

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

Great Plains Research: A Journal of Natural and
Social Sciences

Great Plains Studies, Center for

August 1994

Review of *American Indian Law Deskbook* by Julie Wrend and Clay Smith

Sidney L. Haring

CUNY Law School, Queens College, Flushing, NY

Follow this and additional works at: <https://digitalcommons.unl.edu/greatplainsresearch>



Part of the [Other International and Area Studies Commons](#)

Haring, Sidney L., "Review of *American Indian Law Deskbook* by Julie Wrend and Clay Smith" (1994).
Great Plains Research: A Journal of Natural and Social Sciences. 252.
<https://digitalcommons.unl.edu/greatplainsresearch/252>

This Article is brought to you for free and open access by the Great Plains Studies, Center for at
DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Great Plains Research: A
Journal of Natural and Social Sciences by an authorized administrator of DigitalCommons@University of Nebraska -
Lincoln.

American Indian Law Deskbook. Julie Wrend and Clay Smith, ed. Conference of Western Attorneys General. Niwot, CO: University Press of Colorado, 1993. Table of cases, table of statutes and codes, bibliography, and index. xv + 466 pp. \$49.95.

The problems with this book begin with premises set out in the "Foreword." The *American Indian Law Deskbook* is a product of the Conference of Western Attorneys General. It was collectively written by the attorney general's offices of Montana, Utah, Idaho, Washington, North Dakota, Montana, Nevada, and Colorado because these offices "have long felt that they have been hampered [in their work] by the absence of a comprehensive and objective treatise on Indian law" (p. xiv). "Exacerbating the problem [of a complicated legal structure of Indian law] has been a relatively small amount of legal scholarship in the area of Indian law. While numerous books, treatises, and articles have been published, the attention given to this area of law has been small compared to other areas. And much of what has been published has been polemical rather than pure scholarship, not surprising given the emotion this topic often arouses" (p. xiii).

This premise is simply false, from beginning to end. Felix Cohen's *Handbook of Federal Indian Law* (1942) is not only comprehensive and

objective, but it is perhaps the finest treatise ever written in any area of American law. The third edition, (1989) edited by Rennard Strickland, is not only thorough and scholarly, but it is also comprehensive and objective, even with an underlying dispute about the true nature of tribal sovereignty. Two fine casebooks, Price, Clinton, and Newton, *Law and the American Indian* (3rd ed., 1991) and Wilkinson, Getches, and Williams, *Federal Indian Law* (2nd ed., 1993) also provide comprehensive and objective analyses of the field. The literature on Indian law published in law reviews is similarly voluminous, with hundreds of articles in the field published in the past ten years, including a dozen or more articles each in such small subfields of Indian law as criminal law, civil rights, hunting and fishing rights, water rights, gambling, taxation, even state/tribal relations. Virtually none of this literature is even cited in the *American Indian Law Deskbook*, which raises serious questions about its scholarship and its objectivity.

So, what does objectivity mean in this context? What is a non-objective approach to American Indian law? Evidently, this turns on the simple question of the meaning of tribal sovereignty. Those scholars who begin their analysis of Indian law with a serious treatment of tribal sovereignty, the beginning point for all of American Indian law since John Marshall's decision in *Worcester v. Georgia*, evidently don't meet the standards of Western attorneys general for objective scholarship.

But Chief Justice John Marshall also wrote about the relations between the states and the tribes in *Worcester v. Georgia*: "The Cherokee nation, then is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress" (p. 6). At the core of Indian law is a clear statement of law protecting the tribes from the efforts of the states to encroach on tribal sovereignty. This makes the Conference of Western Attorney Generals attempt to write their own treatise on Indian law completely consistent with the longstanding effort of the states to encroach on tribal rights, the legal continuation of the struggle between Georgia and the Cherokees.

This problem of objectivity of approach aside, what is the objective substance of Indian law? One might look to the quality of the legal analysis of any of the chapters, covering virtually all of the sub-fields of Indian law, but I turned to criminal law, a field I know well, and which accounts for a large number of Indian law cases. Chapter 4 deals in fourteen pages with criminal law, among the largest single bodies of Indian law, the product of both the

complexity of the sovereignty issues that the attorneys general would rather not deal with, and also the hundreds of years of poverty and violence of native people. At the outset the *American Indian Law Deskbook* handles the basic issues of federal responsibility in Indian law in a simplistic way, but only because it avoids difficult questions of federal jurisdiction under the Major Crimes Act, questions that, of course, are irrelevant to the states (p. 89–90). Yet, at the same time, the fact that this federal jurisdiction is concurrent with the jurisdiction of the tribes is clearly relevant, and casts federal authority under the Major Crimes Act, in a political context that recognizes tribal sovereignty.

The important matter of “State Arrest Authority Within Indian Country,” presumably of some relevance to the state attorney’s general, gets one paragraph of eleven lines (p. 96–97). The question whether state authorities can arrest on a reservation a member Indian for a state crime is not answered. Without citation, the paragraph suggests that “where the fugitive is a member, compliance with any available tribal extradition procedures should be *attempted*” (Italics mine.). Then, citing a non-Indian case, the paragraph concludes that the state has the power to make the arrest without tribal consent if the tribe is uncooperative.

Not only is this paragraph, the book’s entire analysis of state arrest authority within Indian country, so simplistic as to be the trivialization of an issue of great legal complexity and great importance to the tribes, but the conclusion is dishonest, and invites illegal and violent state assertions of power on Indian reservations at the bureaucratic whim of any state officer relying on the *Deskbook*. Any tribe, like any state, is readily available for legal action in the federal courts. Thus, the refusal of any tribe to extradite a wanted criminal to either another tribe or to any state, has a ready legal remedy: it can sue for extradition under art. IV of the United States Constitution and the Federal Extradition Act.

This erroneous legal conclusion is not simply a mistake. It is a completely deliberate analytical choice that treats tribal sovereignty as a symbolic device: the state should nicely defer to whatever tribal extradition procedures might exist. But then it has the authority to make a forcible arrest in Indian country anyway. One does not have to be a student of the informal practices of law enforcement in rural America to know how local police authorities read such “legal” opinions. This paragraph reads depressingly like the kind of telephone conversation that some junior member of an attorney general’s staff might have with a sheriff’s sergeant in some far-flung corner of a very large state just before the door to the house of an Indian family is kicked in by

deputies looking for somebody's brother or sister. Finding that person is the job of the tribal police, acting under the valid order of a tribal court.

To be fair, other chapters are better. Chapter 10 on environmental regulation is a much more balanced analysis of the role of the tribes in environmental protection, but I still have concerns about the book's "objectivity" when it comes to restrictions on state power, or requirements that the state defer to tribal authority on environmental questions. The bottom line is that *American Indian Law Deskbook* by definition fails as a deskbook because one cannot rely on it—completely—as an adequate summary of existing Indian law. **Sidney L. Haring**, *CUNY Law School, Queens College, Flushing, NY*.