Genocide-at-Law: An Historic and Contemporary View of the Native American Experience

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THE LANGSTON HUGHES LECTURES*

GENOCIDE-AT-LAW: AN HISTORIC AND CONTEMPORARY VIEW OF THE NATIVE AMERICAN EXPERIENCE

Rennard Strickland**

I. INTRODUCTION

Genocide is a new word for an old tragedy. The term, coined only in the twentieth century, describes the decimation of a people, of a nation. Webster's Collegiate Dictionary defines genocide as "the deliberate and systematic destruction of a racial, political, or cultural group." We most commonly think of genocide as synonymous with the Nazi holocaust, the loss of six million or more lives, or in the

* This essay is an adaptation of three public lectures delivered at the University of Kansas School of Law during the spring semester of 1985. At that time, Dean Strickland was serving as Langston Hughes Distinguished Visiting Professor at the University of Kansas and was on leave from his position as John W. Shleppey Research Professor of Law and History at the University of Tulsa. A revised version of the Langston Hughes lectures and three other public lectures delivered at the University of Kansas are scheduled to be published in book form by the University Press of Kansas. Full bibliographical citations to all sources in the lectures will be found therein.

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The ideas developed in these lectures are the product of more than twenty years of research and writing in the field of Indian law and history. Those interested in more detail should consult the following works in which many of these thoughts are elaborated: FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (R. Strickland ed. 1982) (Charlottesville: Michie/Bobbs-Merrill); J. GREGORY & R. STRICKLAND, HELL ON THE BORDER: HE HANGED EIGHTY-EIGHT MEN (1972) (Muskogee, Oklahoma: Indian Heritage Association); R. STRICKLAND, THE INDIANS OF OKLAHOMA
context of the Chinese Communist extermination of eighteen to twenty million dissidents. The term also describes the Native American experience.¹

The term genocide did not exist in the early nineteenth century when Alexis de Tocqueville recorded the centuries of atrocities directed at the native peoples of the Americas. Policies of the Spanish, French, English, and the United States may have reduced the population of the new world by as many as twenty-five million. Genocide is the modern word for a long historic experience which is no stranger to the American continent.²

In the Langston Hughes Lectures, I want to look at the role of law in the historical and contemporary experience of the natives of North America. I want to look at law both as a factor in the genocidal extermination and as a weapon in the contemporary struggle for survival. For, as Jerry Muskrat, the only Native American member of the Indian Appeals Board warns, "law has been both lance and shield

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for the American Indian. It In the nineteenth century, law was a principal tool of genocidal extermination. In the twentieth century, law has become the major weapon in preservation and extension of Native culture and economy. Finally, I want to suggest some of the relevancy of the historic Indian experience to our contemporary American crisis.

Far from being a people on the road to disappearance, the contemporary Native American is one of the fastest growing groups in the United States. The Indian and Indian culture survived the historic genocidal thrusts. In the mid-1980's, the Indian is very much alive — a surprise to many who believe the myth of the end of the "Noble Red man." The 1980 Bureau of the Census Report shows that there are now one and a half million Native Americans living in the United States — some 1,534,000 Indians to be exact. More than half of this number, according to the Bureau of Indian Affairs (BIA), live on or near Indian Reservations, Trust Land, or Native Villages. The number, again to be painfully exact, is 755,201. Approximately ninety percent of the BIA reservation Indian population is concentrated in eleven states. For example, the three largest concentrations by state are: Oklahoma (159,852); Arizona (154,818); and New Mexico (105,973).

Your state of Kansas is 24th in terms of reservation population, with 2,243, but Kansas is 19th in terms of total Indian population, with 15,373. The Kansas figure helps highlight the major difference between urban and reservation Indians. For example, the State of California has more than 200,000 Indians, but less than 24,000 of these California Indians are a reservation population. Even the urban Indian population is highly concentrated with more than ninety percent located in only fifteen states.

These statistics hide the vast diversity of life and lifestyles of the Native American. The contemporary American Indian is as varied

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4. For the most complete discussion of current Indian economic and population resources, see Presidential Commission On Indian Reservation Economies, Report and Recommendations to the President of the United States (1984) [hereinafter cited as Presidential Commission Report]. The Presidential Commission was chaired by Ross Swimmer, who is currently Assistant Secretary for Indian Affairs in the Department of the Interior, and who was formerly Principal Chief of the Cherokees. For earlier data, see Historical Statistics of the United States: Colonial Times to the Present (1975) (Washington: Government Printing Office).

5. The 1980 census statistics discussed here are taken from the summary contained in Presidential Commission Report, supra note 4, at 56-60.
as the Kansas Kickapoo, the Florida Seminole, the New York Mohawk, the Dakotas' Sioux, the New Mexico Pueblo, the Arizona Navajo, and the Oklahoma Cherokee, not to mention the Alaskan Village native. The Bureau of the Census found American Indians living on 278 reservations and Alaskan Natives living in 487 native villages. Some groups and reservations are large. The Navajos are nearing 200,000; together, the Cherokee and the Navajo constitute twenty percent of the American Indian population. And yet thirty-five percent of all reservations and villages have fewer than 100 persons in residence. Nearly three-fourths of all the reservations and villages have fewer than 500 inhabitants. There are more than 2,000 residences in about fifteen percent of all reservations and villages.

The most encouraging aspect of these census figures is that this Indian population is young — quite young in comparison to the rest of the population. Almost a third of the Indian population is under fifteen years of age while only about a fifth of the non-Indian population is under fifteen. At the other end of the age scale, only 7.6% of the Indian population is over sixty years, while 15.8% of the general population is sixty or older. The median age for all Indians is twenty-three.

Perhaps even more promising is the census news that in 1980 there were 501,840 Indians, three years and older, who were enrolled in nursery, kindergarten, elementary, high school, and college. One-third of the Indian population is in school. More than half of the Indian population under twenty-five has completed high school, as compared to one-third in the older group. The median years of school completed in 1980 was 12.2 years, up considerably from 1970.

And yet despite this encouraging news, the evidence of the plight of the American Indian remains appalling. The red man continues to be the most poverty stricken and economically deprived segment of our population, a people whose plight dwarfs the situation of any other Americans, even those in the worst big city ghettos. The statistics are long, cold, and hard. They are overpowering. Gathered together, the facts establish that “the first American has become the last American . . . with the opportunity for employment, education, decent income, and the chance for a full and rewarding life.”

Whatever index is chosen to measure Indian conditions, the statistics are tragic evidence of our failure. The income level, health conditions, housing standards, unemployment rate, educational level, and statistics of crime and juvenile delinquency all establish that “American Indians . . . suffer . . . indignities that few groups in America suffer in equal

measure.” An Indian born in the twentieth century will live a life not significantly longer in span than his ancestor of 500 years ago. Although the last decade has brought considerable improvement, the Indian is still left out of many of the advances of modern medicine. The United States population as a whole will live one-third longer than the American Indian.

The Indian health level is the lowest and disease rate the highest of all major population groups in the United States. The incidence of tuberculosis is over 400 percent higher than the national average. Similar statistics show that the incidence of strep infections is a 1,000 percent higher, meningitis is 2,000 percent higher, and dysentery is 10,000 percent higher. Death rates from disease are equally shocking when Indian and non-Indian populations are compared. Influenza and pneumonia are 300 percent greater killers among Indians. Venereal disease is not only common but death from gonorrhea is over 500 percent more likely. Diseases such as hepatitis are at epidemic proportions with an 800 percent higher chance of death. And the suicide rate for Indian youths ranges from 1,000 to 10,000 times higher than for non-Indian youths; Indian suicide has also become an epidemic.

On most reservations, several generations of Indians are housed in two- or three-room shacks or hogans which contain no plumbing or bathing facilities. Between 50,000 and 57,000 Indian homes are considered substandard. Most of these cannot be repaired. These dwellings are not only inadequate in size but unsanitary. For example, over eighty-eight percent of the homes of the Sioux in the Pine Ridge area have been classified as substandard dwellings.

Many Indian tribes still possess vast resources capable of sophisticated economic development. Yet the 1980 census reports that 408,000 Indian persons were living below the poverty level — more than twenty-five percent of all American Indians, as compared with 12.4% of the non-Indian population. The unemployment rate on reservations is 25.6% and the median Indian’s income is sixteen percent lower than the national average.

Compare this vast poverty with the richness of the undeveloped Indian resources. In his eloquent essay, “Shall the Islands be Preserved?,” Professor Charles Wilkinson inventories some of the tribal assets:

The stakes are much higher than is commonly realized. The reservation system comprises some 52 million acres — about 2 1/2 percent of the entire surface area of the United States. Add to that the forty million acres which will be transferred to Alaska natives over the next fifteen years, as well

as unresolved land claims in many states on the eastern seabord. . . . The tribes have large mineral holdings: 10 percent of the nation's coal, 10 percent of the oil, and a minimum of 16 percent of the uranium. In addition to valuable recreation land, Indians own 1 1/2 percent of the country's commercial timber and 5 percent of the grazing land. And reservation Indians have first call on the water in many rivers in the parched western half of the country.\footnote{8}

Much of Indian culture, like the Indian population, is very much alive. Survival is perhaps the word that best describes the spirit of Indian people as diverse as the Kiowas of the Sun Dance and the Cherokee of the Kee-Too-Wah fire. The Indian has learned the lesson of building and rebuilding a civilization, of adapting, of changing, and yet of remaining true to certain basic values regardless of the nature of that change. At the heart of those Indian values is an understanding and appreciation of the timeless — of family, of tribe, of friends, of place, and of season. It is a lesson that white civilization has yet to learn. Despite raw poverty and bleak economic prospects, the modern Indian glorifies in his Indianness. Indian pride is a contemporary reality of Native life.

II. THE HISTORIC NATIVE AMERICAN EXPERIENCE

A. Legal Genocide

In the early nineteenth century, the picture for American Indians was not so bright. At this time, it appeared as if the Indian genocide would be total. Alexis de Tocqueville contrasts the styles of extermination of the Spanish and of the Americans of the United States. De Tocqueville, writing in the mid-1830's, concludes:

The Spaniards pursued the Indians with bloodhounds, like wild beasts; they sacked the New World like a city taken by storm, with no discernment or compassion; but destruction must cease at last and frenzy has a limit. . . . The conduct of the Americans of the United States towards the aborigines is characterized, on the other hand, by a singular attachment to the formalities of law. . . .

The Spaniards were unable to exterminate the Indian race by those unparalleled atrocities which brand them with indelible shame, nor did they succeed even in wholly depriving it of its rights; but the Americans of the United States have accomplished this twofold purpose with singular felicity, tranquilly; legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.\footnote{9}

Felix Cohen, the greatest scholarly figure in the field of Indian

\footnotesize{8. Wilkinson, Shall the Islands Be Preserved?, 16 AM. WEST, May-June 1979, at 32-34.  
9. A. de Tocqueville, supra note 2, at 354-55.}
law, writing at a time when the genocidal tragedies of the Second World War were still fresh in the collective conscience of western man, warned:

The Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians . . . reflects the rise and fall in our democratic faith."

I share de Tocqueville's conclusion that it would be impossible to destroy men with more respect for law. In this nineteenth century attack on the Native American, the law was both a formal and an informal instrument of genocide. As America's most perceptive historian of Indian policy, Angie Debo, explains, "[b]ecause of the magnitude of the plunder and the rapidity of the spoliation . . . [s]uch treatment of an independent people by a great imperial power [should] have aroused international condemnation . . . but the Indians . . . were despoiled individually under the forms of existing law."\(^{11}\)

There were, of course, great and tragic Indian massacres and bitter exiles and exoduses, illegal even under the laws of war. We know these acts of genocide by place names — Sand Creek, the Battle of the Washita, Wounded Knee — and by their tragic poetic codes — the Trail of Tears, the Long Walk, the Cheyenne Autumn. But in this lecture, as my title suggests, I am talking not about these cold-blooded atrocities but about law and the ways in which genocidal objectives have been carried out under color of law — in de Tocqueville's phrase, "[l]egally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world."\(^{12}\) These were legally enacted policies whereby a way of life, a culture, was deliberately obliterated. As the great Indian orator Dragging Canoe concluded, "[W]hole Indian Nations have melted away like balls of snow in the sun leaving scarcely a name except as imperfectly recorded by the destroyers."\(^{13}\)

The legal genocide, cultural as well as physical, practiced against the American Indian could only have been the product of a society such as ours, a society with a strong sense of the "rule of law." Even while physically exterminating the Indian — shooting Native men,


12. \textit{A. de Tocqueville, supra} note 2, at 355.

women, and children like deer or buffalo — the state legislature of Georgia passed a formal resolution legalizing their actions by declaring Indians to be outlaws, beyond the protection of the law. Before we move to the more subtle forms of cultural genocide, let me read to you from that 1789 statute legalizing what amounted to an Indian hunting season:

Be it enacted by the Representatives of the Freemen of the State of Georgia, in General Assembly met, and by the authority of the same, That from and immediately after the passing of this Act, the Creek Indians shall be considered as without the protection of this state, and it shall be lawful for the Government and people of the same, to put to death or capture the said Indians wheresoever they may be found within the limits of this state; except such tribes of the said Indians which have not or shall not hereafter commit hostilities against the people of this state, of which the commanding officer shall judge.14

Another excellent example is the series of legal steps whereby the the State of Georgia in the late 1820’s and 1830’s transferred all Indian lands from tribal hands to white hands.15 The procedure looks and sounds and feels oh so legal. The legal process was simple. New counties are created out of Indian lands; land belonging to the Indians is declared surplus; individual Indians are given a right to renounce tribal membership and reclaim their own land; county courts and county judges administer the program with seals, leather-bound tomes and oaths sworn on Bibles. There is even a right to appeal their decisions — to a court system from which Indian testimony is barred. If the Indian refused to renounce tribal citizenship, the Indian lost all claims to his treaty lands. It was thusly under full color of law that the vast majority of Indian land in the southeast passed into white hands and with it the passage of the Indian way of life which it had sustained. This story was repeated again and again. Thus, the law and the courts became the principal institution for acquisition of Indian lands.

The death of Indian tribes and the Native lifeway was an act of cultural genocide. And it was an act which the perpetrators never fully understood. Edward Everett Dale, the great frontier historian and a settler himself, wrote with surprise and shock of the sadness one Indian felt when she remembered the 1907 festivities to “celebrate” the formal end of tribal nationhood and the Indians’ movement into

14. Emphasis added. There are only four known surviving copies of the text printing of this statute. The one examined by the author is in the John W. Shleppey American Indian Law and History Collection at the University of Tulsa.
the State of Oklahoma. The Cherokee woman, married to a white man, refused to attend the statehood ceremonies with her husband. He returned and said to her: "Well, Mary, we no longer live in the Cherokee Nation."16 Tears came to her eyes thirty years later as she recalled that day. "It broke my heart. I went to bed and cried all night long. It seemed more than I could bear that the Cherokee Nation — my country and my people's country — was no more."17

B. Assimilation and Genocide: Law, Education, and Allotment

As an example of legal cultural genocide, I want to look at the series of laws and the policies in the period from 1871 to 1907 which we know under the short-hand phrase of the Dawes or Allotment Era.18 The genocide of which we speak is not the genocide of bloody massacres of frozen trails of tears; the genocide of which we speak is the death of the cultural tradition and the passing of the Indian nations themselves. In many instances, this cultural genocide produced physical shock that decimated whole tribes as surely as if they were infected by smallpox-infested blankets or shot down by soldiers' bullets.

The story of the legal maneuvers by which Indian homelands and lifeways were destroyed was repeated again and again, different in detail but always with the same genocidal result. The Dakotas, Nebraska, Arizona and New Mexico, California, and the Pacific Northwest each presents a different but tragically similar version of the same old tale. We will look for most of our examples to the Indians of the lower woodlands, the southern plains, and the old southeast, and to the sequence of events which began here in Kansas at Medicine Lodge.

The 1867 Indian treaty signed at Medicine Lodge in Kansas signaled the beginning of the end of the old Indian nationhood. It was the beginning of a long tribal dying, the genocide of the plains. Many new treaties signed in 1866 and 1867 contained provisions that ultimately opened the way for railroads to cross Indian domains. Tragic onslaught followed. The Treaty of Medicine Lodge which was forced upon leaders of Plains tribes, including the Kiowas, the Cheyennes, the Arapahos, and the Comanches, foreshadowed the federal government's imposition of reservations and the use of the Army to drive them down the "white man's road."

The Indian understood the dangers — the dangers of the coming

17. Id.
of the railroad, the white farmer, and the settler’s wanderlust. Comanche Chief Ten Bears had foreseen the inevitable consequences of white settlement in his response to the military threats at the Treaty Council of Medicine Lodge. Ten Bears gave four thousand of his fellow Indians a frightening glimpse of what the coming decades would bring:

[T]here are things which you have said to me which I do not like. They were not sweet like sugar, but bitter like gourds. You said that you wanted to put us upon a reservation, to build us houses and make us medicine lodges. I do not want them. I was born upon the prairie where the wind blew free and there was nothing to break the light of the sun. I was born where there were no enclosures and where everything drew a free breath. I want to die there and not within walls. . . . I lived like my fathers before me, and like them, I lived happily. . . . The white man has the country which we loved, and we only wish to wander on the prairies until we die."

The Indian was caught on the crest of one of those great cycles that recur throughout American history. Westward expansion was itself an old story. Many Indians, including the Shawnees, the Iroquois, the Cherokees, the Senecas, and the Creeks, had been caught in earlier stages of the cycle. But this post-Civil War expansion was different. It was driven, more determined, better organized, much faster, more efficient, and more difficult to resist. Powered not only by technological marvels such as the railroads, the steam engine, and the mechanical harvester, the new expansion was also propelled by the “go-getter” spirit that infused the nation after the war. The military energy of the Union victory survived on the frontier. A determination to thrust the nation westward ruled in Congress and, more importantly, in the boardrooms, taverns, and churches. Landless Americans from older sections of the nation and newer emigrants who had temporarily settled elsewhere demanded Indian lands. There was no place left to remove the Indian, and there was little sympathy for the preservation of a way of life that left farmlands unturned, coal unmined, and timber uncut.

The old Indian hunter way and the new white agricultural and industrial way could not coexist. One had to die. The Plains Indians’ roaming hunter culture with the seasonal migration patterns following the herds was targeted for extinction on both economic and moral grounds. The goals and values of white and Indian civilization were incompatible. The legal and philosophical justification for cultural genocide was beginning to be developed.

The Indian understood what was happening and protested loudly and often. In 1874, chiefs and leaders of the Osage Nation met at Bird Creek and issued a “protest against the establishment by Con-

gress of a Territorial Government of the United States, over the Indian Nations.” A drawing, reproduced below the signature of such revered Osage chiefs as Black Dog, White Hair, Jim Bigheart, and Young Claremont, expressed the fears of all the Indians of Oklahoma. The primitive sketch, entitled “Indian Territory,” showed a train engine of the “No Soul Railroad” running over the body of an Indian caught in the iron track. The inscription was “Proposed End,” with an arrow pointing to the body of the Indian. At the very bottom were the words: “23,000,000 acres to the railroads.” This tragic little drawing captures, in an almost prophetic way, the future of the Indian. Almost a decade earlier Roman Nose had voiced the same fears. “We will not have the wagons which make a noise [steam engines] in the hunting grounds of the buffalo. If the palefaces come farther into our land, there will be scalps of your brethren in the wigwams of the Cheyenne,” the great chief warned.

The life of the Indian was changing. The military balance of power had shifted to the white man. The great romantic, free nomadic-hunter civilization of the plains was past or, at least, passing. The Plains Indian wars were coming to an end, with many tribal leaders held captive in distant jails. The brutal massacre known as the Battle of the Washita (1868), in which George Armstrong Custer attacked Black Kettle’s peaceful Cheyenne village, demonstrated the growing disparity between the Indian “Spartans of the Plains” and the white warriors. The “blue coats” appeared more frequently and grow larger and larger in the Indians’ own ledger-book drawings. The impact of the military genocide was felt throughout the plains.

The genocidal story of the dissolution of the Indian nations is primarily one of white law and white policy. By 1865, Indian tribes had begun to lose whatever hint of equality they once possessed. Indians were left primarily to react to the initiatives of white law and policy. By 1871, the treaty era had formally ended, and even the pretense of a negotiated equality had been replaced by the terrorizing potential of executive order and congressional governance.

The history of Indian and white relations is a conflicting story because there has never been a single, clearly articulated American Indian policy. The shifting American Indian policies always reflected the current white definition of the so-called Indian problem. Between 1776 and 1876 there were at least a dozen varied “solutions.” When the Indian problem was seen by federal officials as one of “civilizing” the Indian, the “agents of civilization” were sent to teach the Indian to plant and spin. When it was seen to require a military subjugation of hostile tribes, the Indian administration was centered in the War

20. Id. at 88.
Department. When it was a question of the salvation of souls, denominational Christianity was given government funds to manage portions of Indian policy. And each new set of problems, revisions of policies, systems of regulations, and programs for subjugation inherited a layer of bureaucracy and a set of obligations and procedures from the previous ones. Furthermore, a great many internally inconsistent Indian policies were pursued simultaneously by the same agencies. For Indian issues, the gap between articulated policy and actual implementation was always wide.

Analysis of nineteenth century Indian law is confused because Indian-white relations cannot be understood without consideration of the varied interests, goals, and resources of the parties involved. Indians and whites are not interchangeable historical personages. Several sets of sometimes conflicting, but often complementary, goals are reflected in the laws that so dramatically destroyed the Indian country in the period from 1865 to 1907. Often treated as a single phenomenon, these practices and policies involved many separate tasks. For the cultural genocide to be complete, the white needed to substitute a new way of life for the older Indian way. Land that was exclusively Indian-owned had to be taken out of common tribal ownership. At the same time, a new economic focus had to be created. Thus, from the Indian side, we are dealing both with acculturation, or change of Indian culture, and with allotment, or distribution of Indian lands. These goals became the twin tasks of assorted nineteenth century Indian reform policies, including the Dawes Act of 1887 and the Curtis Act of 1898. Because white settlement, Indian land allotment, and the attempted cultural transformation all occurred at approximately the same time, it is difficult to deal with the genocidal aspects of each in isolation. Taken together, these tasks dominated the life of Indians into the twentieth century.

During this period, nearly 100 million acres of Indian land passed from Indian into white hands. In 1887, when the Dawes Act provided for dividing tribal lands among individual Indians, the already shrunken American Indian heritage in land totaled 138 million acres. Less than fifty years later, when the allotment policy was formally abandoned, only forty-eight million acres were left in Indian hands. Even more dramatic was the almost total collapse of the Indians' tribal holdings. For example, before allotment the entire Indian Territory of twenty million acres in eastern Oklahoma was the exclusive property of self-governing tribal entities, primarily the Cherokees, the Creeks, the Choctaws and Chickasaws, and the Seminoles. Today, virtually the entire acreage of this rich domain of prosperous agricultural and mineral lands has passed away from the Native American. At the turn of the century, "there was not a pauper Indian amongst them." Today, three-quarters of a century later, the heartlands
of these once-powerful tribes are filled with unemployment and destitution. The Indian settlement areas are 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 many of these Indian people from proud, prosperous, self-reliant citizens of their own small republics into poverty stricken, 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 diplomacy.

There is some truth in these old myths, but the most disastrous policies for the tribes of the old Indian Territory were not the exclusive product of frontier villains. They were duly enacted, legally endorsed creations which were supported and ultimately adopted by liberal, pro-Indian Christian reformers. The "good works" of the Indians' friends created conditions ripe for the "evil deeds" of the Indians' exploiters. Ironically, nineteenth century Indian genocide was as friendly as it was legal. Over the years, the Indians' friends have been particularly troublesome to native people. A self-proclaimed purity of heart has not automatically guaranteed wisdom of policy. Many kind souls with the most benevolent purposes have produced Indian laws with the most malevolent results.

The white advocates of reform policy, the Indians' friends, were determined to make little red Farmer Joneses and native Old MacDonalds out of the American Indians. The Indian was to become another lost race in the American melting pot. He was to abandon his tribal lands, own his own farm, and compete for material goods. Two stages of development were thus required. Plains Indians and other nomadic tribes had to be settled on fixed reservations, since only then could their tribal lands be assigned to individuals. Indian lands that were declared "surplus lands" would then become available for white settlement, with the allotted lands becoming available for later purchase from the Indian allottee by whites. To accomplish all this called for a government-supervised division of the commonly owned and held tribal lands among the individual members of the tribes. Implicit in this program was the assumption that this was the Christian God's plan and man's reward. These programs did not work. They robbed the Indian not only of his land but also of much that was working in his own traditional culture. The Indian was asked to sacrifice many of the best parts of his culture for most of the worst parts of the white culture.

The long-range result of federal policy was that many Indians were
handed land with a negotiable title. It was a fee simple absolute title in many cases, and in other cases subject only to a limitation or restriction by supervision for a term of years. A great many Indians were destined to become landless, because Indian tribes no longer held the land and title soon passed to whites. Thus was Indian land lost, allotted over the protests of the vast majority of Indians who wished to retain tribal ownership.

The process of transforming Indian culture into white proved more difficult than the acquisition of land, which only required substituting the name of a white settler or speculator for the Indian name on the allotted land deeds. It was relatively easy to put names to paper and to divide up the real estate; but the cultural resilience of the American Indian amazed even the most dedicated reformer. Cultural genocide was not so easily accomplished.

A clear example of the failure of the program of cultural genocide is "Indian renaming." This was the most symbolically significant attack on the red man. Officials, under the direction of the Commissioner of Indian Affairs, changed the names of Indian people, selecting new ones or reversing their old ones because of "silly or disgusting translation" of Indian proper names. The program reached a climax in 1903 among the Southern Cheyenne. The Indians complained that they did not recognize these white translations of their Indian names and refused to use the new white names given them by the white commissioners. Hamlin Garland, although a strong supporter of the policy, wondered whether

"The ones working on the rolls are not revising from the white man's point of view with a feeling that the names ought to be as nearly Anglo as possible. My notion is to treat them as we would Polish or Russian names—retain as much of the Cheyenne as we can easily pronounce and above all secure the pleased co-operation of the red people themselves."

Most attacks on Indian civilization were not as subtle as the renaming programs. Indian agents were ordered to use the full force of the law to achieve assimilation. To the Indian and the agent this battle was to the death. Commissioner Hiram Price proclaimed that "one of two things must eventually take place, to wit, either civilization or extermination of the Indian. Savage and civilized life cannot live and prosper on the same ground. One of the two must die."

Photographs from this era capture the Indian as a people whose lifeway

22. Id. at 47-48.
23. Hiram Price, unpublished typescript (available in John W. Shleppey Collection, McFarlin Library, University of Tulsa).
was disintegrating. Their traditional culture was drawing to an end, not because the Indian had changed or wished to change, but because the white had determined to change the Indian. The Indian was the most conspicuous victim of federal policies of the middle to late nineteenth century. Those policies outlawed almost all conduct that was traditionally Indian, and sought to substitute conduct that was decidedly white.

The Indian agent as administrator of federal policy played a major role in the effort to modify Indian life, especially among the Plains Indians. Indian agents changed with increasing regularity and functioned with varying degrees of dedication, concern, and honesty. Anyone who has dealt with a government bureaucracy will sympathize with E. C. Osborne, the agent at the Ponca, Pawnee, Oto, and Tonkawa Agency. He complained to the commissioner:

When I attempt to explain some of the vicissitudes of the life of an Indian agent, it will be clearly seen that it tries the nerves, patience, and pride of one to hold the position, and often he goes reeling through the duties imposed with wounded pride and shattered nerves, caused by some not-to-be-avoided obstacle, while upon the other hand he is being strangled to death by necessary "red tape" or "criminal propositions."\footnote{24. \textit{ANNUAL REPORT, COMMISSIONER OF INDIAN AFFAIRS,} 1889 (available in Special Collections, McFarlin Library, University of Tulsa) (unpublished typescript) [hereinafter cited as \textit{ANNUAL REPORT,} 1889].}

"I find from four years of experience," the Ponca agent reported, "that to substitute the ways of the white man for the ways of the Indian cannot be achieved short of a prolonged, very painstaking, and very patient work" because "small faith in the advice or counsel of the white man remains with the Indian character of today."\footnote{25. \textit{Id.}} A more optimistic attitude prevailed on the Cheyenne-Arapaho Reservation, where the agent wrote the commissioner that "results are what instill confidence in an Indian, and he is not slow in availing himself of anything that he is convinced . . . is beneficial."\footnote{26. \textit{Id.}}

"The cow road," Arapaho artist Carl Sweezy wrote, "was different from the buffalo road in more ways than anyone, white or Indian, had realized, and the old people could not learn it in a hurry."\footnote{27. C. Sweezy, \textit{The Arapaho Way: A Memoir of an Indian Boyhood} 47 (A. Bass ed. 1966) (New York: Clarkson N. Potter).} The new direction — the corn road — was for the Indian a very different one. The Arapahos, Sweezy explained, had always lived in bands, with their tipis side by side, their horses grazing together, and with hunting and fighting and worship all carried on by the group.

It took years to learn to settle down on a farm and work alone and see
one's neighbors only once in a while. Neither we nor our dogs nor our
ponies understood this new way of white people. To us it seemed unsocial
and lonely, and not the way people were meant to live.28

To assure that white values lived and Indian civilization died, the
federal government used the full power of the law. They established
"courts of Indian offenses," the goal of which was to eliminate
"heathenish practices." As Secretary of the Interior Henry M. Teller
noted in 1883, one of the major criminal offenses to be wiped out
was the "continuance of the old heathenish dances, such as the sun-
dance, scalp-dance, &c. [sic]" Teller argued that at such dances "[t]he
audience assents approvingly to [the Indians'] boasts of falsehood
. . . and the young listener is informed that this and this only is the
road to fame and renown. The result is the demoralization of the
young, who are incited to emulate the wicked conduct of their elders.
. . ."29

The thrust of this federal criminal law was to end Indian culture.
That objective is reflected in the text of "Rules for Indian Court,"
which defined offenses as follows:

Dance, etc — Any Indian who shall engage in the sun dance, scalp dance,
or war dance, or any other similar feast, so-called, shall be deemed guilty
of an offense. . . .

Practices of Medicine Men — Any Indian who shall engage in the
practices of so-called medicine men, or who shall resort to any artifice or
device to keep the Indians of the reservation from adopting and following
civilized habits and pursuits, or shall adopt any means to prevent the attend-
dance of children at school, or shall use any arts of a conjurer to prevent
Indians from abandoning their barbarous rites and customs, shall be deem-
ed to be guilty of an offense. . . .

Misdemeanors — And provided further, that if an Indian refuses or
neglects to adopt habits of industry or to engage in civilized pursuits or
employment, but habitually spends his time in idleness and loafing, he
shall be deemed a vagrant and guilty of a misdemeanor.30

To the Indian this new life was discouraging, demeaning, and
debilitating. Health problems among the Indians were serious, par-
ticularly among the Upper Woodland Indians and former nomadic
families confined on permanent reserves. The 1889 report of the Osage

28. Id.
29. Courts of Indian Offenses, excerpt from the Annual Report of the Secretary of
the Interior (1883), reprinted in Documents of United States Indian Policy 160 (F. Prucha
ed. 1975) (Lincoln: University of Nebraska Press). The definitive study of this use of courts
is W. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL
30. Rules of Courts of Indian Offenses, 1883 (available in John W. Shleppey Collection,
McFarlin Library, University of Tulsa) (pamphlet reprint); see excerpt from Report of November
1, 1883, in H.R. Exec. Doc. No. 1, 48th Cong., 1st Sess. xi-xii (1883), reprinted in Americanizing
the American Indians supra note 18, at 295-99.
Agency noted that "year by year their numbers decreased, the mortality being largely among the children." In 1876 more than 2,000 Pawnees had been removed to a new reservation. The agent reported, "[t]here has been a yearly decimation, and now they number only 851, being a loss of 1,375 in thirteen years." The cultural viewpoint of the agent was clear in his conclusion: "[t]his fearful loss is largely due to the existence of constitutional diseases, while the incorrigible medicine man adds his list to the deathroll."

"I pray every day, and hoe onions." Thus a young Kiowa named Koba, or Wild Horse, described his life as a boarding-school student being educated to accept the "civilized" ways. The federal government viewed education as a primary force in destroying the old Indian ways. It was a form of educational genocide. Not just the Plains Indians but Indians of all tribes had their lives revolutionized by the attempts at reeducation. Koba, an early Indian artist, may have sensed the transformation in more dramatic terms than other Indians, but the magnitude of the change was apparent to all. The full brunt of the effort of reeducation was directed toward Indian children who were shipped away from the reservation or brought together at reservation schools. The philosophy was most simply expressed by Richard Pratt, the founder of Carlisle School: "'Kill the Indian and save the man.'"

Aged Indian men and women still bitterly remember the harshness of this foreign educational experience of their childhood. Indian children are by white standards indulged by their families, but at Indian boarding schools the youngsters were forbidden to speak their native tongues and were punished — often beaten — if they lapsed into their own languages. The directives issued in 1887 by the Commissioner of Indian Affairs continued until after the Second World War: Indian children must speak English. "'This language which is good enough for a white man or a black man ought to be good enough for the red man. It is also believed that teaching an Indian youth in his own barbarous dialect is a positive detriment to him.'" A strange stiffness, a discordant image shows forth from the photographs of Indian youths at school: whether standing over a washboard doing laundry or in the kitchen baking pies, the boys and girls seem to be indulging their white teachers in what they consider a great and absurd game of playing at white man.

31. ANNUAL REPORT, 1889, supra note 24.
34. Id.
While education was directed at Indian children, occupational reform was a program for adults, and the primary area of that reform was agricultural. The Indian male was to earn his living as a farmer, working the fields with horse and plow. Not only cultural resistance but bureaucratic failures doomed any hope of success of the plans to make Indian farmers of the warrior-plainsmen. At the Kiowa, Comanche, and Wichita Agency, the report of 1889 notes: “Our seed oats arrived so late that a failure in the crop could be predicted with a certainty before they were planted.” Planting was made difficult because Indian ponies were clearly inappropriate as plow horses. Agent Myers wrote the commissioner recommending that

at least 1,500 acres of land be broken for these Indians in the early spring, for the reason that their pony teams are too small and light for the work, and many of them have become discouraged about farming, as they have been unable to secure any help from the Government in this direction for two years past.13

Farming was foreign to the Plains Indian tradition. And yet some Indians became farmers. As N. Scott Momaday recalls, “the Kiowas . . . never had an agrarian tradition, and indeed they were at best disdainful of their neighbors the Wichitas, Creeks, and Osages, who were planters.” But these Indians had to “contend with the matter of . . . survival.” Momaday’s grandfather “had very little choice in the matter,” since “under the allotment system he had too little land to raise cattle as a business, and the whites had long since begun to close in on all sides.” And so this proud Kiowa started up the corn road: “While many of his kinsmen gave themselves up to self-pity and despair, [he] sowed cotton and wheat, melons and beans.”36

The principal task of the Indian was to find a way of sustaining the family, of keeping the body and the spirit alive. The problems were the same over the entire Indian country. As the Indian land was allotted, even the old farming ways of the Five Civilized Tribes could not be sustained. The testimony of a Cherokee before a Senate committee in 1906 summarizes the condition of members of a tribe that is generally regarded as one of the most affluent:

Before this allotment scheme was put in effect in the Cherokee Nation we were a prosperous people. We had farms. Every Indian in this nation that needed one and felt that he needed one had it. Orchards and gardens — everything that promoted the comforts of private life was ours, even as you — probably not so extensively — so far as we went, even as you in the States. . .

Under our old Cherokee regime I spent the early days of my life on

the farm up here of 300 acres, and arranged to be comfortable in my old age; but the allotment scheme came along and struck me during the crop season. . . .

What a condition! I have 60 acres of land left me; the balance is all gone. I am an old man, not able to follow the plow as I used to when a boy. What am I going to do with it? For the last few years, since I have had my allotment, I have gone out there on that farm day after day. I have used the ax, the hoe, the spade, the plow, hour for hour, until fatigue would throw me exhausted upon the ground. Next day I repeated the operation, and let me tell you, Senators, I have exerted all my ability, all industry, all my intelligence, if I have any, my will, my ambition, the love of my wife — all these agencies I have employed to make my living out of that 60 acres, and God be my judge, I have not been able to do it. I am not able to do it. I can't do it to-day. . . . And I am here today, a poor man upon the verge of starvation — my muscular energy gone, hope gone. I have nothing to charge my calamity to but the unwise legislation of Congress in reference to my Cherokee people. . . .

I am in that fix, Senators; you will not forget now that when I use the word "I" I mean the whole Cherokee people. I am in that fix. What am I to do?"

That old Cherokee man had come to the right place to ask that question. The crisis he and his people faced was the making of the Senate and the House and the group of philanthropic friends and reformers who proposed laws which they were sure were for the Indians’ benefit.

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." 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.

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 prepared speeches, reports, articles, and other testimonials about law and legislation. Law professors will be especially interested in the proposals of Harvard Law School’s distinguished constitutionalist, James Bradley Thayer, who for one season took the Indian as a special project.

38. Excerpt from Second Annual Report of the Executive Committee of the Indian Rights Association (1885), reprinted in Americanizing the American Indians, supra note 18, at 43.
39. See Americanizing the American Indians, supra note 18, at 172-84.
In the final analysis, the Indian was to become another lost race in the American melting pot. The Indian was to own his own farm and 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. Allotment and acculturation should not have been tried, even if the policy could have worked.

Angie Debo discovered that "the policy of destroying the Indians' institutions and suppressing the traits that once made them strong has degraded an overwhelming majority of the fullblood group."\(^4\) 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."\(^4\)

Before we go, step by step, through the lawyer's documents, let us consider the Indian legal problems in one of the most dramatic, prolonged instances of an Indian before the law — the Jackson Barnett case or, rather, the almost unbelievable series of cases of an oil millionaire Creek who was known to the press as "the richest Indian in the world." When I was growing up at Muskogee in what had been the administrative and judicial center of the old Indian Territory, I did not know a single lawyer who had practiced in "territorial days" who had not, at one time or another, been involved in one or another of Barnett's many extended legal adventures. A full truckload of legal papers concerning Jackson Barnett has been deposited with the Oklahoma Historical Society; the College of Law of the University of Tulsa has a similar Jackson Barnett legal archive.

Most of the Jackson Barnett question did not involve corruption, graft, or theft, but was the product of an unbelievable 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 elements of dubious legality and questionable morality as well. The cases involved the drama of the oil boom, the Glenn Pool strike, the spendthrift days of black gold, an Oklahoma

\(^{40}\) A. Debo, supra note 11, at 394-95.
\(^{41}\) Id. at 125.
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 copies of white men.

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 mixedbloods and fullbloods. For when the twenty 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 rich, never knowing, as Angie Debo concludes, 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."^4

Thousands of pages of specifically documented testimony outline the means by which these twenty million acres and other accumulated resources were wrested from the Indian. By 1985, the Bureau of Indian Affairs records show that in the Old Indian Territory only 65,000 acres remain in tribal hands and less than a million acres in individual Indian hands. We could not possibly examine in detail the entire process of the seizure. A few of the more common devices were:

1. Fraudulent deeds, approved by courts of law, signed by other than the owner of the land;
2. Purchase prices far below market or actual appraised value of the land, again approved by courts of law;
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 for the benefit of the trustee;
6. False heirship claims or destruction of Indian wills; and
7. Gifts to charities or individual citizens of Indian assets without knowledge or approval of the Indian.

Too many techniques were used to allow a complete examination. Angie 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

^42. Id. at 294-95.
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.43

More dramatic are the kidnappings and murders that were a regular part of the Indian Territory scene.

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 [oil] 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.44

In the midst 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 the small allotments of fullbloods and major fortunes, either by outright theft or through unwarranted or excessive charges for their services. "Few attempts," Angie Debo records, "were ever made to disbar attorneys for unprofessional conduct."45 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 courts.

The friends of the Indian did not envision that their policies would produce pillage and murder. Nonetheless, the Indian condition, which made such wholesale 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 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-

43. Id. at 312.
44. Id. at 200.
45. Id. at 313.
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. There are more than 150 Native American memorials written by Indian tribes. In these testimonials, the Native American quite accurately predicted these abuses.

The allotment experience tells us a good bit about playing with law and manipulating culture. We learn, empirically, that it is difficult, if not impossible, to forcibly graft 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.

III. INDIANS AND THE JUDICIAL SYSTEM

A. American Law and Indian 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 force-feed their transplanted tree. They saw only one possible tree of culture, the English oak 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, had been reached by these English-speaking people. 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 that this tree be grown on individually allotted, not tribally owned, plots of ground.

Determination, even iron-willed, patriotic, American, double-eagled, Victorian determination, is not enough when a policy runs counter to objective reality. 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 boarding school. The native pupil might be punished for speaking Indian words but he could not be stopped from thinking Indian thoughts. Quite simply: What the reformers thought ought to be done could not be done. Again, benevolent purpose did not automatically create effective law.

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 extinc-
tion, 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.

Furthermore, we can learn from the Dawes allotment 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 impor-
tant 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 short-
sighted, 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.

Historical experience shows that no particular group in the popula-
tion has a monopoly on wisdom or folly, friendship or villainy in
Indian policy formulation. It is an understatement to say that we
lawyers and judges do not always emerge as realistic friends of the
Indian. It is perhaps more honest to say that a considerable number
of lawyers emerge as knaves and fools, others as scoundrels, and
even a few as thieves. The politicians and the professional Indian
bureaucrats, as a class, may 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 even a few hearty souls
took an extremely unpopular position by opposing the laws of the
self-proclaimed friends of the Indian. Here is the final lesson: The
person who disagrees with the popular program, the accepted solu-
tion of the self-proclaimed Indian friend, may not, in the long run,
be the Indians' enemy.

We Americans seem to have a naive, almost childlike faith in
reformers, 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 ain'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 first decades of the nineteenth century.

The almost inevitable response is "how tragic" and "how absurd" that white society should seek to impose such values on Indian people. We think, "what fools were these nineteenth century men who did not see that cultural values differ from group to group." How quaintly dated, how Victorian, we muse. And yet, when we look at the present era we find, for example, much of this same attitude emerging in the Indian Civil Rights Act of 1968. This is an Act designed "to insure that the American Indian is afforded the broad constitutional rights secured to other Americans."

These American Indian questions offer ample proof of the oft-quoted dictum of de Tocqueville that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." The docket of the Supreme Court over the last two decades bears eloquent testimony to the emergence of the legal dimension of the Indian problem. The legal setting of the Indian struggle has become increasingly clear. "It was apparent to me," wrote Vine Deloria, Jr., "that the Indian revolution was well under way and that someone had better get a legal education so that we could have our own legal program . . . ."

The Indian is quietly (and not so quietly in some cases) storming the gates of the American legal system. The reason is simple. As the Cheyenne Richard West, Jr., past president of the American Indian

47. S. Rep. No. 841, 90th Cong., 1st Sess. 6 (1967). Despite this lofty and seemingly noble purpose, the Act sought to impose upon the tribal governments a uniform, non-Indian concept of "human rights."

A recent book by Thomas R. Berger is powerful testimony to how little may have been learned in the past one hundred and fifty years, and how white society continues to impose its values on native peoples. See T. Berger, Village Journey: The Report of the Alaska Native Review Commission (1985) (New York: Hill & Wang). In 1971, facing aboriginal claims to Alaska lands which threatened to impede the development of Alaska's oil and mineral resources, Congress passed the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628 (1982). Touted as a progressive and enlightened approach to the settlement of native claims, ANCSA recognized the rights of Alaska Natives to forty-four million acres of land and committed nearly a billion dollars cash to the natives (the equivalent of about $3 per acre). Instead of lodging title to the lands in the native governments, however, ANCSA established Native corporations and made the land an asset of the corporations. The Alaska Natives were given twenty years in which to make the corporations profitable — after that, corporate stock could be sold and traded, and more importantly, the land could be alienated. Furthermore, Alaska Natives born after 1971 receive no corporate stock at all, unless it is willed to them or acquired after 1991. The year 1991 and those following will reveal whether or not ANCSA becomes the Dawes Act of the latter part of the twentieth century.

48. A. de Tocqueville, supra note 2, at 280.
49. Deloria, This Country Was a Lot Better Off When Indians Were Running It, N.Y. Times, Mar. 8, 1970, § 6 (Magazine), at 32, 56.
Bar Association noted, "[S]o much of the [American Indians'] relationship with society at large is defined in terms . . . which lend themselves to lawyer's treatment."\textsuperscript{50} Or, as George Duke, former Director of California Indian Legal Services, explained, "[i]ndians have special legal problems, and more of them, than any other [group]."\textsuperscript{51}

The unique relationship between the Indian and the federal government distorts the function of law as conceived by the typical American community. "Because the very existence of Indian organizations is now dependent on the pleasure of Congress," Monroe Price argues, "law has taken on a role in the life of Indians that it has thankfully not assumed over the life of almost any other groups. The government's power is of life and death dimensions."\textsuperscript{52}

The court system plays a role in the life of Native Americans for which there is no comparable role among other segments of the population. This is true for a number of important constitutional, historical, and policy reasons. Non-Indians who do not live on reservation land, whose continued tribal political existence does not depend upon federal "recognition," whose leasing and utilization of land, minerals, and water resources does not involve interpretation of treaties, nineteenth century statutes and BIA restrictions and regulations, and whose major crimes are not regulated by federal legislation and jurisdiction cannot so easily understand the concern of Indian people with the federal judicial process. Law — and especially federal law — permeates contemporary Indian life. As ethnologist John C. Ewers noted:

We have many ethnic minorities. But the Indians were and are different. . . . Not only is there a large and complex body of laws relating to Indians which spells out the responsibility of all of us for them, but those laws also define certain rights and privileges which are shared by no other groups in the country — either majority or minority.\textsuperscript{53}

Federal law dominates Indian life in a way that is not duplicated. The nature of public law and Indian policy is such that legal questions are central to all tribal, social, economic, and political issues. The very existence of Indian tribes, for example, is perceived by many to be in the hands, not of tribal members, but of administrators applying laws enacted by non-Indian lawmakers. Historically, tribes have had neither the initiative nor the control over the events that dictate their destinies. Such control historically has rested in the hands of the federal courts. Thus, law looms large in the life of the Native American.

\textsuperscript{50} Letter from W. Richard West to Rennard Strickland (October 26, 1969).
\textsuperscript{53} Proposal, \textit{supra} note 3 (quoting John C. Ewers).
“No American,” Deans Christopher and Hart explain, “comes within the sweep of as many laws as the Indian . . . .”

B. Indian Lawyers and the Future of Indian Law

When the Law School Admission Council’s “Minority Recruitment Task Force” was discussing the importance of attracting minority candidates (Blacks and Hispanics, as well as Indians) to legal education, we considered a project with the Children’s Television Workshop. The project was called “Big Bird Goes to Law School.” I am still a little bitter that we rejected the idea. Many of us thought it important that we reach down to the preschool and elementary level, particularly in minority cultures where there are still only a few lawyer role models.

I have recently visualized the creation of a law school recruitment poster entitled “Coyote Goes to Law School.” The California Indian artist Harry Fonseca would be asked to execute the work. Some of you may have seen Fonseca’s wonderful Coyote lithographs in the Indian art exhibition recently sponsored by the University of Kansas. Fonseca’s Coyotes are Pop Art adaptations of the Coyote, the ancient Indian trickster mythological figure, a character not unlike the Brer Rabbit figure from southeastern Indian tales. “For me, Coyote is a survivor,” Fonseca notes, “indeed, the spice of life.” To Fonseca Coyote is a way to follow the Indian into the late twentieth century and especially into the cities where so many Indians were relocated by federal Indian programs or have chosen to relocate themselves. Fonseca says, “I believe my Coyote paintings to be the most contemporary statement I have painted in regard to [Indian] traditional belief and contemporary [American] reality. I have taken a universal Indian image, Coyote, and have placed him in a contemporary setting.”

There are wonderful contrasts among Fonseca’s Coyotes. There is city Coyote, reservation Coyote, tourist Coyote, leather-jacketed biker Coyote, and punk Coyote. Perhaps there will soon be a three-piece-suited lawyer Coyote. As more and more of these Coyotes appear and their personalities develop, a whole new mythology of modern Indian life unfolds, with the richness of the old ways and the old stories once more providing a way to understand the new. And lawyer Coyote certainly belongs in the center of that new world, for the In-

54. Christopher & Hart, Indian Law Scholarship Program at the University of New Mexico, 1970 U. Tol. L. Rev. 691.
Indian who is a lawyer is a major factor in contemporary Indian life.

It is an historical understatement to say that lawyers have not always been the Indians’ best friends. In the heat of the Georgia campaign to remove the Cherokee Indians, the good citizens of Berrien County, Georgia, including a number of the most illustrious members of the bar, are reported to have drunk a toast to Daniel Webster. Proposed on Independence Day, July 4, 1830, the toast was to “Webster — may his passage to Washington City, to the next Congress, be obstructed by thorns, and should he arrive, may his food be Indian’s flesh, and served up by an African.”56 This toast is a none-too-gentle reminder that the law and lawyers do not always show the way toward solutions of Indian problems.

It has been more than four decades since Felix Cohen’s monumental Handbook of Federal Indian Law was completed.7 The revision of Cohen’s Handbook, mandated by the Indian Civil Rights Act, was published four years ago.58 In the forty years between editions there was more legal activity than in the previous 160 years. And even this speeded-up legal activism may soon seem slow. There will be at least four to five times more legal activity in the Indian law field over the next twenty years as over the last forty.

In the late 1930’s and early 1940’s, Cohen created the field of Indian law. Felix Cohen was the Blackstone of Indian law in that he brought systematic legal order out of the chaos of Indian policy. The last forty years, but most particularly the last ten or fifteen, have been spent implementing the theoretical and philosophical base which Cohen distilled from the almost 5,000 laws, statutes, treaties, regulations, cases, and executive orders which constituted the raw materials of Indian law. The field of Indian law has grown and matured. While in the original Cohen Handbook there were only a few pages on water rights, fishing rights, and public services, each of these areas warrants a full chapter in our revised Cohen.

I am not so good with the crystal ball. In the early 1960’s I wrote with great assurance that the United States would never become involved in a ground war in Southeast Asia. Nonetheless I will take a leap and suggest ideas and events which I believe crucial in the future of Indian law.

There is no question that over the next decades Indian law will be increasingly more professional and increasingly in the hands of Indian peoples themselves. A new generation of Indian lawyers —

56. See The Cherokee Phoenix, October 30, 1830.
young lawyers who are Indian people — is already at work within and without the bureaucracy. For example, Richard West, Jr. is a partner in the old Felix Cohen law firm. Two recent Associate Solicitors in the Department of the Interior — Tom Fredericks and Hans Walker — have been Indian lawyers.69 The University of Kansas had the wisdom to appoint one of these new Indian lawyers, Robbie Ferron, as its Affirmative Action officer. From a dozen or so Indian lawyers at the beginning of the sixties, we will soon have as many as a 1,000 attorneys who are American Indians.

More law firms are coming to specialize in Indian law and are thus better able to keep abreast of current legal developments and to bring sophisticated resources to bear on this field. Many law schools have added Indian law to their curriculum. Furthermore, there is a body of legal literature including law journals, indexes, and reporters devoted exclusively to Indian law. Finally, there is a public interest Indian law firm — the Native American Rights Fund; a current Indian law library center — the National Indian Law Library; several Indian law organizations such as the American Indian Law Center at the University of New Mexico, the Institute for the Development of Indian Law, and the Indian Lawyers Training program; an Indian Law Scholarship program; an Indian Bar Association; and for my unpaid commercial, at the University of Tulsa we have a major collection — perhaps the major collection — for the study of Indian law, history, and policy. Indian law has begun to come of age.

This professionalism brings increased responsibility and accountability to the Indian lawyer. For example, if Indian tribal courts are to function efficiently and be taken seriously, legal groups like the Indian Judges Association will need to continue workshops and training. Programs for Indian paralegals must be expanded. Indian family and tribal nepotism cannot govern Indian law as it has too often governed in the past. Some sort of separation of powers is going to be needed so that Indian lawyers and judges in the tribal setting can make decisions involving tribal government and tribal officials without fear of removal or political interference.

If Indian law is to prevail, Indian law must be worthy of prevailing and that requires hard work and systematic effort. For more than a decade, Indian Lawyers have enjoyed the luxury of being the performing exotic, the sequin sparkling for white audiences. In the next decades, traveling to conferences and debating Indian legal issues will not be enough without the long hours in the library and at the typewriter or word-processor. Days of hard, nitty-gritty real lawyer work are

69. Since these lectures were given, Ross Swimmer, formerly the Principal Chief of the Cherokees, has become the Assistant Secretary for Indian Affairs in the Department of the Interior.
ahead. Indians have held out the promise; now we have to make it work.

Also, there must be a recognition of the need for cooperation. Indian tribes are increasingly finding that litigation — a lawsuit — is not always the best answer. For example, a number of interstate and inter-tribal pacts have recently been signed. These work in areas as varied as water management and criminal jurisdiction. Tribes, states, counties, and cities are learning that the costs of litigation may be too great. The fact that an Indian tribe may legally do something is not always a sound reason why they should do it. Flexing sovereignty muscles may cost more dollars than it is worth when, for example, cross deputization of tribal and state police can accomplish the same thing. Furthermore, the "Indians can go it alone" legal philosophy doesn't make much sense when there are common Indian and non-Indian legal issues. Let us also note that some of the best legal friends Indians have at the present time are non-Indian lawyers who have fought and won many of the great cases of the last decade. No matter how many Indian lawyers we graduate, we will continue to need these non-Indian attorneys — continue to need their friendship, knowledge, support, and most of all their keen and imaginative legal minds. If we had two or three times, or perhaps even ten times the number of Indian lawyers we now have — we would still not have enough Indian lawyers for all the issues that will affect Indians over the next decades.

Over the last decade, too much of Indian law has been reactive rather than planned. Frequently, issues that were litigated were defensive, brought under the wrong circumstances, and at the wrong place. Indian tribes went to the courts to put out fires; they were forced to the courthouse as a last ditch effort to preserve and protect. A coordinated plan — a strategy for law — ought to be a part of the long-range planning of every Indian tribe. Thinking ahead — planning ahead — offers the best hope for the years ahead. It is no secret that much of the success of the Black Civil Rights cases came from a coordinated and closely planned litigation strategy.

There are a number of settings, tribal and personal, in which the legal dimension of the Indian problem will certainly be present. The surging legal activism of American Indians is not indicative of new problems, but simply represents a belated recognition of the legal implications of age-old problems. Based on an analysis of the developments in Indian relations, there are at least five contexts in which law-related problems are likely to arise in the life of the American Indian. These are:

1) Tribal relations with other governmental or administrative units on a variety of issues, most generally associated with treaty interpretation, land claims, governmental regulations and services;
2) Internal tribal relations, including elections and administration of law and order functions through tribal police and native courts;

3) Tribal relations with nongovernmental bodies of individuals, especially on questions of economic and industrial development of tribal resources;

4) Personal and tribal problems of individual Indians relating to issues of poverty and disadvantaged social status; and

5) Personal problems of individual Indians associated with traditional civil law issues and violations of legal regulations, including criminal statutes.

Because of what in current Washington rhetoric is denominated "that special relationship between Indian tribes and the Federal government," significant policy considerations with far-reaching legal implications are often raised outside of the litigation process, within the bureaucracy of the Indian administration or before congressional committees. Therefore, it would be a mistake to think that important legal issues are being raised only in the courts. In fact, many of the most serious legal and policy questions are those which continuously face the Indian leader while guiding legislative and administrative decisionmaking.

While these five general areas suggest many of the basic legal issues which will face the American Indian, other divisions are possible. I have attempted to suggest the types of legal questions which are at the heart of American Indian policy. It is clear that the legal needs of the American Indian are as great — if not greater — than those of any people in the world. Following are a few specific issues which will be important in Indian law over the next decades:

1) Internal tribal law will be increasingly significant. For example, the tribe's power to zone will be a weapon to preserve and protect Indian life and lands. Gambling and bingo regulation will continue to test Indian tribal law just as it tests state and federal law.

2) The urban Indian and the problems of the cities will require increased time and resources, particularly with regard to claims for services and with efforts to create new forms of tribal relations and service delivery systems.

3) The vast body of Indian resources — water and mineral — will inevitably create new demands on Indian people, their lands, and their lawyers. Cooperation with private developers, state agencies, private corporations, and individual citizens will hold the key to the role of the law in promoting tribal economic self-sufficiency.

4) There are unresolved land issues, including the question of interest on awards and the recognition of aboriginal rights. Claims for land as well as damages will become crucial.

5) New thrusts in the area of international law will raise issues
of the relationship of Indian tribes to other native or indigenous peoples throughout the world, particularly in the context of their relationship with international organizations and treaties.

6) Legal action will involve more legislation and administrative rulemaking. Indian lawyers will find themselves in the conference room more and in the courthouse less. The administrative agencies — many beyond the BIA and the Department of Interior — are destined to play larger roles in Indian legal questions. For example, a former student of mine recently called me about an Indian issue in radio and television regulations at the Federal Communications Commission.

7) An increasing number of Indian lawyers will be working for Indian interests — and their own — beyond the reservation and the Washington bureaucracy, in large corporate offices, banks, oil companies, and in the great Wall Street, Phoenix, Boston, Washington, and Atlanta law firms, where they will bring a new perspective to the decisionmaking of America's ruling elite.

8) More and more — over the next decades — the BIA will be called to account for failures as trustee to protect Indian tribes in negotiations of leases and husbanding of resources. The Klamath settlement, in which the tribe collected damages for timber mismanagement, is an example of things to come. I fully expect to see other actions like those in which coal leases were set aside and renegotiated with more favorable terms for the Indian people.

9) There will be more direct tribal action as tribes discover that programs they have contracted to perform under the Indian Self-Determination Act are underfunded at the time of transfer. We are beginning to realize that no combination of Geronimo, Chief Joseph, and the Virgin Mary could succeed with some of these budgets. So tribes, of necessity, will become more aggressively independent in economic and legal matters.

10) The day-to-day operation of tribal legal functions will become more significant as the social programs of the sixties and the seventies come to rest more heavily on Indian tribal groups and upon tribal resources.

What Indian lawyers convinced legislators and judges that sovereign Indian tribes and competent Indian people were eligible for and capable of doing must now be done. We are at the proof of the legal pudding stage. The rhetoric of the courtroom and the legislative hall must now be actualized. A good example of this is implementation of the Indian Child Welfare Act, as well as expanding Indian health care, education, and land and probate responsibility.

At this point the old genocidal drive for cultural and national extermination clashes with the new preservation drive for cultural extension and tribal self-sufficiency. When this occurs, as in the recent history of the Creek Nation (Muscogee Confederation), we have a
perfect laboratory in which to explore both the historic and contemporary functions of law in a Native American community. By the beginning of the 1980's, the Creeks in their sovereign capacity found themselves faced with thousands of their people inadequately cared for through the federal, state, or private health care systems. In response to this and other equally serious basic needs, particularly of their very old and their very young, they drew upon what remained of their treaty-guaranteed land base and upon their historic sovereign status. The Creeks, on one of their few remaining tracts of treaty land, undertook to fulfill the federal Indian policy of the 1980's which was designed to encourage (perhaps "force" might even be a more accurate word) tribes to become economically self-sufficient. The Creek/Muscogee Nation opened a very successful bingo operation which created revenues which they used to fund health care and prenatal services. And, at the same time, they created productive employment for hundreds of their Creek people. These Indians discovered, as acting Undersecretary of the Interior Fritz concluded, that this "made more economic sense than raising soybeans or corn."

The Creek/Muscogee Nation is a southeastern Indian tribe, long recognized by the federal government as one of that group of Native peoples collectively called "The Five Civilized Tribes." The Creeks as a people had long been settled villagers who were engaged in agriculture at the time of initial white contact with the Spanish explorer DeSoto in 1540. The Creeks have always been known as a people of law, who functioned as a governmental unit not unlike the classic Greek Confederacy. One of their earliest myths concerns the coming of law. According to Creek elders, when the world was young, they had no law and were confused and disorganized, but the Great Spirit sent the turtle among them to bring them "The Way," the law of the spirit. And ever since that time the Creeks have been a people of law, in harmony with the spirits and living as the spirit intended them to do.

Creek history mirrors the genocidal impact of law as reflected in the entire Native American experience. The Creeks were once a powerful confederacy whose strategic location along the great rivers and trade routes and whose military prowess made them a major international force in the struggle of European nations for control of the American continent. The Creeks were the target of the Georgia legislature, which

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enacted the "law of outlawry" authorizing the extermination of hostile Indians. Despite numerous treaties protecting the Creeks' land and guaranteeing their tribal sovereignty, the Creeks were driven from their southern homeland as a part of the Indian removal of the 1820's and 1830's which culminated in "The Trail of Tears," in which as many as one-third of the Creek people died from the forced march in bitter winter.

Yet, once settled on the Indian Territory lands guaranteed by the removal treaty, the Creeks again became a prosperous and economically self-sustaining people, able to provide resources and opportunity for all of their tribal members. Drawn into the American Civil War, more of their land was taken and their homeland opened for railroads and ultimately for white settlement. In the period after the Civil War, the Creeks suffered from the concentrated effort of legislation specifically designed to dismantle tribal government and eliminate the Indian-owned lands. All of the genocidal programs of the Dawes era were brought to bear upon the Creek Nation. The Curtis Act attempted to outlaw their entire tribal existence. "Final Rolls" were made for the abolishment of the Creek Nation. And the Muscogee people were to become citizens without a Native State. The genocide was thought to be absolute, final in all respects.

And yet the Creek nation survived. As the United States District Court for the District of Columbia concluded in Harjo v. Kleepe,62

Despite the general intentions of the Congress of the late nineteenth and early twentieth centuries to ultimately terminate the tribal government of the Creeks, and despite an elaborate statutory scheme implementing numerous intermediate steps toward that end, the final dissolution of the Creek tribal government created by the Creek Constitution of 1867 was never statutorily accomplished, and indeed that government was instead explicitly perpetuated.63

As Judge Ellison noted in Indian Country, U.S.A., Inc. v. Oklahoma,64 "The tribal government of the Creek Nation was never disestablished."65 The acts of total genocide had, in fact, failed. The tribe had retained their historic sovereignty and a homeland of original treaty land.

This recent history of the Creek/Muscogee Nation reflects the changes as the federal government has shifted Indian policy from the genocidal destruction of the Dawes and Curtis era to the economic development and self-sufficiency of a modern era, beginning as early as the Ken-

63. Id. at 1118.
65. Id. at 3.
nedy presidency and continuing through the Reagan administration. The Creeks' historic fight for survival tested their sovereignty, but the tribe preserved its independent political and cultural heritage despite the persistent efforts of the state and federal governments to destroy the tribe as a sovereign entity. The final acknowledgement came in *Harjo v. Kleppe*: the Creek tribe existed as a separate sovereign entity. In 1979, the Creek Nation ratified a new tribal constitution organized under the provisions of the Oklahoma Indian Welfare Act. There was no longer a question that the Creeks would survive.

The genocidal thrust of the Dawes Act and the Curtis Act had failed. Today the Creek Nation is recognized as an operational government pursuant to its various treaties, federally approved constitution, the Oklahoma Enabling Act and the Oklahoma Constitution, the Oklahoma Indian Welfare Act of 1936, the commerce and supremacy clauses of the United States Constitution, and the inherent sovereign tribal powers. As the twentieth century closes, the Creek/Muscogee Nation is a part of federally acknowledged "Indian Country," in which the inherent sovereignty of this Native nation preempts state and county jurisdiction and action, enabling the tribe to create social and economic opportunities for the Creek people. Thus the Creeks, like so many other Indian tribes, are able to proclaim with Mark Twain, "The report of my death has been greatly exaggerated."

At this point I am cutting to a commercial — a commercial for the American Indian Law Scholarship Program administered at the University of New Mexico, the Minority Task Force Programs of the Law School Admission Council (LSAC), and the Indian programs of various law schools such as the one at the University of Tulsa. More than a thousand Native Americans have been attracted to and assisted through law school, primarily by the American Indian Law Scholarship Program with help from other efforts such as the LSAC Matching Grants program. These new Indian lawyers have created a legal revolution by which the sword of genocidal law has been replaced by the legal shield of tribal sovereignty and economic self-sufficiency.

Once again, the Creeks illustrate this contemporary experience. The young Indian lawyers who represented the Creek tribe were presented with the challenge of creating in the Creek nation bingo enterprise a legal entity which fairly and responsibly fulfilled the tribal goals of assisting the nation's needy, while promoting employment opportunities for the able-bodied among the tribe. They approached this challenge with the finest of lawyering skills. They helped the tribe create a comprehensive tribal ordinance, assisted by a review from

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66. Copies of materials relating to the Creek Constitution of 1979 have been deposited by the Muscogee Nation in the John W. Shleppey Collection at the University of Tulsa.
the Federal Bureau of Investigation which prevented the taint of organized crime; secured a "Big Eight" accounting firm to create sound audit procedures; established regulation by a Creek Nation Gambling Commission; effectively negotiated for venture capital and management assistance; and located a site on tribal treaty land which would sustain a legal assault from a state tax commission attempting to limit the tribe's exercise of its sovereignty. No blue-chip Wall Street firm could have done a better job for its client. The result has been a sound tribal enterprise returning significant funds to the Creeks, with which the tribe supports tribal health care and other worthwhile projects. While this is the end of my commercial message, we are only seeing the beginning of the good works of these new Indian lawyers.

IV. IT IS HARD TO HOLD A GREAT VISION: INDIANS AND THE AMERICAN CONTEMPORARY EXPERIENCE

Much of what the Indian lawyer is doing is what every other good lawyer is doing for his or her clients. The legal issues of the next decades may not appear to be of the cosmic and theoretical nature of the last decade's dramatic decisions, when Washington tribes acquired half the state's fish catch and Maine's Indians settled great land claims. But law will continue to be at the very heart of Indian questions. History has shown that Indian policy without law is unpredictable. There can be no sound Indian policy without aggressive and determined Indian law and lawyers. But law alone, without good will and a commitment to moral right, produces only legal tyranny. The danger of lawless law is at the heart of Alexander Solzhenitsyn's warnings to the western world.

And our old friend, the Indian's Coyote, has as much as Solzhenitsyn to say about our world. As a long-time advocate of the importance of professional diversity, I want once again to assert that it is not just the Indian who will benefit from the presence of lawyer Coyote. Our whole profession is made the richer by diversity in background and experience. As one observer noted of the impact of artist Harry Fonseco's mythical creatures:

Coyote grins, snickers, dances, and cavorts in a conventional world suddenly made absurd by his presence. His antics, however, are not directionless; he is the universal trickster armed with the cutting tongue of the fool. He internalizes and then presents the banality of the easily accepted. He has played a mirror joke, for we are laughing at ourselves.

I could not close the Langston Hughes lectures without actually lecturing you — giving my sermon, if you please! If this really were a sermon, I would say in the best frontier evangelical tradition that

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I take for my text a statement from Crazy Horse: "It is hard to hold a great vision." And I might add that when that "great vision" encompasses a "world view" that runs counter to the popular western doctrines of "progress" and "enlightenment," that vision is even harder to hold. Yet, this is the traditional Indian view, the one which has survived the genocide. Indeed, this world view made it possible for Indian people and their nations to survive these genocidal onslaughts.

The mass of the American people faced, perhaps for the first time, in the aftermath of Vietnam, the shattering realization that all "progress" and "development" does not run its course for the divine purpose of fulfilling American ideals. We came face to face with the shattering fact that our version of right does not always make might — that superior military strategy or forces may overcome what we personally view as a superior ideology. Even more shattering, the Vietnam experience raises the question of whether or not purity of purpose creates superiority of vision. Hopefully, we have at least rejected the old Whig theory of history that good causes are always victorious — that the judgment of the sword is just and fair, a vindication of the rightness of policy.

Most Americans have always believed that the American Indian was subjugated, defeated if you will, in the nineteenth century, primarily because he was wrong, he was a social anachronism, he stood in the way of a vision that was preordained. The Indian opposed progress, stood in the way of inevitable growth and the ultimate evolution of man. We know, for example, that in orthodox Puritan theology the Indian was the embodiment of the "anti-Christ" and that his military defeat, in the popular American view, was a triumph ordained from on high. So it is that good people can harden themselves to witness genocide, the devastation of another people, the destruction of their culture, indeed, the end of their being. Genocide becomes an act of salvation, something done for the good of all.

I am certainly not the first to suggest that there is a major analogy between America's Indian policy of the nineteenth century age of manifest destiny and American foreign policy of this twentieth century age of Communist containment. If one looks at the photos of stacked bodies from the Middle East or El Salvador or Indochina, one is struck with a sense of de ja vue. For they are the stacked bodies of Wounded Knee moved to a warmer climate. The comparison has become a popular one and is, I think, in many respects a valid one. I suspect that in these last decades of the twentieth century our whole civilization may stand in much the same position as the American Indian did in the later decades of the nineteenth century.

There are lessons that Coyote, and indeed the whole Indian experience, can teach the rest of society. We are again in need of "In-
Indian missionaries" — but this time let’s have the Indian do the teaching. Let’s see what Coyote has to say. Foremost among the lessons we can draw from the Indian experience is the following: Virtue is not always its own reward. Right does not always triumph. My students know that I believe that on a significant number of great issues the “lost cause” was, in fact, the “best cause.” And they are right. For example, I believe that traditional Cherokee society was vastly more humane and more desirable than the white middle class American ethic which supplanted much of it.

The Cherokee historical experience is yet another case study of the failure of law and lawyers to provide protection for native peoples. Toward the close of the third decade of the nineteenth century, when the Cherokee Nation began to publish a newspaper, the name Phoenix was selected for the masthead. It was an appropriate choice. The power of that ancient mythical bird, who was consumed by fire and arose from his own ashes, seems to be inborn in the soul of all Indian people. There is an eternal flame of the Indian — a fire so carefully guarded that it has continued to burn for them through the deliberate genocide of forceable removal, civil war, and tribal dissolution. According to the ancient legend, as long as that fire burns, the Indian will survive. American Indians are indeed a remarkable people, having survived in the face of overwhelming odds. This Indian accomplishment is eloquent testimony to what William Faulkner described as the enduring spirit of man, proof that humanity will not only endure but triumph.

The Cherokee example is only one among hundreds. Students of Indian history are familiar with the tale of how disorganized bands of Cherokees forged themselves into a political state, created their own native alphabet, adopted a written constitution, and ultimately provided political, social, and economic leadership for a new state. What is not as well known is that these Cherokees were not an anemic people given only to simple domestic pursuits, but were a tribe of Indian warriors and hunters whose conquests had given them military dominion over the heartland of the southern mountain ranges. That the Cherokees were eventually to be known as one of the "Civilized Tribes" is testimony of their ingenuity. The Cherokees saw, paradoxically, that change was their only hope for survival as an Indian people. The failure to survive as a powerful political state was not a failure on the part of the Cherokees. Again and again, as tribal accomplishment laid a foundation which would have preserved the Cherokees as a people, the white man stepped in and enacted

laws which destroyed the Cherokees’ accomplishment. The triumph of the Indian is that they have been able to survive, coming back fiercely determined that they will not only survive but prosper.

This specific incident is germane to our lesson because it vividly illustrates the dilemma of all Indian people. At each stage in their history, as soon as the Cherokees adapted their laws and culture so that they might survive as a people, white society stepped in and, through new legislation, destroyed what they had accomplished. The pattern was repeated again and again and again.

At the close of the nineteenth century, the Cherokees and a group of their brother Indian tribes, including the Creeks, stood ready to accept admission to the Union as an Indian state. The Cherokees, following the counsel of Presidents Washington and Jefferson, had changed their legal system from clan revenge to court process, and waited for the long-promised Indian state which would culminate their historic cultural and legal compromise. Instead, the United States Congress and the instrument of its creation, the Dawes Commission, divided tribal lands, abolished Indian courts, and weakened the governing powers of the Cherokee Nation. The Cherokees and their neighbor tribes were forced to abandon the long-promised Indian state of Sequoyah.

Yet the accomplishment of the Cherokees in making that remarkable transformation remains a tribute to the intellect, the determination, and the dedication of Indian people. A Cherokee legend says that in the beginning the Indian was given both the book and the bow, but did not use the book and so was left only the bow. After the white man came, the Cherokees, faced with the question of survival as an Indian people, turned to the book and learned to use it. If the white man had only believed in the book and not broken faith with the Indian, we might all be the richer. The Indian tragedy was that they believed what the white man proclaimed about a nation of law.

There is a justifiable temptation to glory in the Cherokee legal transformation from clan revenge to court process. It is truly a remarkable cultural achievement. Yet one must fight the Whig theory of history — the belief that what is later is always better, the feeling that progress is its own reward. As John Crowe Ransom has reminded us, progress as a god figure has no end and exerts no ethical judgment. The thoughtful person must ponder the question which Cherokee society was superior. I am convinced that Cherokee society in 1985 is vastly inferior to tribal society in 1785 or 1885, weaker in almost every respect. While I have not studied other Indian tribes in as great a depth, I am reasonably certain that the same is true of other Indian societies — the Sioux, the Iroquois, the Navajo, the Creek, and the Blackfoot.

Ironically, there may be a final victory for the traditional Indian way. The Indian who borrowed from the white man in order to sur-
vive may, in turn, contribute an element to the survival of civilization. We can learn from the Indian the necessity of a "world view" which comports with reality and which is rooted in the deepest values, traditions, and ideals of the civilization. We can learn from the Indian that if our "vision" is great enough, if our outlook is profound enough, and if our ideals run deep enough, defeat of our material culture is not the same as defeat of our spirit or our "world-view." And it is this which will help us preserve our own culture against even the most determined.

Indian ideals and spirits are not dead. Despite the oft-quoted dictum, the reckless prophecies of the Indian and War Departments of the nineteenth century, the Indian is still very much alive, very much with us. For in a viable society with deep running tap-roots, the material culture of the society is not the same as the spiritual values of the culture. Cultures have a spirit, a kind of Volksgeist, as the German historists used to say.

I am afraid, however, that in our own age, in our American consumer world, material culture and spiritual values have become closely identified, if not identical. We live in a glacial age of the spirit. We have become possessed by our possessions. The controversial activist Tom Hayden took this concept as the title and theme of his little book comparing Vietnam and the American Indian wars. His title, "The Love of Possessions Is a Disease With Them," is taken from a speech of Sitting Bull. Many of you are familiar with it. Sitting Bull proclaimed:

Yet hear me, people, we have now to deal with another race — small and feeble when our fathers first met them but now great and overbearing. Strangely enough they have a mind to till the soil and the love of possession is a disease with them. These people have made many rules that the rich may break but the poor may not. They take their tithes from the poor and weak to support the rich and those who rule.69

Frankly, the American people must, to borrow a phrase from the Southern Baptists, "get right with this place." As D. H. Lawrence has told us — the Indian will again rule America, or rather his ghost will. And I think he is right. Please excuse me while I preach. The American people must remember that the Indian way is a vital part of our tradition, and our treatment of him should be our standard of national conscience. Our future as a people may rest in rediscovery of our Indian roots — in recognizing that our tradition runs to the League of the Iroquois as well as to the sage of Monticello and the drawing rooms of the French enlightenment; that the best of our tradi-

tion might be a guiding vision based upon both Jefferson and Tecumseh. What then can we learn from the Indian? There are, no doubt, many messages he might have for us. First, we can learn that we must have a vision for our life, a well-ordered and reasoned understanding of our goals. Second, we can learn that we must live in partnership with nature.

I wish to close on a somewhat more personal note. My great-grandfather, my mother’s grandfather, used to tell of an old Osage prophecy which said that the white man would bring something but would not know how to use it, and that the Indian would take that gift and add to it and make it great, and thereby give all men a new vision. My great-grandfather believed that gift was Christianity and that the Indian addition was Peyote which produced a new vision of life in the Native American Church.

I am not arguing for any particular religious viewpoint, for I do not have his strong faith, but I am saying that we need both new ideals and reaffirmation of old values. We need to stop and think not only how but why. We cannot survive as a nation, or as a people, for another 200 years without a “world-view” which in some rational manner comports with reality. We must stop running without direction.

Our new “world-view” must recognize that more than one such world-view is possible. We must abandon the thrust of a philosophical genocide that sees life in only one way. Historically, the Vietnam experience proves that the cultural arrogance of the Dawes Indian policy, designed to make “little red farmers” out of American Indians, failed once again when tried in Southeast Asia. Just as we could not force Indians to become “red Farmer Browns,” we could not will Vietnamese to become “little yellow old McDonalds.” And yet, this is what our historical experience has been.

Perhaps white society does not want Natives to be themselves because white society does not want to be itself. Americans have spent the last 200 years fighting themselves, their time, their place, and their roots. Much of the time that we have not spent in denying ourselves, we have spent in hating ourselves. Until we face the Indian side, the red aspect of our tradition, we will continue to be aliens, to be displaced persons — and will continue to force the same upon others. There is a frightening image in Stephen Vincent Benet’s unfinished poem, “Western Star.” A daughter of New England, as Benet calls her, sees a cutworm on a vine and knocks it to the ground and crushes it under her heel. For, as Benet concludes, to her it knew not God. And she and her descendants were to rule in this new land for generations to come.

Once I asked an Osage friend who is one of the new Indian lawyers why he had left his highly successful career as a ranking Army officer. He told me. Because he was an Osage, they sent him into the highlands
of Vietnam to "pacify" a village, to organize them democratically, and to help modernize their way of life. As part of his unit resources, he was given perhaps as much as a $500,000 development grant to help the Vietnamese natives with projects they felt were needed. The village was organized and held elections. They determined that the only thing they really needed or wanted was a small bridge that would cost less than $60,000 to build and which would join two parts of the village that were separated during the rainy season. The United States Army spent the half-million, built roads, schoolhouses, and modern-plumbed outdoor toilet facilities. They arrogantly refused to build the bridge. When my friend asked why the "top-brass" had ignored the request of the South Vietnamese, he was told that the Vietnamese did not know what they wanted or what they needed or what was good for them.

As he said: "I saw right then and there why American Indian policy had failed." Americans did not know what they wanted and therefore thought nobody else did either. A people who had no world-view of their own — who didn’t know where they were going — felt sure that they could tell everyone else where they ought to go and why.

Such arrogance is unbelievable, especially when you consider how sick many of the basic values of twentieth century American society have proven to be. How many times have you heard of the "blood-thirsty savages" or been told of the bloody human sacrifice of the Aztec and Mayan empires. And yet, each year on American highways, as many as 75,000 people are sacrificed to a God of Speed so that we can get from Kansas City to Lawrence in less than an hour.

The Southeast Asian experience is but another example of what happens when visions of order, basic ideals, and fundamental values are perverted. What we are left with is expediency instead of principle, pragmatism instead of ideals. I believe Richard M. Weaver was right when he said that American civilization in the nineteenth century created the monster of total warfare and broke down the long-established conventions of regulated war. What we developed during the War Between the States, we perfected in the Indian wars. We raised genocide against our own Native peoples to a high American art.

Is there a lesson here? I think so! A world-view which justifies "total war" by the "rightness of the cause," makes the sword the final arbiter of justice. The Indian wars are but one example. I once thought hopefully that Vietnam had driven that point home to the majority of Americans, who may now stand in the position of our Indian forefathers. El Salvador hints that we may be very slow learners.

I would love to close on an optimistic note, but I am not sure that is possible. We are clearly in a cataclysmic phase in the saga of American civilization. There is little in the "progressive" tradition of the last 200 years as relevant for the next 200 as the experience of the American
Indian tribes, whose material culture was annihilated, who were subjected to the most vicious forms of legalized genocide, but who turned inward and fostered the spirit of their native tradition. We stand, I think, at a crucial juncture in the history of this nation, even of civilization. The stakes are high, unbelievably high — perhaps even the survival of the best of our inherited tradition. We live at a time when we must clarify our goals, our values, and our ideals. We must define our world-view, our conception of life, our vision of the desirable. We must balance tradition and reality.

Should we fail, it is not likely that we will be given another 200 years. Civilization is in mortal danger, not because of El Salvador, the loss of Vietnam, or the threat of war in the Middle East, but because of the possible loss of spirit. As Crazy Horse said: "It is Hard to Hold a Great Vision."

I believe the tragedy of the Indian experience can help all of American society face the realities of this modern world. The trickster Coyote speaks not just to native peoples. This world is not a cosmic Good Ship Lollipop sailing only for the benefit of American civilization. We do not live on the Big Rock Candy Mountain from which we can dispense the riches of our lemon drop trees. For 200 years we have accepted as fact a doctrine which placed white American at the very center of the universe, at the heart of a divinely ordained plan. This is not a realistic world view.

I want to close the Langston Hughes Lectures with a portion of a speech of Chief Sealth delivered in 1855, and suggest that if American civilization is to survive, our salvation may come from Coyote's people who themselves survived genocide parading under the color of law.

Tribe follows tribe, and nation follows nation, like the waves of the sea. It is the order of nature, and regret is useless. Your time of decay may be distant, but it will surely come, for even the white man . . . cannot be exempt from the common destiny. We may be brothers after all; we will see.

When . . . the memory of my tribe shall have become a myth among the white men, these shores will swarm with the invisible dead of my tribe, and when your children's children think themselves alone in the field, the store, the shop, upon the highway, or in the silence of the pathless woods, they will not be alone . . .

At night, when the streets of your cities and villages are silent and you think them deserted, they will throng with the returning hosts that once filled, and still love this beautiful land. The white man will never be alone."

70. Chief Sealth is more popularly known as "Chief Seattle."

71. An Indian Commonplace Book (typescript and scrapbook assembled by John W. Shлеппей) (quoting Chief Sealth) (available in John W. Shлеппей Collection, University of Tulsa).