Why Indian Law?

Michael Lieder & Jake Page
Wild Justice: The People of Geronimo vs. The United States
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When asked what subjects I teach, I usually list federal Indian law first. The reaction is often a quizzical look, sometimes accompanied by a verbal articulation of the mental question behind the look: "Why Indian law?" In a way, I am flattered (perhaps unjustifiably) by this reaction – for it seems to imply that I have the ability to be doing something really important. Why then, the questioner seems to intimate, spend time working with what Justice Brennan reportedly described as "chickenshit case[s]"[1] involving a group of persons who constitute less than 1% of our current population?

I have given a variety of answers to the "why Indian law" question in the past. In the future, however, I will be tempted to tell the questioner to read Michael Lieder and Jake Page's *Wild Justice: The People of Geronimo vs. The United States*, which illustrates so well the way in which a seemingly arcane area of law can be of great interest and, more importantly, great relevance to those concerned with law and social policy in modern America.

Wild Justice deals with the Indian Claims Commission, an aspect of Indian law that is itself somewhat removed from most current federal Indian law. The vast majority of the cases filed with the Commission are over, and the statute of limitations for bringing such claims expired more than 45 years ago. Yet, Lieder, a lawyer who has taught Indian law, and Page, a writer who has written extensively on Native Americans, describe and analyze the development of this "relatively quiet lagoon in the turbulent sea of Indian law" (p. 156) in such a way that both the engaging nature and the current relevancy of this aspect of Indian law and Indian law in general soon become apparent.

The book focuses on the struggle of the Chiricahua Apache, the "People of Geronimo,"

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1 Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court 359 (1979).

to obtain justice from the United States government. The book briefly explains the culture and history of the Chiricahua Apache prior to the late 1800's and then chronicles in greater detail their subsequent interaction with the U.S. government. That interaction included the capture of Geronimo's small band in 1886, and their subsequent forced removal, with the rest of the Chiricahua Apache, from their aboriginal home in present day Arizona and New Mexico to what were in essence prison camps in Florida, where most of the tribe remained in captivity for twenty-seven years before their relocation to Fort Sill in Oklahoma.[2] The book then describes the efforts of the Chiricahua Apache to obtain legal redress for their forced captivity, the loss of their aboriginal lands, and other government-imposed harms. While these efforts resulted in a settlement of more than $22 million, the book leaves one wondering if anything close to justice has been done.

Interspersed throughout this story (in alternating chapters in many instances), are explanations of congressional, judicial, and executive actions that led to the creation of the Indian Claims Commission and guided its work for more than thirty years. The Commission was a unique tribunal created in 1946 to deal once and for all with the claims of Native American tribes for past wrongs at the hands of the federal government. Its existence was remarkable both because it represented an unprecedented effort by a colonial power to allow "displaced natives to sue for wrongs done to them decades and even centuries before" and because it was authorized to resolve disputes based not only on established legal principles, but also according to the moral standards of "fair and honorable dealings" (p. 83). The book describes how this "unique" tribunal eventually failed to escape the deeply-entrenched legal and historical tradition from which it sprang and became, in the long run, "little more than an unimportant sideshow in Indian affairs" (p. 265).

The book's account of the development of the Indian Claims Commission and its subsequent disappointing performance is nuanced and yet still very readable, even for those not familiar with Indian law or with law in general. Lieder and Page resist the temptation to oversimplify the story into a tale of conniving lawyers and lawmakers preying upon helpless Native American victims, noting accurately the heroic and partially successful efforts of some lawyers and Commissioners to advance Native American claims and identifying a number of factors that contributed to the Commission's shortcomings.

The authors ultimately conclude that the judicial system was fundamentally "incapable of handling the Indian claims" and that the reasons it was not "expose[] the limits of the American legal system" (p. 266). It is in making the case for this position through an examination of the Chiricahua Apache claims that the book takes on relevance beyond the Indian Claims Commission and federal Indian law. And it is when issues of this nature are raised in this kind of context that Indian law becomes so engaging and so important.

As this book ably demonstrates, a large part of the appeal of Indian law is that it is an area of law where history really matters and where that history is so fascinating. Many lawyers would love to spend their billable hours learning about Geronimo, his history, and the origins and culture of his people. To say the least, it sure beats proof reading prospectuses. Those involved in Indian law frequently have such opportunities. As this well-written book shows, the context of Indian law by itself makes the subject extremely appealing.

2 A portion of the tribe eventually moved to New Mexico, where they merged with the Mescalero Apache Tribe.

Yet, that is only part of the attraction of Indian law and, for me, a good deal less than half of it. For it is the issues that Indian law constantly raises, and the way in which they are raised, that ultimately make it so interesting and so important. In one sense, Indian law is law at the edge. The cultures, values, and history of the numerous Indian tribes are so different from that upon which much of our legal and political system rests that attempts to fit them into that system inevitably strain the system. And the way in which the system responds to that strain says much, not only about Indian law, but also about the legal and political system itself. This, in turn, sheds considerable light on current non-Indian law issues being decided within that system.

For example, Lieder and Page conclude that one of the reasons that the Indian Claims Commission failed is that while the statute required that claims be brought by an "Indian tribe, band or other identifiable *group* of American Indians," the American legal system focuses so much on individuals that it simply cannot adequately recognize and protect group rights (p. 267-68). That conclusion, if true, is of considerable significance to the future of the Voting Rights Act, not just because that Act protects Native Americans, but because it is viewed by many, including some Justices of the U.S. Supreme Court, as a group right.[3] Thus, the experience of Native Americans in Indian Claims Commission cases in the 1950's and '60's may well shed light on the future viability of the Voting Rights Act.

Similarly, the authors' conclusion that the Commission's failure was due, in part, to the fact that the Commission could award only monetary relief (p. 271) raises questions concerning movements like law and economics, which attempt to measure all legal doctrines in purely economic terms. Moreover, the authors' related assertion that at least some tribes would have been more satisfied with an apology than with monetary damages,[4] seems to have some significance for the ongoing debate about how America might best put the issue of slavery behind it once and for all. Lieder and Page indicate that the government's sometimes successful efforts to dismiss a tribal claim in order to protect the public treasury prevented the tribe from obtaining any acknowledgment of governmental error (which is what many tribes wanted), and thereby further alienated Native Americans from their own government (p. 93). This suggested link between formal apologies for past misconduct and the state of future relations between the government and different segments of its population is obviously of considerable relevance to the recent discussions concerning the propriety of a formal apology for slavery and other past societal abuses.

Moreover, the book demonstrates that the relevance of Indian law is not limited to controversies involving race. The authors' assertion that the Commission's inability to recognize and protect the tribes' interest in perpetuating their culture is the logical outgrowth of a system of law whose constitution protects individual religious freedom, but not "the rights of religious groups to impart their values and beliefs" (p. 267), clearly indicates that those interested in law and religion might learn something from the Indian Claims Commission experience. Moreover, any body of law that suggests that our legal system is in fact incapable of protecting and promoting the rights of groups to impart their values and beliefs to the next generation should be of considerable interest to those involved with

3 See *Bush v. Vera*, 116 S. Ct. 1941, 1999 & n.3 (1996) (Souter, J., dissenting).

4 The leader of one native Alaskan group indicated "all we want is for the U.S. Government to admit that they did a serious wrong to the Angoon people" (p. 95).

family law or concerned about the extent to which our legal and political system can promote family values which may require the intergenerational transfer of beliefs by the family "group."

This is not to suggest that principles of Indian law can be blindly applied to other contexts. There is much about Indian law and the relationship between Native Americans and the U.S. that is, as the first Justice Marshall suggested, truly unique.[5] Indian tribes are not solely ethnic groups tied together by common ancestry. They are recognized political entities, whose membership is usually clearly defined and who can often "speak" with one voice through an identifiable leadership structure. The ability of the law to recognize and protect the rights of such a group may be different than it is for groups who are more loosely organized and less clearly identifiable. In this respect, the lessons of *Wild Justice* for the future of group rights may have more meaning in the religion context (where there is more often a clearly identified and organized group with common leadership) than in the racial minority context. Who, after all, speaks for African Americans as a group? However, even the recognition of this uniqueness of Indian tribes causes us to think about what it is that makes group rights more or less viable, an interesting and important endeavor which an understanding of Indian law causes us to engage in.

There is also room for disagreement with some of the conclusions Lieder and Page reach about the American legal system. I think, for example, that the constitutional right of association, if properly understood, could protect the rights of groups such as Indian tribes,[6] religions, and even families, to protect and promote their cultural values. However, the fact that the authors can credibly reach a contrary conclusion based on an examination of the Indian Claims Commission demonstrates how this seemingly backwater area of the law can hold such fascination even for those not drawn in by the almost romantic appeal of Native American history.

Part of the story of *Wild Justice* is that of Israel "Lefty" and Abraham Weissbrodt, the two brother lawyers who ultimately handled the Chiricahua Apache claims. Reared in the Bronx by two Jewish immigrants from Galicia (now part of Poland), the pair were unlikely candidates for prominence in the Indian law bar. Lefty worked for the Securities and Exchange Commission and the National Housing Agency in Washington, D.C., for fourteen years before becoming involved in the Chiricahua Apache claims shortly after entering private practice. He had never met a Native American prior to that time. His first act after accepting the case (which had already been filed by another lawyer) was to seek a continuance so he could figure out something about Indian law. Yet, as the Weissbrodts attracted more tribal clients, "representing Indian tribes became not just a career, but a passion" (p. 148). They, like other lawyers described in the book, became "hooked" on Indian law despite their lack of prior connection with Native Americans or involvement in Indian law issues (p. 196). A reading of *Wild Justice* may be the beginning of a similar addiction for others.

5 "The condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

6 See Kevin J. Worthen, *Sword or Shield: The Past and Future Impact of Western Legal Thought on American Indian Sovereignty*, 104 Harv. L. Rev. 1372, 1385-92 (1991) (book review); Kevin J. Worthen, *One Small Step for Courts, One Giant Leap for Group Rights: Accommodating the Associational Role of "Intimate" Government Entities*, 71 N.C. L. Rev. 596, 628-643 (1993).