Resource Page

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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


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—has been recently updated to incorporate new cases and developments in the field. The authors, Robert T. Anderson, Bethany Berger, Philip P. Frickey, and Sarah Krakoff, are experts in the field of American Indian law and have written a comprehensive casebook that covers a wide range of topics. The casebook provides a comprehensive overview of key cases and statutes, as well as a useful guide for practitioners and scholars.

Canby’s book, American Indian Law in a Nutshell, is a concise and portable guide to the law of American Indians. The book is written in a clear and accessible manner, making it an excellent resource for judges and practitioners. The book includes a comprehensive overview of key cases and statutes, as well as a useful guide for practitioners and scholars.

Cohen’s Handbook of Federal Indian Law is a comprehensive resource that covers the law of American Indians in detail. The book provides a comprehensive overview of key cases and statutes, as well as a useful guide for practitioners and scholars.

Pevar’s book, The Rights of Indians and Tribes, is a comprehensive guide to the law of American Indians. The book provides a comprehensive overview of key cases and statutes, as well as a useful guide for practitioners and scholars.

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.

**WEBSITES OF INTEREST**

**University of Oklahoma College of Law**

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](http://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**

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.
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 justice 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.