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# INTRODUCTION TO INDIAN LAW SYMPOSIUM

## INDIAN LAW AND POLICY: THE HISTORIAN'S VIEWPOINT

Rennard Strickland\*

One purpose of this special section is to bring new and fresh perspectives to the field of Indian law. The editors hope to create a broader understanding of the concerns of the Indian, the non-Indian community, the states, and the federal government. I hope to give you a look from yet another viewpoint, the historian's viewpoint. To historians there is the appearance of great circularity yet underlying continuity in the course of Indian law and policy. In this brief introduction I want to convey to you something of that historian's viewpoint in the hope that these new perspectives on Indian law may be free of the most fundamental misconception which pervades prior dealings with Indians.

Indian law itself is one of the most historical of all areas of law. Like all law and all history, Indian law has become encrusted with a series of myths. One of the greatest of these myths is that law itself is at the heart of Indian policy. Rather, the contrary is true. It may be heresy for a law professor, especially one who professes about Indian law, but it is an historical truth (if there can be such a thing) that this collection of doctrines and decisions we call Indian law is merely an expression of Indian policy. And that policy is little more than the collected value judgments of society at any given moment: a matter of history. Indian law grows from, and is merged in, the historical experience.

The content of our Indian law depends upon society's definition at any point in time of the so-called "Indian problem." The fact that we often talk about the "Indian problem" as if it were a disease, a malig-

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This essay is condensed and adapted from an address presented to the Indian Law Section of the Federal Bar Association, 1977, and at the Annual Meeting of the Organization of American Historians, 1978. Professor Strickland wishes to thank those who have commented on the earlier versions.

nant tumor which can be removed like some operable cancer, tells us much, in an historical sense, about how we frame the policy issue, and about what legal solutions society thinks possible. To the historian the recognition of the very existence of a problem, the definition of an issue as one which requires a solution, and the sort of definition given for the issue are products of an historic time and an historic place. Our conception of the problem, moreover, defines what we consider to be its solution. Law, a response to these problems and issues, is thus a social phenomenon; it comes into being in a particular historical milieu.

Let us run quickly through prior ages of Indian policy, looking at the definitions of the "Indian problem" in historical perspective. Experience shows that government policy follows shifts in public perceptions of the "Indian problem." We are all familiar with the early Jeffersonian civilization policy, with the age of trading posts and federal factors when the instruments of civilization such as plows and spinning wheels were distributed by men who were officially called "the agents of civilization." We are also familiar with the era when operation of Indian policy was turned over to the churches, to denominational Christianity. Monies were paid directly to church groups to conduct Indian policy. Who can forget the age of military conquest? When the "Indian problem" is seen as a military problem, Indian administration is entrusted to the War Department. And there were the times when the "solution" was thought of as "education," or "urban resettlement," or any of a dozen other programs. The important fact is that when we saw the "Indian problem" as one of saving his soul, we turned to men of God; when we saw it as a problem of securing military victory, we turned to soldiers; and when we saw it as training and educating, we turned to teachers.

To appreciate the social influence on law and policy to its fullest, let us look at Indian law and the manipulation of policy in the late nineteenth century. To assure that white values lived and Indian civilization died, this was the time of forced reservation assimilation, the allotment of Indian lands, and the founding of the so-called "Courts of Indian Offenses," the goal of which was to eliminate "heathenish practices." Law and land were twin cornerstones of this Indian "reform" structure. Education, in turn, was to make the program workable. In the final analysis, the earnest nineteenth-century reformers, who called themselves "the friends of the Indians," were determined to use the law to make Americans out of the American Indian. The Indian was to become another lost race in the American melting pot. The Indian was to own his own farm and to become selfishly inter-

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ested in competing for material goods. Accomplishing this end required a division of the commonly owned and held tribal lands among the individual members of the tribe. Implicit in this program was the assumption that this was God's plan and man's reward. Tragically, not only did it not work, but it robbed the Indian of much that was working in his own traditional culture. It could not have worked, given the conditions of the age and the values of the Indian. The Indian was being asked to sacrifice many of the best parts of his culture for most of the worst parts of the white culture.

In the past, we turned to traders, missionaries, soldiers, and teachers for solutions to the "Indian problem." Today, we have turned to lawyers. As deTocqueville said, in America sooner or later every problem becomes a judicial one. Many questions of Indian policies are indeed before courts. In truth, however, I suspect that society has only partially defined the Indian problem as a legal one. Older conceptions of civilizing, assimilative, and even military solutions still have some currency. Moreover, from the historian's viewpoint, we are at a "watershed," or "shifting point," in popular, social definition of the "Indian problem." We are at a time when the basic value aspects of public attitude may change.

I think we are now moving into an age where much of society no longer perceives the Indian problem as legal. Social planners are now attempting to fill the role which the lawyer has played. We may see the Indian question not as a dispute over rights with a legal solution but as a "social problem" for which we seek a federal, alphabet-soup solution from HEW, HUD, and half-a-hundred other agencies. Quite frankly, it is a time in which the Indian leader has learned how to manipulate, and yet is being manipulated by, the no-name, too-many-programs, easy-solution-with-the-dollar bureaucrats. Thus, the Indian problem is now becoming a bureaucratic one.

In the process, the administrator and the administered feed upon each other. Many of these programs are needed and successful. My criticism, however, is that congressional and administrative dollars and directives establish the categories, determine the programs, direct the energies, and set the priorities of Indian people. This year it may be houses, last year it was juveniles, next year it may be the elderly. My point is that the energies of Indians are too often drawn off by non-Indian dictates. Social planners direct Indians toward programs the social planners feel are the solutions to the "Indian problem." This new Indian policy is just another form of dollar colonialism.

If, as we maintain, history does teach, what are the historical lessons for our present policy? The experience of prior phases of Indian pol-

icy should tell us a good bit about playing with law and manipulating culture. We learn, empirically, that it is difficult, if not impossible, to graft white institutions forcibly onto the Indian body politic. For law is organic, the product of a specific time and an actual place. The nineteenth-century “friends of the Indians” failed because the provisions of their laws were not suited to Indian values. The nineteenth-century reformer believed that the Indian was approaching extinction, that native values and culture were destined to pass. A sound contemporary Indian policy must recognize that the Indian way is very much alive and well.

We ought also learn that the persistent conceptual framework of the Indian as a “problem” to be corrected by whatever means seem appropriate to the non-Indian government of the time is fundamentally flawed. We quickly acknowledge the errors of the nineteenth-century reformers and other past “solutions”; it is to be hoped that we will acknowledge as clearly that present day “solutions”—when determined by non-Indians—are equally flawed. What is needed is a new perception of the Indian, a perception of the Indian not as a problem to be corrected, but as peoples with rights, duties, and powers. The pieces which follow in this special section share that new perception and may enable others to come to appreciate it as well.