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: