Friends and Enemies of the American Indian: An Essay Review on Native American Law and Public Policy

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Self-assurance in the righteousness of one's cause does not alone determine rightness and is not enough to guarantee success. Though sincere and humane in their outlook, the reformers were entrapped in a mold of patriotic Americanism that was too narrow to allow them to appreciate the Indian cultures. Their all-out attack on Indianness must be judged a disaster for the Indians, and therefore for the nation. . . . Land in severalty, forced upon individuals whose whole tradition had been one of communal existence, did not automatically create selfish white farmers out of the Indians. Bewildered and put upon by land-hungry whites, the Indians under the Dawes Act lost their landed heritage.


The age of military conquest was succeeded by the age of economic absorption, when the long rifle of the frontiersman was displaced by the legislative enactment and court decree of the legal exploiter, and the lease, mortgage and deed of the land shark . . . . The policy of the United States in liquidating the institutions of the Five Tribes was a gigantic blunder that ended a hopeful experiment in Indian development, destroyed a unique civilization, and degraded thousands of individuals. . . . The orgy of exploitation that resulted is almost beyond belief. Within a generation these Indians, who had owned and governed a region greater in area and potential wealth than many an American state, were stripped of their holdings, and were rescued from starvation only through public charity.

Angie Debo, *And Still the Waters Run*, pp. ix-xi.


In 1887, when the Dawes Act was passed, the American Indian's heritage in land totaled 138,000,000 acres. Short of fifty years later, when the allotment policy of Dawes was abandoned, only 48,000,000 acres were left. Even more dramatic was the almost total collapse of the Southern Indian tribal holdings ultimately consolidated in the great expanse of the Indian Territory.

Less than seventy-five years ago this entire Indian Territory of more than 20,000,000 acres was the exclusive property of self-governing tribal entities, primarily the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osages. Today, virtually the entire acreage of this rich domain of prosperous agricultural and mineral lands has passed from Indian hands. Reliable testimony suggests that at the turn of the century, "there was not a pauper Indian amongst them." Three-quarters of a century later the heartlands of these once powerful tribes are filled with destitution and they are regularly declared primary battlegrounds for any war on poverty.

How did this happen? How was the entire Indian Territory, a maturing political entity at one time destined to become the Indian state of Sequoyah, so quickly transferred from Indian to white hands? What transformed so many of these Indian people from proud, prosperous, self-reliant citizens of their own small republics into wandering, landless, manipulated outcasts in a white state? The conventional wisdom is that these Indians suffered at the hands of mighty enemies—land hungry railroad barons and zealous land developers—who were able to translate evil designs into Indian policy with bribes and six-shooter warfare. And, no doubt, there is truth in these old myths; however, the two books here under review, Angie Debo's And Still the Waters Run: The Betrayal of the Five Civilized Tribes and Francis Paul Prucha's Americanizing the American Indian: Writings by the Friends of the Indian, establish that the most disastrous policies for the tribes of the old Indian Territory were not the exclusive product of frontier villains but were created, supported, and ultimately adopted by pro-Indian, friendly, Christian reformers. Without question, the "good works" of the Indian reformers created conditions ripe for the "evil deeds" of the Indian exploiters.

This little understood historical phenomenon of friends bringing disaster has contemporary relevance because today everyone loves the Indian—or almost everyone loves the Indian. It now takes a fellow of strong purpose and great dedication to admit Indian hating, to profess that his heart is not heavy with what his ancestors have done to the "first American," the "true American," the "Native American." And, I guess, this is better than the situation would be if everyone hated the Indian. Nonetheless, read together, the books of Debo
and Prucha do much to support the thesis that over the years friends have been mighty costly, that on American Indian questions purity of heart does not automatically guarantee wisdom of policy, that many kindred souls with the most benevolent purposes have produced laws with the most malevolent results.

At the height of the Indian book and talk-show craze, Vine Deloria, Jr., wrote a critique for the *Texas Law Review* of the biggest best-seller of all Indian books, *Bury My Heart at Wounded Knee*. I very much admired his review because he pointed out that the tragic abuse of the Indian over whose nineteenth-century massacres so many tears were then being shed, is a continuing contemporary abuse, not exclusively a historical phenomenon which ended in some distant age of Helen Hunt Jackson. In this same review, Deloria spoke of "the multitude of books now being vomited from the presses."

I rarely sit down to write a review without the image of those presses spewing forth yet another partially digested smorgasbord of assorted tidbits of Indian life and lore. And so much of it, oh, so much of it, is the stereotyped version of hostile enemies of the Indian as concocted by the knee-jerk, bleeding heart, lo-the-poor-Indian, save-the-noble-savage-because-he-never-polluted, friend of the Indian. As we "Okies from Muskogee" used to say in our high school days—with such friends, who needs enemies? Or as Wilcomb Washburn so boldly put it—"With such friends, who needs Indians?"

Forgive me if I am cynical in the face of so many obviously sincere and well-meaning friends, but a reading of *And Still the Waters Run* and *Americanization of the American Indian* demonstrates that there is a valid historical reason for such a reserved attitude. History has too often demonstrated that "friends of the Indian" want to befriend him only on non-Indian terms, to tell him what they (as friends) know is best for him, and to protect him from an enemy who often turns out to be the friend, if not the Indian himself. Thus the act of friendship becomes an act of self-salvation on the part of the Indian who is already quite happy being an Indian. How well I remember the tales of older Indian men and women who were locked in "detention rooms" or brutally beaten for speaking their own Indian language at a boarding school. This was done, no doubt, "for their own good" and by teachers who "knew" that the best thing for the Indian was to cease being an Indian.

Recently I have been reading speeches from the great Jacksonian Indian removal debates of the 1820's and 1830's; almost without exception those who wanted to remove Indians from their homelands argued that removal was for the benefit of the Indian. And many, no doubt, believed this, just as the friends of the 1880's believed in allot-
ment, friends of the 1950’s believed in termination, and friends of the present believe in Indian environmental salvation.

I have an Indian law colleague who says he has a recurring dream of those friendly men and women who demand that Indians be “real Indians” just like in the books. A part of this nightmare is that television ad, or public service announcement, where the Indian rides and rides through the great American wilderness and at the end, in the midst of all that pollution, a single tear comes to his aboriginal eyes. My friend wants to make an Indian version of the ad with a white man tearfully approaching a ravaged Indian village. His idea conveys something of the magnitude of the often forgotten human loss. Personally, I save my tears for those very much alive Indian men and Indian women and Indian children whose way of life continues to be abused, manipulated, controlled, and destroyed, and who, in the minds of the vast majority of good-hearted, friendly, modern American Indian lovers ought to be preserved just as the timber and the water and the whooping crane ought to be saved. One should never forget that it was fear of extermination of the alligator and not Seminole protests that an Indian lifeway was being destroyed that helped save much of the Florida Everglades.

We now seem to be in an “angel phase” of Indian policy which attempts to atone for the “devil phase” of the last century. This devil-angel/friend-enemy dichotomy of policy is not limited to the Indian issue alone. Americans seem to have a naïve, almost childlike faith in angels, a belief that those who profess to do good will be able to do the good they profess and that those who denounce deplorable conditions most loudly and most resolutely are the most likely to be able to correct them. Well, it just isn’t so. We still have too much faith in the success of Little Toot, our childhood storybook train, who said, “I think I can, I think I can.” Despite our nursery morals, wishing does not always make it so. As a people we Americans suffer from what Sir Henry Maine called a “credulity based upon the unverified expectations of the future.”

Few historical examples better illustrate the misplaced American belief that good motives make good policy than the Indian laws of the last decades of the nineteenth century. Father Prucha’s book is a republishing of the policy arguments of the philanthropic advocates of Indian allotment and assimilation, the so-called “Friends of the Indian.” In Dr. Debo’s book are seen the tragic results when these policies, so optimistically set forth, are actually adopted and forcibly implemented. In this case, wishing didn’t make it so and thus almost one-hundred million (100,000,000) acres of Indian land passed into white hands.
To begin to understand how and why this loss of land happened, let us examine the Prucha book. In it, Prucha examines the theoretical framework, enumerates the policy arguments, and captures the motivations of the disastrous allotment and assimilation programs urged by the friends of the Indian. Americanizing the American Indian is essentially an anthology of 47 selections from the literature of the post-Civil War Indian reformers. Prucha has written a brief but excellent introduction, short transitions into each of the excerpts, and a helpful bibliographical note. In addition, he has attempted to provide some logical organization by grouping the selections into five chapters and an epilogue.

This is not the conventional, run-of-the-mill Indian anthology. In fact, Prucha does not include a single excerpt from the Chief Joseph speech which, I was beginning to fear, was required in all collected works on American Indians. Prucha's selections are interesting and unique. I doubt if I have seen more than two or three of them in the general literature. The heart of the book is the published work of the reformers themselves. Prucha explains that he selected "a number of representative pieces that illustrate the mind of the reformers and indicate the arguments they advanced in support of their proposals." (Prucha, p. 9) Perhaps in justification for the publication of yet another Indian anthology, the editor argues that,

Only by reading the words of the reformers can one begin to appreciate the strength of their convictions and the lengths to which they were willing to go in their program of Americanizing the Indian. They were an articulate lot, who employed rhetoric as a weapon in their crusade. They hammered incessantly on the public conscience—in countless pamphlets and flyers spread across the country by the local Indian rights associations, in the speeches and discussions printed in the annual proceedings of the Lake Mohonk Conferences, in the annual reports of the Indian Rights Association, in press releases, in articles written for national magazines like the Atlantic Monthly and the North American Review, in editorials in the religious press, by speeches in Congress by loyal supporters, and in official correspondence and reports of government officials who sympathized with the cause. (Prucha, p. 9)

As Father Prucha reminds us, a torrent of persuasive material came forth in support of programs such as allotment of Indian lands and abolition of Indian tribal institutions. Prucha has served us well as an editor because he has selected from this morass of Indian reform propaganda a representative sampling which conveys both the ideas and the enthusiasm of the reforming advocates. Furthermore, he
maintains an appropriate editorial distance and absolute intellectual honesty in the task of reporting on the historical experience of a “a small but active group of reformers who,” as the dust jacket explains, “wrote and spoke vigorously in favor of acculturating and assimilating the Indians.” We are thus given a clear view of the arguments for bringing the Indian into the cultural mainstream through education, elimination of native languages, suppression of “wild west” shows, distribution of tribal lands in severalty, and the general duplication of white, American, Christian institutions in the Indian world.

Prucha’s Indian policy book is of interest to students of Indian law because Indian law and Indian policy are sides of the same coin. Too often we forget that Indian law is more than court cases; we lose sight of the fact that the heart of Indian law is the public policy aspect—the congressional enactment or the Bureau directive. Many of the most important issues of Indian law are determined in a committee room, or in a public meeting, or in an office conference, or around the water cooler in an area office of the BIA. These were the settings in which the nineteenth-century advocates of allotment and acculturation worked most effectively as members of a small, active group with shared common values on Indian questions.

I have always felt that one of the most important contributions of the new Indian lawyers, the Indian Law Scholarship Program, and the Indian Law Center of the University of New Mexico has been in putting Indians in such places. This is what one might call the knowing infiltration of formal and informal decision-making processes by trained Indian lawyers who understand and appreciate the Native American viewpoint. Americanizing the American Indian demonstrates, in an absolute sense, the importance of such influence and proves once again that Indian law cannot be viewed in cultural isolation, that he who would make effective law and policy for Indian people must first understand Indian people.

Who were these reformers and friends who, toward the close of the nineteenth century, sought to reshape the life and lifestyle of the Indian people? What was their objective and how did they seek to achieve it? Father Prucha, with the selections in this book, lets these zealous men and women speak for themselves through their own addresses, reports, essays, and pleas. However, his introduction summarizes the basic attitudes of the groups whose works are reprinted as the body of the book.

In the last two decades of the nineteenth century American Indian policy was dominated by a group of earnest men and women
who unabashedly called themselves “the friends of the Indian.”

... They set about to solve the “Indian Problem” in terms of religious sentiments and patriotic outlook that were peculiarly American. They had great confidence in the righteousness of their cause, and they knew that God approved. Convinced of the superiority of the Christian civilization they enjoyed, they saw no need to inquire about positive values in the Indian culture, nor to ask the Indians what they would like. With an ethnocentrism of frightening intensity, they resolved to do away with Indianness and to preserve only the manhood of the individual Indian. There would then be no more Indian problem because there would be no more persons identifiable as Indians ... These humanitarian reformers and their friends in government decided that the Indians were to be individualized and absolutely Americanized. ... The goal was complete assimilation; the goal was patriotic American citizenship for the Indian no different from that envisaged for the Irishman, the Pole and the Italian; the goal, in the ironic phrase of one of the Commissioners of Indian Affairs, was to make the Indians feel at home in America. (Prucha, pp. 1, 3)

Law and land were twin cornerstones of the Indian reform structure. Education, in turn, was to make the program workable. Merrill E. Gates, President of Amherst College, spoke boldly of “Land and Law As Agents in Educating the Indian.” (Prucha, pp. 45-46) The Indian Rights Association outlined a threefold objective to be secured for the Indian:

I. Law, and to awaken that spirit of even-handed justice in the nation which will alone make law, when secured, fully operative.

II. Education. Signifying by this broad term the developing for their highest use physical, intellectual, and moral powers.

III. A protected individual title to land. This is the entering-wedge by which tribal organization is to be rent asunder. (Prucha, p. 43)

Lawyers, with ministers, were always at the forefront of the Indian reform groups. This alone should be ample proof that having lawyers concerned about Indian welfare is not enough. Lawyers will be pleased that Prucha includes a considerable number of speeches, reports, articles, and other items about law and legislation. While section three, entitled “Law for the Indians,” concentrates on courts, procedures, and rules, legal materials are an integral portion of each of the sections. Quite a number of the reprinted articles are written by lawyers; other excerpts come from groups such as the Law Com-
mittee of the Indian Rights Association. Lawyers will be especially interested in the proposals of Harvard Law School's distinguished constitutionalist James Bradley Thayer, who, at one time, took the Indian as a special project. (Prucha, pp. 172-84)

Those who have worked with Indian tribal courts will recognize the roots of the modern reservation court systems in these earlier writings. Frankly, I thought I saw some contemporary branches of the legal tree that had not been trimmed in "Courts of Indian Offenses" and "Rules for Indian Courts." (Prucha, pp. 295-305) Any lawyer can imagine the difficulty of enforcing the regulation of Commissioner of Indian Affairs Thomas Morgan that "if an Indian refuses or neglects to adopt habits of industry, or to engage in civilized pursuits or employments, but habitually spends his time in idleness and loafing, he shall be deemed a vagrant and guilty of a misdemeanor." (Prucha, p. 304)

In the final analysis, these Indian friends were determined to use the law to make little red Farmer Joneses and native Old MacDonalds out of the American Indian. The Indian was to become another lost race in the American melting pot. The Indian was to own his own farm and to become selfishly interested in competing for material goods. To accomplish this end called for a division of the commonly owned and held tribal lands among the individual members of the tribe. Implicit in this program was the assumption that this was God's plan and man's reward. Tragically, not only did it not work but it also robbed the Indian of much that was working in his own traditional culture. It could not have worked, given the conditions of the age and the values of the Indian. Personally, I strongly believe that allotment and acculturation should not have been tried even if the policy could have worked. The Indian was being asked to sacrifice many of the best parts of his culture for most of the worst parts of the white culture.

The result of this policy was that a great many Indians were handed land with a title in the most desirous of all Anglo-Saxon forms, the fee simple, and it was absolute in many cases or subject only to a limitation or restriction by supervision for a term of years in other cases. Soon, the Indian no longer held the land; title had passed to a white man. Thus, his land, allotted despite the fact that the vast majority of Indians wished to retain tribal ownership of land, was lost. And the results of the policy became clear: It was a total, absolute, unmitigated failure. As Prucha concludes:

[I]t broke down their heritage and cultural pride without substituting anything in its place, until the Indians became demoralized
people, lost between their historic identity and the white American culture they could not accept. Citizenship, subjection to the white man's laws, the English language, the personal homestead—none accomplished what the reformers had hoped for. (Prucha, p. 10)

If, generally, the reform policy was a tragedy, and I know of no student of Indian law who does not so regard it, the allotment of land in severalty was a death sentence for the tribes of the old Indian Territory. To paraphrase Winston Churchill, never in the history of Indian affairs have so many paid so much for so little. As Angie Debo concludes,

[B]ecause of the magnitude of the plunder and the rapidity of the spoilation the most spectacular development of this policy occurred with the Five Civilized Tribes of the Indian Territory . . . . Such treatment of an independent people by a great imperial power would have aroused international condemnation; . . . but the Indians had been forced to accept the perilous gift of American citizenship and they were despoiled individually under the forms of existing law. (Debo, p. x)

While Prucha's Americanizing the American Indian outlines the expectations of the reform policy, Debo's And Still the Waters Run documents the failures in actual operation. In the tradition of the Saturday movie serials, when we left Father Prucha at the end of the nineteenth century, the land of the American Indian was about to be allotted to the individual redman so that he could become a self-sufficient, prosperous, acculturated American citizen. We now join Dr. Debo at the beginning of the twentieth century for the rest of the story. She tells us what happened when the benevolent philanthropic design of the Indian reformers clashed with the cultural traditions and basic wishes of the Indian himself. In the background, waiting to get at the Indian land, we see the villainous land speculators and, pardon me, but it is true, corrupt administrators and dishonest lawyers.

Angie Debo's And Still the Waters Run was originally published by Princeton University Press in 1940 and is reissued now with a new preface in which Dr. Debo updates portions of her study. The book is one of the half-dozen or so major works in Indian law and policy. Subtitled The Betrayal of the Five Civilized Tribes, this hard-hitting investigation of the implementation of the Dawes Act stands as a monument to the practical value of the historical method in a policy setting. In one word, this is a classic.

Students of Indian law, history, and policy are familiar with the
general body of works of this great student of Indian life. In 1934, Angie Debo won the John H. Dunning Prize of the American Historical Association for *The Rise and Fall of the Choctaw Republic*. Without question, *The Road to Disappearance* remains the definitive treatment of the Creek or Muscogee Nation, and her recent *A History of the Indians of the United States* is a widely read study of the Indian’s historical experience with special reference to the southeastern and Oklahoma Plains tribes. These three works were all published by the University of Oklahoma Press. Well into her eighties, Dr. Debo shows no signs of letting up with her *Geronimo: The Man, His Time, His Place*, due also to come from the University of Oklahoma Press in the fall of 1976.

I believe *And Still the Waters Run* is the best of the books written by this truly remarkable woman. I believe it is her best book because she uses history as history ought to be used—to tell a story from which a lesson of policy naturally emerges. She does this without artificial device, without moralizing, without screaming, without the discordant note of the Whig historian or the “relevant” chronicler. She lets the historical facts paint the picture, and she does this in a calm, almost clinical manner. Nothing of the all too popular modern technique of rewriting the past to conform with the popular political theories of the present can be found in this book. Dr. Debo examines her facts objectively and does not approach the topic already sure of what she will find. She is a true historian; she has no program to push, no enemies to punish. Her explanation of the background of the book makes this quite clear:

The research was carried on independently and with no preconceived theories of Indian policy. The facts uncovered during the investigation were a revelation to the writer, who had grown up in Oklahoma without knowing that these things were so . . . . Fortunately the historian is not expected to prescribe remedies. The policy of the United States in liquidating the institutions of the Five Civilized Tribes was a gigantic blunder that ended a hopeful experiment in Indian development, destroyed a unique civilization, and degraded thousands of individuals. As the story unfolds, the reader may formulate policies that might have averted this disaster if adopted, or he may conclude that the catastrophe was inevitable. (Debo, pp. x-xi)

What were these revelations that Angie Debo discovered when she investigated the application of the allotment policy to the Five Civilized Tribes? Her revelation, in summary, was that “unquestionably the policy of destroying the Indian’s institutions and suppressing the
traits that once made them strong has degraded an overwhelming majority of the fullblood group.” (Debo, p. 394) The era of the friendly reformers ushered in the following era of grafting despoilers. Thus, from a misplaced vision of Indian assimilation was born “a whole period of wholesale exploitation of Indians, feverish and speculative development, and confused and sometimes corrupt administration.” (Debo, p. 125)

Any lawyer, especially an investigator or public prosecutor, would be proud to have written And Still the Waters Run. The facts are all there. This book is no polemic written by a reforming do-gooder long on emotion but short on evidence. This is a lawyer's brief based on the hardest sort of evidence, naming names and citing places. The history of the book itself is a study in attempted suppression. Publication was delayed, pressures were applied to revise the manuscript, the manuscript was withdrawn in a noble gesture that may have saved a fledgling university press, and, finally, the book was published in an uncut version by a great Eastern university press. Despite a number of threats, no libel suit ever matured. Angie Debo had facts that would stand up in court. Dr. Debo, the historian, used scholarship in the service of policy by enabling her readers to see the documentation for themselves. In cold, hard, statistical data, she exposed the process by which the reformers' ideals degenerated into the grafters' abuses.

Before we go, step by step, through the incidents that Miss Debo documents, let us consider the magnitude of the Indian legal problems in what I believe to be the one most dramatic, prolonged instance of an Indian before the law. This is the Jackson Barnett litigation, the almost unbelievable series of cases of an oil millionaire Creek who was known to the press as "the richest Indian in the world." As a young boy in what had been the old Indian Territory, I did not know a single lawyer who had practiced in "the old days" who had not, at one time or another, been involved in one or another of Barnett's many legal adventures. A full truckload of legal papers concerning Jackson Barnett have been deposited with the Oklahoma Historical Society, and the College of Law of the University of Tulsa has a similar Jackson Barnett legal archive.

Older lawyers will testify that most of the Jackson Barnett question did not involve corruption, graft, or theft but was the product of an unbelievable Indian system of bureaucratic bungling, complex oil and gas Indian land title questions, efforts by Christian church groups to build their resources through his gifts, attempts to preserve the corpus of a gigantic Indian guardian trusteeship, and ultimately, the task of distributing an estate claimed by a white wife and a whole clan of Indians alleging kinship. To this must be added some ele-
ments of dubious legality and questionable morality as well. The cases involved the drama of the oil boom, the Glenn Pool, the spendthrift days of black gold, an Oklahoma Indian and his white wife in Hollywood, and the congressional effort to clean up rather widespread corrupt Indian guardianships. Taken together, the Barnett cases illustrate the folly of the old reformers' belief that Indians could or should be made into carbon copy white men. Dr. Debo traces not only Barnett but others, who by the stroke of allotment luck, were given the valuable resource of oil. (Debo, pp. 294, 336, 338-42, 346-50, 365, 384)

The very few oil-rich Indians, the Jackson Barnettts and Exie Fifes seen in the bold newspaper headlines, convey a tragic picture which could have been duplicated in the less spectacular tabloids about thousands and thousands of mixed-bloods and fullbloods in the Indian Territory. For when the 20 million acres of the Five Tribes' land was assigned on an individual, per capita basis to tribal citizens, the fabric of Indian society was torn asunder. Ironically, the nation came to believe that all Indians out in "The Territory" were oil rich, never knowing that "a whole generation of children born subsequent to 1906 was growing up in illiteracy and squalor with no land and no tribal relations and no hope for the future." (Debo, pp. 294-95)

In hundreds of pages of tightly reasoned and specifically documented testimony, And Still the Waters Run describes the means by which these 20 million acres and other accumulated resources were wrestled from the Indians. The reviewer could not possibly examine in detail the entire process of the seizure but lists below a few of the more common devices:

1. fraudulent deeds signed by other than the owner of the land;
2. purchase prices far below market or actual appraised value of land;
3. payments of bribes for court approval of fraudulent land sales;
4. excessive administrative and guardianship fees;
5. embezzlement of Indian money and personal expenditure of Indian trust funds;
6. false heirship claims or destruction of Indian wills;
7. gifts to charities or individual citizens of Indian assets without knowledge or approval of Indian or court.

Clearly, there were too many techniques used to allow a complete examination, but Dr. Debo summarizes both the magnitude of the orgy of abuse and the general procedures:

Forgery, embezzlement, criminal conspiracy, misuse of Notary's seals, and other crimes against Indian property continued with
monotonous regularity, but these grosser and slightly more dangerous forms of swindling were not as common as the more respectable methods of investing Indian money in worthless real estate, padding guardians' accounts, and allowing excessive fees to guardians and attorneys. It was almost impossible to secure a conviction for outright crime, and the many legal methods of overcharging minors and incompetents passed almost without notice. (Debo, p. 312)

More dramatic are the kidnappings and murders that were a regular part of the Indian Territory scene. Again, Dr. Debo reports:

In this confused atmosphere of guardian frauds, forgery, and the great speculative value of uncertain titles, murder became very common. Some spectacular crimes occurred, such as the dynamiting of two Negro children as they slept, in order that the conspirators might secure title to their Glenn Pool property by forged deeds; and many sinister stories were told of Indians who died under suspicious circumstances after bequeathing their property to white men. An epidemic of such deaths broke out among aged Choctaws..., and the Federal officials became convinced of an organized plot whereby the Indian made out a will to the land dealers in return for a ten-dollar monthly pension for the remainder of his life. A suspicious fatality followed the making of such wills, and in several cases carbolic acid or ground glass was found on the premises. Several prominent real estate dealers were arrested, but the mystery of the Choctaw murders was never solved. (Debo, p. 200)

In the midst of all of this corruption, lawyers who ought to have been guarding the Indians, preserving the integrity of the judicial process, and policing the behavior of their colleagues were often themselves guilty. Too many other lawyers who were not participants stood by while their brothers at the bar stole small fullblood allotments and major fortunes either by outright theft or through unwarranted or excessive charges for their services. "Few attempts," the author notes, "were made to disbar attorneys for unprofessional conduct." (Debo, p. 313) This is not an ennobling chapter in the history of professional relations with Indian people. Knowing of this earlier chapter should help us understand, at least in part, Indian hostility toward lawyers and the courts.

Now, obviously, the friends of the Indian did not envision that their policies would produce pillage and murder such as Dr. Debo reveals. Nonetheless, the Indian condition which made such whole-
sale crime possible would have been apparent to them had they attempted to understand the Indian and his value system. The vast majority of these Indians did not speak English, had no conception of the Anglo-American land ownership, and were used to living in a society with a strong sense of shared common values that emphasized cooperation rather than competition. They, as a people, were not selfish, not acquisitive, and certainly not sophisticated in terms of a money economy and a system of real estate sales and arm's length contract negotiations. The reformers refused to listen to the Indian side. The Indian, with great regularity, attempted to draw these facts and conditions to the attention of both Congress and the Indian reformers. I have read dozens of these memorials written by Indian tribes, especially the Five Civilized Tribes. In these they quite accurately predict that these specific abuses would occur if the allotment policy were adopted.

Those who advocate policy reform, such as the old philanthropic friends of the Indian, are allowed to do so and are taken seriously because they proclaim insights and expertise. They are assumed to have some understanding of what will, in fact, be the real world results of the adoption of their policies. They should, therefore, be considered responsible for predictable results of their policies. They should be considered responsible, even though they did not envision those results, especially in this case when a more realistic understanding of Indian people would have indicated that these disastrous results were reasonably foreseeable, perhaps inevitable. Opponents of allotment and forced acculturation predicted the tragic results. Father Prucha reprints a speech of Senator Teller of Colorado in which he correctly argues:

If I stand alone in the Senate, I want to put upon the record my prophecy in this matter, that when thirty or forty years shall have passed, and these Indians shall have parted with their title, they will curse the hand that was raised professedly in their defense to secure this kind of legislation, and if the people who are clamoring for it understood Indian character, and Indian laws, and Indian morals, and Indian religion, they would not be here clamoring for this at all . . . . This is a bill that, in my judgment, ought to be entitled “A bill to despoil the Indians of their lands and to make them vagabonds on the face of the earth,” because, in my view, that is the result of this kind of legislation. (Prucha, p. 137)

At another time, the famous “Hanging Judge,” Isaac C. Parker, also spoke out against the reformers. Not usually regarded as an In-
A destruction of their system of government at this time and the establishment of a Territorial government over them, with free access of white men would have precisely the same effect as our action toward the California Indian has had upon these people there; it would send them out as beggars without a dollar. The man who has a blanket mortgage would rush in there and persuade them that they needed money to build a house or improve their land, and in six months, if left with the ownership over the soil, they would not have a place to lay their heads in that country. It would be in my judgment, absolute cruelty... [Today] they protect their own people, so that there is not a pauper Indian in the whole Five Civilized Tribes.

At the real world juncture where proposed policy is translated into actual practice, the relationship between friends and enemies becomes even less clear. If we must label people, and I am afraid we American adherents to the devil-angel theory of life and law are so inclined, our self-proclaimed friends may be, as an actual matter, more dangerous than our alleged enemies. Well-wishing friends may create conditions which make it possible for corrupt enemies to do their evil deeds. In other words, in the Indian situation, the circumstances wished for, assumed to exist, by philanthropic reformers, did not, in fact, exist. The conditions they desired were not present and could not be created and, therefore, because their policy was so clearly at odds with the reality of the Indian world, exploiters were able to step in and work their dishonest games. In truth, villains had been placed in the most opportune position to despoil by the innocent, but ill-conceived, policies of the Indian's friends. I ask again: With such friends, who needs enemies?

If, as we so strongly maintain, history does teach, what are the lessons of the Indian experience with friends and enemies in the era of allotment? What can we learn from reading And Still the Waters Run and Americanizing the American Indian? Since so much of history's teaching is by a sort of case method, any first-year law student will tell you that the issues are sometimes hard to grasp. In the case of the Dawes Act and the humanitarian reforms, a number of the lessons are obvious; others are more subtly hidden. In attempting to draw out these morals, the reviewer does not pretend objectivity but rather freely indulges his own particular biases.

We should remember that on Indian questions, just as on other public order issues, there are great dangers in the simple solutions
often created in the hysteria of crisis policy making. Our great legal historian Cal Woodard speaks of the “fortnightly crisis” as a characteristic of modern society. Elsewhere I have spoken of a “conventional reality of the news magazines and broadcast world” which has about a three-week run. We are very close to having a “cause of the month club” to which all of the tears and energies of society are directed for 30 days, or less, if another suitable “fortnightly crisis” should arise in the meantime. For the Indian community this means that periodically, at really unpredictable intervals, the Native American will be the “in-group,” the chosen “crisis of the month.” During these times Indian policy is subject to the penetrating analysis of Johnny Carson, Dick Cavett, Time Magazine, and assorted senators and would-be presidents. This advice and support is often ill-conceived and fleeting, at best. I called 1970 the “Year of the Indian” because it was, within my memory, the time of the longest sustained public concern for Native American questions. In 1970 we got Indian policy from all directions—Ralph Nader, Marlon Brando, Jane Fonda, Concerned Citizens for a Safe Environment, the Indian Rights Association, the Friends of Native Peoples. Sound familiar? Well, they were all friends and most of them had a “solution” for the “Indian problem.” Most never bothered to ask the Indian about their proposed solution.

One of the lessons of the reform era is the fickleness of friends. The public-spirited, reform-minded, philanthropic advocates of the Indian cause were nowhere to be found when their policies backfired. Many of them, including Professor Thayer, had moved on to another cause. The Indian was the one who had to live with the results. And, unfortunately, mistaken policies are not easily reversed; you cannot say “King’s X” and call them off just like that with the snap of a friendly finger. Some policies, like the Dawes Allotment of Indian lands, can never be reversed. So while the friend of the Indian is back in his pulpit in Boston, his college classroom at Amherst, his courtroom in Philadelphia, or his office in Washington, the Indian is living (or dying) with the policy. This tragic reality of Indian law is clearly demonstrated by the long-lasting effect of the acknowledged failure of allotment of land in severality. As Prucha emphasized in the concluding paragraph of his introductory essay: “[F]or three decades or more the principles advanced by the friends of the Indian held sway, and so powerful was the pressure that the condition of the Indians today can be understood only if we understand what they were subjected to during the high tide of the sea of Americanism that sought to engulf the Indians and swallow them up.” (Prucha, p. 10)

The allotment experience tells us a good bit about playing with law

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and manipulating culture. We learn, empirically, that it is difficult, if not impossible, to graft forcibly white institutions onto the Indian body politic. For law, as we all know, is organic. Law is the product of a specific time and an actual place. The Dawes and Curtis acts failed because the provisions of these laws were not suited to Indian values, to Indian attitudes regarding land, and to Indian use of resources. The Englishman’s dream of his own little piece of land turned out to be the Indian’s nightmare. The extreme ethnocentrism of Americans, especially American lawyers and judges, contrasts sharply with the attitude of British legal comparativists of the same era. As Frederic Pollock noted in his essay on Henry Maine:

It is a matter of fact, nothing more and nothing less, that trees of liberty, like other trees, have a way of not growing when they are planted at their full stature. Our old English oak is rugged and weather-beaten; its branches are not symmetrical; some limbs have spread abroad while others have stunted; it savours of its own soil and knows of none other. But in that soil it is fast rooted, and from the deepest fibres that feed it in the secret places of the earth to the topmost leaves that leap to the air and glance in the sun, it still lives and grows.

And yet, transplanting the tree of English or American liberty was the essence of the nineteenth-century Indian reform policy. The reformer sought to bring to the Indian, as Merrill Gates explained, “the logic of two thousand years of Teutonic and Anglo-Saxon history.” These friends were determined to speed up what men and women of this era regarded as the process of social evolution, to fertilize and to force-feed their transplanted tree. They saw only one possible tree of culture, the English oak as transplanted to American soil. They believed that there was a tree of all mankind’s civilizations and that the highest branch, the most civilized level, has been reached by these English-speaking people. And one advocate, Merrill Gates, quotes no less distinguished an authority on the tree of liberty than Maine himself to the effect that, “I state the inference suggested by all known legal history when I say there can be no material advance in civilization unless landed property is held by groups at least as small as families.” (Prucha, p. 500) To these Indian friends the movement of history required, indeed demanded, that an Indian tree, borrowed from the English forest, be planted on American soil and this tree be grown on individually allotted, not tribally owned, plots of ground.

The Reverend Lyman Abbott denied the impracticability of planting this tree and refuted the charge that the proposed reforms, especially education, as a device to change Indian values, would not
work. "My answer to that objection," he orated to the reforming Mohonk Conference, "is [that] whatever ought to be done can be done." (Prucha, p. 215) Such faith the nineteenth-century friend of the Indian had! And this provides yet another of the lessons from this historical experience. Determination, even iron-willed, patriotic, American, double-eagle, Victorian determination, is not enough when a policy runs counter to objective reality. As was said earlier, wishing does not always make it so. An example of this is the misplaced faith in education as a panacea, as the tool to replace Indian culture. The reality of the situation was that the Indian way was too strong, too viable, too resilient to be swept away by a childhood spent in a distant school. The native pupil might be punished for speaking Indian words but he could not be stopped from thinking Indian thoughts. Quite simply, Abbott was wrong: What the reformers thought ought to be done could not be done. Again, benevolent purpose did not automatically create effective policy.

We, too, will be doomed to fail in formulating native law and policy if we ignore the strength and reality of Indian culture. The nineteenth-century reformer believed that the Indian was approaching extinction, that native culture was destined to pass. A sound contemporary Indian policy must recognize that the Indian way is very much alive and well. We must learn what the friends of the Indian never learned, that there is no single Indian culture, that no one policy is capable of working effectively for all Indian people. For example, we must recognize that what is needed for the mineral estate of the Osage may not be the appropriate policy for the fishing rights of the Salish. The almost landless Chickasaws do not need the same resource development programs as the land-rich Navaho nor do the urban Hopi require the same help as those on the mesa. At the heart of this whole issue is the major historical failure of these early friends—they did not bother to determine what the Indian wanted, what the Indian needed, what the Indian felt was important, and what the Indian dreamed would happen. Hopefully, we now know that Indian policy without Indian participation can never work. At the same time, we have yet to address the complex issue of the division of opinion and conflict of values within the Indian community itself.

Furthermore, we can learn from the Dawes experience that the Indian question is not a short-term "Indian problem" which demands, or is even susceptible of, a final "solution." Indian people are a part of our national heritage and will continue to be an important segment of the population. Recognizing them as such, we must acknowledge that the so-called Indian question is one of continuing
national concern in the same manner as domestic justice, foreign policy, or monetary consideration. If we accept this, we can avoid the shortsighted, temporary expedients of the instant experts with easy answers and quick solutions that have at their heart the unrealistic assumption that we can wish away a whole group of native people with their own strong cultural traditions.

In conclusion, I would suggest that And Still the Waters Run and Americanizing the American Indian show that no particular group in the population has a monopoly on wisdom or folly, friendship or villainy in Indian policy formulation. Prucha, a Jesuit, quite correctly spots the anti-Catholic bias and pro-Protestant ethic in many of the proposals. Debo, who, for all I know, could be a Druid, chronicles the selfish efforts of church groups to encourage the unselfish benevolence of the few oil-rich Indians. And it is an understatement to say that we lawyers and judges do not always emerge as friends of the Indian. It is perhaps more honest to say that a considerable number of lawyers emerge as scoundrels and even a few as thieves. The politicians and the professional Indian bureaucrats, as a class, come off the worst. And yet, equally important to this story is the fact that a few ministers, some lawyers, and a number of men in the Indian service emerge from the whole rotten mess having performed a real and vital service, often at great personal sacrifice. One should not forget that Prucha has even found a few hearty souls who took an extremely unpopular position by opposing the self-proclaimed friends of the Indian. Here is the final lesson: The man who disagrees with the popular program, the accepted solution of the Indian’s friend, may not, in the long run, be the enemy.

In a broader sense this American experience has implications for all branches of law and public policy. The failure of the Indian friends was a failure common to society at large—the failure to grasp law as an historical phenomenon. The nineteenth-century legal comparativists were absolutely correct when they argued that Law and the tree of liberty “savours of its own soil.” Too often modern policy advocates, the contemporary friends of the “cause of the month,” offer solutions to the current “fortnightly crisis” which ignore important cultural values and traditions. The Indian is not alone in being dominated by a world-view. Any contemporary policy which does not conform to the reality of the historical experience is likely to meet the tragic results of Indian law and policy at the close of the nineteenth century, and wishing will not make it otherwise. Thinking noble thoughts will no more reverse such tragic errors of policy than will acknowledging the historical error bring back 100 million acres of lost Indian lands.