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Book Reviewws: 800 Miles to Valdez, The Indians in Oklahoma, Lawyer' Ethics

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BOOK REVIEWS

800 MILES TO VALDEZ: THE BUILDING OF THE ALASKA PIPELINE. By James P. Roscow. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1977.

THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS. By Mary Clay Berry. Bloomington, Ind.: Indiana Univ. Press, 1975.

Reviewed by DAVID E. LINDGREN*

The Trans-Alaska Pipeline has been an accomplished fact for three years. Many see it as a permanent intrusion through the great wilderness between the Yukon River and Prudhoe Bay. To others, it is the means of United States' access to the substantial petroleum reserves of the North Slope, currently delivering 1.5 million barrels of domestic oil daily to domestic markets.¹ A third perspective is that of the State of Alaska, for by making commercial production possible on the Slope, the pipeline indirectly provides the state with royalty and tax revenues which are projected to exceed \$3 billion annually.² No matter what one's vantage, James P. Roscow's observation that the Trans-Alaska Pipeline "breeds superlatives" remains apt.³

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1. Telephone Interview with John Ratterman, Manager of Public Affairs, Alyeska Pipeline Service Co. (April 30, 1980). This quantity, which eventually will increase to 2 million barrels per day, constitutes 17.6 percent of U.S. daily production (8.514 million barrels, U.S. Dept. of Energy, Monthly Energy Review 28 (March 1980)) and is equivalent to 18.3 percent of United States imports (8.212 million barrels per day, *Id.* at 30). At 1980 world oil prices of \$29.70 per barrel, U.S. Dept. of Energy, Weekly Petroleum Status Report 39 (May 9, 1980), oil transported through the pipeline each year would have an aggregate value of \$16.3 billion.

2. U.S. NEWS & WORLD REPORT, May 12, 1980, at 82.

3. J. ROSCOW, 800 MILES TO VALDEZ: THE BUILDING OF THE ALASKA PIPELINE 3 (1977) [hereinafter cited as J. ROSCOW, 800 MILES].

The pipeline has inspired several books, two of which are James Roscow's *800 Miles to Valdez* and Mary Clay Berry's *The Alaska Pipeline*. They are contemporary, popular histories of the pipeline, one published prior to its completion and the other very shortly afterwards. Both employ the now common reportorial technique of frequent quotation of contemporary conversations and statements, which may or may not have occurred, in order to increase the human dimension of the story.

The story is rooted in the remarkable history of the pipeline, and the significance of these two books can best be understood with some recollection of the main benchmarks of its history. As domestic petroleum production began to enter a period of decline, oil was discovered at Prudhoe Bay in early 1968. In 1969, the Trans-Alaska Pipeline project was announced, and applications for rights-of-way across federal lands were filed with the Department of Interior in June of that year.⁴ Ten months later, in April 1970, plaintiffs in two separate lawsuits obtained preliminary injunctions barring any grant of the right-of-way by the government. One injunction was awarded to a Native Alaskan village because the pipeline would cross lands subject to the village's aboriginal claims.⁵ The other was issued to three environmental organizations which contended that the proposed right-of-way was wider than permitted by the Mineral Leasing Act and that, in any event, the Department of Interior had not prepared an environmental impact statement pursuant to the recently enacted National Environmental Policy Act.⁶

During the next two years, parallel efforts continued to settle both the Native Alaskan land claims and the environmental controversy over the pipeline. The former were resolved by the Alaska Native Claims Settlement Act in December of 1971.⁷ Resolution of the environmental issue, however, consumed more time. The Department of

4. *Id.* at 21, 23. The applications were filed under section 28 of the Mineral Leasing Act, 30 U.S.C. § 185 (1970) (current version at 30 U.S.C. § 185a-185y (1976)), which authorizes the Secretary of the Interior to grant rights-of-way through public lands for oil or natural gas purposes.

5. *Native Village v. Hickel*, Civ. No. 706-70 (D.D.C., Apr. 1, 1970) (order granting preliminary injunction). The action was filed by several villages that had claims along the pipeline route, but the injunction ran only in favor of Stevens Village, the only village which had been organized under § 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (1976). The case was eventually settled.

6. *Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970) (order granting preliminary injunction).

7. Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. §§ 1061, 1601-1628 (1976)) (current version at 43 U.S.C. §§ 1601-1628 (1976 & Supp. II 1978)).

the Interior published a 246 page draft environmental impact statement in January of 1971. Extensive public hearings followed in Washington and Anchorage, and in April of 1972 a six volume final statement, supplemented by a three volume economic analysis, was issued.⁸ On May 11, 1972, Interior Secretary Morton announced his decision to issue rights-of-way for the pipeline "as soon as it is legally permissible to do so,"⁹ thereby returning the matter to the courts. The district court thereupon promptly dissolved the outstanding preliminary injunction.¹⁰ The court of appeals, however, sitting en banc, reversed and reinstated the injunction.¹¹ The Supreme Court then denied certiorari on April 2, 1973.¹²

Having now run the gamut of the judicial as well as the executive branch, the pipeline moved into the legislative branch. There, the administration already had proposed an omnibus legislative package to modernize the Department of the Interior's land management and mineral leasing authorities, and incidentally, to cure the effect of the court of appeals decision.¹³ Congress responded rapidly, albeit with legislation far more specific and narrower in scope. The Trans-Alaska Pipeline Authorization Act became law on November 16, 1973,¹⁴ just one month after the Arab oil embargo. The Department of the Interior issued the actual right-of-way on January 23, 1974,¹⁵ and construction

8. J. ROSCOW, 800 MILES, *supra* note 3, at 79; M. BERRY, THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS 217, 228 (1975) [hereinafter cited as M. BERRY, THE ALASKA PIPELINE].

9. Applications for Pipeline Right-of-Way and Ancillary Land Uses—Prudhoe Bay to Valdez, Alaska; Application by State of Alaska for Right-of-Way for Highway; Statement of Reasons for Approval 45 (May 11, 1972).

10. *Wilderness Society v. Morton*, Civ. No. 928-70 (D.D.C., filed Aug. 15, 1972) (order dissolving injunction and dismissing complaint).

11. *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir. 1973). The court unanimously held that because all construction activities could not be confined to an area 25 feet on either side of the pipeline, a grant of a right-of-way would violate § 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1970) (current version at 30 U.S.C. § 185a-185y (1976)) which states: "[r]ights-of-way . . . may be granted . . . for pipeline purposes . . . to the extent of the ground occupied by the said pipeline and twenty-five feet on each side of the same . . ." 479 F.2d at 847.

12. 411 U.S. 917 (1973).

13. S. REP. NO. 93-207, 93d Cong., 1st Sess. (1973), reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2458-67. Part of this legislation was the precursor of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, §§ 101-707, 90 Stat. 2744 (codified in scattered sections of titles 7, 10, 16, 22, 25, 30, 33, 40, 42, 43, 48, and 49 U.S.C.). The remaining portion, a reform of the Mining Law of 1872, codified in scattered sections of 30 U.S.C. (beginning with § 22) (1976 & Supp. II 1978) has yet to be enacted by Congress.

14. Act of Nov. 16, 1973, Pub. L. No. 93-153, 87 Stat. 576 (codified at 30 U.S.C. § 185 (1976), 43 U.S.C. §§ 1651-1655 (1976), and in scattered titles of U.S.C.).

15. Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline between the United States of America and Amerada Hess Corp., ARCO Pipe Line Co., Exxon Pipeline Co., Mobil

activity began immediately. The pipeline was completed in mid-1977.¹⁶

Each of the authors has selected a different aspect of this history for concentrated treatment, the choice being, in part, the product of the assumptions and biases with which the authors began and which affected their perceptions of the significance, and the reality, of the events being described. Mr. Roscow's bias, an obvious admiration for industrial achievement, undoubtedly is the reason for his book; it is evident from the excitement he finds in the pipeline's engineering challenges and in his seeing events through the eyes, and "words," of those responsible for building the pipeline. *800 Miles to Valdez* is a layman's history of how the technological problems posed by the unique and harsh Alaskan arctic environment and by the sheer magnitude of the world's costliest project were overcome. Mr. Roscow describes all of these, ice-rich permafrost, otherwise unstable soils, extreme seismicity, difficult mountain passes, massive ice movements on the Yukon, revegetation of the tundra, passage of wildlife over (or under) the pipeline, even the fiasco of the falsified weld records, as problems which had to be, and eventually were, surmounted. He does not give consideration to the belief of environmentalists that these problems might be reasons to question the very concept of an Alaskan pipeline. Thus, Mr. Roscow's book is, in a sense, a paean to pipeliners, which leaves one with an understanding of what an engineering accomplishment the pipeline truly is.

This view of the pipeline, however, also creates the book's basic weakness, a failure to examine events to determine if another, and more obscure, reality might be hiding behind them. The matter of quality control during the line's construction is one such instance. Although Mr. Roscow notes that "this project by dint of the federal government has a high quality control requirement,"¹⁷ his discussion of the matter gives the impression that, apart from the problem of the falsified weld records of a subcontractor, quality control was essentially a matter left to Alyeska Pipeline Service Company, the owner's arm for building and operating the line. But, the role of the federal government during construction was continuing and pervasive. The Agreement and Grant of Right-of-Way between the government and the owners con-

Alaska Pipeline Co., Phillips Petroleum Co., Sohio Pipe Line Co., and Union Alaska Pipeline Co. (Jan. 23, 1974) [hereinafter cited as Agreement and Grant of Right-of-Way].

16. J. Roscow *800 MILES*, *supra* note 3, at 94, 198.

17. *Id.* at 164.

tained detailed environmental and technical stipulations, many of them performance standards, which had to be met. In addition, Alyeska was required, before commencing construction on any portion of the line, first to submit to the federal government final designs, environmental studies, data demonstrating that the stipulation requirements would be met, and a "detailed network analysis diagram" covering, *inter alia*, work scheduling and construction sequencing. Construction then could proceed only after the government approved all of this by means of a Notice to Proceed. The government also continually monitored construction through an Authorized Officer, assisted by an engineering contractor, who had extraordinary authority to order immediate suspension of construction activity under a variety of circumstances.¹⁸

Mr. Roscow, unfortunately, does not explore the effect of this federal presence or even, given the point of view from which he writes, the opinions of Alyeska toward it. Was the stringent quality control program a function of responsible corporate management, obviating the necessity of extensive federal monitoring, or did federal compulsion add to it? In retrospect, was it adequate, inadequate, or excessive? Similarly, was the Notice to Proceed procedure an impediment to construction, and to what extent, or did it have some salutary effect? Questions such as these would have been, and in fact still are, worth exploring.

800 Miles to Valdez, then, is largely a history of the design and construction of the Trans-Alaska Pipeline, with an occasional incursion into the Alaskan Native and the clash between environmental preservation and energy development which swirled around it. On the other hand, Ms. Berry's *The Alaska Pipeline* centers on these two issues. Despite its primary title, the book is for the most part a history of the Native claims and, to a lesser degree, a recounting of the three-way environmental battles involving conservationists, oil companies, and government. The book divides neatly into these two parts.

The first section is a noncritical history of the Alaskan Native claims. It is noncritical in the sense that it does not examine their legal foundation or the extent of the national moral obligation and brushes over any distinctions between Alaskan Natives and Indians of the lower forty-eight states.¹⁹ The book is, more precisely, an illuminating

18. Agreement and Grant of Right-of Way, *supra* note 15. The "Notice to Proceed" procedure, including the required submittals, is set out in stipulation 1.7 of Exhibit D of the Agreement, and the suspension authority is in § 25 of the Agreement.

19. For example, the author does not note that, of all the plaintiffs in *Native Village v. Hick-*

treatise on the political process by which the Natives achieved a legislative settlement of their claims.

Ms. Berry recounts the multitude of disparate forces involved in this legislative fight. Various Native groups' interests conflicted according to the economic potential of the land which each claimed. The environmentalists sought to preserve the Alaskan wilderness from development by Native as well as by white men, while the Alaskan Shites were intent on maintaining the paramount land selection right of the state under the Alaska Statehood Act²⁰ and minimizing shifts in political and economic power which a generous settlement would promote. The oil companies' goal was a rapid settlement which maintained federal jurisdiction over the proposed pipeline corridor and did not jeopardize their tenure under the North Slope oil leases. The Nixon Administration was caught in the dilemma of the tension between its Indian self-determination policy and the perceived need for prompt development of the North Slope reserves. Finally, there were the quixotic elements of Congress: a House subcommittee chairman with a bruised ego and the on again, off again feud between the two Senators from Alaska. Ms. Berry presents a fascinating insight into how these forces interacted. Of particular interest is the manner by which lobbyists for the companies and the Natives first came together, and then added those labor unions whose members would be employed on the pipeline, to form a successful tripartite coalition.

Having insightfully described the resolution of the Native claims, Ms. Berry proceeds to chronicle the environmental conflict over authorization of the pipeline. This element of the book, measured by its brevity, is clearly secondary. It is also flawed by virtue of Ms. Berry's shift from the analytical narrative of the political process she uses successfully in discussing the Native claims to an assessment, which is at best superficial, of the merits of the specific issues bound up in the environmental controversy. The central question, in her view, was whether the pipeline should be built at all—a question she complains was never

el, only Stevens Village had been organized under § 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (1976), which conferred on the village the power "to prevent the sale, disposition, lease or encumbrance of tribal lands . . . without the consent of the tribe . . ." Moreover, while 25 U.S.C. § 323 (1976) broadly empowered the Secretary of the Interior to "grant rights-of-way for all purposes, subject to such conditions as he may prescribe" over Indian lands, 25 U.S.C. § 324 (1976) prohibited him from doing so with respect to lands belonging to a tribe (or village), such as Stevens Village, organized under the Indian Reorganization Act.

20. Act of July 7, 1958, Pub. L. 85-508, 72 Stat. 339 (codified at 48 U.S.C. Prec. 21) (West Supp. 1980).

answered. The difficulty is that she never attempts to do so either. Instead, her description of the issue has essentially a single dimension, preservation of the "awesome and sobering" Alaskan wilderness. Ms. Berry dismisses the energy supply-demand component of the issue as insignificant; the petroleum which the pipeline would transport to domestic markets is "a drop in the bucket of United States petroleum needs" and the energy crisis which heightened the government's interest in the pipeline was "more a matter of distribution than of actual shortages."²¹

The "Canadian alternative,"²² with which Ms. Berry appears enamoured, is dealt with in a similarly disingenuous fashion. She again perceives the issue in strictly environmental terms, which, she believes, favored construction of the line through Canada. Yet, what made the North Slope discoveries so significant was not just their size but the fact they were domestic reserves of the United States. A Canadian pipeline, if Canada in fact would have permitted it, would have diminished United States access to these reserves because Canada would have required fifty percent of its capacity to be available for the transportation of Canadian oil.²³ Ms. Berry does not even mention this facet of the issue, let alone balance it against the relevant competing considerations.

This perhaps is the key to the major problem with this portion of *The Alaska Pipeline*, a problem it shares with many others that attempt to deal with the merits of the frequently emotionally charged conflict between preservation of an existing environment and exploitation of

21. M. BERRY, *THE ALASKA PIPELINE*, *supra* note 8, at 147, 260.

22. *Id.* at 217.

23. Canada would have imposed four conditions:

(1) a majority of the equity interest in the line would have to be Canadian (in this connection, ownership by a Canadian subsidiary of an American company would not qualify as Canadian ownership); (2) the management would have to be Canadian; (3) a major portion (at least 50%) of the capacity of the line would have to be reserved for the transportation of Canadian-owned oil, with the primary objective being to carry Canadian oil to Canadian—not United States—markets; and (4) at all times preference would be given to Canadian-owned and controlled groups during the construction of the project and in supplying materials. . . . The question, then, is not simply whether Canada is willing to have a pipeline built through its territory (although no Canadian official has ever said it is willing), but also whether the four requirements Canada would impose are acceptable in light of the United States' national interest.

These four requirements are probably reasonable from the point of view of Canada's national interests. They are unacceptable from the point of view of our [United States] national interests. . . .

Letter from the Secretary of the Interior to the Chairman, Senate Committee on Interior and Insular Affairs (April 4, 1973), S. REP. NO. 93-207, 93d Cong., 1st Sess. (1973), *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2510.

natural resources. The issues are multi-faceted, complex, and difficult. The Alaskan pipeline, as Mr. Roscow notes in passing, involved a wide range of momentous national issues. Ms. Berry writes about only one of these, and *The Alaska Pipeline* must be viewed accordingly. But, in this light, the book is just as fascinating as *800 Miles to Valdez*, and both can be commended to anyone with an interest in the history of the Alaskan pipeline.

THE INDIANS IN OKLAHOMA. By Rennard Strickland. Norman, Oklahoma: University of Oklahoma Press 1980. Pp. vii, 171.

Reviewed by Carole Goldberg-Ambrose*

This book is one of a series devoted to the history of different ethnic and racial groups in the state of Oklahoma. The books in this collection were not written especially for lawyers, but for anyone curious about the experiences and contributions of Oklahomans with different cultural origins.

Whatever may be the connection between law and the other groups included in the series, however, there is a powerful connection between the law and the story of the Oklahoma Indians. Neither Indian history nor Indian law can be understood without the other. It is therefore fitting that Professor Strickland, a much-honored lawyer as well as historian, should have been called upon to relate what it means and has meant to be an Indian in Oklahoma.

The symbiotic relationship between Indian law and history means that the culture and experience of Oklahoma's Indians cannot be related apart from the legal enactments and administrative policies that have been directed at them. As Professor Strickland demonstrates, the law has not been a peripheral force in the history of Oklahoma's Indians. In its frequent interventions into the lives of these people, the law has produced total upheavals, not minor tremors.

Like other ethnic groups in Oklahoma (but unlike most other Indians in the United States), most of Oklahoma's Indians are not indigenous to the area they now consider their home. Oklahoma's Indians came to the state under legal circumstances not experienced by other immigrant groups. They were forced, tricked, or induced by treaty to move to Oklahoma from Eastern reservations that had been guaranteed to them by earlier treaties. The new treaties promised these tribes

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a land of their own, theirs to hold communally and to govern free from unwanted white settlement and interference. Thus, unlike other immigrant groups, the Indians in Oklahoma had a group recognition that included acknowledgment of sovereign status and the right to remain apart.

Professor Strickland's account of these legal developments, as well as the federal government's subsequent legal efforts to strip Oklahoma Indians of their land base, their rights of self-government, and their culture, is neither exhaustive nor novel. What is so enormously valuable, however, is his skillful interweaving of these legal events with the development and expression of the Oklahoma Indians' character and culture.¹ Professor Strickland draws on Indian authors, poets, and artists, creates vivid vignettes of Indian domestic life at various points in time, and provides an illuminating collection of photographs to elicit understanding of the Oklahoma Indians, buffeted as they have been by Anglo law and policy. The adjustments attendant on removal to a new land and loss of the old; the flourishing of tribal culture and government under conditions of isolation and protection prior to the Civil War; the dislocations and disruptions accompanying the forced change of livelihoods and status during the period of forced selling and allotting of land; the efforts to maintain group identity and cohesion following the Interior Department's persistent effort to dismantle tribal institutions; and the renewal of tribal self-consciousness and pride in the wake of legal victories reinstating tribal governments and compensating for land losses, are told through evocative and moving sources. The reader is required to confront laws and bureaucratic practices not as self-contained systems, but as potent forces determining and altering individual lives.

By relying so heavily on Indian writers and artists, Professor Strickland may not be giving us a wholly accurate picture of the Oklahoma Indian experience. At one point in the narrative he even acknowledges this possibility. To show how the late nineteenth century efforts by the federal government to destroy Indian culture affected the Indians, Professor Strickland offers a description of Indian boarding school life by a young Kiowan named Koba, or the Wild Horse. "I

1. Actually, as Professor Strickland ably explains, there are some significant variations among the Indian groups in Oklahoma, particularly between the so-called Five Civilized Tribes that settled in eastern Oklahoma, and the plains Indians that settled in the western portion of the state. Professor Strickland makes the reader aware of this diversity, while also depicting the common experiences and ways of life.

pray everyday," Koba wrote, "and hoe onions." Professor Strickland follows this quotation with a generalization about the impact of federal reeducation programs, but notes that "Koba, an early Indian artist, may have sensed the transformation in more dramatic terms than other Oklahoma Indians."² Professor Strickland's announced assumption is that a lithograph or a poem can speak "in a way that a dozen sociological and economic surveys could never do."³ He may be correct if the proper literary or artistic work is selected. Fortunately, Professor Strickland's choices can be accepted with confidence, for his body of prior legal and historical writing⁴ testifies to his knowledge of the sociological and economic literature he minimizes.⁵

One consequence of Professor Strickland's choice of sources is that he introduces the reader to a variety of Indian literary and artistic figures in the course of relating what they have to say about the Oklahoma Indians' experience. Without reciting a list of cultural achievements by Oklahoma Indians, he makes the reader aware of them. Another imaginative device he uses to convey information indirectly is the metaphor of the calendar. He divides Oklahoma Indian history into seasons of the year, with the period from removal until the Civil War era as autumn, the period of forced allotment and tribal dismantlement between the Civil War and World War II as winter, and the post-War period, particularly the past ten years, as a springtime of renewal for tribal government and culture. Although there are not enough distinctive historical eras to provide a comparable chapter for summer, the device nevertheless is effective because it communicates an Indian way of thinking about subjects—connecting them with natural phenomena—as well as the spirit that prevailed at different times of Oklahoma Indians' history. Professor Strickland's masterful utilization of such multi-purpose material is what enables him to provide so much understanding in such a slim volume.

For lawyers, the most valuable aspect of the book may be its capacity to illuminate not only how law has affected Indian people, but how the experience and culture of people have affected law. For exam-

2. R. STRICKLAND, *THE INDIANS IN OKLAHOMA* 41-42 (1980).

3. *Id.* at xiii.

4. *E.g.*, R. STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* (1975); B. PIERCE & R. STRICKLAND, *THE CHEROKEE PEOPLE* (1973); J. GREGORY & R. STRICKLAND, *AMERICAN INDIAN SPIRIT TALES* (1974). This is only a partial listing of Professor Strickland's extensive writings in the area of Indian law.

5. Notwithstanding his professed dissatisfaction with such material, Professor Strickland does include some valuable demographic tables and maps.

ple, in *Harjo v. Kleppe*,⁶ a watershed case for Oklahoma Indians decided in 1976, the issue was whether Congress had abolished all but two offices of the Creek tribal government. Federal District Court Judge Bryant prefaced his lengthy opinion by noting that “[m]ore than is sometimes the case, the legal analysis necessary to unravel the statutory tangle present here is inextricably bound up with the social, political, and economic history of the times from which the legislation emerged.”⁷ His statement is true of most issues in Indian law. To understand cases and legislation that may have bearing on present legal disputes, it is essential that one appreciate the condition of the particular Indian tribe at the time the case was decided or legislation enacted, and the goals and practices of the Bureau of Indian Affairs bureaucracy at that time. Although venerable legal precedents exist protecting Indian rights of self-government and depriving states of authority over Indian reservations,⁸ application of those precedents has depended upon the strength and operation of tribal institutions of self-government. Where meaningful tribal self-government is lacking, courts have been much more willing to acknowledge state powers over Indians, thereby compromising claims of tribal sovereignty. What Professor Strickland’s book reveals is how closely the Bureau of Indian Affairs came to eradicating tribal institutions in Oklahoma during the late nineteenth and early twentieth centuries through boarding schools, law and order codes, and destruction of the land base. Some of the Bureau’s activities were carried out with Congressional authorization. Others constituted what Judge Bryant went so far as to call “bureaucratic imperialism, manifested . . . in deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by [federal legislation].”⁹

Professor Strickland’s focus on the Indians rather than the federal bureaucrats causes him to omit many of the sordid facts detailed in the *Harjo v. Kleppe* opinion and other recent cases.¹⁰ By showing the demoralizing effect the Bureau had on Oklahoma’s Indians, however, he provides a context for understanding some of the case law involving Oklahoma Indians. For example, several twentieth century Supreme

6. 420 F. Supp. 1110 (D.D.C. 1976), *aff’d*, 581 F.2d 949 (D.C.Cir. 1978).

7. 420 F. Supp. at 1118-19.

8. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet. 1)-178 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet. 515) 214 (1832).

9. 420 F. Supp. at 1130.

10. *See, e.g., Logan v. Andrus*, 457 F. Supp. 1318 (N.D. Okla. 1978).

Court opinions upholding imposition of state inheritance taxes on restricted Indian property¹¹ may be best explained as instances of the Supreme Court tacitly recognizing state domination of Indian affairs in an era of dormant tribal government. In fact, in one of those cases, the Court made reference to the fact that the state was supplying services to the Indians.¹² By contrast, modern cases involving more active tribal governments have resulted in exclusion of various forms of state taxation.¹³ It is no coincidence that recent decisions denying Oklahoma criminal jurisdiction on trust allotments¹⁴ have come at the same time as cases reinstating Oklahoma Indians' tribal governments.

Understanding Indian law has never been a matter of isolating cases and statutes from Indian experience and the actions of federal bureaucrats.¹⁵ Professor Strickland offers lawyers insight into those phenomena in their past and present form, through his rich narrative, fascinating photographs, and an extremely valuable bibliographic essay.

11. *West v. Oklahoma Tax Comm'n*, 334 U.S. 717 (1948); *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943).

12. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 608-10 (1943).

13. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

14. *See, e.g., Oklahoma v. Littlechief*, 573 P.2d 263 (Okla. Crim. App. 1978).

15. *See* F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW XXVII-XXVIII* (1941) (Introduction by Solicitor Nathan R. Margold). "Federal Indian law is a subject that cannot be understood if the historical dimension is ignored. . . . 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." *Id.*

LAWYERS' ETHICS. Edited by Allan Gerson. New Brunswick, New Jersey: Transaction Books. 1980. Pp. x, 279. \$17.95

Reviewed by Donald R. Joseph*

The ethics of the legal profession are currently the subject of both public and professional scrutiny. Traditional conceptions of the boundaries of ethical conduct of a lawyer have been increasingly questioned. The Code of Professional Responsibility, which became effective in 1970,¹ has for some time been criticized as outmoded and insufficient. In response to that criticism, the Commission on Evaluation of Professional Standards of the American Bar Association is now circulating for public comment a Discussion Draft of Model Rules of Professional Conduct,² which, if adopted by the ABA, would replace the Code. The publication of *Lawyers' Ethics*, a selection of articles on a variety of legal ethics issues, is therefore particularly timely. The works selected for inclusion in *Lawyers' Ethics*, like the Model Rules, present not only questions that have recently arisen, but also those that have troubled the profession for some time.

A quick review of the contents of *Lawyers' Ethics* discloses both the variety of issues addressed and the stature of the authors addressing them—authors ranging from Alexis de Tocqueville to Jimmy Carter.

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1. The Code of Professional Responsibility [hereinafter cited as the CODE] became effective on January 1, 1970 for members of the American Bar Association. Membership in that organization is not mandatory. Almost every state, however, has adopted a code of ethics substantially similar, if not identical, to the CODE. The Oklahoma version of the CODE was enacted as 5 OKLA. STAT. ch. 1, app. 3 (1971), as amended.

2. 48 U.S.L.W. 1 (Supp. Feb. 19, 1980) [hereinafter cited as the Model Rules].

This Discussion Draft has been authorized to be circulated for comment but has not been adopted or approved by the House of Delegates and does not represent policy of the American Bar Association.

The text remains under study by the Commission and is open for further revision. Comments and suggestion for revision are invited and should be submitted to the Commission's Reporter, Professor Geoffrey C. Hazard, Jr., Yale University Law School, New Haven, Connecticut 06520.

The preceding two paragraphs are included at the request of the Commission on Evaluation of Professional Standards in the Model Rules [hereinafter referred to as the Commission].

The articles chosen also make clear the fact that the intention of the editor was not to compile either a defense of present ethical guidelines or a "how-to" manual for the legal profession, but instead to consider some of the major problems now facing the profession, as well as to analyze some of the basic assumptions upon which our legal system is premised.³

The book progresses from the general to the specific: from the role of the legal profession in American society to the unique ethical difficulties confronting certain specialized segments of the bar. The first article, an essay by Alexis de Tocqueville,⁴ cannot be dismissed as simply of historical interest. Although written almost 150 years ago, its observations are often echoed today. Characterizing the judicial bench and the bar as "the American aristocracy,"⁵ de Tocqueville considered them generally to be "opponents of innovation"⁶ and the "sole interpreter[s] of an occult science."⁷ Certainly, a part of his analysis is no longer valid,⁸ but de Tocqueville's perception of the legal profession as a conservative elite exercising political power greatly disproportionate to its numbers is hardly an unfamiliar viewpoint.

Also included in the section concerning the role of the legal profession is a speech by President Carter to the Los Angeles County Bar Association⁹ which is representative of the criticisms currently being leveled at the bar. It would be too easy to dismiss the President's charges as overly general or simplistic, though that point could perhaps be made. No great controversy is likely to result, for example, from his statements that criminal justice should be faster and fairer, that the law should be impartial and honest, or that litigation is over-emphasized and delay-ridden.¹⁰ In pursuit of those unimpeachable goals, however,

3. In keeping with that questioning it might have been appropriate to include more articles by non-lawyers; almost all of the 28 authors named are lawyers.

4. *The United States: A Unique Government of Lawyers*, de Tocqueville, in *LAWYERS' ETHICS* 3 (A. Gerson ed. 1980) (excerpted from A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835).

5. *LAWYERS' ETHICS*, *supra*, note 4 at 7.

6. *Id.* at 4.

7. *Id.* at 6.

8. He characterizes the judiciary as having the "instincts of the privileged classes." It is difficult to argue that *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Gideon v. Wainwright*, 372 U.S. 335 (1963), to choose only two of many possible examples, were decided in the interest of the privileged classes. Unfortunately, the comment that "the lawyers form the only enlightened class whom the people do not mistrust," *LAWYERS' ETHICS*, *supra*, note 4 at 9, is also outdated.

9. The speech also served, coincidentally, as a vehicle for the President to promote certain reforms which he advocates in the legal system. The speech was delivered on May 4, 1978. *Id.* at 273.

10. *Id.* at 19-20.

he makes a number of specific proposals which are worthy of consideration, *e.g.*, uniform sentencing standards for federal offenses and a "lobby reform bill."¹¹ Some of the President's comments may seem untenable¹² or even contradictory,¹³ but are in any event thought-provoking.¹⁴

Professor Auerbach's article¹⁵ returns to the themes expressed by de Tocqueville and carries them several steps further. He begins by asserting that the legal profession has "failed to relate the legal process to the purpose of justice,"¹⁶ and has "aligned itself with privilege rather than justice."¹⁷ To Professor Auerbach, much of the Code and the ethical precepts underlying it, as well as the substance and process of legal education, are the result of an active conspiracy among mem-

11. *Id.* at 21-22.

12. For example, the President singles out for criticism the increasing number of medical malpractice suits. *Id.* at 19. Such suits, like those under Rule 10b-5, 28 U.S.C. § 1983, or any other theory of liability, are subject to abuse; but the evolution of a cause of action for medical malpractice represents only the application of a well-established standard of care to a previously insulated profession. One solution to the problem of frivolous lawsuits that President Carter might have proposed is the award of attorney's fees to the victorious party in a greater range of cases.

13. While decrying society's over-reliance on litigation, the President argues for fewer procedural barriers in class actions and a broader definition of standing to bring suit. *Id.* at 22. Such changes would undoubtedly result in both an increase in litigation and in the dependence upon litigation, rather than other methods, to achieve certain desired ends.

14. Two of the President's most telling points are that "interminable delay" is sometimes produced in litigation which "can often mean victory on one side," *id.* at 18; and that "too often the amount of justice that a person gets depends on the amount of money that he or she can pay." *Id.* at 22. Again, even if overstated, there is undeniably more than a little truth in these statements. Lawyers should be concerned not only that such problems exist, but that the President of the United States is convinced that they exist.

One of the most controversial innovations of the Model Rules is sure to be its provision concerning *pro bono publico* legal services. The Introduction to Model Rules 8.1 states, "A lawyer may properly be expected to contribute time and effort to civic undertakings in general and to improvement in the administration of law in particular."

A lawyer *shall* render unpaid public interest legal service. A lawyer may discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, or by providing professional services to persons of limited means or to public service groups or organizations. A lawyer *shall* make an annual report concerning such service to appropriate regulatory authority.

Model Rules 8.1 (emphasis added). The proposed rule leaves several questions unanswered, such as the amount of service required, the use to be made of the information received by the "appropriate regulatory authority," and even the constitutional implications of mandatory *pro bono* service. The proposed rule is nevertheless a radical departure from the current recommendations contained in the CODE to "participate in serving the disadvantaged" and "support all proper efforts to meet this need for legal services." CODE, EC 2-25. The debate over mandatory *pro bono* work has already begun. See 66 A.B.A.J. 280 (March, 1980).

15. Auerbach, *Access to the Legal System in Historical Perspective*, in *LAWYERS' ETHICS*, *supra* note 4, at 29 (excerpted from J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976)).

16. *Id.*

17. *Id.*

bers of corporate law firms to perpetuate their own social and political interests.¹⁸ Although one may disagree with his conclusions, the questions raised—self-interest, social origins, financial resources and their effect upon equal justice—are valid ones. The critique¹⁹ following the excerpt from *Unequal Justice* makes several equally valid points, such as demonstrating that most major law school curricula hardly indicate an undue influence by corporate law firms.

Professor Dershowitz, in his response to the role of legal education in the abuses alleged in *Unequal Justice*, contributes the timely observation that most law school ethics courses confine themselves to the official ethics of the ABA. Such instruction is of course necessary, since the primary goal (in fact, if not in theory) is to enable students to pass the state bar examination section on legal ethics. Courses in the subject should, however, be of a broader scope. The function of law schools is not simply to train technicians,²⁰ but to educate members of a profession entrusted with the responsibility of shaping and protecting the legal rights enjoyed in our society. The method of critical analysis and reasoning taught in other law school courses is perhaps even more appropriate in a study of the rules governing the duties owed by the lawyer to the pursuit of justice, to society, to the legal system, to his client, and to himself or herself.²¹

That critical analysis might well be turned toward the foundation of the American legal structure, the adversary system. In a detailed and absorbing historical study of the evolution of the adversary system,²² the authors effectively dispel the notion that the adversary system is "best" or that its arrival was somehow inevitable. After tracing its antecedents in ancient Greek, Roman, and medieval English societies, and the effect upon it of the American colonial experience, Neef

18. *Id.*, *passim*.

19. Bishop, *Against the Bar: A Critique of Professor Auerbach's Views*, *id.* at 38.

20. Judge Frank's essay is not to the contrary. Frank, *Legal Education*, in *LAWYERS' ETHICS*, *supra* note 4 at 46. While contending that legal education should endeavor to provide more practical experiences in preparation for a career as a lawyer, he also exhorts law schools to "interest [themselves] mightily, as most of our law schools do not, in the problem of thoroughly overhauling our trial methods, and in the ability of many litigants to obtain justice because of lack of money to meet the expense of obtaining crucial testimony." *Id.* at 50.

21. The Model Rules have specifically attempted to expand upon and reconcile the duties surrounding the other roles of the lawyer in addition to his role as advocate. Sections A.1. through A.6. are entitled, respectively, "Client-Lawyer Relationship," "Adviser," "Advocate," "Negotiator," "Intermediary Between Clients" and "Legal Evaluator." It might well be argued that the list is incomplete.

22. Neef & Nagel, *The Adversary Nature of the American Legal System: A Historical Perspective*, in *LAWYERS' ETHICS*, *supra* note 4, at 73.

and Nagel summarize four theories offered to explain the solidification of the adversary system in the United States.²³ Even the most devoted advocate of the adversary system must, upon reflecting on these theories, acknowledge that some of the underpinnings of the adversary system may not be as logical or indispensable as were once thought. One especially noteworthy comment is that in an ideal adversary system, the least skillful antagonist should lose the dispute.²⁴ While this may comport with the laissez-faire notion of individualism and competition, it offers a less than satisfying rationale for the determination of justice between litigants.

The controversy over the interrelationship of truth, justice (however those terms may be defined), and the adversary system continues with Judge Frankel's article. His central premise is that the system rates truth too low among the values that institutions of justice are meant to serve.²⁵ The corollary to that premise is that the duty owed the client is given too high a value. In the course of his article, Judge Frankel questions whether many of the premises of the adversary system are realistic: that two relatively equally qualified lawyers, by thorough preparation and intense advocacy of their clients' positions, will cause all relevant evidence to be produced for the court; and that presentation of the two most extreme interpretations of a dispute will enable the court to arrive at the more likely middle ground, with little or no intervention in the fact finding (as opposed to fact determination) process.²⁶ He touches on a variety of other topics, including the rela-

23. "They are: (1) the fight theory; (2) the sporting, or game theory; (3) the laissez-faire theory; and (4) the ritual theory." *Id.* at 85.

24. *Id.* at 87. Even under the CODE, however, the extremely unskilled antagonist (and thus his client) is not left to his fate. A lawyer in litigation is bound to disclose legal authority in the controlling jurisdiction known to be directly adverse to his client which is not disclosed by opposing counsel. CODE DR 7-106(B)(1). See also Model Rules 3.1(c) (must advise tribunal of "legal authority known to the lawyer that would probably have a substantial effect on the determination of a material issue").

The Commission was sensitive to the possibility that the system is not infallible in producing all relevant facts for consideration by the court. "When an adversary has failed to present such a fact [*i.e.*, a "probably decisive" fact, "one that opposing counsel clearly should have presented"], the system manifestly has suffered breakdown." Model Rules, Comment to Rule 3.1. The Model Rules stop short of requiring disclosure of all such facts, however, and impose a duty to disclose only if required by law or the Model Rules, if necessary to correct a manifest misapprehension resulting from a previous representation the lawyer has made to the tribunal. Model Rules 3.1(d). This obligation is modified as to criminal defense lawyers, see Model Rules, 3.1(f) and prosecutors, see Model Rules 3.1(g), 3.10.

25. Frankel, *The Search for Truth: An Umpireal View*, in *LAWYERS' ETHICS*, *supra* note 4, at 99, 100.

26. One aspect of the judicial process not considered by Judge Frankel or the other selections in *LAWYERS' ETHICS* is the role of the jury and, in particular, the schizophrenic attitude of the

tive merit of the European inquisitorial system,²⁷ certification of trial lawyers,²⁸ and his view of the ethical rationalizations and shortcomings resulting from the role of the lawyer in the adversary system.²⁹ Here, as throughout *Lawyers' Ethics*, opposing viewpoints are presented.³⁰ Professor Freedman endorses the premises mentioned above³¹ and contends that truth cannot be an absolute value because of our concern for the dignity of the individual. The privilege against self-incrimination and the presumption of innocence, for example, are considered of paramount importance despite their potential conflict with the search for truth in a criminal trial.³²

By including two opinions on the availability of the attorney-client privilege to a criminal defendant upon the facts considered in *People v. Belge*,³³ the editor attempts to clarify the ethical duties of the criminal defense lawyer. Harmonizing ethical directives with the law of attorney-client privilege is an ongoing dilemma, epitomized by *Belge*.³⁴ It has been argued that the privilege must be limited if the client is engaged in a continuing crime.³⁵ In further justification of disclosure, the duties of the attorney to avoid even the appearance of professional impropriety³⁶ and to refrain from assisting the client in conduct known to be illegal are cited.³⁷ The response, equally substantiated under the Code,³⁸ is that the constitutional right to counsel and the privilege

American legal system toward juries. Although we adulate the jury as the cornerstone of democracy and the repository of justice, we exhibit our mistrust of the jury's ability by continually restricting the evidence it is allowed to consider.

27. LAWYERS' ETHICS, *supra* note 4, at 105, 107.

28. *Id.* at 109.

29. *Id.* at 104.

30. Freedman, *Judge Frankel's Search for Truth*, LAWYERS' ETHICS, *supra*, note 4 at 124. See also Professor Uviller's interesting discussion of some of the implications of these ideas, *id.* at 130. Professor Freedman's views on the duty of the lawyer to his client and the potentially conflicting moral obligations may also be found elsewhere in LAWYERS' ETHICS. *Id.* at 63.

31. *Id.* at 127.

32. *Id.* at 126.

33. 50 A.D.2d 1088, 376 N.Y.S.2d 771 (App. Div. 1975).

34. The defendant in a murder case, Garrow, was represented by two court-appointed attorneys, one of whom was Mr. Belge. Garrow disclosed to them the location of two other victims he had admittedly killed. The attorneys, after finding and photographing the bodies, refused to divulge the location of the remains until Garrow, in his testimony in another case, implicated himself in the slayings. By doing so, the attorneys concluded that Garrow had waived the attorney-client privilege of confidentiality. LAWYERS' ETHICS, *supra* note 4, at 145, 156-57.

35. Habin & Jensen, *The Impropriety of the Attorneys' Actions in the Lake Pleasant Case*, in LAWYERS' ETHICS, *supra* note 4, at 145, 148-49.

36. CODE, Canon 9.

37. CODE, DR 7-102(A)(7).

38. CODE, DR 4-101(B). But see CODE, DR 4-101(C), stating that a lawyer may reveal confidences when permitted by the Disciplinary Rules. This suggests the application of DR 7-102(A)(7). The controversy obviously is not resolved by the CODE.

against self-incrimination cannot be compromised in this situation; the lawyer is prohibited from knowingly revealing information protected by the attorney-client privilege.³⁹ The Model Rules recognize the conflict and rely on the applicable law of attorney-client privilege as the standard for ethical conduct of the defense lawyer.⁴⁰

An equally difficult problem, one which has long vexed the legal profession, is that of a client's perjury in a criminal case. The editor has included two brief considerations of the issue.⁴¹ As discussed therein, whether the duty of the lawyer to represent his client zealously includes knowingly cooperating in perjury is by no means certain. The Code, aside from its own internal ambiguity,⁴² must also be considered in conjunction with the constitutional rights of a criminal defendant.⁴³ The time at which the contemplated perjury arises can present other problems. The lawyer, after learning of his client's intention to perjure himself, faces very different considerations if the trial has already begun.⁴⁴ The Model Rules again determine that the ethical rules must ultimately look to the applicable law in the jurisdiction on due process and the right to counsel.⁴⁵

The next section of *Lawyer's Ethics* is devoted to a study of the

39. Callahan & Pitkow, *The Propriety of the Attorneys' Actions in the Lake Pleasant Case*, in *LAWYERS' ETHICS*, *supra* note 4, at 156.

40. "A lawyer for a defendant in a criminal case:

(1) is not required to apprise the prosecutor or the tribunal of evidence adverse to the accused, except as law may otherwise provide;

(2) may not disclose facts as required by paragraph (d) [*see* note 24, *supra*] . . ." Model Rules 3.1(f); *see also* Model Rules 1.7. Other provisions of the Model Rules, however, can be cited in support of a different result under certain circumstances. *See, e.g.*, Model Rules 3.4 and 3.11.

41. Pino, *Attempting to Regulate Perjurious Testimony: The Massachusetts Experience*, in *LAWYERS' ETHICS* *supra* note 4, at 183, and Pickett, *Perjury: Stay In or Pull Out?*, *id.* at 187.

42. Compare CODE EC 7-5, DR 7-101(B)(2), DR 7-102(A)(4)-(8), and DR 7-102(B) with EC 4-1, DR 4-101, DR 7-101(A)(3), and EC 7-1.

43. "A criminal accused has a right to the assistance of an advocate, a right to testify on his own behalf, and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury." Model Rules, Comment to Rule 3.1. *But see* note 45 *infra*.

44. *See* note 42 *supra*, CODE DR 2-109 and DR 2-110.

45. The criminal defense lawyer "shall offer evidence regardless of belief as to whether it is false if the client so demands and applicable law requires that the lawyer comply with such a demand." Model Rules 3.1(f)(3); *see also* Comment to Rule 3.1., *id.*

In a civil case the question is resolved somewhat differently under the Model Rules.

Except as provided in paragraph (f) [concerning the criminal defense lawyer], if a lawyer discovers that evidence or testimony presented by the lawyer is false, the lawyer shall disclose that fact and take suitable measures to rectify the consequences, even if doing so requires the disclosure that the client is implicated in the falsification.

Model Rules 3.1(d). The judgment of the Commission is that the possible sense of betrayal felt by the client, loss of the case and prosecution for perjury are outweighed by the necessity to avoid

petition of Alger Hiss for reinstatement to the Massachusetts bar.⁴⁶ The case revolves around the requirement of good moral character as a condition to the practice of law, and, by extension, the internal regulation of the legal profession. Particular ethical matters facing the Washington lawyer⁴⁷ and the international lawyer,⁴⁸ and a comparative review of certain ethical principles of medical and legal professions⁴⁹ conclude the book. Each contributes to the purpose served by *Lawyers' Ethics*—to pose questions about the present structure of the legal community and heighten the sensitivity of its readers to ethical controversies present in every aspect of the profession.

Mr. Gerson's collection is neither an exhaustive consideration of all major ethical issues now before the profession, nor a completely detailed treatment of any one issue. Yet it achieves a valuable balance between the two. *Lawyers' Ethics* does not provide any sure answers, but presents a multitude of questions, usually with more than one opinion on each. These are questions too often swept aside or ignored completely not only in law school legal ethics courses, but by the members of the bar as well. Professor Dershowitz would have his students in legal ethics read *Unequal Justice* before reading the Code:⁵⁰ Should I teach such a class, I would rather my students read *Lawyers' Ethics*.

deceiving the court and subverting the judicial process. Model Rules, Comment to Rule 3.1. See also Model Rules 1.4, 1.7 and 3.11.

The CODE and Model Rules recognize that a criminal prosecutor plays a unique role in the criminal justice system. CODE EC 7-103; Model Rules 3.10.

46. The brief on behalf of Mr. Hiss and the judgment of the Massachusetts Supreme Judicial Court reinstating him are reproduced in LAWYERS' ETHICS, *supra* note 4, at 193 and 209. A commentary follows on the effect of the Hiss decision and the same court's action with regard to Charles W. Colson, former counsel to Richard Nixon. Brown, *Reinstatement Dilemma: The Hiss Decision and Its Effects Upon Disciplinary Enforcement*, *id.* at 225.

47. Kampelman, *The Washington Lawyer: Some Musings*, *id.* at 239. See also CODE EC 9-3; DR 9-101(B), (C).

48. Gwartzman, *The International Lawyer: Extra-territorial Application of Professional Responsibility Standards*, in LAWYERS' ETHICS, *supra* note 4, at 251.

49. Norton, *Ethics in Medicine and Law: Standards and Conflicts*, *id.* at 259. The Oklahoma Bar and Medical Associations have adopted a Medical-Legal Interprofessional Code. 51 O.B.J. 170 (Jan. 26, 1980).

50. *Id.* at 44.

