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"Resource Page" (2009). *Court Review: The Journal of the American Judges Association*. 285.
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Resource Page: Focus on Indian Law

Editor's Note: Professor Nancy Carol Carter has provided an excellent review of sources for research on Indian Law (see p. 32). This Resource Page separately identifies some resources that we have surveyed that appear useful. Judges wanting a comprehensive overview of potential sources about Indian law should review the Carter article in addition to this Resource Page.



BOOKS

ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY & SARAH KRAKOFF, *AMERICAN INDIAN LAW: CASES AND COMMENTARY*. Thomson/West, 2008 (\$141). 901 pp.

WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL*. Thomson Reuters, 2009 (\$33). 529 pp.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (NELL JESSUP NEWTON, ED.). Lexis Nexis, 2005 (with 2009 Supp.) (\$189). 1,413 pp. plus 153-pp. Supp.

STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS*. New York Univ. Press, 2004 (\$20). 380 pp.

These four books are among the best for providing coverage of American Indian law. We will briefly describe each one before comparing their potential usefulness to judges.

The first one listed—we'll call it the Anderson casebook for convenience since he's the first-listed author—is the most recent law-school casebook in the field, published in 2008. All four of the authors are law professors who also serve either as editors or authors for *Cohen's Handbook of Federal Indian Law*. (We note too that one of the authors, Philip Frickey, is a member of the *Court Review* Editorial Board.) The book is thorough and well written; it includes both source materials (excerpts of key statutes, cases, and even legislative history) as well as treatise-like coverage of

the caselaw in many areas of focus, like the Indian Child Welfare Act.

The Anderson casebook begins with three chapters explaining the scope of Indian law and reviewing the various approaches to Indian policy that have been used in United States history. Later, at least one chapter is devoted to each of these topics: criminal jurisdiction in Indian country; tribal sovereignty; jurisdictional struggles between states and tribes; tribal jurisdiction over non-members; tribal jurisdiction over natural resources, hunting, and fishing; water rights; and the religion and culture of American Indians. Other chapters look at the rights of natives in Alaska and Hawaii, as well as the rights of indigenous people in other countries, including Canada, Australia, and New Zealand.

For those who may be interested in the disputes that drive scholarly work in the area of American Indian law, there is a useful, six-page overview of those debates at the end of the book. The authors describe *foundationalist* scholars who attempt to reconnect Indian law to its precedential and constitutional roots, *critical* scholars who point to racism as a factor in the decisions made, *pragmatists* who note imperfections but also point to guiding principles even in cases that today may seem flawed by racism, and *skeptics* who question whether there are truly distinctive Indian law principles that should guide cases rather than more general principles applicable to all types of disputes. Caselaw is often shaped, subtly or directly, by the themes at play in scholarly work. This section of the book provides a good survey of the current academic literature, with citations to key articles from each group of scholars.

Canby's book is part of West's Nutshell series, which consists of about 150 books summarizing key concepts related to various law-school courses. But Canby's book is famous within Nutshell circles as the first—and probably only—Nutshell to have received published book review. Now in its fifth edition, Canby's book still provides a good introduction to all of the key concepts of American Indian law. His first two chapters cover what is an

Indian tribe, who is an Indian, and the historical development of federal Indian law. He then reviews tribal governance and sovereignty, the relationship between tribes and the United States government, civil and criminal jurisdiction in Indian country, Indian gaming, taxation and regulation in Indian country, water rights, individual rights of Indians, and rights related to water, hunting, and fishing. Canby includes one chapter related just to Alaska natives.

As would be expected from a Nutshell, Canby provides an overview in each of these areas, not an exhaustive survey of cases. You can be confident, though, that any United States Supreme Court cases relevant in an area will be covered, and Canby notes key cases from federal and state caselaw as well.

Canby is a senior judge on the United States Court of Appeals for the Ninth Circuit. He formerly was a law professor at Arizona State University.

Cohen's Handbook of Federal Indian Law is the only true treatise in this area. It has an interesting history, and the present edition is a first-rate scholarly work. It also has regular updates (including one published this year), and you should be able to find it in most law-school or state law libraries.

The book was first published by Felix Cohen in 1941, and it brought together what had been seen as a relatively unconnected set of materials. *Cohen's Handbook* is credited with creating federal Indian law as a separate area of study and specialty. Cohen died in 1953, and the treatise was later revised by the U.S. Department of the Interior. While Cohen had stressed tribal self-government, the federal government's revision stressed the plenary power of the federal government. The Indian Civil Rights Act of 1968 mandated another update of *Cohen's Handbook*, and a board of editors and authors produced a new edition in 1982 that was more faithful to Cohen's views. The present edition is the work of more than three dozen Indian law scholars, led by a team of scholar-editors and a chief editor, Nell Jessup Newton, now the dean at the Notre Dame Law School.

Cohen's Handbook provides fairly thorough treatment of all areas of Indian law. The book includes coverage related to natives of Alaska and Hawaii, as well as specific discussion regarding tribes in Oklahoma and the Pueblo Indians. A particularly useful feature early in the book is a chapter detailing a number of principles of interpretation that are specific to Indian law, including a number of canons of statutory construction that have been laid down, mainly by the United States Supreme Court, for Indian law matters. The Anderson casebook also provides a detailed discussion of these canons, but the discussion in *Cohen's Handbook* is especially good, including as it does a supplement that keeps the material up-to-date. *Cohen's Handbook* also includes coverage of federal laws of general applicability that may affect Indian law cases as well.

Pevar's book is intended for a lay audience, and it's written in a question-and-answer format. All of these books answer the question, who is an Indian? Pevar methodically sets out all of his book in questions like that, and he then provides straightforward answers. The book is not updated as often as the others we've listed here; its first edition was in 1983 and this third edition was published in 2004. But it too provides a very good overview of all of the major areas of Indian law: historical development; civil and criminal jurisdiction in Indian country; hunting, fishing, and water rights; taxation; civil rights; gaming; and the Indian Child Welfare Act.

Pevar is an attorney for the American Civil Liberties Union. He has taught at the University of Denver School of Law.

For a quick check of the comparative usefulness of these four books for state-court judges, we looked at their treatment of the Indian Child Welfare Act (ICWA), which is of concern to any judge handling a matter related to custody or adoption of a child who might be eligible for membership in a recognized Indian tribe. Between Pevar and Canby, Pevar provides more thorough coverage of this topic, with a straightforward, 30-page chapter. But Canby has a good overview too. We looked at coverage of a subtopic—the “existing Indian family doctrine,” under which some state courts have held that ICWA doesn't apply when the Indian parents haven't maintained a

significant relationship with the tribe. Both Pevar and Canby covered this issue. Once again Pevar had a bit more detail on it, but Canby's discussion, though brief, was a good summary of the caselaw development. And he cited to a leading and recent case in which the Oklahoma Supreme Court had reversed its initial acceptance of the doctrine. See *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004). Reviewing that one case and checking for later cases citing it would quickly give any judge or reader a good overview of the issue and a way to find the most relevant cases on this topic.

The Anderson casebook and *Cohen's Handbook* had even more extensive treatment of ICWA. Judges will generally find *Cohen's Handbook* of more help since it's a treatise with regular updates, while the casebook format leaves some questions unanswered—questions designed for class discussion, though often of significance. But both books provided an excellent discussion of the existing Indian family doctrine, with ample case citations. Both books had a complete presentation of cases on that doctrine, identifying seven states that followed the doctrine and 13 that had rejected it as of the books' publication dates. One of the seven states both books identify as following the doctrine has recently reversed course. See *In re A.J.S.*, 204 P.3d 543 (Kan. 2009). Presumably the *Cohen Handbook*, which is the most regularly updated, will be the first to note that.

If you have an interest in this area of law, any of these books can provide you with a good overview of the key cases, statutes, and issues. You might be able to find the Pevar book in a local public library; *Cohen's Handbook* can be found in most law-school libraries.



LAW-SCHOOL LIBRARY RESEARCH SUGGESTIONS

Berkeley Law (Univ. of Cal. – Berkeley)
<http://www.law.berkeley.edu/library/dynamic/guide.php?id=49>

Law-school libraries have reference librarians whose mission is to make it easier for all of us to find what we need. Reference librarian Dean C. Rowan at

Berkeley Law has prepared an excellent guide to source materials on American Indian law. He includes a much longer list of books than we have, and he includes a description of each book. He also provides a review of web-based sources, even including blogs. We could have included a of several other research guides prepared by librarians—there are useful ones from the Cornell University libraries, the University of Connecticut School of Law Library, and others. But Rowan's guide is a good one.



WEBSITES OF INTEREST

University of Oklahoma College of Law
<http://www.law.ou.edu/native/index.shtml>

The University of Oklahoma College of Law publishes the *American Indian Law Review*, now in its 33rd year, and the law school's website has an excellent collection of American Indian law materials. This includes the Native American Constitution and Law Digitization Project, where you can find codes and constitutions of many tribes. The website also provides links to home pages of many tribes, and a comprehensive set of links to legal resources.

Native American Rights Fund
www.narf.org/icwa/index.htm

The link we've provided takes you to the Native American Rights Fund's online publication, *A Practical Guide to the Indian Child Welfare Act*. The online guide works through a series of frequently asked questions (with answers, of course) and a series of flow charts about when and how ICWA may apply to a given case. The full, 367-page written guidebook (including appendices) may be downloaded free from the website.

National Tribal Justice Resource Center
<http://www.ntjrc.org/triballaw/>

This resource center put together by the National American Indian Court Judges Association provides links to codes and constitutions of tribes, a directory of tribal courts, and searchable opinions from participating tribal courts.



The Resource Page



JOURNALS OF NOTE

Chapman Journal of Criminal Justice Symposium on Evidence-Based Sentencing

http://www.chapman.edu/images/userImages/dfinley/Page_12412/CCJ_Spring_2009_a.pdf

Thirty years ago, published research concluded that an expert's chance of predicting recidivism was no more accurate than flipping a coin would be, and there was little in the way of valuable research on risk factors generally for criminal behavior or effective means of rehabilitation. Much has changed, and the *Chapman Journal of Criminal Justice* has devoted its inaugural issue to an excellent discussion of the research now available and its implications for more effective criminal sentencing.

The full, 282-page journal is available online, and we think that any criminal judge interested in more effective sentencing practices would find this issue of real interest. Indeed, in an introductory essay, Chapman law professor Richard Redding argues that a judge's "failure to apply known best practices constitutes sentencing malpractice and professional incompetence." We will leave that debate to another time, but we encourage judges to read this issue.

Here's a quick rundown of the symposium articles:

- Professor Redding provides an overview of the issue with a comprehensive overview of the existing literature on evidence-based sentencing. In nine quick pages, he gives you a thorough introduction to the use of risk and needs assessments in sentencing. He also provides reference to key articles and studies.

- A prosecutor, San Diego district attorney (and former judge) Bonnie Dumanis, and a former defense attorney, University of Illinois law professor Margareth Etienne, provide the perspective of advocates. Dumanis

argues for an individualized approach to sentencing to more effectively reduce recidivism. She also provides an overview of San Diego's prisoner reentry program for non-violent felony offenders. Etienne raises due process and fairness issues, asking whether evidence-based sentencing actually "amounts to a form of statistical profiling." She concludes that evidence-based sentencing will benefit many defendants.

- Villanova University law professor Steven Chanenson, a former federal prosecutor and current member of the Pennsylvania Sentencing Commission, describes the evidence-based program used for substance-abusing offenders in Pennsylvania. He lays out the risks and benefits that prosecutors may face in using evidence-based sentencing practices.

- Oregon state judge Michael Marcus, who has previously written about sentencing issues in *Court Review* [Winter 2004 at 16], has long been an advocate of evidence-based sentencing. See www.smartsentencing.com (Judge Marcus's website on the subject). In this article, he pulls together his key arguments and the supporting evidence, emphasizing that evidence-based sentencing promotes accountability for all of those involved in the sentencing process to assess the impact of sentencing decisions on public safety. He also provides a discussion of the interrelationship of evidence-based sentencing with the traditionally recognized objectives of sentencing: deterrence, incapacitation, rehabilitation, and retribution.

- Drexel University psychology professor Kirk Heilbrun, a leading scholar in best practices in forensic mental-health assessment, provides an in-depth overview of risk assessment in the criminal-justice system. He describes advances made in the research over the past two decades, focusing on actuarial assessments and structured professional judgments, which he suggests based on research can each provide fairly accurate

results as risk-assessment tools. He then discusses how these tools may be used in sentencing, with special emphasis on drug courts and mental-health courts.

- Simon Fraser University psychology professor Stephen Hart, one of the developers of the Risk for Sexual Violence Protocol, provides a detailed look at evidence-based risk assessments for sexual violence. He concludes that appropriate sentences cannot be given without good, evidence-based risk assessments. But, like Professor Etienne, he also cautions that although a given risk-assessment tool may be generally characterized as evidence-based, "the risk assessment of a given offender is not." He urges judges, attorneys, and probation officers to become knowledgeable about risk and needs assessments.

- Dr. Douglas Marlowe, a lawyer and clinical psychologist, reviews the use of evidence-based sentencing practices in drug courts. He serves as the science and policy chief for the National Association of Drug Court Professionals. Dr. Marlowe suggests different treatment of offenders based on an assessment of each offender's needs and risks; he gives specific recommendations for high-risk, high-needs; high-risk, low-needs; low-risk, high-needs; and low-risk, low-needs offenders.

- Mark Bergstrom, executive director of the Pennsylvania Commission on Sentencing, outlines what state sentencing commissions can do to implement evidence-based sentencing practices. His discussion includes very practical questions like how to obtain good statewide data that can be used to support evidence-based sentencing.



FOCUS ON INDIAN LAW

Court Review surveys resources on Indian law at page 54.