The Puppet Princess: The Case for a Policy-Oriented Framework for Understanding and Shaping American Indian Law

Rennard J Strickland, University of Oklahoma College of Law

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The Puppet Princess: The Case for a Policy-Oriented Framework for Understanding and Shaping American Indian Law

I may not be the best person to introduce this symposium about the future of American Indian law. For more than a decade I’ve been traveling across the country speaking to gatherings like this symposium about what is euphemistically called “The Indian Problem.” Every year—as faithfully as Detroit used to roll out new models—I revised the old Indian law song and dance. One year I called it “The Wild West Banana Oil Medicine Show”; the next year it was “Inventing the American Indian Doll.” The title for this speech is “The Puppet Princess: Introducing the Case for a Policy-Oriented Framework for Understanding and Shaping Indian Law.” After more than a decade of those speeches in which I have sounded like a sort of Native American Norman Vincent Peale proclaiming “The Power of Positive Indianness,” I am weary, weary, weary. I have delivered the gospel of salvation by Indian law throughout this land. I have been evangelical about it. Looking back over those speeches, I’ve sold Indian law almost as a magic elixir—a kind of Blackstonian ghost dance shirt: “Put it on and no bullet can penetrate, the white man will go away, the

* Shleppey Res. Prof. of Law and History, The University of Tulsa College of Law. B.A. (1962), Northeastern College; J.D. (1965), University of Virginia; M.A. (1966), University of Arkansas; S.J.D. (1970), University of Virginia.


buffalo will return, and besides that you’ll have a Mercedes and designer jeans.” What more could we ask of law?

I still believe in Indian law, or part of it, because, for the Indian, law may be the only game in town. Yet I think about the forthcoming publication of the long-awaited, oft-announced, frequently delayed 1982 revised edition of Cohen’s historic *Handbook of Federal Indian Law*, and realize that we should be aware of the limitations of law. Law can be no better or stronger than the society it serves. Frankly, on this occasion, I am pessimistic about the future of the Indian and Indian law. Perhaps this comes from the anxiety of knowing that a single case decided a different way in January of 1982 could have completely undermined seven years of analysis and work on the *Cohen Revision*.3

While I regard myself more as a legal historian than as a real world lawyer, I share Oliver Wendell Holmes, Jr.’s belief that the law is a “magic mirror” that reflects not only the present but the past, our own lives and the lives of all men that have been.4 Holmes’s biographer, Catherine Drinker Bowen, was once offered the suggestion that the best time to begin a new study is “the day after the latest one [on that subject] appears in print.”5 Let me suggest that the recently published *Cohen Revision* be the starting point for a new analytical look at Indian law and policy.

I’m afraid that all of us who speak about Indian law have been

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3 Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894 (1982). In *Merrion*, the Court held that the Apache tribe’s ordinance imposing a severance tax on oil and gas production on tribal land was within the tribe’s inherent authority as part of the power of self-government and did not violate the commerce clause.

4 The “magic mirror” observation is from Oliver Wendell Holmes, Jr.’s speech to the Suffolk Bar Association on February 5, 1885. O.W. HOLMES, THE LAW, in COLECTED LEGAL PAPERS 25 (1920).

saying too many of the same things for too long. Again and again and again, over the last decade and a half, Indian law scholars have paraded out the great hope of Indian law. Those who write and lecture in this field, myself included, have, like Detroit, simply redesigned our analysis from year to year. We use some new chrome, a little more sophisticated carburetor, and an analysis of the latest set of cases—Wheeler, Martinez, and now the new Apache case. This symposium is an occasion for us to begin to do more than redesign; it is an occasion for us to ask new, different, and perhaps unthinkable, even heretical, questions. It is time for us to begin a policy-oriented analysis of American Indian law.

In her collection of essays titled Practicing History, Pulitzer Prize winning historian Barbara Tuchman includes a brilliant chapter titled “Why Policy-Makers Do Not Listen.” She suggests:

> Policy is formed by preconceptions, by long-implanted biases. When information is relayed to policy-makers, they respond in terms of what is already inside their heads and consequently make policy less to fit the facts than to fit the notions and intentions formed out of the mental baggage that has accumulated in their minds since childhood.

To illustrate this point, the author uses an example about Franklin Roosevelt and his Soviet bias.

Roosevelt's bias... was in favor of the progressive. George Kennan has told how, when the Embassy staff in Moscow began reporting the facts of the Stalinist purges of the 1930s, revealing a tyranny as terrible as the Czars', the President discounted the reports as the product of what he considered typical State Department striped-pants mentality. It was not only inconvenient but disturbing to be in receipt of reports that would have required a change of attitude toward the Soviet Union (foreign policy obeys Newton's law of inertia: It keeps on doing what it is doing unless acted on by an irresistible force). Rather than be discomfited by these disclosures, which Roosevelt's own bias caused him to believe were biased, the Russian Division was closed down, its library scattered, and its chief reassigned.

As a historian, I suggest that before we can effectively understand contemporary Indian law and policy we must understand

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10 Id. at 289.
11 Id. at 290.
the biases and the myths upon which those biases feed. The title,
"The Puppet Princess," comes from an important contemporary
version of those myths. It is found in a major work of Indian art,
a sculpture by Bob Haozous, the Apache-Navajo artist. The work
was commissioned by a white couple in Santa Fe. When the artist
delivered the massive sculpture, it was refused because it was not
what the couple believed an "Indian Princess" should be. So
often real Indians are not. She didn't look like Debra Paget or
Jennifer Jones. She was an Indian princess who was a full-scale
working puppet on a star-filled wooden background. She wasn't
the maiden out of Alfred Jacob Miller or George
Catlin.12 She
was a little overweight, and she had a sharp tongue that she was
ready to use. The masterstroke of artistic irony was that, as a pup-
pet, her strings could be pulled by the owner. Haozous had cre-
ated the double twist of Indian policy that reflects, as does all
great art, the reality of the modern world.13

The reality is that the modern Indian is caught, like the puppet,
with lawyers and courts and legislators trying to pull his strings.
The Indian is a very small minority of the population, perceived
to have been vanishing for generations, who now holds valuable
resources the society at large needs. In law, the Indian is caught in
what Aleksandr Solzhenitsyn considers an overlegalized society, a
society in which "[e]very conflict is solved according to the letter
of the law and this is considered to be the ultimate solution."14 In
many respects we are all at the mercy of lawyers, a group which
more than four decades ago Fred Rodell called the "Modern
Medicine Men."15 The experience of the 4000 Cherokees who
died on the "Trail of Tears" in 1838 and 1839 after their legal
victory in Worcester v. Georgia16 suggests that law alone is not
enough.17 Unfortunately, law cannot always be, as one Indian

Strickland, Inventing the American Indian Doll: Observations of an Indian Lawyer
About Law and Native Americans, 5 Va. L. Sch. Rep. 6 (1981) (discussion that asks
and answers the question "what is this strange Indian doll the white man has
invented?").
13 For other examples of the Haozous artistic and political irony, see E. Wade & R.
14 A. Solzhenitsyn, A World Split Apart 17 (1978) (commencement address at
Harvard University (June 8, 1978)).
17 See generally R. Strickland & W. Strickland, The Court and the Trail of Tears,
lawyer so eloquently wrote, "both lance and shield for the Ameri-
can Indian in his attempts not only to protect himself and his cul-
ture from white encroachment but also to advance Indian interests in the dominant white society."  

In earlier essays I outlined a variety of analytical steps to sug-
gest alternative, evaluative policy models. Today, I am not sure any would work well, particularly in the white American society of the 80s, an unsure society that is in a monumental value crisis and is susceptible to cultural bias. When I recently toured the Butler Indian Museum in Eugene, Oregon, seeing the unity and sense of Indian values reflected in those native works of art reminded me that the greatest policy bias is the cultural ethnocen-
trism that labels whites as "civilized" and Indians as "savage." This is the type of policy bias Barbara Tuchman wrote about, and until that bias is overcome it is like FDR banishing the Russian section of the State Department. No one is listening. Effective policy formulation is impossible under such circumstances.

The Indian community itself is now very much enamored with the legal model. We lawyers and law professors have sold it to them. The legal model is relatively new. Over the past two hun-
dred years, the United States more often has followed other histor-
tical models when dealing with her native peoples. These models include:

1. The International Model of the Age of Exploration;
2. The Colonial or Military Model;
3. The Federal or "Domestic Dependent Nation Model" with a variation which might be called "The Constitutional Model," now called "The Indian Commerce Clause" or the "Preemption Doctrine";
4. Great Society/Public Welfare Model;
5. Zoo or Museum Model of the IRA/New Deal.

In a sense, the legal model is a gladiator model in the gunfighter mode. It now threatens to become our only model, and it is cer-
tainly the reigning one. Before we embrace it too tightly, let me

1979 Y.B. SUP. CT. HIST. SOC'Y 20 (discusses the inability of Supreme Court decisions to prevent the removal of the Cherokees to the West).
20 See B. TUCHMAN, supra note 9.
begin my formal call for rethinking Indian law and policy by quoting a Georgia Statute of 1789:

Be it enacted by the Representatives of the Freemen of the State of Georgia, in General Assembly met, and by the authority of the same, That from and immediately after the passing of this Act, the Creek Indians shall be considered as without the protection of this state, and it shall be lawful for the Government and people of the same, to put to death or capture the said Indians wheresoever they may be found within the limits of this state; except such tribes of the said Indians which have not or shall not hereafter commit hostilities against the people of this state, of which the commanding officer shall judge.21

Still, Indian law is not for all the world a set of clearly articulated and just legal principles drawn from jurisprudential leaders such as Francisco de Victoria or Felix Cohen. Those of us who are scholars in the field too often forget that our view is not the world view. Warbonnet Law, one of our modern dime novels, is the model or view that most often comes to the mind of the general public when Indian law is mentioned. Even the more sophisticated lawyer knows only a little about Felix Cohen and the monumental analysis in his Handbook of Federal Indian Law22 or about Adamson Hoebel and Karl Llewellyn’s classic The Cheyenne Way.23 History buffs have a faint recollection of John Marshall and Andrew Jackson’s confrontation over the Cherokee cases.24 Readers of popular nonfiction remember Bury My Heart at Wounded Knee25 or Custer Died for Your Sins.26 At best, to the rhythm of the ever-present jerk of knees, a whole body of turquoise-clad bleeding hearts know of the law of rape, pillage, and murder of Indians as practiced by lawless whites; and, at worst, in their heart of hearts, movie-going Americans know of John Wayne and the law of the Indian tomahawk. Together these spell Indian law with a vagueness and an ambiguity that make our old

21 Only four copies of this Georgia statute are known to survive. One is found in the Shleppey Collection at the University of Tulsa. See Strickland, The Price of a Free Man: Resources for the Study of Indian Law, History, and Policy at the University of Tulsa, 15 TULSA L.J. 720, 726 (1980), for a discussion of the statute as part of the University of Tulsa Indian Law and History Collection.
22 See 1942 edition, supra note 2.
25 D. BROWN, BURY MY HEART AT WOUNDED KNEE (1972).
26 V. DELORIA, CUSTER DIED FOR YOUR SINS (1969).
friends the blind men at the elephant look like masters of biological precision and scientific classification.

This lack of clarity in analyses and models would present few problems if limited to the public-at-large. The tragedy of the present status of Indian law is that the lack of clarity and the misconceptions also dominate the views of Indian law policy-makers. In fact, Indian law has only recently emerged as a specific subject matter discipline recognized within the larger legal world and taught as a regular part of the curriculum at many law schools.

Indian law is now a growing field, increasingly practiced by lawyers, many of whom are Indians. Never before in the history of the republic has so much time and talent been focused upon the legal rights and public interest of indigenous peoples. Never again will there be such opportunity. We have time yet to bring new order into this old but still developing chaos that we call Indian law, but we can do this only if we proceed from an analytical standpoint. Only when we recognize how sophisticated and complicated Indian law has become can we hope to begin to formulate a system capable of protecting and expanding the diverse rights and interests of the American Indian.

We must understand the vastness and permanence of the field of Indian law, and we must acknowledge that the Indian will not be miraculously transformed into red versions of middle-class white Americans. We must destroy the prevailing myth that there is a single body of transitory Native law uniformly applicable to all Indian people. Because there is no single Indian tribe, no single Indian culture, no single Indian personality, no single Indian language, and no single Indian history, there can be no single body of rules that can be applied to every Indian tribe, culture, personality, language, and history. Much of the confusion of Indian law and policy in the past has been a refusal to face what we have always known—that while there are many common interests among Indian people, there are also many divergent needs within the Indian community.

Anyone who doubts this diversity of interests and patterns of law need only talk to Indian lawyers or teachers of Indian law and ask them what legal problems are most significant and troublesome. Or, perhaps, talk to a Congressman or Congresswoman from a district with an Indian population to learn the concerns of Indian constituents. The conceptions and definition of Indian law problems will vary significantly from tribe to tribe, from geo-
graphic area to geographic area, often even within the same tribe in the same geographic area. For example, the near-landless Oklahoma Creeks have few law and order jurisdictional problems, the Florida Seminoles have few mining rights issues, and the Washington Salish have few oil lease questions. The urban and rural, landed and landless—all are Indian, but each is faced with peculiarly different aspects of Indianness. There are significant common issues and common goals, but the legal paths to those goals are presently, and will continue to be, many and diverse.

The purpose of this introductory essay is to suggest the scholarly need for broad analytical frameworks to help evaluate that vast amorphous collection of statutes, regulations, policies, rules, tribal laws, directives, cases, treaties, and traditions that we call Indian law. The application of a policy-oriented framework, one like Myres McDougal and Harold Lasswell have applied to public order issues in the international arena, would enable Indian law scholars, advocates, claimants, and decision-makers to more fully understand and appreciate the many dimensional aspects of historical and contemporary Indian policy. By promoting a more precise analysis, we should be able to achieve an understanding of Indian law that reflects the diverse needs and common interests of participants in the process while promoting significant societal goals and values.

In this effort we are extremely fortunate that Felix Cohen was the modern founding father of our discipline. In a very real sense, Cohen is our Blackstone, for he did for Indian law what Blackstone is credited with doing for Anglo-American law. Cohen organized a hopelessly confused set of isolated cases, rules, and procedures into a reasonable and comprehensible unit. Even better than Blackstone, Cohen did not carry with him the Tory ideological baggage that so long weighted down the efforts of English law reform. Cohen was a realist. He did not bequeath a rules tradition that ignores the vast contextual complexities of Indian law. As a legal realist, Cohen's intellectual and philosophical moorings have much in common with policy-oriented jurisprudence. In fact, Cohen's *Handbook of Federal Indian Law* reflects an appreciation of law as a process. Felix Cohen would, no doubt, approve John Norton Moore's general definition of law as con-

ceived in a policy-oriented framework. Moore concluded that "the most useful conception of law is a broad one encompassing the entire process by which judges, legislators, litigants, and many others pursue particular values through the whole panoply of authoritative community decision-making."\(^{28}\)

Because of Cohen's work, we are, in a sense, at an advantage in our search for an analytical process. We have been freed from many of the threshold jurisprudential tasks. The purpose of the federal government's massive Indian law projects of the 1930s and 1940s was, as noted by Solicitor Nathan Margold, to provide "systematic analysis."\(^{29}\) The varied jurisprudential dimensions of that task are suggested in the following enumeration:

Federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored. . . . Not only is it important to recognize the temporal "depth" of existing legislation, it is also important to appreciate the past existence of legislation which has, technically, ceased to exist. . . . Important, however, as is the historical factor in the understanding of federal Indian law, a mere chronology of laws and decisions would be of little value. Systematic analysis is needed. . . . [T]o discover and define the common standards, principles, concepts, and modes of analysis that run through this massive body of statutes and decisions is an analytical task of the first order.

History and analysis need to be supplemented by an understanding of the actual functioning of legal rules and concepts, the actual consequences of statutes and decisions. Language on statute books, in the field of Indian law as in other fields, frequently has only a tenuous relation to the law-in-action which courts and administrators and the process of government have derived from the words of Congress. . . . Functional study of the federal Indian law in action is essential. . . .\(^{30}\)

Felix Cohen was, to borrow his own phrase, able to transform Indian law from "transcendental nonsense" to functional jurisprudence.\(^{31}\) Cohen brought what Felix Frankfurter described as a "luminous order out of such a mish-mash."\(^{32}\) Cohen did this, as Nathan Margold had hoped he would, through a systematic and

\(^{28}\) Id. at 667.

\(^{29}\) Margold, Introduction to 1942 edition, supra note 2, at xiv.

\(^{30}\) Id. at xiii-xiv.


functional analysis of law as a process rooted not in "an infinite maze of trivialities" but "in terms of an ethical theory."\textsuperscript{33}

Almost fifty years have passed since Cohen left his New York law practice for the Solicitor's Office; forty have passed since his Handbook was published. During that period of time Indian law has grown far beyond what Cohen, Margold, Collier, or Ickes dreamed possible. In fact, the volume of litigation in this area seems to have increased in geometric proportions. Certainly, the cases, the regulations, the directives, and the problems have multiplied at a rate hardly conceivable by the policy-makers who, in the 1950s, rewrote Cohen's book to introduce termination values and language.\textsuperscript{34} The Indian world has come alive with legal services, individual and tribal rights cases, energy regulations, and programs for more people, more tribes, and more organizations.

Rarely has a field been so rich and yet so poor, so old and yet so new as Indian law. Those of us who regard Indian law as our scholarly province have a special opportunity to build upon the rich analytical tradition of Cohen by creating a renewed, systematic, policy-oriented study of the jurisprudence of Indian law. The challenge is difficult, but the potential reward is great. Those who would accept the challenge must have, as Professor Calvin Woodard has demanded, the heart of a lion.\textsuperscript{35} Myres McDougal and William T. Burke have outlined the justification for a systematic, analytical approach to policy analysis. They set forth the need for a framework of inquiry with regard to competing policy claims and the decision-making process regarding the law of the sea. In Indian law, as in international law, the complexity of issues demands "a clear and unambiguous understanding of both the process of claim, by which interests are asserted, and the process of authoritative decision, by which interests are honored and protected."\textsuperscript{36} Failure to recognize the various intellectual tasks involved in solving such complex legal problems produces major confusions that mar serious efforts at policy clarification.

Indeed, there are multiple confusions that mar attempts to clar-

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\textsuperscript{33} Margold, Introduction, in U.N.M. reprint, supra note 2, at xxviii (quoting Cohen, The Problems of Functional Jurisprudence, 1 MOD. L. REV. 5, 7 (1937)).
\textsuperscript{34} See 1982 edition, supra note 2, at ix, for a discussion of the 1958 government revision.
\textsuperscript{36} McDougal & Burke, Crisis In the Law of the Sea: Community Perspectives Versus National Egoism, 67 YALE L.J. 539, 547 (1958).
\end{flushleft}
ify Indian law policy. Yet, at this time in history, we may be in a position to clarify or possibly remove many of those ambiguities. For the first time, at least in recent history, large numbers of lawyers are concerned about Indian law. For the first time in our entire history, people perceive that Indian law is here to stay, and that neither the Indian nor his law are a transitory phenomenon likely to fade away or merge into some cultural mainstream. Through the Policy Review Commission and the revision of Cohen’s Handbook, we have entered into an era ripe for reappraisal of Indian law and policy. Finally, new laws, new doctrines, new cases, and new rights are emerging at a rate and with an urgency never before felt in American Indian legal history.

The following confusions and misconceptions endanger effective deliberation of Indian law and policy:

1. Failure to distinguish between problems of Indian law that relate to federal, state, and tribal powers and to recognize the jurisdictional distinctions thereby produced;

2. Belief that questions of Indian policy and law are governed by the public concern and guilty generosity for Indian people rather than from a constitutional basis with firm legal rights rooted in treaty and statutory law;

3. Failure to recognize that a single set of Indian policy guidelines and rules is inappropriate for all separate tribal groups and their members, and lack of focus on individual needs, rights, treaty guarantees, and tribal goals;

4. Refusal to clarify value judgments and policy goals regarding long-range objectives of an Indian program, resulting in a normative vacuum from which decision-makers often operate;

5. Insufficient emphasis on the historical experience as a standard against which to judge proposed policy-solutions and inability to see Indian policy as one component of national policy;

6. Unwillingness to create and evaluate new or alternative policies that may alter the status quo relationship between the Indian community and the other participants in the national or international arena;

7. Terminological confusion produced by the continued re-

37 See AMERICAN INDIAN POLICY REVIEW COMMISSION, 95TH CONG., 1ST SESS., FINAL REPORT (Comm. Print 1977), for recommendations made to Congress after a two-year investigative study of the field of Federal-Indian relations.
luctance to distinguish between basic legal rights of Indians and services provided to Indian people;

8. Failure to conceptualize the Indian law process as encompassing all of the intellectual operations in decision making and a tendency to concentrate on the rules or norms aspects, the prescriptive phase, rather than the operational or actual practices;

9. Too great an analytical emphasis on the official legal structure (the formal authority pattern) and too little consideration of the nonofficial or quasi-official processes (the informal authority patterns);

10. A "solution" orientation produced by the continued treatment of Indian law as a short-term problem which can be cured rather than a "permanent issue" orientation in which appropriate legal and power processes continue to function.

One of the major tasks facing scholars in the field is defining and clarifying the scope of Indian law. In fact, we must still ferret out the hidden reaches of our discipline to identify the major problems and the areas in which the most productive results can be produced. The complexity of the definitional task was acknowledged by Felix Cohen in chapter one of his original *Handbook*. In drawing boundaries for the field, Cohen concluded:

> Our subject, therefore, cannot be defined in terms of the parties litigant appearing in any case. It must be defined rather in terms of the legal questions which are involved in a case. Where such questions turn upon rights, privileges, powers, or immunities of an Indian or an Indian tribe or an administrative agency set up to deal with Indian affairs, or where governing rules of law are affected by the fact that a place is under Indian ownership or devoted to Indian use, the case that presents such questions belongs within the confines of this study.\(^{38}\)

Cohen suggests areas of Indian law in his "Analysis of Chapters." This analysis illustrates the extremely broad nature of the discipline. It is for many purposes as far reaching as French law, Roman law, Chinese law, or any other system of national jurisprudence. Because of the duality of United States citizenship and tribal membership, the field actually may be even more complex. Cohen's divisions are as follows:

I. The Field of Indian Law: Indians and the Indian Country
II. The Office of Indian Affairs
III. Indian Treaties
IV. Federal Indian Legislation
V. The Scope of Federal Power Over Indian Affairs
VI. The Scope of State Power Over Indian Affairs
VII. The Scope of Tribal Self-Government
VIII. Personal Rights and Liberties of Indians
IX. Individual Rights in Tribal Property
X. The Rights of the Indian in His Personalty
XI. Individual Rights in Real Property
XII. Federal Services for Indians
XIII. Taxation
XIV. The Legal Status of Indian Tribes
XV. Tribal Property
XVI. Indian Trade
XVII. Indian Liquor Laws
XVIII. Criminal Jurisdiction
XIX. Civil Jurisdiction
XX. Pueblos of New Mexico
XXI. Alaskan Natives
XXII. New York Indians
XXIII. Special Laws Relating to Oklahoma.

Despite its scope, this list does not even begin to include Cohen's important subdivisions. For example, under "Tribal Property" he enumerated twenty-four significant subsections, including: water, timber, and subsurface rights; aboriginal possession; tribal leases; tribal land purchases; and treaty reservations. Thus, it is no surprise that Harold Ickes wrote the following in 1940:

Such . . . is the complexity of the body of Indian law, based upon more than 4,000 treaties and statutes and upon thousands of judicial decisions and administrative rulings, rendered during a century and a half, that one can well understand the vast ignorance of the subject that prevails even in ordinarily well informed quarters.

39 Id. at xix-xxiv.
40 Id. at v.
The structural organization of Cohen's 1982 revised edition retains much of this original analytical framework, but places new emphasis on the source and scope of powers. The chapter breakdown of the new edition is as follows:

I. The Field of Indian Law: Indian Tribes, Indians, and Indian Country
II. A History of Indian Policy
III. The Source and Scope of Federal Authority in Indian Affairs
IV. The Source and Scope of Tribal Authority in Indian Affairs
V. The Source and Scope of State Authority in Indian Affairs
VI. Jurisdiction
VII. Taxation
VIII. Hunting, Fishing, and Gathering Rights
IX. Tribal Property
X. Water Rights
XI. Individual Property
XII. Civil Rights
XIII. Government Services to Indians
XIV. Special Groups.41

I cite Cohen's categorical division as a place to begin. This essay is not designed to provide a specific analytical framework but rather to argue for such a structure. While I am reluctant to step into the fray and advocate something as seemingly scientific and systematic as a policy-oriented jurisprudence, I believe this to be an essential next step in the evolution of American Indian law and policy. Those who know me should suspect that my own analytical framework will look like something designed by Rube Goldberg and built by Pa Kettle with the assistance of Crowbar, his Indian helper. Despite that, I am convinced that we must somehow bring analytical order into this emerging field and that "the jurisprudential yield from such digging is among the highest in legal education today."42

Digging, real analytical digging, is required to understand and use any policy-oriented framework. By the consistent application of a basic analytical procedure we can better understand and di-

41 See 1982 edition, supra note 2, at xix-xxviii, for the full analytical contents.
42 Moore, supra note 27, at 688.
rect the formulation and application of Indian law and policy. Perhaps I exaggerate the complexity. The system simply outlines a way to look at law that considers all of the processes involved. For example, McDougal and Lasswell have made our task of analysis easier by giving us a checklist for evaluation, a method of dissecting the whole, big blooming, ongoing social-control process that we denominate as law.\(^{43}\) Thus, we know where to begin and how to proceed with the many questions we ought to ask before we have a reasonably complete view of the policy or decision-making aspects of a field. A policy-oriented analytical framework may help us find a loose thread to begin to unwind Holmes's seamless web.

Recognizing the maze-like qualities of the Indian law field, I have suggested in earlier essays five contexts in which law-related problems might arise in the life of a typical American Indian:\(^{44}\)

I. Tribal relations with other governmental or administrative units on a variety of issues most generally associated with treaty interpretation, land claims, governmental regulations and services;

II. Internal tribal relations including administration of law and order functions through tribal police and native courts;

III. Tribal relations with nongovernmental bodies or individuals especially on questions of economic and industrial development of tribal resources;

IV. Personal problems of individual Indians relating to problems of poverty and disadvantaged social status;

V. Personal problems of individual Indians associated with violations of legal regulations.

Since I first defined these categories, I have recognized in this broad analysis a number of gaps that now make focusing on specific issues difficult. This is, however, only an example of a starting point. Even here we have only begun to frame questions; we have not come far enough to have the tools necessary to supply meaningful answers in real tribal settings.

As with any analytical system, we are trying to make sure that all of the appropriate questions are asked. We are playing a who, what, when, where, and how game of clarification and classifica-

\(^{43}\) See supra note 27 and accompanying text.

\(^{44}\) See, e.g., Strickland, supra note 19, at 854-55.
tion. We are reaffirming that law involves different questions in different settings which thereby produce different answers. Absent such a framework, we are often left not only comparing apples with oranges, but apples with oranges, kitchen sinks, and puppy dog tails. And we are comparing them in no equitable or understandable manner. Too often, absent an analytical system, we cannot explore all of the important questions. We find ourselves moving in unrelated time frames, with divergent and unstated premises, responding to totally different propositions. While no system of analysis can eliminate all fundamental policy differences, a consistent system allows those differences to surface and to be understood in the context of the basic perspectives of the participants, their values, goals, and strategies.

As a model for an analytical framework, we might borrow these policy-oriented jurisprudential concepts from McDougal and Lasswell\textsuperscript{45} and apply the concepts to systematic analysis of Indian law.

1. Evaluation of policy in terms of the steps or intellectual operations in the decision process:
   a. Clarification of goals;
   b. Description of past trends;
   c. Analysis of conditions affecting past trends;
   d. Projection of future trends;
   e. Invention of policy alternatives;

2. Utilization of basic value premises in evaluation and formulation on public policy questions;

3. Recognition of the basic legal realist distinctions or differences between rules or norms of a system (perspectives) and actual practices of a system (operations);

4. Acceptance of the importance of clarification of observational viewpoints and recognition that function governs outlook, that scholars, claimants, and decision-makers have different perspectives;

5. Breaking down the decision process into component elements or sequences:
   a. The participants in the process (the who);
   b. The perspectives of the participants (the view);

c. The situations, geographical and temporal, in which the participants are interacting (the when and where);
d. The means or base values which the participants have available for achieving their objectives (the what);
e. The manner of strategies by which these means are employed by the participants (the how);
f. The immediate outcomes of the process of interaction;
g. The longer-range effects of the interaction;
h. The broader context of conditions in which the process of interaction takes place;

6. Clarification and formulation of analysis in terms of decision or authority functions or components by conceptualizing issues in terms of the broadest social context of the legal decision-making process:
   a. Obtaining and supplying of information to the decision-makers (intelligence-gathering);
   b. Recommendation of policy (promotion);
   c. Promulgation of norms or rules as in legislation (prescription);
   d. Provisional application of a prescription as by an appellate court (application);
   e. Ending of the prescription (termination);
   f. Evaluation of the degree of policy realization achieved (appraisal).

There are other systems. In fact, I hope we will see many schemes of analysis employed by Indian law scholars. I am suggesting that serious scholars in the field move beyond mere case parsing and statute recitation and look at the field from the broadest historical and policy perspectives. For Indian law is, after all, concerned with the human condition, with the Indian experience, and with the preservation of cultural spirit, all of which are at the heart of legal rights and responsibilities.

In conclusion, I return to Bob Haozous's "Indian Princess" and the art show in which it was first displayed. In that Indian exhibition there was another contemporary work, a subtle masterpiece by the Sioux painter Randy Lee White. Titled "Custer's Last Stand Revisited," White's canvas is in a traditional ledger style, but the horses have been replaced with 1930 vintage junk cars, the tripods with old gas pumps. This painting tells the story of exploitation and conquest by second hand car dealers instead of

46 E. WAdE & R. StrICKLAND, supra note 13, at 28, 36.
blue coated cavalrymen, but it reaffirms the bitter treatment of Indians by a society whose economic interests and values run counter to those of most tribal peoples. "Custer's Last Stand Revisited" illustrates the continued relevancy of the historical experience and the continued need for understanding law and policy in its varied social, economic, and cultural contexts.

I am delighted to have been invited to introduce this symposium. I look forward to the ideas other speakers and panelists will present. I also look forward to the next decade and a renewed emphasis upon an analytical, policy-oriented framework to help us understand and shape Indian law. I am hoping to be "born again" as a true believer in Indian law, to once again embrace Indian law through Worcester and its progeny. But today I find myself, like John Rollin Ridge, whose Cherokee father was one of Samuel Worcester's translators, unable to believe fully in salvation through law. As a twelve-year-old boy, Rollin Ridge witnessed the assassination of his father in an internal tribal conflict resulting from the failure of the Supreme Court to enforce their decision in Worcester. In 1849, Rollin Ridge became the first American Indian to practice law in California, but always considered himself a poet and writer. Just before his death he wrote "All About the Rain," an autobiographical reflection that captures the frustration of many Native Americans who have found justice unable to fulfill her promises.

What hopes have we not all buried, and what dreams have we not all mourned, that come to us again with the soft music of the rhythmic rain? Have we trusted and been deceived? Have we lost what we loved? Have we seen joy after joy fade in the sky of our fate! All comes to us again in sad and mournful memory as we listen to the patter of the rain.

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48 J. Ridge, All About the Rain, quoted in Ranck, John Rollin Ridge in California, 10 CHRONS. OKLA. 561, 567-68 (1932).
49 Id. at 568.