Crow Dog's case

American Indian sovereignty, tribal law, and United States law in the nineteenth century

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"This high pretension of savage sovereignty"

Early on the afternoon of August 5, 1881, on a dusty road just outside the Rosebud Indian Agency on the Great Sioux Reservation in Dakota Territory, Kan-gi-shun-ca (Crow Dog) shot to death Sin-ta-ga-le-Scka (Spotted Tail), a Brule Sioux chief.[1] Great confusion followed as Crow Dog was hunted down by Indian police on the orders of the reservation's chief clerk and locked in a military cell at Fort Niobara, Nebraska. The families of both men met and, following tribal law, settled the matter for $600 in cash, eight horses, and one blanket. A year later, Crow Dog, still in jail, was tried in the Dakota territorial court in Deadwood, convicted of murder, and sentenced to hang. In December 1883, the U.S. Supreme Court reversed the conviction, holding that the United States had no criminal jurisdiction over Indian tribes in "Indian country," because the tribes, inherently sovereign, retained the right to administer their own law as an element of that sovereignty. Crow Dog returned to his people a hero and a "troublemaker" in the eyes of his Indian agent, living out his life as a traditional leader, resisting U.S. government authority until the end, even refusing to accept his allotment until the year before he died at the age of seventy-five in 1911.

Crow Dog and the origins of U.S. Indian law

Crow Dog's case captures, in one instance, the complex and unique nature of U.S. Indian law. Based on a scant constitutional framework for a conflict over the whole of North America, nineteenth-century judges carved out federal and state Indian law one case at a time.[2] This process, often more

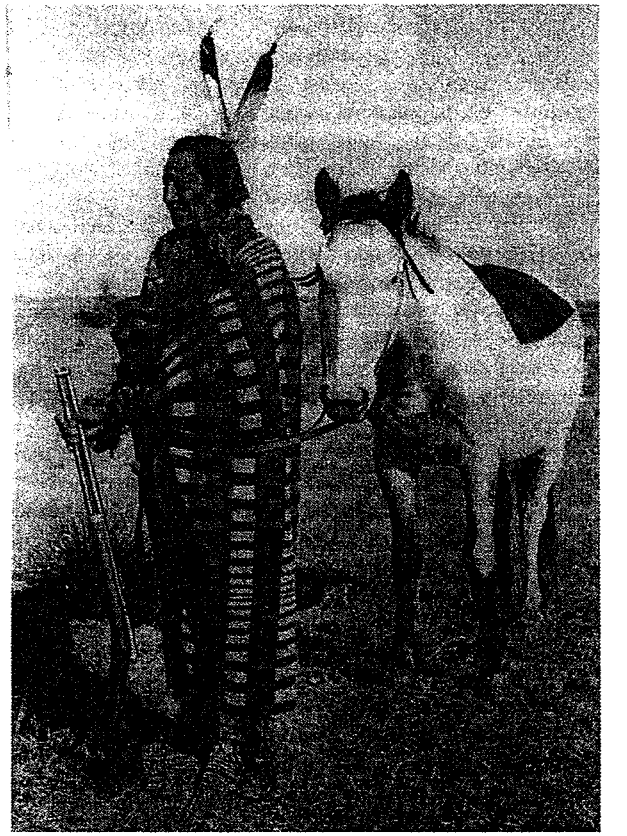
[1] U.S. courts referred to Indians by either their tribal names or their Anglicized names, sometimes both. The practice followed here is to use the form and spelling used in the original case, but always to indicate the tribal name (if shown in the records) at the first usage. Spellings are also often inconsistent, as court clerks phonetically spelled Indian names. These spellings of Crow Dog and Spotted Tail are as they appear in the reported opinion.

[2] The core of U.S. Indian law turns on two clauses in the Constitution. The first, the Indian Commerce Clause, grants Congress the right to "regulate Commerce . . . with the Indian tribes." The second grants the president the power to "make Treaties" with the advice and

Sin-ta-ga-le-Scka (Spotted Tail) with three of his sons, about the time he removed his children from the Carlisle Indian School

opportunistic and pragmatic than doctrinal, provides a window into the character of nineteenth-century U.S. law, for it can be said that no area of that

consent of the Senate. A third clause, exempting "Indians not taxed" from the population base that determined the representation in the House of Representatives (contained in the same clause that counts "three-fifths" of all other persons, referring to slaves), has had less significance but clearly shows that Indians were eligible for citizenship at the time of the making of the Constitution. Kenneth W. Johnson, "Sovereignty, Citizenship, and the Indian," *Arizona Law Review* 15 (1973):973, analyzes the original constitutional language on Indians at 976–85.



Kan-gi-shun-ca (Crow Dog) posed with horse and gun

law is more uniquely American than Indian law. Opportunism and pragmatism alone cannot account for the development of U.S. Indian law, for there was a great struggle over its fundamental character, the nature of the legal doctrines that outlined the development of the government's relationship to the Indian tribes.

When the U.S. Supreme Court handed down its decision in the *Crow Dog* case, the United States was rapidly proceeding with a policy of forced assimilation, destroying the tribes as political units and incorporating individual Indians into the states as small farmers, a policy inconsistent with the

Court's holding. Crow Dog's act, in this context, was political: he had killed a "government chief," one recognized by the Bureau of Indian Affairs (BIA), which used Spotted Tail as an intermediary to persuade the Brule Sioux to adapt to reservation life and assimilate into the American nation. The federal government, which fifty years before had won a legal victory over the states, taking control over Indian affairs, was attempting to divest its authority over the tribes, even entertaining proposals to return Indians to state jurisdiction. *Crow Dog* reminded policymakers that the doctrine of tribal sovereignty was at the heart of Indian law. Although this principle had been central to the Cherokee cases, the foundation of federal Indian law, the courts had failed to develop and defend this doctrine in the years that followed.

In the fifty years between the Cherokee cases, *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832), when the U.S. Supreme Court had first set out the "domestic dependent nations" framework for the place of the Indian tribes in relation to the United States, and *Crow Dog* (1883), the Court had failed to give significant effect to tribal sovereignty, permitting both the states and the federal government to erode the rights of the Indian tribes. Few Indian cases came before the U.S. Supreme Court during this period – perhaps twenty significant cases in fifty years – mostly involving federal claims of power over the tribes, federal–state conflict over the tribes, or legal conflicts between whites, some of whom claimed legal right by way of an Indian title or status.[3] The Court did not develop a coherent doctrine of Indian law, but applied basic doctrines of federalism.[4] During these fifty years, tribal rights were attacked on all sides: by the states, by the federal government, and by local citizens acting extralegally. Lower federal courts and state courts, facing increasing numbers of Indian cases, did not have a coherent doctrinal base to the legal decisions they applied to Indians, producing dozens of diverse and inconsistent opinions.

During the same period, Indian policy changed in ways unrelated to formal law. Dozens of Indian wars occurred as the tribes fought to defend their lands and ways of life. Congress, in 1871, unilaterally abolished the making of treaties with the Indian tribes, a fundamental change in the policy of nation-to-nation relations between the federal government and the tribes. The BIA was created to administer the assimilation of the Indian tribes into

[3] I have deliberately chosen to refer to "non-Indians" as "whites," unless, as in the Indian Territory, the actual context of the term referred to other races as well. My point here is that it was a particular racial group, whites, who both took Indian land and structured the federal Indian law that governed that process. When a non-Indian party to a case is not a white, that is specifically stated in the text. Only in the Indian Territory was Indian–black interaction a frequent subject of legal intervention.

[4] See Chapter 2, the section entitled "Federal Indian Law from *Worcester* to *Crow Dog*," for a discussion of U.S. Supreme Court Indian cases between 1832 and 1883.

the American nation.[5] In the midst of this legal chaos, the Supreme Court's holding in *Crow Dog* was not an abstract and vacuous one – the fate of Chief Justice John Marshall's "domestic, dependant nations" language of *Worcester* (which failed either to release a white missionary from a Georgia prison or to save the Cherokees from the loss of their lands) – but a holding that gave immediate effect to Brule Sioux sovereignty: Brule laws were recognized, as was Crow Dog's right to be free. Such a legal result, while consistent with *Worcester*, was anomalous in the context of U.S. domination of reservation life and the policy of forced assimilation.

In the fifty years between *Worcester* and *Crow Dog*, there were relatively few cases in federal Indian law. *Crow Dog*, the Major Crimes Act of 1884, which limited the application of *Crow Dog* by extending federal criminal jurisdiction to selected intra-Indian crimes, and the Dawes Act of 1886, which allotted (and alienated) much tribal land, resulted in hundreds of cases in federal courts over the next twenty years, with nearly a hundred reaching the U.S. Supreme Court by 1903. These cases collectively produced a unitary doctrine of federal Indian law, creating a new category of legal doctrine, incorporated into new sections in treatises and digests.[6] In more than a metaphorical sense, *Crow Dog* marks the beginning of the field of federal Indian law as a coherent body of legal doctrine.

It is not coincidental that the development of a body of doctrine in U.S. Indian law did not occur until after the violent and illegal conquest of the tribes. That process was still, however, a legal process because U.S. government policymakers chose to keep it beyond the reach of the law. A new ethnohistory of Indian warfare suggests that the wars were legal events to the tribes. The Indian nations resisted government illegality, attempting to enforce their legal norms on a disorderly frontier and also to protect their

[5] There is an extensive literature on federal Indian policy in this period. For an introduction, see F. Cohen, *Handbook of Federal Indian Law* (Washington, D.C.: U.S. Government Printing Office, 1942), Francis Paul Prucha's *Great Father: The U.S. Government and the Indians*, 2 vols. (Lincoln: University of Nebraska Press, 1984), and Frederick Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880–1920* (Lincoln: University of Nebraska Press, 1984).

[6] Cohen, *Handbook of Federal Indian Law*, which is clearly authoritative in the field, lists 38 U.S. Supreme Court cases before 1883 in its index, but a number only peripherally concern Indians or Indian rights, and several do not directly affect Indians at all but determine white land titles after alienation. Through 1900 this index includes 149 Supreme Court cases, or 111 in the seventeen years after 1883 – an increase from an average of less than 1 case per year to about 8 per year. In this same index are listed 296 lower federal court cases through 1900. This listing clearly does not include all federal court cases, for many, especially criminal cases, were unreported, but it does include all U.S. Supreme Court cases. The index also lists 71 state cases before 1900 but here is much less complete. For example, Cohen does not cite in his index *Tassels, Caldwell, Foreman*, or most of the state cases discussed in Chapter 2 of this volume and was clearly not intending to study state Indian law.

cultures, including their legal traditions.[7] While *Crow Dog* turns explicitly on the U.S. Supreme Court's recognition that the Brule Sioux possessed both their tribal law and the right to use it, neither U.S. courts nor policymakers would extend that same recognition of "Indian law" to the tribe's collective use of violence to apply and defend that same tribal law.

The study of the legal history of "Indian law" encompasses two distinct, though related inquiries, relating to two distinct and wholly unrelated bodies of law. The U.S. Indian law that is studied in law schools is an evolution of the English common law, largely federal, but also including a substantial body of state law.[8] It originated, as a distinct area of doctrine, in a twelve-page chapter, "Of the Foundation of Title to Land," in a larger section on the law of real property in Chancellor James Kent's *Commentaries on the Common Law*, dating from the first edition published in 1828, based on New York state law (and written before the Cherokee cases). Chancellor Kent's successors never removed U.S. Indian law from the real property section, although by the 1880s "Indian law" had as much become a subfield of public law as of real property, reflecting the increasing concern of the law with matters of tribal sovereignty.[9] The American Digest (published in 1896), an exhaustive survey of U.S. law, included a section on "Indians" running 109 pages of case summaries in fine print, divided into 66 subsections, recognizing the doctrinal complexity of late-nineteenth-century U.S. Indian law.[10] While this framing of U.S. Indian law as a subcategory of public law focused the doctrine on the political status of the tribes, including tribal sovereignty, the core of doctrinal expansion was still focused on real property, as non-Indians hired lawyers to clear Indian title in the postallotment period. Growth of the doctrine of U.S. Indian law was so swift that in 1909 the first treatise on U.S. Indian law was published, covering only a small portion of federal

[7] Kenneth Morrison, "The Bias of Colonial Law: English Paranoia and the Abenaki Arena of King Philip's War, 1675–1678," *New England Quarterly* 53 (1980): 363–87. A legal history of the Indian wars from the standpoint of Indian law has yet to be written. For a parallel study of the conquest of the Maori, see James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Aukland: University of Aukland Press, 1986).

[8] Simple nomenclature in "Indian law" is a problem. The two published casebooks in the field are Robert Clinton, Nell Jessup Newton, and Monroe Price, *American Indian Law* (Charlottesville, Va.: Michie, 1990), and David Getches and Charles Wilkinson, *Federal Indian Law* (St. Paul, Minn.: West Publishing, 1986). I distinguish "U.S. Indian law" – federal and state law defining tribal rights, rooted in the English common law – from "Indian law" – the law of the tribes, rooted in the customary law and tribal sovereignty of the tribes but now often adapted to the form of U.S. law.

[9] James Kent, *Commentaries on the Common Law*, vol. 3, 6th ed. (New York: Halstead, 1828); Kent, a New York Supreme Court judge, had ridden many court circuits in the frontier countries of western New York State in the early nineteenth century. He had lamented the passing of the Iroquois and, a Federalist, was alarmed at the coarse frontier settlers who replaced them. John T. Horton, *James Kent: A Study in Conservatism, 1763–1847* (1939; New York: Da Capo, 1969), 124–6.

[10] *American Digest*, Centennial ed. (St. Paul, Minn.: West Publishing, 1896), 27:149–258.

Indian law. *Oklahoma Indian Land Laws* was narrowly concerned with post-allotment Indian title.[11] Omitted from all these legal discussions, including the *Crow Dog* case, is serious attention to the legal traditions of Indian tribes, a body of law recognized in *Crow Dog*.

U.S. Indian law is among the most historically grounded of all areas of legal doctrine.[12] The law that shaped Indian–white relations in the nineteenth century continues to influence the major cases in federal Indian law more than a hundred years later. While these nineteenth-century cases provide the grounding of federal (and state) Indian law, their legal principles are almost always taken out of historical context. More than any other area of law, however, U.S. Indian law is the product of vivid historical events and complex historical relationships between two distinct and sovereign peoples. An ahistorical approach to the foundational U.S. Indian law cases distorts their fundamental doctrines. This is especially true of the doctrine of tribal sovereignty, buried in nineteenth-century U.S. Indian law because it was inconsistent with the policy of forced assimilation.

U.S. Indian law lacks a historical vision because it is so policy oriented and so full of contradictory objectives. At the same time that *Worcester v. Georgia* promised sovereignty to Indian tribes,[13] that sovereignty was at odds with the rapid development of the United States. At every point of conflict, the United States took some action to limit the tribes' sovereignty. The U.S. Supreme Court's *Crow Dog* opinion took the BIA and the country by surprise, for Brule Sioux sovereignty had been under forty years of U.S. encroachment, leaving the tribe on the Rosebud Reservation under the supervision of an Indian agent. The focus on the historical context of the foundation cases in U.S. Indian law is important because the concept of tribal sovereignty, as well as other doctrines, was not developed as an abstract statement of policy or principle but arose around singular events. *Worcester* can never

[11] S. T. Bledsoe, *Indian Land Laws* (Kansas City, Mo.: Vernon Law Book, 1909). Oklahoma Indian land law became a substantial legal specialty as whites increasingly acquired control of allotted lands. A 1913 edition was also published. A second treatise on the same subject was also written by Lawrence Mills, *Oklahoma Indian Land Laws* (Tulsa, Okla.: Lawyer's Publishing, 1924).

[12] Charles Wilkinson, *American Indians, Time, and Law* (New Haven, Conn.: Yale University Press, 1987), 13, 14. Wilkinson claims that one-fourth of the courts' decisions in Indian law refer to statutes or cases dating to the country's first century, a larger proportion than in any other area except the civil rights laws.

[13] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). This case is considered in detail in Chapter 2. It has been the subject of considerable analysis, which is documented there. The well-known "domestic dependent nation" formulation of Chief Justice John Marshall failed to give substantive guidance to lower courts or to state and federal officials concerning the nature of tribal rights, so Marshall attempted to elaborate on the meaning of this language in *Worcester v. Georgia*, 31 U.S. 515 (1832), decided the next year. The two are always seen as companion cases, although any doctrinal meaning of the original *Cherokee Nation* has been entirely subsumed into *Worcester*.

be understood outside of the conflict between Georgia and the federal government over domination of Indian lands, and *Crow Dog* cannot be understood outside of the factional conflict that the BIA created on its reservations.

Many legal historians have followed Alexis de Tocqueville in noting Americans' great concern with law and legality.[14] Eighteenth- and nineteenth-century Americans were enamored of the law and wanted a legal framework to govern their society.[15] At the same time, this legal framework came to have an instrumental quality. Americans were not bound by Old World legal traditions or by abstract notions of morality; they felt free to write laws that would unleash the productive forces needed to develop a new land. The application of this legal order to Indian tribes ranks as a test of the absolute limits of legality and constitutionalism. De Tocqueville, who spent much of his time as a guest of wealthy planters, did not see the dangers and the dishonesty in the U.S. government's attempt to apply its laws to Indian tribes. His best-known observation compared the Spanish pursuit of the Indians to bloodhounds, and "sacking" of the New World to the Americans' "singular attachment to the formalities of law" in their relationship to the Indian tribes.[16]

Although the United States did not have to exercise great legal imagination in incorporating the Indian tribes within its boundaries, it made a great effort to do so. From the recognition of the treaty system as the most appropriate method of legal dealings with the Indian tribes, to the early-nineteenth-century "Cherokee cases" that gave that system legal meaning, to the "plenary power" decisions that ended the century and the notion of tribal sovereignty, U.S. law helped to structure not only U.S. Indian policy but also Indian–white relations and, to an extent, the tribal strategies intended to accommodate the United States. This nation's emphasis on law did not lead to results very different from those achieved with vicious Spanish bloodhounds. Law was used to perpetrate murder and land frauds of all sorts, and the legal rights of American Indians were ignored by state and federal

[14] Alexis de Tocqueville, *Democracy in America* (1840; New York: Knopf, 1980), 237–53.

[15] This U.S. ideal of legality received a good deal of critical attention during the bicentennial of the Constitution in 1988. Michael Kammen, *The Machine That Would Go of Itself: The Constitution in American Culture* (New York: Knopf, 1987), is one statement of the theme of legality in U.S. history. James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915* (Cambridge, Mass.: Harvard University Press, 1964), has, as a central theme, the adherence to legality and the use of law to structure the opening of the frontier and the expansion of the nineteenth-century U.S. economy.

[16] "The Spaniards pursued the Indians with bloodhounds, like wild beasts; they sacked the New World like a city taken by storm with no discentment or compassion.... The conduct of the Americans of the United States towards the aborigines is characterized... by a singular attachment to the formalities of law. Provided that the Indians maintain their barbarous condition, the Americans take no part in their affairs; they treat them as independent nations and do not possess themselves of their hunting grounds without a treaty of purchase." De Tocqueville, *Democracy in America*, 354–5.

courts.[17] The product of the great concern with the "legality" of nineteenth-century federal Indian policy was genocide: more than 90 percent of all Native Americans died, and most native land was alienated, the balance occupied by Indians but "owned" by the United States. Indian people were under the control of Indian agents, political hacks sent out from Washington to manage the lives of native peoples and backed by the army.

The rich body of material on the history of the Indian tribes has not been incorporated into U.S. legal history. The study of U.S. Indian law should reach beyond the narrow history of U.S. laws specifically applied to the tribes. The nation's choice to simply deny that many issues of tribal sovereignty were legal issues, leaves many of the issues of U.S. expansionism, economic development, and land policy removed from the doctrine of U.S. Indian law. As a result we have the anomaly that, while U.S. Indian law is among the most historically grounded of doctrinal areas of U.S. law, we lack an Indian presence in other areas of legal history. Surveys of U.S. legal history either leave this unique Indian legal history out or lament the lack of scholarship in the area.[18] Even classic legal histories of areas of law that might include some analysis of Indian legal history often do not. Willard Hurst's *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915*, a detailed legal history of the role of law in structuring the economic development of half of Wisconsin pays scant attention to the ownership of this land by Indian tribes, who continued to live there during the entire period of the study.[19] Omitted is any discussion of the forced removal of the Winnebago, fraudulent timber contracts on Chippewa and Menominee lands (frauds that led to hearings by the U.S. Senate in 1889), a lawsuit over state title to timber on school lands on the Menominee Reservation that reached the U.S. Supreme Court in 1877, deprivation of Indian hunting and fishing rights reserved by treaty, and an extensive legal conflict over basic issues of federalism as the state resisted federal jurisdiction over the tribes resulting in at least ten reported cases.[20] There is no need

[17] There were two main themes in nineteenth-century Indian law. A line of cases affirming sovereignty runs through *Worcester, Crow Dog,* and *Talton v. Mayes,* 163 U.S. 376 (1895), while an opposing line of cases denying that sovereignty and giving the United States "plenary power" over the Indian tribes begins with *Kagama* and *Lone Wolf* and dominates Indian law in the first half of the twentieth century. See Wilkinson, *American Indians, Time, and the Law*, 24.

[18] See, e.g., Kermit Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), 146–8, 371; and Lawrence Friedman, *A History of American Law* (New York: Simon & Schuster, 1986).

[19] Cambridge, Mass.: Harvard University Press, 1964. Hurst discusses "Indian titles" at 9, 20, 28, 95, 119.

[20] U.S. Congress, Senate, 50th Congress, 2d session, Report no. 2710, March 2, 1889; *Beecher v. Wetherby*, 95 U.S. 517 (1877); Richard N. Current, *Pine Logs and Politics: A Life of Philetus Sawyer* (Madison: State Historical Society of Wisconsin Press, 1950), 72–3, 211–12; Horace S. Merrill, *William Freeman Vilas: Doctrinaire Democrat* (Madison: Wisconsin State Historical

to belabor the point that Indians occupy an important place in U.S. legal history that has not been adequately studied.

Indians and their law

The scope of the legal issues defined thus far are traditionally the subject of legal history, a study of courts and cases, creating a set of doctrines unique to U.S. law. This, however, is only a portion of the study of Indians under U.S. law, for as *Crow Dog* makes clear, there were two laws, two legal traditions that were absolutely unrelated. The Indian tribes had their own laws, evolved through generations of living together, to solve the ordinary problems of social conflict. This legal tradition is very rich, reflecting the great diversity of Indian peoples in North America. Yet this law was seldom analyzed in U.S. Indian law, even when it was recognized. When it was discussed, as in *Crow Dog*, is was often treated contemptuously, dismissed there as "a case of Red man's revenge," a racist and false description of Sioux law.[21] The legal history of Indians and their incorporation into the United States is the history of the meeting of these two legal traditions.

Tribal political structures, based variously on the extended family, clan, band, village, tribe, or other unit, met in many different kinds of contexts to make legal decisions.[22] These legal decisions were based on the collective

Society Press, 1954), 141–50. The denial of Chippewa hunting and fishing rights underlies ten federal court cases in the 1970s and 1980s; see Kenneth Nelson, "Wisconsin, Walleye, and the Supreme Law of the Land: An Overview of the Chippewa Indian Treaty Rights Dispute in Northern Wisconsin," *Hamline Journal of Public Law and Policy* 11 (1991):381–416. Wisconsin's legal conflict with the United States over its jurisdiction over Indians within the state is discussed in detail in Chapter 2, the section entitled "The North and West, 1835–1880."

[21] Even the labels often given the laws of Native people, "customary law" or "traditional law," imply that it is inferior to the state law of Anglo-American nations. Here I refer to the laws of the Indian tribes as "tribal law," just as I would call the law of Wisconsin "state law." When I refer to the collective laws of Indian America I use the term "Indian law" representing the law of Indian people. Correspondingly, when I am referring to United States law defining legal matters with the Indian tribes, I use the term "U.S. Indian law" or "federal Indian law." This language treats the two legal traditions as equals. The English common law is every bit as "customary" or "traditional" as the laws of the Indian tribes. The only context where I use "traditional" to refer to a body of Indian law is when an Indian nation had two sets of laws, one the original tribal laws, which I call "traditional," and one a formally enacted code of written laws, intended to assist the tribe in governing itself in the context of a larger U.S. nation. This form of legal dualism was common in the Indian nations of what is now Oklahoma.

[22] There are ten full-length monographs or dissertations on the traditional law of Indian people, works that are rarely cited in legal scholarship. Karl Llewellyn and E. A. Hoebel *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941); E. A. Hoebbel, "The Political Organization and Law Ways of the Comanche Indians," *Memoirs of the American Anthropological Association*, no. 54 (1940); John Phillip Reid, *A Law of Blood: The Primitive Law of the Cherokee Nation* (New York: New York University Press, 1970); Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (Norman:

social experiences of the tribe, often individualizing decisions in ways very different than is common under U.S. law. Even more important, tribal law was not static, but underwent great change following contact with whites, adapting to changing social, economic, and political situations. The Creek law that confronted forced removal in 1820s and 1830s Alabama was a very different law than had existed when white traders first met the Creek a hundred years before. Creek law in the Creek Nation after the U.S. Civil War reflected a complex meeting of this tribal law and a formal set of laws adopted by a bicameral legislature, a House of Warriors and a House of Kings. It cannot be a coincidence that the laws adopted by this legislative body most often avoided areas covered by traditional tribal law, deliberately leaving two sets of Creek law in force, a complex policy of legal dualism designed to enable the Creek Nation to function within the broader context of U.S. hegemony.[23]

Such elaborate forms of legal adaptation were not the norm of the Indian tribes. By and large, tribal law operated informally within very small social units. Most tribal legal actions were invisible; others appeared to whites as individual actions. The scale of tribal law made it flexible and efficient but also vulnerable to the social disorganization introduced by the cataclysmic social change that accompanied the military defeat or forced removal to reservations far away, fates that befell most of the tribes. Michael Green, in a sensitive analysis of the nature of Creek law in the 1820s, reminds us that by that time, even before removal, the Creek people had been decimated, the population reduced to a tiny percentage of a once powerful nation.[24] The whole social order of the Plains tribes was scarcely a hundred years old when whites arrived in the early nineteenth century, reflecting a legal order adapted to a nomadic life-style and highly organized buffalo hunts. The transitory nature of these societies required well-structured police societies not found among other Indian tribes.[25] Through the work of Karl

University of Oklahoma Press, 1975); Julius Lips, "Naskapi Law," *Transactions of the American Philosophical Society*, vol. 37, p. 4 (1947); Jane Richardson, "Law and Status Among the Kiowa Indians," *Monographs of the American Ethnological Society*, no. 1. (1940); Bruce A. Cox, "Law and Conflict Management Among the Hopi," Ph.D. dissertation, University of California, Berkeley, 1968; John Provisne, "The Underlying Sanctions of Plains Indian Culture: An Approach to the Study of Primitive Law," Ph.D. dissertation, University of Chicago, 1934; John A. Noon, "Law and Government of the Grand River Iroquois," *Viking Fund Publications in Anthropology* 12 (1949); William A. Newell, *Crime and Justice Among the Iroquois Nations* (Montreal: Caughnawaga Historical Society, 1965). My own survey of ethnographies of various Indian tribes has produced more than seventy sections or chapters describing the operation of tribal law.

[23] The Five Civilized Tribes of the Indian Territory, the Cherokee, Creek, Choctaw, Chickasaw, and Seminole, used similar versions of this strategy of legal dualism (discussed in Chapter 3).

[24] Michael Green, *The Politics of Creek Removal* (Lincoln: University of Nebraska Press, 1983).

[25] Provisne, "The Underlying Sanctions of Plains Indian Culture."

Llewellen and E. A. Hoebel, we have a sensitive picture of the complexity of the substantive law of two Plains tribes, the Cheyenne and the Comanche. There is no question that these societies had sophisticated legal traditions, bodies of unwritten law that were understood by all the people and applied through tribal legal processes.[26] While these tribal laws were under great pressure because of the rapid social change that followed contact with white people, tribal law often adapted to these changes, continuing to govern increasingly complex social relations. *Crow Dog* itself demonstrates the effectiveness of Brule tribal law after repeated tribal adaptations to white domination.

The Pueblos, Iroquoan, and Algonquin peoples, Northwest Coast tribes, California tribes, and Great Basin desert tribes add even greater legal diversity to those discussed. Each of these legal traditions was changing in the face of contact with whites, helping to structure interpersonal relations within the tribes, as well as to accommodate white pressure on tribal society. Tribal law did not disappear. Rather, it did much to help structure the position of Indians in U.S. society, preserving traditional tribal cultures and protecting traditional political orders. Still, tribal law was in conflict with U.S. law, and the violent exercise of U.S. power did great damage to tribal legal orders. A full understanding of the Indian in U.S. legal history requires a parallel study of the meeting of these two laws, tribal law and U.S. law.

Legal pluralism: the meaning of sovereignty in U.S. Indian law

The doctrine proclaimed in Crow Dog's case should have the same meaning for all Indian people that it had for Crow Dog. He went free because the U.S. Supreme Court recognized the sovereign right of the Brule Sioux to have their own law in their own land. The *Crow Dog* doctrine provides the clearest recognition under U.S. law of a pluralist legal tradition in the United States.[27] This legal pluralism not only benefited native peoples, but

[26] Llewellyn and Hoebbel, *Cheyenne Way;* Hoebbel, "Law Ways of the Comanche Indians."

[27] H. M. Hooker, *Legal Pluralism* (Oxford: Oxford University Press, 1974), analyzes the different models for recognizing legal pluralism present in the world today. The dominant model in Western industrial societies has been to incorporate minority legal systems into the dominant system. Colonial legal systems, however, often left the preexisting local systems alone, keeping the law of the colonial power for its own nationals and for matters affecting them. Today, in southern Africa, such countries as Lesotho, Botswana, and Malawi have a system of legal dualism, where a citizen may choose between a common law and a customary law resolution of a conflict. Canada, Australia, New Zealand, and Latin American countries have not recognized the traditional law of native people in their legal systems. This is now an issue of controversy in some of those countries. Australia has considered these questions in great detail in a two-volume report of its Law Reform Commission: *The Recognition of Aboriginal Customary Laws* (Canberra: Australian Government Printing Service, 1986). New Zealand's Maori land court, restricted under New Zealand law to jurisdiction over customary land titles, is now aggressively stretching its jurisdiction into other areas. Several Canadian tribes, although they have no right to their own law, simply defy Canadian authority and apply customary law in matters where they believe it appropriate.

as Robert Williams has shown, also provided a great opportunity to enrich the legal culture of the United States: a chance to "Americanize" U.S. law, to infuse it with tribal legal traditions.[28]

That opportunity has substantially been lost. After the *Crow Dog* decision of 1883, an aggressive policy of assimilation sought to "Americanize" the Indian.[29] This process ranks as one of the great legal atrocities in the United States, equal to the *Dred Scott* case and the internment of U.S. citizens of Japanese descent in concentration camps. Assimilation was implemented by a draconian system of laws. "Law for the Indian" became a slogan of Indian reformers and the BIA. This slogan referred to a violent process of imposing an external law, either state or federal, on the tribes for the express purpose of forcing their assimilation into the United States, deliberately destroying tribal law in the process. As U.S. courts came to hold that the reservation jail was "analogous to a school," the law overshadowed the army as the method of choice to force assimilation.[30]

The image of U.S. law replacing the gun as the agent of civilization reveals the coercive core of the application of criminal law to Indians. Even if the law could not accomplish this end, it was inextricably intertwined with other assimilationist institutions. BIA schools could not function without compulsory attendance laws and BIA police to arrest or threaten parents for not sending children to school. BIA farmers could not teach the Indians to farm without laws and police to prevent Indians from killing their stock for food. Christian churches could not convert without laws to ban traditional ceremonial activities. Land could not be allotted without laws to punish Indians who resisted.[31]

In this process, traditional tribal law yielded. It did not disappear, but it was seriously weakened and, beginning in the 1880s, lost much of its au-

[28] Robert Williams, "The Algebra of Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence," *Wisconsin Law Review* (1986):219.

[29] This process is well documented in Hoxie, *The Final Promise.* The process of assimilation is analyzed and the vast literature cited in Prucha, *The Great Father,* p. 6, "Americanizing the American Indians," 609–757. Prucha has also published an edited collection of primary documents on this process: *Americanizing the American Indian* (Lincoln: University of Nebraska Press, 1966).

[30] Prucha, *The Great Father,* 676–81, analyzes the "law for the Indians" position. It is considered here in Chapter 4. The analogy between the prison and the school was the basis for the holding of *United States v. Clapox,* 33 F. 575 (D.C. Or. 1888), discussed in Chapter 6.

[31] Both Hoxie and Prucha offer numerous examples of forced assimilation, and tribal histories contain additional testimony. The best single source of information is the annual report of the BIA. The reports for each year after the Civil War are full of detail, organized on a reservation-by-reservation basis, with each agent proudly, and undoubtedly with exaggeration, reporting the progress in Americanizing "his" Indians.

thority to a BIA legal order composed of an all-powerful Indian agent backed by a "code of indian offenses," Indian police, and agency-appointed chiefs and judges.[32] Later, the Indian Reorganization Act of 1934 empowered the tribes to establish tribal governments that were copies of white local governments, complete with local laws, local police, and even a local "justice of the peace" in the form of a tribal judge.[33] Although both of these models were called "Indian courts" and the law that was applied was called "Indian law," they were a form of U.S. law and not the tribal law that the U.S. Supreme Court had found Crow Dog entitled to be judged by.[34]

Yet the sharpest observers of tribal courts have pointed out that the Indian judges of these courts preserved much tribal common law; therefore, these "courts of Indian offenses" should not be dismissed as simply copies of white courts.[35] Rather, they were a foundation for building a pluralist legal tradition in the United States. In these tribal courts and in their tribal governments, native people in the United States have the political foundation for the broad application of whatever tribal law they want to use. *Crow Dog* recognized that right.

A more detailed understanding of the context of nineteenth-century federal Indian cases helps to clarify the doctrine of federal Indian law in another way: Indian people understood themselves to be sovereign, acted as if they were sovereign in the most responsible way they could under the circumstances, made judgments concerning ways to defend their sovereignty, and

[32] William T. Hagan, *Indian Police and Judges: Experiments in Acculturation and Control* (New Haven, Conn.: Yale University Press, 1966).

[33] Samuel Brakel, *American Indian Tribal Courts: The Costs of Separate Justice* (Chicago: American Bar Foundation, 1978), gives a brief history of the system of tribal courts, as does Hagan, *Indian Police and Judges.*

[34] L. Meriam, *The Problem of Indian Administration* (Cleveland, Ohio: Meriam, 1928), analyzes the problems in the courts of Indian offenses just prior to the passage of the Indian Reorganization Act. Kirke Kickingbird, "In Our Own Image..., After Our Likeness: The Drive for Assimilation of Indian Court Systems," *American Criminal Law Review* 13 (1976):675, offers a historical overview of the entire process.

[35] Brakel, *American Indian Tribal Courts,* criticizes tribal courts for not measuring up to white standards of due process, although his findings (and even his examples) could well have come from the courts of New York City. William J. Lawrence, "Tribal Injustice: The Red Lake Court of Indian Offenses," *North Dakota Law Review* 48 (1968):639–59, finds parallel criticisms of one tribal court. The problem with both studies is that they compare the reality of tribal justice with an idealized view of U.S. justice. James Zion's two studies come to sharply different conclusions and are based on much more careful work with the tribal courts. See Zion, "The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New," *American Indian Law Review* 11 (1985):89–110, and "Harmony Among the People: Torts and Indian Courts," *Montana Law Review* 45 (1984):265–79. Zion establishes convincingly that there is a Native American common law that has survived imposed U.S. law and nearly one hundred years of BIA-imposed courts and that is practiced in the existing tribal courts. D'Arcy McNickle, in a short story surely based on his boyhood experiences on the Flathead Reservation in Montana, shows how the Flatheads used the agent's court to outwit the Indian agent.

both retained Indian law and used that law to structure their actions. Therefore, the record of Indian peoples' attempts to protect their sovereignty defines the legal concept of sovereignty more accurately than does a long line of ambiguous federal cases, and the history of this struggle is a vital part of the U.S. legal tradition.

An inquiry into this record can strengthen contemporary critiques of federal Indian law in at least two ways. First, the doctrine of federal Indian law preserves only a white peoples' interpretation of the legal reality of Indian–white relations. No Indian participated in the lawmaking, and rarely could Indians assist in the preparation of arguments in cases involving Native Americans.[36] Moreover, Indians, like blacks, were frequently the subject of statutory discrimination, denying them even the right to appear at witnesses against white people.[37] Nineteenth-century interpretations of Indian legal status might be dismissed as both illegitimate and illegal. If we accept them, however, as a modern legal and political reality, these historical cases can still be viewed as both Indians and whites understood them. In this way, modern federal Indian law can be seen in the context of both tribal history and the tribal understanding of the meaning of sovereignty.

Second, analysis of the context of nineteenth-century Indian cases shows that they are misunderstood in their modern applications. All first-year law students are taught that the holding of a case cannot be separated from its facts. But what happens when the facts of the case are thoughtlessly or deliberately distorted? The principle of tribal sovereignty at the heart of modern *Crow Dog* doctrine is undermined in federal Indian law because the image of Crow Dog as a murderer who escaped punishment marks the case as a kind of legal atrocity rather than as an important statement of doctrine.

The century of dishonor

The full bloody history of nineteenth-century Indian–white relations, although not recounted here, underscores Rennard Strickland's statement that we are dealing with "genocide at law," a legal history of a million deaths and the violent dispossession of several hundred distinct native

[36] Native Americans were accorded citizenship by a 1924 act of Congress. A variety of earlier federal statutes had afforded citizenship to individual Indians who applied for it and met certain standards. One Indian leader's struggle against citizenship is reported in Clinton Rickard, *Fighting Tuscarora* (Syracuse, N.Y.: Syracuse University Press, 1973). In only a few cases at the beginning and end of the nineteenth century did natives actively shape their position, chiefly in cases involving Cherokees, who worked with their lawyers in a very astute way.

[37] Christian Fritz, *Federal Justice: The California Court of Ogden Hoffman, 1851–1891* (Lincoln: University of Nebraska Press, 1991), 211.

peoples from their lands over an area five thousand miles wide.[38] The legal core of this genocide begins with the constitutionally enshrined treaty process, the nation-to-nation compacts that set out binding legal obligations on the United States and on the Indian tribes. Through these treaties, the United States bought land for expansion and settlement and secured peace and political stability on its frontiers. In exchange, the Indian tribes secured the rest of their lands in perpetuity, the legal recognition of their ways of life and their right to continue those traditions, and political stability on their frontiers.[39]

When the United States refused to enforce Indian treaty rights against its own citizens, leaving the tribes open to all forms of violent encroachment, the tribes often tried to enforce the treaties themselves. White history now recounts these events as the "Indian wars." There is no accurate count of them, for there is no common agreement of what constitutes an Indian war, but they number more than a hundred.[40] This process of systematic treaty violation, backed by a ready willingness to engage in military action against Indians, defined for Helen Hunt Jackson the "century of dishonor."[41] She, like many Americans, did not see Indian wars as the result of the tribes' attacks on innocent settlers. Rather, she saw them as defensive actions, engaged in reluctantly by tribes pushed beyond all limits by greedy whites with the tacit approval of the government. U.S. law has yet to redress these legal wrongs. Chief Justice William Rehnquist has dismissed these violations of law as "historical and not legal matters," beyond the scope of modern law.[42]

The U.S. courts never developed a consistent theory for the legal structuring of the Indian wars. International law was never applied, and Congress, with the sole power to declare war under the Constitution, never declared a war against an Indian tribe.[43] After these wars, the tribes were often dealt with by military action that lacked any legal pretext at all; military trials and executions of Indians for murder and other offenses resulting from these

[38] Rennard Strickland, "Genocide at Law: An Historic and Contemporary View of the Native American Experience," *Kansas Law Review* 34 (1986):713–55.

[39] The Indian treaties are collected in Charles Kappler, *Indian Laws and Treaties* (Washington: U.S. Government Printing Office, 1904). There is an elaborate law of treaties. A good discussion of the current legal status of treaties is Charles Wilkinson and John Volkman, "Judicial Review of Indian Treaty Abrogation: As Long as Water Flows, or Grass Grows upon the Earth – How Long a Time Is That," *California Law Review* 63 (1972):601–61.

[40] Robert Utley, *The Indian Frontier of the American West, 1846–1890* (Albuquerque: University of New Mexico Press, 1984), is one account of the final fifty years of this process.

[41] Helen Hunt Jackson, *Century of Dishonor* (1881; New York: Harper & Row, 1965).

[42] *United States v. Sioux Nation,* 448 U.S. 371 (1980), at 435. Rehnquist was dissenting in this particular case, although the Chief Justice's distortion of history is often at the heart of court opinions. See, e.g., *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978).

[43] This was a major argument for the conclusion in *Caldwell v. State,* 6 Peter 327 (1832), that the Indian tribes are not sovereign. See Chapter 2.

wars occurred. Whole peoples were removed hundreds or thousands of miles from their homelands, held in concentration camps, and deprived of their lands without trial. Legal recognition of the Indian wars did not occur until the 1890s in federal court interpretations of the Indian Depredations Act of 1891. The purpose of this act, passed after the Indian wars were over, was to force the tribes to pay for damages to property, largely the property of whites, resulting from Indian "depredations." Dozens of these cases were decided in federal courts, with the U.S. Supreme Court finally passing on the legal status of an Indian war.[44]

This systematic abrogation of the law in the U.S. treatment of Indians cannot be explained without reference to racism and legal imperialism. Many nineteenth-century whites did not regard agreements with Indians as serious undertakings to be respected because they believed that Indians were not the same kind of human beings and that their political and legal institutions merited no recognition.[45] The laws of the Creek people, for example, were dismissed as "a high pretension of savage sovereignty" in *Caldwell v. State* (1833), an Alabama Supreme Court case that is the most detailed pronouncement of the states' position on Indian rights in the nineteenth century. This language was not an aberration: racist language describing Indians was routine in judicial opinions, BIA reports, and legislative hearings.[46]

Images of the American Indian and the tribal relationship to U.S. society are deeply ingrained in our culture. The Indian symbolically stands for many different things in the United States, many having nothing at all to do with Indians themselves. The conquest of the Indian on the frontier was a powerful rite of passage for whites, perhaps equal in importance to the Civil War. The resistance of the Indian to forced assimilation marked a rejection of white values that were seen as universal, even divine. Indian law reflected this imagery as much as it did economic and political interests, as whites destroyed the tribes because their sovereignty rejected universal Anglo-American cultural values.[47]

[44] The Indian Depredations Act is discussed in Chapter 8, the section entitled "The Legal Recognition of Indian Wars."

[45] Yasuhide Kawashima makes this clear in his study of the Puritans and their legal relations with Indians: *Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630–1763* (Middleton, Conn.: Wesleyan University Press, 1986). See also Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* (Cambridge, Mass.: Harvard University Press, 1981); Richard Drinnon, *Facing West: The Metaphysics of Indian Hating and Empire Building* (Minneapolis: University of Minnesota Press, 1980); and Ronald Takaki, *Iron Cages: Race and Culture in 19th Century America* (New York: Knopf, 1979).

[46] Edmund Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: Norton, 1975), esp. 316–37.

[47] On the image of the Indian in U.S. culture, see Richard Slotkin, *The Fatal Environment: The Myth of the Frontier in the Age of Industrialization, 1800–1900* (New York: Atheneum, 1985), and Robert Berkhofer, Jr., *The White Man's Indian* (New York: Knopf, 1978).

Of red, black, and yellow: the relationship of U.S. Indian law to the legal oppression of other racial minorities

The doctrines of Indian law have been kept far removed from civil rights law, and the legal struggles of Indian people have involved different cases and distinct legal issues from the legal struggles of other racial minorities. While Indian law is based primarily on tribal status, not on racial status, it is clear that the genocide perpetrated against Indians and the denial of Indian humanity inherent in the "plenary power doctrine" would not have been perpetrated against white people. Late-nineteenth-century attempts to apply the Fourteenth Amendment and extend U.S. citizenship to Indians failed.[48] Ironically, this benefited the tribes because attempts to impose citizenship on Indians, originating with eastern liberal Indian reformers, were inconsistent with the tribes status as nations. Only Justice John Harlan, the "great dissenter" who believed that the Constitution followed the flag, would have applied U.S. citizenship to the Indian tribes and the Fourteenth Amendment to tribal institutions, just as it applied to state institutions.[49]

The same Supreme Court that "buried" the civil rights acts in the 1880s and 1890s also created the plenary power doctrine, allowing the federal government virtually unlimited power in suppressing the rights of tribal Indians, clearly consistent policies. Just as blacks were put at the mercy of state and local authorities, tribal Indians were turned over to BIA bureaucrats, with both races kept from self-determination, their cultures smashed and effective participation in the American nation thwarted. As late as 1879 a U.S. attorney argued that Indians were not even "persons," entitled to a writ of habeas corpus, citing *Dred Scott,* an infamous U.S. Supreme Court case holding that blacks were an inferior class of person, unable ever to be citizens of the United States, for the proposition.[50]

Dred Scott is revealing in another respect, for in it Chief Justice Roger Taney distinguished Indians from blacks doctrinally, the earliest the Court ever attempted to do so. Taney had dealt with the legal status of Indians only once before in his twenty-one years as chief justice. In *United States v. Rogers,* an 1846 case involving a white man claiming Cherokee citizenship

[48] R. Alton Lee, "Indian Citizenship and the Fourteenth Amendment," *South Dakota History* 4 (Spring 1974):198–221.

[49] See Harlan's dissent in *Talton v. Mayes,* 163 U.S. 376 (1896). The "Constitution following the flag metaphor" comes from the "insular cases," where Harlan powerfully argued that the Constitution extended to the rights of colonized peoples in Puerto Rico. *Downes v. Bidwell,* 182 U.S. 244 (1901).

[50] This occurred in the case of *United States ex rel. Standing Bear v. Crook,* 25 Fed. Cas. 695 (C.C.D. Neb., 1879), a case discussed in Thomas Henry Tibbles, *The Ponca Chiefs: An Account of the Trial of Standing Bear* (Lincoln: University of Nebraska Press, 1972). *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857).

(in many nineteenth-century cases, Indian rights were legally defined in cases where no Indian was a party), Taney had simplistically followed John Marshall's "domestic dependent nations" analysis, but had rejected the notion that the Cherokee was a foreign nation, emphasizing the tribes dependent status.[51] In *Dred Scott* Taney ignored this reasoning, distinguishing Indians from blacks (important in his racist argument that blacks could never become citizens while Indians could) by stating that Indians were in law equivalent to foreign nations, and when the government extended citizenship to Indians it did so by its power to naturalize foreigners.[52] Later in the opinion Taney forgot this distinction, referring to blacks as "this unfortunate race," the same phrase he had used to refer to Indians in *Rogers.*[53]

Nor can there be any question that issues of race underlay the Cherokee cases, even though Marshall was careful to keep such issues out of his opinion, focusing instead on the political status of the Cherokee Nation.[54] This distinction, that the Indian tribes were in a unique political relationship with the United States, has survived and is still the fundamental reason why civil rights laws do not apply to Indian tribes: civil rights are personal rights, extending to individuals, not to tribes. Georgia, and southerners generally, were outraged by the interference of northerners in Cherokee affairs, a danger equally likely if northern missionaries or teachers came to work with black people. Georgia also feared the consequences of an egalitarian relationship between blacks and Indians that might promote slave unrest. Finally, the whole concept of state's rights, the right of Georgia to regulate its own affairs, was fundamental to protecting slavery as an institution, and any undermining of that right, by Indians or anyone else, threatened that institution.

In the West, later in the nineteenth century, Chinese and Indians were involved in numerous court cases, but again, the legal doctrines were kept distinct. Illustrative of the nature of these distinctions Federal District Judge Matthew Deady of Oregon simultaneously wrote opinions very sensitive to the rights of Chinese while dismissive of the rights of the Indian tribes. For Deady it seems the distinction was not racial but turned on policy. The Chinese sought the chance to participate in the American nation, to work

[51] *United States v. Rogers,* 4 How. 567, 572 (1846). The significance of this case is discussed in Marvin L. Winitsky, "The Jurisprudence of Roger B. Taney," Ph.D. dissertation, UCLA, 1973, 84–5.

[52] Don H. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978).

[53] *Dred Scott v. Sanford,* 60 U.S. (19 How.) 393 (1857), at 426; *United States v. Rogers, 4 How.* 567 (1846), at 572.

[54] Chief Justice John Marshall, a Virginian, clearly kept legal issues surrounding blacks far from legal issues relating to Indians. G. Edward White, *The Marshall Court and Cultural Change, 1815–35* (New York: Macmillan, 1988).

hard and occupy commercial positions in American communities. Indians sought to remain outside of the American nation, openly challenging U.S. authority whenever it intruded on tribal sovereignty. Deady's opinions all undermine tribal sovereignty, promoting a policy of forced assimilation, while at the same time requiring the federal government to respect the civil rights of Chinese. Following Marshall's original distinction that relations with Indian tribes were political and not personal, it was tribal status as much as race that accounts for the distinct Indian policy of the nineteenth century. While issues of race and racism underlie Indian law, these issues were subordinated to a political status, derived from the original nation-to-nation treaty status. The fact that Indians owned so much land forced the United States to recognize their political status as nations, a status at the core of treaty negotiations for the alienation of Indian lands.

Legal history and legal doctrine

The emergence of new fields of legal doctrine characterizes the United States in the nineteenth century: torts, labor law, and commercial law all developed virtually anew in response to social and economic growth. Indian law, however, is uniquely American: no other nation with an indigenous population incorporated them so determinedly through legal means, developing a vast body of new law for the purpose. By and large U.S. Indian law is judge made law. Chief Justice John Marshall's domestic dependent nations framework from the first half of the century structured legal reasoning concerning the place of the tribes in America, informing the opinions that succeeded *Worcester* whether local judges followed Marshall's reasoning or distinguished it. The plenary power doctrine of Justice Samuel Miller, while less original and imaginative than Marshall's, was every bit as judicially created.[55] Both doctrines struck political compromises that both justices believed would allow the law to structure the complex relationship between the United States and the tribes. Local judges – federal, state, and territorial – had to apply these general frameworks, and the continuous judge-made modifications to them, in a variety of situations that was almost unimaginable: the frontier gave rise to all manner of schemes, all manner of human choices.

The social nature of legal doctrine, "black letter law," divides scholars. There is no question that the detailed development of legal doctrine to structure social life, and formalistic styles of judicial reasoning that follows from the development of black letter law accompanied the rapid social change of nineteenth-century industrialization, allowing various groups of land-

[55] Nell Jessup Newton, "Federal Power over Indians: Its Source, Scope and Limitations," *Pennsylvania Law Review* 132 (1984):195–288, offers an excellent introduction to the origin of the major doctrines of federal Indian law, focusing on the nature of federal power.

owners, industrialists, and commercial entrepreneurs to build a legal framework that would, even if left alone, protect their interests as "neutral" judges applied black letter law to the increasing numbers of cases that came before them.[56] There is no agreement as to the meaning of this expanded doctrine, however. For some the development of legal doctrine was largely independent of direct political and economic structuring, as judges, acting as legal scientists, struggled to strike appropriate doctrinal balances among competing forces, looking for guidance to basic principles of the common law. For others the development of these new legal doctrines was much more explicitly political, representing the interests of the dominant political forces of the day. Still others struggle to define more complex relationships, involving the interplay of various social, economic, and political forces, with the law, to a greater or lesser extent, mediating and structuring social development.[57]

The rise of judicial formalism permitted judges to deny the value choices that underlay difficult, even inhuman, decision. A. E. Kier Nash argues that southern judges came to rely on legal formalism, the idea that reference to black letter doctrine was a neutral inquiry, as slave law became more complex and more repressive, denying the basic immorality of the whole system of law they enforced.[58] We know less about the motivations of western judges in federal Indian law decisions. Many, for example Matthew Deady of Portland, Oregon, and Isaac Parker of Fort Smith, Arkansas, wrote a number of major opinions in federal Indian law, relying on legal formalism, borrowing widely from different areas of common law to find doctrinally based "solutions" to legal problems brought to their courts. Of other judges, even well-known ones, we know nothing beyond the text of the opinions themselves, usually competently drafted with routine citations to a few cases, masking obvious policy choices behind legal formality.

The plan of the study

There were at least four distinct legal models for the structuring of Indian–white relations in the nineteenth century. Each is the subject of one part of

[56] David Sugarman, "A Hatred of Disorder: Legal Science, Liberalism and Imperialism," in Peter Fitzpatrick (ed.), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Durham, N.C.: Duke University Press, 1991).

[57] Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass.: Harvard University Press, 1987). See esp. chap. 7, "Visions of History," for an introduction to this debate. See also the special issue of *Wisconsin Law Review* 4 (1985), "Legal Histories from Below," for three approaches to the new legal history.

[58] A. E. Kier Nash, "Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution," *Vanderbilt Law Review* 32 (1979):7–218, and idem, "Fairness and Formalism in the State Supreme Courts of the Old South," *Virginia Law Review* 56 (1970):64–100.

this study, with the focus on a particular Indian people and the legal structuring of their incorporation into the United States, considering both tribal law and U.S. law. Federal Indian law begins with the Cherokee cases. Instead of focusing on *Worcester v. Georgia* – John Marshall's classic, but so ambiguous as to be almost meaningless, statement of the status of American Indians under the laws of the United States – I look first at a case that represents a great loss. Corn Tassel was tried and sentenced under Georgia law for a crime committed on Cherokee lands. His appeal to the U.S. Supreme Court led to a hasty hanging and arrogant state defiance of federal law and the right of federal authorities to regulate Indian affairs. Georgia's actions, and the state court decisions that legalized them, survived as precedent in state cases until 1931, when a Wisconsin decision, *State v. Rufus,* abandoned the doctrine that states, as an attribute of state sovereignty, have full jurisdiction over Indians within their boundaries.

The second model of Indian–white relations, and the greatest U.S. experiment with tribal sovereignty, was the federal recognition of the Indian nations as "domestic nations," incorporating them within the scheme of constitutional federalism. In the Indian Territory – modern-day Oklahoma – the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles had constituted themselves as Indian nations in the 1850s and built sophisticated political systems modeled, at least in form, after the United States. The United States, through treaties, guaranteed the sovereignty of these nations, and the legal status of these Indian nations was repeatedly recognized by the federal government. There, with judges, sheriffs, courts, appellate courts, juries, and jails, Indians administered their own legal systems virtually free of federal authority. This situation continued until 1898, when the last tribal murder trials and executions were carried out – legal actions upheld by the U.S. Supreme Court in *Talton v. Mayes* (1896). Although the major cases are primarily Cherokee, the legal doctrine covers equally all of the Five Civilized Tribes. The focus here is on the meaning of sovereignty in the Creek Nation and in Creek law through the *Talton* decision and the termination of the nation in 1898. The legal history of the Creeks, struggling to build a nation that honored the legal traditions of the people but also accommodated a changing Creek society and an encroaching American nation, shows both the great capacity of the Indian people to adjust to change and the limitations of tribal sovereignty within the United States.

The third model followed from Crow Dog's case. Congress and the BIA rejected the application of tribal sovereignty to reservation Indians, imposing instead a policy of forced assimilation, backed by the extension of federal law to tribal Indians for serious offenses under the Major Crimes Act, and a repressive system of administrative justice for lesser offenses. A full range of federal cases gave effect to this policy of forced assimilation, giving rise

to a new doctrine in federal Indian law, the plenary power doctrine holding that federal power over tribal Indians was essentially unlimited. *Crow Dog* was still good law, however, and the *Crow Dog* doctrine that tribes had sovereign right to their own law – unless limited by federal authority – survived. Still, the plenary power doctrine, the legal foundation of a national policy of forced assimilation of the tribes, represents the deliberate use of U.S. law to destroy the Indian tribes.

Alaska was left outside the preceding legal models because of a district court decision, *United States v. Seveloff,* rendered by Judge Matthew Deady of Portland, Oregon, in 1872 and clarified in four successive opinions. Deady denied that the federal Indian law operant in the rest of the United States applied to Alaska. In giving Alaskan Indians the same legal status as white people, these decisions at the same time accorded no recognition of any form of tribal legal or political institutions, a parallel of the legal models of Canada and Australia. Ironically, this was the legal model that Georgia wanted to apply to the Cherokees in the 1820s. The federal government, by the 1870s, had come full circle on its own legal policy toward American Indians and was trying to divest the tribes of their legal sovereignty, even turning tribal Indians over to states for criminal trial and punishment. Hence, the tribal sovereignty of Alaskan natives was not recognized because that recognition had come to pose so many legal problems in the rest of the United States. The fourth model I will discuss is the complete extension of U.S. law in the 1880s and 1890s to the Tlingit, the dominant tribe in the southeastern Alaskan panhandle. These were the first American Indians put under the full authority of state or territorial law by the federal government in a direct attempt to extinguish tribal sovereignty and force assimilation.[59]

For each of these studies, although the full range of legal issues structuring Indians will be considered, the focus, for reasons given, is on the criminal law. The tribes' right to their own law as an attribute of tribal sovereignty, the core of *Crow Dog* doctrine, specifically concerned criminal law. The tribes' right to structure their own social orders required the right to their own criminal law. While Indian traditional landholding laws were characterized as "communistic" by whites, tribal criminal law was called "barbaric," and tribal sovereignty in that area was subject to the worst attack, being called "a high pretension of savage sovereignty." Moreover, the U.S. criminal law that was imposed on the tribes has played, both historically and at the present, a disproportionate role in shaping Indian tribes in the U.S. image.

[59] The Pueblo's of New Mexico were put under territorial authority in *United States v. Joseph,* 94 U.S. 614 (1876), but on the theory that they already were assimilated, having held Mexican citizenship. Many other states had taken jurisdiction over Indian tribes through federal acquiescence.

The criminalization of American Indians and other native peoples has largely been ignored by scholars. American Indians, along with Canadian Indians, New Zealand Maories, and Australian Aborigines share the awful distinction of being the most arrested and jailed peoples in the world. American Indians are arrested at a rate that approaches 40 per 100 of population per year, compared to about 5 per 100 for black Americans and just over 1 per 100 for white Americans.[60]

This study is more thematic than temporal, with the core legal process of the imposition of federal law on the Indian tribes occurring in the late nineteenth century. Because of this thematic focus, rigid time frames are not adhered to, and a number of times doctrinal evolution is followed into the early twentieth century. Study of the development and change of the doctrine of Indian law between *Worcester* and *Crow Dog,* the period between 1832 and 1883, dominates one chapter. Because U.S. Indian law is so deeply rooted in history, most of the doctrinal discussions have relevance in current U.S., now largely federal, Indian law. While occasionally these linkages are pointed out, generally they are not because such references cannot be made without extensive citation to complex bodies of doctrine. This study, although it considers the evolution of legal doctrine, is not primarily a history of legal doctrine. Rather, it is a social history of Indian law.

With this focus on the legal structuring of violence throughout these parallel studies, my concern is the incorporation of the tribes under U.S. law in each of these contexts, the evolution of U.S. law and legal doctrine, the changing law of the Indian tribes, and the legal structuring of the meeting of these two systems of law. Indian law played a vital role in the structuring of U.S. law. Nineteenth-century Indian tribes had a distinct legal culture, which, though it changed continually, was distinct from non-Indian legal culture and deeply held in the hearts of Indian people – so deeply held, in fact, that this legal culture was retained in the face of U.S. legal imperialism, creating a foundation for a pluralist legal system in the United States today.

[60] Arrest rates on Indian reservations, while there are enormous variations, include some statistics that are among the highest in the world, exceeding rates of 100%. Sidney L. Harring, "Native American Crime in the United States," in Laurence French (ed.), *Indians and Criminal Justice* (Montclair, N.J.: Allenheld-Osmun, 1983), 93–108.