is the important focus. Who makes laws to govern behavior and who decides whether an infraction has taken place? And what difference does it make who governs? There is yet another issue, once removed: who decides who makes laws and who has the power of adjudication? The source of power may have a great deal to do with its exercise. (p. 3)
Sovereignty is thus identified with the power to govern. Sovereignty as the power to govern can be analyzed from three perspectives which parallel jurisdictional concepts in Anglo-American law: power over land, power over people, and power over subject matter. Through a discussion of these three powers and their exercise, the book can be evaluated to determine if it exposes the “rawr cultural aspects” of the choice of law.

Chapter III, “Concepts of Property in Federal Indian Law,” and Chapter IV, “Land Tenure, Land Use, and Economic Development,” are directly concerned with the theme of power over land. Chapter III traces federal property concepts to their origin in the rights of discovery and conquest of European nations, through the expansion of federal title to land by the treaty process, into the congressional exercise of power over land to pursue policies deemed beneficial for the United States, Indian tribes, and individual Indians, and into the procedures for compensation for aboriginal title under the Fifth Amendment and the various claims acts. Chapter IV discusses the various policies of allotment, the Indian Reorganization Act, termination, and economic development which have been applied by the federal government to Indian lands and the cultural reasons which may have thwarted these federal policies. Chapters III and IV make it clear that the government, by having power over land, has the power to support or destroy the cultures occupying that land.

Chapters III and IV also reveal the cultural conflicts which made it almost inevitable that the Native Americans would lose substantially all their land once the North American Continent had begun to be inhabited by European settlers. The settler culture valued private property and productive use of land either for agriculture or industry. Native American cultures valued communal property and a stable, harmonious relationship to the land. Moreover, as the population of the United States swelled with immigrants, the settler culture became convinced that the land was vast and the Indians few. Indians could be removed further westward to permit the frontier to expand. In the end, numbers and force overwhelmed the resistance of Native American peoples to the loss of their land.

Despite the loss of most of their land, Native American peoples still control large amounts of land. At the same time, the values of the settler culture and the values of the Indian cultures, the balance of numbers and force, remain relatively the same today as in the past. Hence, power over land is as crucial an issue today as it has been in the past.

*Law and the American Indian* clearly presents the meaning and
significance of the struggle for power over land and the cultural conflict involved. Another perspective on the legal relationship between Native Americans and the United States with respect to land could have been obtained, however, if the book had contained a chapter devoted solely to comparative experiences wherein the land base of minority cultures have been somewhat protected, e.g., the commonwealth status of Puerto Rico, the American trust territories of Micronesia, the autonomous and union republics of the Soviet Union, and the national minorities regions of China. Comparative experiences emphasize those events and values of a culture which permit or prevent the creation of various legal relationships. An examination of comparative experiences would, therefore, provide further insight into the extent to which American society is willing to permit and to protect the exercise of power over land by Native American cultures.

Chapter I, “Sovereignty and the Flow of Power,” has the best discussion of the struggle between the federal government, state governments, and tribal governments for power over people. It focuses on criminal law and criminal justice administration to examine which government determines what behavior is criminal and which government controls the adjudication procedure. The chapter points out that American society has generally been unwilling to permit tribal cultures to define crimes and to punish offenders.

Chapter I also exposes several cultural values of the American society which led to the imposition of Anglo-American criminal law upon the Native American peoples. The American society firmly believed in the moral superiority of its criminal laws as compared to the moral judgments of tribal cultures. American society firmly believed in the civilizing influence of its criminal law upon the Native American peoples. And finally, American society was loath to permit Native American cultures to punish non-Indian persons. Underneath the reluctance to permit tribes to define and to punish crimes is a pervasive trait of this society: the classification of persons according to their race.

Excerpts from two law review articles, reprinted in Chapter I, especially discuss classifications of Native Americans according to race. Moreover, the chapter points out that so long as racial classification is maintained, tribal cultures will be limited in its power over people. But overall, the book fails to develop the implications of racial classification upon the legal relationship between Native Americans and the United States. An examination of racial classification in American society would provide further insight into the extent to which it is willing to permit tribal cultures to define their
own membership and to control those persons who inhabit Indian lands.

Chapter V, "Strengthening Tribal Government," most cogently discusses the conflict for power over subject matter. The chapter delineates the control over education, food, and religion that has been exercised by the federal government. Chapter V then turns to an exposition of the powers of the Secretary of Interior to approve or disapprove actions of tribal governments and the limitations on the actions of tribal governments by the United States Constitution and the Civil Rights Act of 1968. As Professor Price views this chapter, it "is an attempt to raise questions about the manner in which the legal framework within the United States weakens or strengthens tribal governments." (p. 675)

Chapter V makes it clear that if tribal governments were permitted to control their political structure, their religion, their children, without outside interference, then the tribal cultures would be more likely to survive. From the chapter, it is equally clear that the American cultural values of a republican form of government, constitutional freedoms of speech and religion, and due process in criminal law clash sharply with tribal cultural values that may grant governing powers to elders, consider freedom of speech and religion disruptive of the tribal community, and have no conception of criminal law, as distinct from the cultural mores, which would necessitate due process conceptions. American cultural values are oriented toward the individual, whereas the tribal cultural values are oriented towards the collective. The book underemphasizes the importance of this difference between a culture that values the individual and cultures that value the collective.

Power over the subject matter of religion is informative as to the different consequences that flow from protection of the individual or protection of the collective. For members of the American community, whether or not certain religious practices are permissible should be decided under the First Amendment to the United States Constitution. For Native Americans, whether or not certain religious practices are permissible could be determined not by reference to the First Amendment, but by reference to the preservation of the cultural entity of which the religious practice is an expression. Native American peoples can claim to be distinct from all other inhabitants of the United States because they are indigenous groups while everyone else is an immigrant by choice or force. No immigrant group can claim to stand apart from the political framework of the United States; Native American cultures can make that claim under the concept of "inherent tribal sovereignty."
Professor Price states that "only muted discussion of one of the most interesting debates in Indian legal history, the extent of 'inherent tribal sovereignty'" (p. 676) is presented because he has opted for a more legal analytical approach. The book would have been strengthened as a jurisprudential book by a full and explicit discussion of the concept of “inherent tribal sovereignty.” An examination of inherent tribal sovereignty would have provided further insight into the extent to which American society is willing to permit tribal governments to exercise power over those matters which affect political structure, religion, and culture generally.

Although *Law and the American Indian* could have dealt more broadly with the themes of power over land, power over people, and power over subject matter, the book presents excellent material for a jurisprudential course. The problems raised by the legal relationship between Native American peoples and the United States, and the insights of the author, presented by the arrangement of the book and the textual notes, supply rich material for discussion and debate.

**III. History Book**

As a legal history of the relationship between the United States and the Indian tribes for use in colleges and universities, *Law and the American Indian* would not, in my opinion, be very satisfactory as a text. The tension between the analytical approach for a substantive legal process book and the thematic approach for a jurisprudential book make the book difficult to read. In addition, for history students who are unfamiliar with judicial decisions, statutes, regulations, and the process of legal reasoning, the book would be ambiguous and obscure. The history is too well hidden in the legal materials. Conventional history books can more easily and more understandably present the legal history of the United States and Native Americans. Professor Price seems to admit as much when he comments in Chapter V, "On the matter of tribal strength, a half page of history would be as relevant as a thousand words of legal analysis;..." (p. 675)

For the professional legal historian, the law professor, and law students, the tension between legal analysis and thematic development is manageable because each is familiar with legal materials and legal reasoning. For most history students, however, the book is too unusual to be comprehensible.

*Law and the American Indian* does contain, however, several sections of excellent historical material. Chapter III A, detailing the origins of federal property concepts in the rights of discovery and
conquest of European nations, and Chapter III B, detailing the treaty negotiations between the United States and the Cherokees and the United States and the California Indians, are especially informative and interesting. Pragmatism mixed with self-righteousness, and backed by force, has characterized both European claims of title to land and the negotiation attitudes of American representatives.

Chapter IV B on the development and meaning of the allotment policy is also very informative and interesting. American values of private property, hard work, thrift, and industry were not as easily transferable to the Indian person as the patent to the land.

In light of these three subchapters, Law and the American Indian could serve as a reference work and supplementary reading for a course on the history of Native Americans and the United States.

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