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CROW DOG'S CASE: A CHAPTER IN THE LEGAL HISTORY OF TRIBAL SOVEREIGNTY

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By any standard, *Ex parte Crow Dog* ranks among the most important of the foundational cases in federal Indian law. Moreover, its place in the foundation, as the most important late nineteenth century tribal sovereignty case, means *Crow Dog* has continuing importance as American Indians, lawyers and scholars call for a new federal Indian law that recognizes tribal sovereignty and a continuing nation-to-nation relationship between the United States and the Indian tribes.[1] Even within this sovereignty framework, *Crow Dog* has special meaning. Its compelling story began with the killing of a Brule Sioux chief, Spotted Tail, by Crow Dog, who was later sentenced to hang for the crime. His conviction was reversed by the United States Supreme Court with a strong holding that the Brule had a sovereign right to their own law, leaving the United States courts with no jurisdiction. Felix Cohen, who very nearly originated the field of federal Indian law, refers to the case as "an extreme application of the doctrine of tribal sovereignty."[2]

This characterization of the *Crow Dog* holding has always colored the case, leaving it a kind of legal atrocity, showing the "savage" quality of tribal law, and setting the stage for a succession of doctrinal devices that emphasized tribal "dependency"

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Due to the inability of the law review staff to obtain certain archival materials cited in this article, we have relied on the author's own research and expertise to verify those materials.—*Ed.*

1. Ex parte Crow Dog, 109 U.S. 556 (1883) has been characterized along with Worcester v. Georgia, 6 Pet. 515 (1832) and Talton v. Mayes, 163 U.S. 376 (1896) as the three major "sovereignty" cases of the 19th century. C. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW (1987). As examples of the current literature emphasizing a tribal sovereignty interpretation see Williams, *The Algebra of Indian Law: The Hard Trail of Decolonizing the White Man's Jurisprudence*, 1986 WIS. L. REV. 219; Kronowitz, Lichtman, McSloy and Olsen, *Toward Consent and Cooperation: Reconsidering the Political Status of the Indian Nations*, 22 HARV. C.R.-R.L. L. REV. 507 (1987), and Ball, *Constitution, Court and Indian Tribes*, 1987 AM. BAR FOUND. RES. J. 1.

2. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 24 (1942).

at the expense of "sovereignty." Thus, while *Crow Dog* was an important victory, the case was infused with a distorted fact situation that characterized Brule law as "lawless," the killing as "red man's revenge", and the Brule Sioux as a "people without law." This characterization continues to describe the case, undermining its importance as a sovereignty decision, and undermining the whole concept of tribal sovereignty. The following analysis seeks to rehabilitate the sovereignty core of the *Crow Dog* case by showing that our contemporary understanding of both the facts and context of the case is wrong, and to show that even Felix Cohen might have been wrong in referring to the case as "extreme." On the contrary, we can show that the result was moderate and consistent with existing doctrine. Perhaps, in the same way, we can understand the modern call for tribal sovereignty as not "extreme" but as also moderate and consistent with the original history of tribal-federal relations.

As stated earlier, *Ex parte Crow Dog* reversed the conviction of Crow Dog, convicted of murder and sentenced to be hanged in the Territorial Court of South Dakota for the 1881 shooting death of his chief, Spotted Tail. The court held that following *Worcester v. Georgia*, Indian tribes enjoyed the right to their own law as an attribute of sovereignty and, therefore, the courts of the United States lacked criminal jurisdiction over crimes committed by Indians on a reservation. This result, by all accounts, aroused such a "popular outcry" that Congress reacted by enacting the Major Crimes Act of 1885 to expressly provide for federal jurisdiction over major felonies occurring among reservation Indians.[3] This rendering of the story is common to all major analyses of Indian law.[4] The case never comes to mind without at least

3. Ex parte Crow Dog, 109 U.S. 556 (1883); ch. 341, 23 Stat. 362, 385 (1885). The Major Crimes Act is now codified as 18 U.S.C. Sec. 153 and has been expanded to fourteen felonies from the original seven.

4. While some mention is made of *Crow Dog* in every study of Indian law, it is usually with only the briefest description of the context of the case. This often leads to a misunderstanding of its meaning, and the major casebooks accord the case very different meanings. For example, in M. PRICE AND R. CLINTON, LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES (2nd ed. 1983), the case is printed on page 10, and presented with no discussion of its history at all to illustrate the basic policy choices concerning how an Indian tribe should be treated under American law, but with a two page footnote on the difficulties in implementing the Major Crimes Act. On page 78, the Major Crimes Act is presented as the product of a "standard Congress." Both discussions occur

in a chapter titled *Indians as a Protected Minority*, which is not the issue in *Crow Dog*.

The other major casebook, D. GETCHES ET AL., CASES AND MATERIAL ON FEDERAL INDIAN LAW (1st ed. 1979) locates the case toward the end on page 359, in its criminal jurisdiction section. It identifies the case's modern significance under a heading, "The Presumption of Tribal Jurisdiction", but also not discussing the history of the case (based on G. HYDE, SPOTTED TAIL'S FOLK; A HISTORY OF THE BRULE SIOUX), and similarly attributing the Major Crimes Act to "outrage" on the part of Congress and the white neighbors of the Sioux. D. GETCHES ET AL, CASES AND MATERIAL ON FEDERAL INDIAN LAW (2d ed. 1986) locates the case as the lead case in a section titled *Tribal Sovereignty, Federal Supremacy, and State's Rights.*

The first (1942) and third editions (1982) of F. COHEN, HANDBOOK OF INDIAN LAW, are replete with references to *Crow Dog*, beginning with its significance as a tribal sovereignty case, but continuously referring to it in a wide variety of doctrinal contexts.

Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951 (1975), is the best study of the legal history of Indian criminal jurisdiction and fully discusses the doctrine of *Crow Dog*, but again fails to discuss the social context of the case. *Id.* at 962-63, 981-82. The Major Crimes Act is attributed to the fact that *Crow Dog* had "aroused the ire of Congress, the Department of the Interior, and the public". *Id.* at 963, this at least acknowledges the intricate involvement of the Interior Department, more specifically the Bureau of Indian Affairs, in the process, but still overlooks their manipulation of the issue. Kickingbird, *In Our Image . . . After Our Likeness: The Drive for Assimilation of Indian Court Systems*, 13 AM. CRIM. L. REV. 675, 690-91 (1976) gives us at least a short description of the case: "Crow Dog killed another famous Sioux, Spotted Tail," but both assumes that Crow Dog himself was somehow famous (he wasn't), doesn't say that Spotted Tail was among the most important of the BIA-appointed chiefs, and that his killing was a major blow to BIA plans to force the assimilation of the Indian tribes, and again doesn't locate the historical context of the case. Congress, similarly, responded to "public pressure". *Id.*

R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980) gives us an equally sketchy view of the context of the case, but goes far beyond the above accounts in correctly locating its significance. The reservation was to become a "legalized reformatory" and the coercive power of the criminal law was to be used to enforce that assimilationist policy. Id. at 86-88. V. DELORIA & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983) provides us with the most extensive discussion of the case, nearly two pages including a brief discussion of the factional struggle on the Rosebud reservation, some detail on the operation of customary law in the case, Crow Dog's trial, as well as discussing the doctrinal significance of the case, ending up attributing the Major Crimes Act to "the pressure of public opinion." *Id.* at 168-70.

The case doesn't fare much better in historical studies. F. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984), the best study of the assimilation movement, mentions the case only in one line, in relation to the idea that the government was the guardian of the Indian tribes, and in general does not concern himself with the role of the criminal law in the assimilation process, focusing instead on schools, land policy, and a general discussion of the question of Indian citizenship. F. PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE INDIANS (1984) devotes five pages to a discussion of the "law for the Indians movement" including a one paragraph discussion of Crow Dog, attributing the Major Crimes Act to the "just consternation" caused by the decision. *Id.* at 678.

Far more appreciative of the importance of understanding the context of the Crow Dog case in relation to modern Indian law is P. MATHIESSEN, IN THE SPIRIT OF CRAZY HORSE.

an unconscious thought that the holding was based upon a murder—one in which the killer escaped punishment—perpetrating an injustice that a popular reaction caused Congress to remedy quickly. The factual confusion about the case has historically undermined the doctrine of tribal sovereignty, and is at the center of the doctrinal confusion about what the case stands for.

This analysis seeks to clarify the factual context of the case, so that a "*Crow Dog* doctrine" can emerge from the casebooks, asserting that Native Americans have a sovereign right to their own laws. Federal Indian law has always been and continues to be deeply rooted in history, as nineteenth century doctrines dominate current law. Similarly, nineteenth century events continue to shape current interpretations of this doctrine.

Crow Dog is important because it is a bridge between the strong but ambiguous sovereignty language of *Worcester*, and the complete subjugation of Indians that followed *Crow Dog* with the passage of the Major Crimes Act, a keystone in the development of the new "plenary power" doctrine of *Kagama* that put the tribes completely under the control of Congress and the American political process.[5] The accompanying undermining of customary social control mechanisms of tribal society was a part of the weakening of not only law and social control, but also of all other traditional relationships, involving marriage, family and clan relations, the distribution of property, and social and political organization.[6]

(1980). Mathiessen, a journalist, spends one page on the context of the killing as part of a general history of the Sioux which sets the context for the Wounded Knee uprising of 1973. *Id.* at 15-16.

Finally, in two important recent articles on federal Indian law, the case has been cited as an example of the racism of 19th century Indian law opinions because of racist language contained in the opinion. Williams, *Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Jurisprudence*, WIS. L. REV. 219, 266-67 (1986), and Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. OF PA. L. REV. 195, 212 (1984).

5. The plenary power doctrine begins with U.S. v. Kagama, 118 U.S. 375 (1886).

6. We are just beginning to see a renewed interest in the customary law of American Indians, a subject universally left out of "Indian law" casebooks. There is a small literature on Sioux customary law. See, Humphrey, *Police and Tribal Welfare in Plains Indian Cultures*. 33 J. CRIM. L. & CRIMINOLOGY 147 (1942); MacLeod, *Police and Punishment Among Native Americans of the Plains*, J. CRIM. L. & CRIMINOLOGY, 181 (1937); Provinse, *The Underlying Sanctions of Plains Indian Culture*, in F. EGGAN, SOCIAL ANTHROPOLOGY OF NORTH AMERICAN TRIBES (1955) and Deloria, *Dakota Treatment of Murderers*, 66 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 368 (November, 1944). Currently,

A closer analysis of *Crow Dog* reveals the extension of criminal law over reservation Indians was the product of a broad national movement toward an assimilationist Indian policy. We can see clearly that the "popular outcry" does not explain either the decision to criminally prosecute Crow Dog at the outset (for under *Worcester* there should have been no prosecution), or the subsequent Major Crimes Act. Rather, analysis of primary documents shows that the Bureau of Indian Affairs cultivated *Crow Dog* as a test case (and tried to create other test cases both before and after *Crow Dog*) to gain precisely the end that was won: criminal jurisdiction over the Indian tribes.

The Bureau of Indian Affairs (BIA) had been attempting to get such jurisdiction since 1874 because BIA officials felt that they needed the coercive power of the criminal law to help force the assimilation of the Indians—the forceable application of criminal law as one painful way to learn civics.[7] It is clear from primary records that beginning on the day after the killing, the BIA engaged in a systematic distortion of the facts of the case. This began with their claim that there was a popular outcry among local whites necessitating the arrest, even though the agent had immediately ordered the arrest well before the killing was even known off the reservation. The Supreme Court's reversal of the case likewise produced a clear "outcry" from BIA officials and Indian reformers, rather than from anyone else. This led to the Major Crimes Act being tacked onto the end of an annual Indian Appropriations Bill, where it produced less debate than the liquor regulations included in the same measure.[8]

This action of the BIA reveals a great deal about the process of implementing the assimilationist policy which, in the early

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some lawyers and legal scholars working with Indian tribes are concerned about the issue of revitalizing customary law so that current tribal court systems might better serve Indian communities. *See* Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265 (1984).

7. S. REP. No. 367, 43rd Congress, 1st Sess. 2 (1874). A discussion of the course of this BIA lobbying for "criminal law for the Indians" follows. It is useful to note that Barsh and Henderson attribute the same motivation to the "criminal laws for the Indians" policy, although their citations, to BIA Annual Reports for 1872 and 1889, are to quotations that refer to coercion rather than to the application of American criminal law to Indians, although the latter may certainly be inferred. BARSH & HENDERSON, *supra* note 4.

8. On the debate over the liquor measure, see CONG. REC. 892-94; 931-34; 1745-46 (1885). For the debate on the Major Crimes Act see *id.* at 934-36.

1880's, replaced the long established "treaty" policy that recognized the parallel development of two distinct nations of people (modified in the *Cherokee* cases to clearly indicate that one of those distinct nations was in "domestic dependent" status in relation to the other).[9] By the early 1880's, policy towards American Indians had changed, reflecting the national expansionism that had provoked the last of the major Indian wars. There was no more tolerance for any notion of Indian sovereignty than there had been in Georgia during the 1830's. These Indian nations were simply in the way of white expansion; their treaty rights interfered with the Black Hills gold rush, railroad lines, and the westward expansion of agriculture.

There were few changes in federal legal doctrine in the area of criminal jurisdiction over Indians during this period. Between *Worcester* and *Crow Dog* very few cases involving criminal jurisdiction over Indian country went to the United States Supreme Court. These cases did not go to the heart of the issues decided in *Worcester* and *Crow Dog*. In the most important of these cases, *United States v. Rogers*, Chief Justice Roger Taney decided that the definition of "Indian" in Section 25 of the Indian Trade and Intercourse Act—which said that federal jurisdiction did not extend to crimes committed "by one Indian against the person or property of another Indian"—did not include white men adopted into Indian tribes.[10] The Court, however, did not impair the sovereignty of the Indian tribes by forbidding such adoptions. Rather, they held concurrent jurisdiction: the United States did not give up its jurisdiction over its citizens when they chose to become adopted into an Indian tribe.[11] An 1854 Attorney General's opinion clearly recognized the criminal and civil law of the Five Civilized Tribes in the Indian Territory, a legal position so deeply entrenched that it survived the Major Crimes Act and the *Kagama* decision.[12]

United States v. McBratney, involved the murder of one white man by another on the Ute Reservation in Colorado. The Court held that the state had criminal jurisdiction over all lands within

9. *See* Johnson v. McIntosh, 21 U.S. 542 (1823). *See also* Swindler, *Politics as Law: The Cherokee Cases*, 3 AM. INDIAN L. REV. 7 (1975) and Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969).

10. U.S. v. Rogers, 4 How. 567 (1846), 572-73.

11. *Id.* at 573.

12. 16 Op. Att'y Gen. (1854).

the state as an attribute of state sovereignty unless the federal government specifically restricted that right upon statehood.[13] This potentially threatened Indians in states that had been admitted to the union without a specific reservation of federal authority over Indians. However, the Supreme Court never intended that, and the case was never extended to Indians. It seemed to be prompted by the very real threat to law and order presented by rough whites who gravitated to Indian reservations because they were free from state authorities there. *McBratney* swept that away. Since the tribes did not have jurisdiction over whites on their reservations, *McBratney* did not deprive Indians of any jurisdiction. Rather, it deprived federal authorities of jurisdiction. Still, the opinion had negative consequences for the tribes because it did give the states concurrent criminal jurisdiction over reservation lands (but not over Indians).[14]

The sovereign right of Indians to maintain their own law was completely intact in federal Indian law at the time of *Crow Dog*, except in the removal of virtually all tribal jurisdiction over whites by both treaty and case law. Although rooted in treaties that recognized such rights, the basis of the right went much deeper to the very heart of the doctrine of sovereignty. The tribes held rights as sovereign political communities from time immemorial, with or without treaty recognition. This principle, while unrecognized by BIA administrators in the aftermath of *Crow Dog*, was clearly understood by the Brule.

The Killing of Spotted Tail

By the time a case becomes a Constitutional landmark it is often true that the significance of the events that originally gave rise

13. U.S. v. McBratney, 104 U.S. 621 (1882).

14. *Id.* The logic of *McBratney* is unclear. Given Marshall's strong language describing federal responsibility for Indians, *McBratney* clearly exposed Indians to depredations of local whites, who would have to be punished under local law, not federal law. This was precisely what Georgia wanted in *Worcester*. The issue was not jurisdiction over Indian people, but rather the "Indian country," the lands that the Indians needed to preserve their traditional way of life. The court narrowly held that a statute repeals any treaty provisions inconsistent with it. Thus, the federal statute creating the State of Colorado repealed any inconsistent treaty provisions, including those that gave the federal government jurisdiction over white crimes occurring on the reservation. The real issue, however, must have been the growing "law and order" concern voiced in the West about white criminals fleeing to Indian reservations.

to the case are lost. So it is with the killing of Spotted Tail, an event that reveals a great deal about late nineteenth century Brule reservation life.

The most common version of the killing, the one implicitly in the minds of readers of the decision, is best narrated by the popular historian George E. Hyde in the final chapter of *Spotted Tail's Folk: A History of the Brule Sioux*, a chapter not insignificantly titled "The Betrayal." Hyde's account, briefly summarized, is that Crow Dog, a sub-chief whom Spotted Tail had appointed a captain of the Indian police on the Rosebud reservation, was a political rival of Spotted Tail. Crow Dog was jealous of the power of the chief and greedy for the spoils of power available on the reservation. From his position as captain of the police he had openly stirred up discord over Spotted Tail's leadership and had tried, but failed, to elect as Chief a member of his faction, Yellow Hair, who was defeated two-to-one in a tribal council election.[15]

As though this "jealous factional rivalry" issue was not enough to explain the killing, Hyde incorporated two more reasons, completely confusing this political motivation. The first was that Spotted Tail had twice removed Crow Dog from his powerful job as captain of police, leaving Crow Dog bitter over his loss of personal power. Then, as though to cover all bases, Hyde added a dispute over a woman, Light-in-the-Lodge, the wife of Medicine Bear, a cripple. Spotted Tail had taken Light-in-the-Lodge as his second wife, but Crow Dog had taken up her husband's cause as part of a deliberate effort to portray himself as the champion of ordinary Brules against the arbitrary power of Spotted Tail.

For Hyde these somewhat inconsistent personal and political reasons together led Crow Dog to assassinate his chief. On August 5, 1881, Crow Dog brought a load of wood down to the agency

15. G. HYDE, SPOTTED TAIL'S FOLK: A HISTORY OF THE BRULE SIOUX, (1961) 308-36. Hyde's work is a classic example of traditional tribal histories, essentially relying on both popular and documented sources to create an "Indian history." Since Hyde does not use many footnotes, it is not always clear what his sources are for the events surrounding the killing of Spotted Tail. His acknowledgments show that he made extensive use of local historical societies. He does not, however, appear to have used the legal documents concerning the case, any BIA files, and, although he must have used the local newspaper, the *Black Hills Daily Times*, his account does not reflect it.

Another major popular history that is consistent with Hyde is Robinson, *A History of the Dakota or Sioux Indians*, SOUTH DAKOTA DEPARTMENT OF HISTORY COLLECTIONS 444 (1904). While the general tone of this study is far more anti-Indian than Hyde, the facts are consistent. *Id.* at 449-54.

from his camp nine miles away. He sold the wood, a major source of his income, and headed for home in mid-afternoon, just after the tribal council had broken up. He may have known that Spotted Tail would leave the council at this same time and ride two miles to his newly-built government house on the same road. As Spotted Tail rode toward him, Crow Dog stopped his buckboard and crouched low on the ground beside it as if to repair a wheel. As Spotted Tail approached within fifteen feet Crow Dog sprang up with his rifle and shot him in the side, the bullet exiting through his chest. Spotted Tail fell from his horse, rose, took a step or two toward Crow Dog and attempted to draw his pistol, but then fell dead. Crow Dog then leaped onto his buckboard and drove off at high speed toward his camp.[16]

The aftermath of this account is as important as the killing, for this is where the "popular outcry" distortion first emerges. In Hyde's account, Eagle Hawk, the current head of the Indian police, "did not dare arrest Crow Dog". This left the acting Indian agent, Henry Lelar, to wait until the day after the murder, when the "first fury of the Sioux" had worn itself off, to call a tribal council meeting. This tribal council meeting followed Brule law and ordered an end to the trouble, sending peacemakers to both families. The families, in turn and also following Brule law, agreed to a payment of $600, eight horses, and one blanket, which Crow Dog's people promptly paid to Spotted Tail's people. Brule law effectively and quickly redressed the killing and restored tribal harmony, a point that even the United States Supreme Court later recognized.[17]

If this account of the killing itself can be questioned using primary documents, it is even more important to see that the standard account of the process through which American criminal law was imposed on Crow Dog—and, through Crow Dog's case and the Major Crimes Act it "prompted," on all American Indians—can also be refuted through examination of primary documents. Once again, Hyde's account follows the official one and is the one given in the major accounts of the *Crow Dog* case in legal texts and in scholarly articles.[18]

16. HYDE, *supra* note 15 at 332-34, contains the actual description of the killing.

17. *Id.* at 332-34. This account of the process of customary Sioux law in the case of *Crow Dog* is corroborated in an account of this settlement of the case according to customary law in the *Black Hills Daily Times*, Aug. 9, 1881.

18. GETCHES, *supra* note 4 (2nd ed.), quotes Hyde at 271. Whether quoted or not, Hyde's account is the one is general usage.

There was, according to Hyde, a "popular outcry". When Indian agent John Cook returned to the Rosebud on August 10, "he seems to have been contented with this [customary] settlement, but the public was now aroused and the officials in Washington demanded action at Rosebud." Accordingly, Cook "got the council to act again." Crow Dog and Black Crow, a son-in-law of Spotted Tail who was thought by Cook to be the instigator of the conspiracy, "were induced to submit to arrest and were taken in charge" by Indian police (under the authority of the agent, not the tribe). They were then sent to Fort Niobara, Nebraska, to be held for trial. Thus, the impetus for the intervention of the United States government—a fundamental change in a long recognized policy of recognizing tribal law in all cases among Indians—came not from a massive popular reaction but instead was implemented five days after the killing with the return of Agent Cook from a business trip to Chicago.[19] This popular outcry argument is also often placed later in the case in the form of the massive outrage in Congress after the Supreme Court's *Crow Dog* opinion, but is fundamentally incorrect there as well.[20]

From the speed with which the Bureau of Indian Affairs and the Justice Department moved, they must have already developed a legal theory through which to extend American criminal law to Indians well in advance of the *Crow Dog* case, and were only awaiting the fortuity of an appropriate "test case." The most immediate evidence of this sharply rebuts the "popular sentiment" explanation, occurring after August 10 and the return of Agent Cook. The National Archives contains a copy of a telegram dated three days earlier, on August 7, sent to Lelar from Fort Niobara: "I have the honor to inform you that Hollow Horn Bear has this day turned over to the C.O. [Commanding Officer] of this Post Crow Dog and Black Crow—and that they are now held here under

19. This account of Agent Cook's return to the Rosebud on Aug. 10 to be confronted with the case and ordering the arrest of Crow Dog is completely wrong. Telegrams sent that day show that it was Acting Agent Lelar who ordered the arrest. *See infra* note 21. Similarly, it reports that Black Crow was "dropped when the law went to work on the case," again an error since Black Crow was held in jail until after the conviction of Crow Dog eight months later. *See* HYDE *supra* note 15 at 334.

20. It is an impossibility to cite evidence for the non-existent, but I tried to find evidence of this "popular outcry" and failed. I checked South Dakota's two major newspapers, the *Black Hills Daily Times* and the *Sioux Falls Register*, as well as two major national newspapers, the *Chicago Tribune* and the *New York Times*, the *Congressional Record*, and the BIA files on the case.

the charge of the guards."[21] This document reveals that, given that the killing occurred late in the day on August 5, and that Crow Dog had fled to a remote part of the reservation, and considering the distance of perhaps twenty-five miles to Fort Niobara, Crow Dog had been arrested with all deliberate speed. It is known from trial testimony how the arrest occurred, for both Hollow Horn Bear and Acting Agent Lelar gave testimony.

According to Lelar: "I sent Eagle Hawk to arrest defendant. When he failed, I sent Hollow Horn Bear, who made the arrest." Hollow Horn Bear described the arrest in detail:

> Mr. Lelar gave me a paper for the arrest of Crow Dog. Found defendant on a hill between White River and Rosebud Creek, where I made the arrest. Defendant had no clothes at the time, except a blanket, breechclout, and leggings and was on horseback. I did as I was ordered and took defendant to Fort Niobara.[22]

A.J. Plowman, Crow Dog's lawyer, asked Hollow Horn Bear whether he read the "paper" to Crow Dog. Hollow Horn Bear responded that he did not read the paper but simply told Crow Dog that he "wanted him to go with me to the post" and Crow Dog assented. According to Hollow Horn Bear, Black Crow was with Crow Dog at the time and also agreed to accompany them to the post, where both were locked in the guard house.[23]

21. Letter from Lt. James Paddock to Henry Lelar (Aug. 7, 1881) (on file in the National Archives, Record Group No. 75; Records of the Bureau of Indian Affairs, Special Case 91). Here I should add a note on this source. I have had the National Archives, where United States Supreme Court records and BIA records are kept, the National Archives Branch in Kansas City (where old Dakota Territorial Court records are officially deposited), and the archives of the South Dakota Historical Society searched for *Crow Dog*-related material. I have about 200 pages of primary documents in my possession, including numerous letters, miscellaneous trial documents, and a copy of the Appellate Brief for *Crow Dog*.

22. Black Hills Daily Times, Mar. 25, 1882. Here is another note on sources: although there may have been a transcript made of the trial, none turned up in my search. Fortunately, the *Black Hills Daily Times* ran a day-to-day account of the trial, including detailed quotations of testimony from the witness stand, evidently recorded (judging from the syntax and the dropping of unnecessary words) by a shorthand stenographer in the courtroom. While this account is not "official," it appears to be accurate. One test of this is that Crow Dog's appeal brief contains extensive quotations of testimony that are completely consistent with the *Daily Times* account.

23. *Id.*, Mar. 25, 1882, at 1.

Although it is not clear whether Black Crow was formally arrested at that time, it is clear from the Army telegram that Lelar had ordered the arrest of Crow Dog, and that this arrest had been carried out within a day of the killing. Thus, Lelar had intervened in the process of Brule law and had immediately, in contradiction of long standing federal policy, begun formal criminal proceedings. As far as the "popular outcry" suffice to say that the local paper, the *Black Hills Daily Times* of Deadwood, first ran the story of the killing of Spotted Tail a day later, on August 8, under the headline "Spotted Tail Shot." It was an unemotional account that did not indicate any "outcry."[24]

Given the speed of Lelar's action in contravention of federal law, the Bureau of Indian Affairs had decided to use this spectacular case to change well-established law. We find confirmation of this through a telegram to Cook one week later (on August 15) from Hugh Campbell, United States Attorney in Deadwood: "Is it desire of Indian Department that Crow Dog should be prosecuted criminally for murder of Spotted Tail? If so where are witnesses and where is Crow Dog?"[25]

Campbell's telegram is a strangely offhand communication considering that a hundred years of treaty law were being ignored. It makes it evident that the United States Attorney, a week after the case had appeared in the local paper, had taken no interest in the case, and did not know if, or where, Crow Dog was in custody. This cannot be ordinary procedure in murder cases. But this is understood in the context of other documents. Given the slow communications of the day, decisions were being made with great speed.

Three days before, on August 12, Campbell had wired Washington for instructions:

> Crow Dog, Brule Sioux Indian is reported to have killed Spotted Tail, Brule Chief, in this District about first August. Referring to article eight page two fifty six, vol. nineteen statutes at large and page three eighteen vol. eighteen statutes at large amendment to Revised Statutes twenty one forty six and sections twenty one forty six, revised statutes and the Indian ameniable to U.S. laws and does the department think the court has jurisdiction

24. *Id.*, Aug. 8, 1881, at 1.

25. Telegram from Hugh Campbell, U.S. Attorney at Deadwood to Indian Agent John Cook (Aug. 15, 1881) (on file in the National Archives, Record Group 75; Records of the Bureau of Indian Affairs, Special Case 91).

> and will a prosecution conflict with government policy as to treatment of Indians? Do provisions of page two fifty six, vol. nineteen statutes at large being later date control rather than section twenty one forty six Revised Statutes?[26]

This telegram was forwarded to the Interior Department on August 13, which responded on August 22 with a letter to the Attorney General expressing the opinion "that it is perfectly competent for the United States courts for that territory to take cognizance of the alleged murder," further requesting the Attorney General to "examine the law on the subject."

The Attorney General concurred with the Interior Department:

> It seems to me entirely clear that the conclusion that you have reached is correct. The treaty between the United States and the different tribes of Sioux Indians, proclaimed February 24, 1869 /15 Statutes 635/ expressly provided in its first section that "if bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrongdoer to the United States to be tried and punished according to the law.
>
> Article 8 of the subsequent agreement with the same Indians, approved by Act of Congress, February 28, 1877, expressly provides "the provisions of the said treaty of 1868 as herein modified, shall continue in full force, and that the provisions of this agreement shall apply to any country which may hereafter be occupied by the said Indians as a home, and Congress shall by appropriate legislation secure to them an orderly government they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life."[27]

26. Telegram from Hugh Campbell, U.S. Attorney at Deadwood, to Attorney General (Aug. 12, 1881) (on file in the National Archives, Record Group 75; Records of the Bureau of Indian Affairs, Special Case 91).

27. Letter from Attorney General to S.J. Kirkwood, Secretary of the Interior (Aug. 13, 1881); letter from Attorney General to S.J. Kirkwood, Secretary of the Interior (Aug. 25, 1881) describing contents of Aug. 22, 1881 letter (which is not preserved). Both letters, grouped with some legal notes, are in National Archives Record Group 75, Records of the Bureau of Indian Affairs, Special Case 91.

Any person familiar with the *Crow Dog* case will immediately recognize these two treaty clauses as providing the entire basis of the government's case in the Constitutional argument before the Supreme Court—here fully developed via intercontinental telegraph only twenty days after the killing, thirteen days after the local U.S. attorney asked for instructions, and merely ten days after that same U.S. attorney inquired of the Indian agent where the defendants and witnesses were. Furthermore, it shows that all parties were fully aware they were making new law—otherwise U.S. Attorney Campbell didn't need to wire Washington for legal authority to try an ordinary murder case, and did not need to ask the Bureau of Indian Affairs whether they "desired prosecution". The question remains of the origin of the case's legal theory. We will see that it was not uncovered in the legal research of U.S. Attorney Campbell in Deadwood, but already had a short, and discredited history in the Bureau of Indian Affairs.[28]

The Trial of Crow Dog

Crow Dog and Black Crow were taken to Deadwood on September 16, but only Crow Dog was ever arraigned on the murder charge. Nevertheless, Black Crow remained in jail until after the trial of Crow Dog eight months later. The failure to try Black Crow speaks to the government's lack of evidence of a conspiracy between the two men.

By the time of the arraignment all parties were aware that they were participating in a test case, and that it was bound for the United States Supreme Court. Perhaps the clearest proof of this is that almost a month before the trial, Agent John Cook sent a telegram to the BIA, asking that they split the cost of a court stenographer because the appeal was sure to go to the Supreme Court and this cooperation would save money for both the BIA and the U.S. Attorney.[29]

While the trial occurred in a sharply anti-Sioux climate — in the Black Hills six years after the 1876 war over this sacred Sioux Land—and took on something of the character of a frame-up,

28. In the Johnson Foster case, and in two Nevada and two Oregon cases occurring the year before, U.S. attorneys had attempted to subject Indians to state or federal criminal jurisdiction. See *infra* notes 67-71 and accompanying text.

29. Telegram from John Cook to "Commissioner of Indian Affairs" (February 28, 1882) (on file in the National Archives Record Group 75; Records of the Bureau of Indian Affairs, Special Case 91).

the initial newspaper reporting in the *Black Hills Daily Times*, the local Deadwood paper, was quite fair to Crow Dog. He was described as forty-eight years old, the father of eight children, and monogamous, having been married twenty-one years to his wife, Pretty Camp. The change in federal Indian policy in regards to charging Crow Dog with murder was accurately described. Similarly, the paper fully described the character of Brule tribal law, giving full credence to Crow Dog's claim that he had settled the killing according to Sioux law:

> In the Case of Crow Dog, as in all other offenses of a like nature, the relatives of the deceased and his own meet together in council, talk the damages over until they come to some agreement as to what they should be, and have an understanding as to how much property shall be given to make peace. The pipe of peace and fellowship is then smoked, and the gifts distributed, and there the matter ends in harmony and fellowship. . . .[30]

Since a white understanding of Sioux factionalism was at the heart of the government's theory of the case, it is important to note elements of that understanding as reflected in both the popular press and later the government's opening statement. Generally, the political factionalism of the reservation is widely described in anthropological literature, and turns on a distortion of traditional Indian government: a white-introduced economy of dependency and reliance on the agent for sustinence and political power produced sharp tribal divisions over how to maintain tribal identity under such conditions. This division produces a pattern of tribal disagreement not easily described, and often oversimplified in a "treaty" faction versus "traditional" faction dichotomy, with the treaty faction convinced that accommodation was the key to survival, and the traditionals opposing many of the accommodationist actions.[31]

We can see something of this oversimplification in conflicting images of Spotted Tail, a chief who drew his power from government recognition, and who had kept his people at peace through

30. Black Hills Daily Times, Sept. 16, 1881.

31. *See generally* Berkhofer, Jr., *Faith and Factionalism Among the Senecas: Theory and Ethnohistory*, XII ETHNOHISTORY 99 (1965); Clifton, *Factional Conflict and the Indian Community: The Prairie Potawotomie Case*, in N. LEVINE & N. LURIE, THE AMERICAN INDIAN TODAY (1973).

the Great Sioux Wars of 1868 and 1876. Under the headline, "Spots Pleasantries" the *Daily Times* ran an account of his chieftanship four days after his killing, quoting Major A.D. Burt of the U.S. Army who allegedly knew Spotted Tail well:

> He was a great chief and statesman among his people. He was strikingly handsome and manly, and a great friend of peace, but given to absolute authority over his minor chiefs. He was never timid, but was polite in his course towards the white. . . . He brooked no opposition to his commands and the fight probably arose from Old Spot's aggresiveness, he wanted no opposition from any of his people. He was fond of slipping out on the streets of his village with his Winchester rifle over his shoulder and was liable to command Mr. Red Dog, Mr. Rain-in-the-Sky, Mr. Crow Dog, or any other chief, to do so and so, and if the gentle savage opposed the old man's wishes, "Spot" would quietly cock his rifle, suggest that the order was not only quite imperative but the eyes of the Great Spirit were upon him and a little more delay might open to him a beautiful vista of the happy hunting ground. . . . General Crook selected Spotted Tail [to be sergeant in his famous corralling of Crazy Horse] because of the determination of his character and power to control this vicious element among his people.[32]

This matter-of-fact and utilitarian view of Spotted Tail, and the nature of his exercise of power, is broadly consistent with Hyde, but less favorably presented. It is illustrative of the nature of the power of chiefs under the reservation system. Spotted Tail's rule was complex and not easily described in white political terms: his power was no longer derived from the traditional consensus model of the selection of Brule chiefs, but, at least in part, derived from the army and the Indian agent. Lacking complete legitimacy, Spotted Tail had to rely on a great deal of coercion and political maneuvering to maintain his authority. His appointment of Crow Dog as a captain of police was a necessary compromise made to include opposition sub-chiefs in his tribal government. But Spotted Tail had often enraged agents by his independent course. At the time of his death, he was something of a pariah among Indian reformers in the Eastern U.S. because, on a visit to the Carlisle Indian School in June of 1880, he had become enraged at the

32. Black Hills Daily Times, Aug. 9, 1881.

treatment of his children there and had taken them back to the Rosebud. This was a major setback for the reformers, because of the belief that effective assimilation required the removal of Indian children to such schools. As a result, Spotted Tail was portrayed as violent and savage by the Eastern press. He had successfully stopped the construction of a railroad across the reservation, but at the time of his death was preparing for another trip to Washington to discuss railroad leases, another fact that had encouraged a rising level of dissent among his opponents.[33]

This view of Spotted Tail — full of contradictions and colored by his difficulty in governing without traditional consensus—was quite different than the picture painted by the prosecution in its opening statement:

> Deceased was chief of the Brule Sioux . . . by reason of a proclamation eminating [sic] from General Crook in 1876. He devoted himself and his utmost energy to an observance of all the treaty stipulations to be observed by his people. To this policy exception was taken by the more war-like element of the tribe, which faction became bitter and quite openly in defiance of the authority of the chief. A leading spirit in this faction was the defendant, Crow Dog. Each succeeding controversy became more bitter—finally to result in the death of the deceased. Attempts were frequently made to heal these differences, one step to this end being the appointment of the defendant as chief of police. Upon his refusal to abstain from further feuds defendant was dismissed from such service.[34]

The prosecutor presented his version of the events on the day of the murder, the same view later given by Hyde and the one since incorporated into the lawbooks. It is important to note that this image of Spotted Tail and Crow Dog was specifically put in the context of the Indian wars, with Crow Dog presented as a member of a faction favoring a continuation of the wars. In Deadwood in 1882 this must have had some impact on the jury.

It is conceivable that much of the trial was lost by the time the jury was selected, for there was no way to adequately control the strong anti-Indian prejudice prevalent in Dakota Territory at the time. When Crow Dog's court-appointed defense attorney, A.J. Plowman, asked one juror whether he could let the testimony

33. HYDE, *supra* note 15 at 321-325.
34. Black Hills Daily Times, Mar. 17, 1882.

of an Indian outweigh the testimony of a white, he got an honest answer: "I could not. The testimony of one white man would go further with me than that of a hundred Indians." Juror George Ayers was asked if he had any fights with Indians. "I never have," he responded, "but I have been pretty badly scared by them." The jury was empanelled in a few hours.[35]

There were no surprises in the government's case, which was competently, but not brilliantly presented. It is not insignificant that their lead witness was not any of the eye-witnesses to the killing, but Agent John Cook, who had been in Chicago on private business when the killing occurred. He testified concerning the political facitionalism prevalent at Rosebud, and about Crow Dog's role in undermining the authority of Spotted Tail.

Then He Dog testified, a political ally of Spotted Tail who had been riding beside and slightly behind Spotted Tail. He provided the factual basis of the government's case. He Dog was followed by Spotted Tail's brother-in-law Kills on Horseback, another eye-witness who gave the same testimony supporting Crow Dog's guilt. They were followed by Chasing Hawk, Ring Thunder, Spotted Tail Jr., Windy Horse, Hills Mother (Spotted Tail's wife), Henry Lelar, Stinking Foot, Thigh, Reverend William J. Cleveland (who had officiated at Spotted Tail's funeral), High Bear, Calls-on-People, and Iron Wing. Most of this testimony was insignificant, generally serving the function of establishing that Crow Dog was present near the council house at the time of the killing. Many of the above were re-called, however, in anticipation of Crow Dog's claim of self-defense, testifying they had not seen Spotted Tail draw his pistol before the shooting. Even so, the prosecutor's case took only a day and a half.[36]

The defense was straightforward as Plowman outlined in his opening statement, and was based on a sharply different interpretation of the facts. As Spotted Tail approached Crow Dog's wagon, Crow Dog's wife Pretty Camp called to Crow Dog, who was on the ground repairing the wagon. When he looked up he saw Spotted Tail drawing a pistol. Crow Dog seized his rifle at the same time and fired—displaying a classic case of self defense.

A whole day was taken from the jury to decide the legal issue of whether under territorial law a wife could testify either for

35. *Id.*, Mar. 17, 1882.
36. *Id.*, Mar. 17, 1882 & Mar. 18, 1882.

or against her husband, a rule in conflict with federal law. After losing a request to permit Pretty Camp to testify, Plowman tried an tactic inconsistent with his position that Brule law governed this case: he argued that Pretty Camp and Crow Dog were not legally married, because their traditional wedding had never been formalized under territorial law.

The judge held that since the prosecution sought to exclude the testimony, the burden was on the prosecution to prove Crow Dog and Pretty Camp were married. The prosecution called Hollow Horn Bear, who had arrested Crow Dog. Hollow Horn Bear testified that he had been at their wedding when he was a child of nine years. Henry Lelar, chief clerk of the reservation, testified that Pretty Camp was carried on the agency's rolls as Crow Dog's wife. The court ruled Pretty Camp was Crow Dog's wife and not competent to testify.[37]

Plowman then called Brave Bear and asked, "Are you acquainted with the local laws and customs of the Brule tribe, for the punishment of offenses?" When the prosecution objected, Plowman explained that he intended to use the witness to show that Brule Sioux law was recognized by treaty and that Crow Dog had been "arraigned in keeping with custom, duly tried, and subjected to the penalties of such tribal laws." The court sustained the prosecution's objection, and the witness retired. Thus, the defense had raised the customary law issue, in the context of a "double-jeopardy argument," but was not allowed to present evidence on the issue.

Plowman then called Crow Dog, who told his own simple but eloquent story of the killing, recorded in the choppy syntax of a newspaper reporter's notes:

> I knew the deceased, Spotted Tail. I shot and killed Spotted Tail. Arrived at the scene of the tragedy on a wagon in company with my wife and child. There was no box on the wagon—two loose boards spanning the space between the boulsters. One of these had worked forward and dropped to the ground. Had got off to fix it. Had gone to horses to unwind a line when a person approached at a gallop, from the direction of the council lodge whom I recognized as Spotted Tail. [He] checked his horse into a walk. As he approached seemed to be searching

37. Most of the day of Monday, March 20 was spent on the Pretty Camp motion. *Id.*, Mar. 21, 1882.

for weapon in the vicinity of his hip. My wife said something which I did not understand. Saw from the facial expression of Spotted Tail that trouble was on hand. Deceased halted—drew his pistol—levelled it at me when I fired and killed him. [I] run around the wagon and was putting another cartridge—thinking I had missed him—when Iron Wing caught hold of me . . . I shot him without taking aim from a distance of fifteen feet. I was standing on the ground, my heart beating violently, as I was sure from demeanor of deceased that the time had come.[38]

Crow Dog admitted that there was hostility between himself and Spotted Tail but denied threatening to kill him. He was asked his relationship with Pretty Camp and admitted being married to her for twenty-one years. Finally, Crow Dog testified that at Spotted Tail's insistence he had been twice-removed as captain of police, the last time by the agent who had said he must "make up with Spotted Tail."

Deprived of Pretty Camp's eyewitness account (which is preserved in affidavit form and corroborates Crow Dog's testimony), Plowman recalled a number of Brules who had earlier testified to testify to Spotted Tail's violent character. Brave Bull testified that Chasing Hawk, an eyewitness, had said to him: "Old man, I am going to tell you something. Spotted Tail had a pistol and I know it well, and if Crow Dog had not been quick Spotted Tail would have killed Crow Dog." Brave Bull further testified that Spotted Tail's reputation was "not good. I never knew any good of him."[39]

Eagle Hawk, a member of the police force, then testified as having the same conversation with Chasing Hawk on a different occasion: "He said that Spotted Tail had a pistol and that he saw it; that he was going over to the Black Hills [to the trial] to testify and that he proposed to tell the truth about it this time; that we had agreed to tell the same story at the previous hearing, but he had made a fool of himself and told nothing concerning the pistol . . . that he saw it lying beside the body of the deceased. I had another conversation with Thunder Hawk on the court house steps, last Friday night, in which he stated that he had not testified as he had said he would testify — that it was too late to rectify."

38. *Id.* Crow Dog testified at the end of the day on Monday, Mar. 20, 1882.
39. *Id.*, Mar. 21, 1882.

Thunder Hawk was then called and corroborated "the material points of the conversation." This unsettling evidence of perjury ended the defense case.[40]

The prosecution then tried to recall Crow Dog in rebuttal, but Plowman objected. Brave Bull was then recalled and testified as to a conversation that he had had with Hollow Horn Bear at the sawmill where he had criticized Hollow Horn Bear for his "interference" in arresting Crow Dog. Brave Bull testified he had said "that [Hollow Horn Bear's] interference was like three white men standing there, one of whom should turn his back when one of the two would kill the other." Hollow Horn Bear was recalled to testify to the circumstances of Crow Dog's arrest.

Acting Agent Henry Lelar testified that Spotted Tail's reputation was "good. He was ever on the side of law and order, and was faithful in his observance of treaty stipulations." Plowman asked Lelar if he had heard that Spotted Tail had killed Big Mouth. Lelar responded that he had heard the story, but that they both were drunk at the time. H.L. Deer, John Cook, and Colonel Steele ended the prosecution's rebuttal, all testifying to the law-abiding character of Spotted Tail. On the character evidence of these three white men (no Brule was called by the prosecution to testify on Spotted Tail's character), the trial ended on the afternoon of the fifth day. The balance of the day was taken up with Plowman's argument that the court had no jurisdiction over crimes among the Brule. Here Plowman presented a competent argument based on existing federal Indian law.[41] Plowman lost this jurisdictional argument, but it is doubtful that he ever had a chance.

In his summary Plowman used the evidence to great effect in attacking the prosecution case, and to support his self defense argument. Concerning the plot to replace Spotted Tail as Chief with Black Crow, Plowman reminded the jury that a council meeting had been held on that very question with the agent attending, hence it was hardly as secretive and evil as the prosecution intimated. Plowman then asked a series of rhetorical questions: If Spotted Tail was unarmed why did Crow Dog run around to the rear of the wagon after firing? If Spotted Tail did not stop his horse, how come that horse remained standing after the shooting? If Crow Dog was plotting to kill the deceased, why

40. *Id.*, Mar. 22, 1882. The defense also took only two days to present their case, including most of one day on the Pretty Camp motion.

41. *Id.*, Mar. 23, 1882.

did he bring his wife and child along? Plowman ended with a plea not for mercy but for simple justice, asking jurors to put away their prejudices. Nor did he drop his reference to the now legally lost customary law issue. Having failed to convince the judge, he tried it on the jury:

> The race to which the defendant belongs has been driven east and west until here they are a mere remnant. Not only has his property been taken from him, but now we would cap the climax of his degradation and take away his local laws and customs for the trial of offenses and place him upon trial under laws in the making of which he has had no voice. It was upon the transcending of this God-given right that our forefathers made war upon the mother country.[42]

The jury retired after judges' instructions about 6:00 p.m. and returned a guilty verdict at 9:15 a.m. the next day, indicating that they did not have much difficulty reaching agreement. The judge thanked the jury, remarking that their verdict was in keeping with the evidence, and that he did not see how they could have decided any other way. Plowman gave notice of a motion for a new trial, pointing out that the defendant had no funds for an appeal. The judge, prosecutor, and Agent Cook promised to do their utmost to help Plowman raise money and to petition the BIA for funds. The next week Judge Moody sentenced Crow Dog to death by hanging. Surely it was not a coincidence that three days after the March 22 conviction of Crow Dog, Black Crow was discharged, no bill having been found by the Grand Jury. Black Crow had been held in custody nearly eight months.[43]

The *Crow Dog* case remained to go on appeal to the United States Supreme Court. In order to go up as a test case there had to be a conviction. But the conviction left much local uneasiness, further undermining the "local outrage" position. The *Black Hills Daily Times* noted: "We have conversed with a good many sensible people devoid of prejudice and feeling, and where we found one who approved of the verdict, a dozen equally as good men would

42. *Id.*, Mar. 24, 1882.

43. *Id.*, Mar. 25, 1882. After Crow Dog was sentenced to hang, the court allowed him to return to the Rosebud to get his affairs in order. On the day he had agreed on, he drove himself back to prison, accompanied by Pretty Camp. MATTHIESON, *supra* note 4, at 16. This account is also found in V. DELORIA & C. LITTLE, *supra* note 4, at 169. It does not appear in the *Daily Times*.

disapprove it in the strongest terms . . . The verdict . . . was received with great surprise by the entire community who had from the evidence believed that either acquittal or possible manslaughter would be the result." Simply put, the government had not proven its case, and the jury had uncritically accepted the agent's version of the case on faith, in the context of local prejudice.[44]

Yet, this is not the end of the "evidence" in the case. In the context of the Rosebud reservation — defeated, divided, occupied by the cavalry, and on a war-footing — a strong argument can be made that only Brule law could fully try the case. A handful of Indians were transported half-way across Dakota Territory to stand in the hallways of the courthouse in Deadwood waiting to tell, through an interpreter, what they knew about an event that whites had to convert into cultural patterns that white justice could understand. Hence, it was never possible to reconstruct the facts inside the Deadwood courtroom, because the facts were culturally determined.

By the time the case reached Washington, Plowman had assembled a sheaf of affidavits which, while tending to show that the "facts" of the case contained a good deal of fiction, were only of marginal use in a Supreme Court argument that turned on matters of law rather than fact. An affidavit of William Garnett, a half-blood Sioux who had served as the official interpreter, stated that based on his acquaintance with the Brule and his background knowledge, his "firm belief was that most of the evidence given by Indian witnessess for the prosecution were untruths and exaggerations." Valentine T. McGillycuddy, Indian Agent at the neighboring Pine Ridge Reservation, stated in his affidavit that, first, bribery and intimidation were used with witnesses against Crow Dog at the trial; and, second, that he had no doubt that Spottted Tail was fully armed at the time of his death and that it was "merely a matter of chance at to which should be killed first." William Henry Wright, a reporter of the *Black Hills Daily Times*, stated that he had interviewed an Indian woman called "Woman that Carries the Shield", who was the fourth person to arrive on the scene of the killing. She stated that Spotted Tail had had a pistol and that High Bear's wife had taken it and given it to young Spotted Tail. She also stated that when Hollow Horn Bear, He Dog, and Charley Jacket came back from Deadwood, Spotted Tail Jr. had

44. Black Hills Daily Times, Mar. 25, 1882.

given them each a horse for proving that Spotted Tail had no pistol. Bear's Head told affiant that he was afraid to testify about the killing of Spotted Tail because he was afraid of Spotted Tail Jr. Wright further stated that many Indians told him that Spotted Tail Jr. called a council the night after Spotted Tail was killed and told his people that they must all swear that his father was unarmed.[45]

It is questionable how much of this testimony was legally admissible, because the affidavits contained hearsay evidence. However, that is not the point here. Rather, all of this evidentiary confusion shows the injustice of imposing one system of law on an existing system of law and out of that injustice flows the impossibility of producing an accurate rendering of facts, or of fairly judging the evidence.

The Appeal of Crow Dog

There is an inherent distortion of the legal process that emanates from simply studying appellate cases. The appeal of Crow Dog makes this point very clearly. While there are important doctrinal questions involved, most of the remaining correspondence concerning the case concerns the financing of the appeal, a significant problem in a case involving an indigent defendant in the days before any form of legal aid. What is perhaps remarkable, and underscores the significance of this as a test case, is that the trial lawyer, the U.S. Marshall, the U.S. Attorney, the Indian Agent, the BIA, the Secretary of the Interior, and the Justice Department all engaged in a concerted effort to ensure adequate financing of the appeal. They also were instrumental in getting the United States Congress to pass a special appropriation of $1,000 to finance the appeal — out of the $10,000 that defense attorney Plowman argued was a reasonable fee for his work. This action testifies to the government's assessment of the importance of *Crow Dog* as a test case, and not particularly to any humanitarian concern for the life of Crow Dog.

It is clear that from the moment of the conviction of Crow Dog that the BIA was willing to invest its resources in pushing the case speedily forward on appeal. On March 29, the day after

45. These quotations from affidavits come from a small sheaf of affidavits from the file, "Crow Dog Trial and Related Papers, Folder #3: Affidavits, 1883" from the Archives of the South Dakota State Historical Society, (Pierre, S.D.). All are quoted from, except one from Brave Bull that further testifies to Spotted Tail having a pistol in his hand.

Crow Dog was sentenced to hang, Attorney Plowman wrote Samuel Kirkwood, Secretary of the Interior, to ask for money for the appeal:

> Sir:
>
> The trial of Crow Dog, a Sioux Indian indicted in the First District Court of Dakota Territory for the killing of Spotted Tail, also an Indian, had just resulted in a verdict of guilty of murder.
>
> This is the first reported case where the United States has prosecuted one Indian for an offense committed upon another Indian and was brought under the provisions of the treaties made by the United States with the Sioux Nation of Indians, Statutes at Large, vol. 15, p. 635 and vol. 19, p. 254. . .
>
> In view of this being the first case of the kind it is very much desired that the questions of law be passed upon by the Supreme Court, but the defendant is poor and unable to pay counsel in the costs necessary to make a review of the case. I therefore in behalf of the defendant respectfully apply to your department for the necessary funds. . .

Plowman added as a postscript that Crow Dog had been sentenced to be executed, a matter evidently not as important at the doctrinal question. Further, Plowman's letter enclosed with it a letter from A.S. Stewart, foreman of the jury, supporting Plowman's request for funds. Perhaps, more revealing, Stewart's letter indicates that the jury was unsettled about the state of the law relating to federal jurisdiction over the Sioux but had felt unable to consider the question because it was a matter of law to be decided by the judge.[46]

The Secretary of the Interior was not especially sympathetic. He sent both letters on to the Commissioner of Indian Affairs stating that, while he appreciated the importance of the matter, the Department had no money for such purposes. However, the Commissioner of Indian Affairs, Henry Price, the federal official

46. Letter from Plowman to Secretary of Interior (Mar. 29, 1882) (on file in the National Archives, Record Group 75, Records of the Bureau of Indian Affairs, Special Case 91). There is no intent to be sarcastic by attributing meaning to Plowman's addition that Crow Dog was sentenced to hang as a p.s., after a long discussion of first doctrine, and then, money. However, it is also appropriate to say that there is not the slightest concern for Crow Dog's life expressed in any of these hundred-odd pages of letters, by Plowman or anyone else.

with responsibility for protecting the right of Indians, had an idea where the money might come from: "The Sioux are rich having large possession in cattle and ponies and should be willing to provide the money to have their legal status decided by the courts." In the event the Sioux did not see the logic of this, Plowman was to be informed that his fee depended entirely on an appropriation by Congress.[47]

Plowman was the first, but not only person seeking money for work on the case. Frank Washabaugh, clerk of the Territorial Court in Deadwood, sought $150 for his part of "the work of preparing the Crow Dog case for the Supreme Court" in a letter to Agent John Cook, dated April 7. Not content to merely ask for the money, he also had two suggestions of how to raise it. One was for Cook to write on his behalf to the Secretary of the Interior and the Commissioner of Indian Affairs:

> informing them of the importance to the Indian Service to have the matter settled beyond doubt that the Indians may know and feel the responsibility which they owe to the white man's laws, and in as much as this is an appropriation made and set apart from the purpose of education and civilizing the Indians, this seems to me could consistently be taken from such fund as I know of no better way of educating or civilizing the Indians than making them feel their responsibility to the law of the Government.
>
> If the Department will not or cannot furnish the means, then it is but right to have the Indians on the Agency and particularly the friends of the department to raise the money and pay me by some means, either by selling some ponies, or any other way that they can raise it.[48]

Plowman, recognizing that money from Congress might be more certain than collecting Brule ponies, vigorously pursued his money claims, and ultimately secured an appointment as special agent in the Bureau of Indian Affairs for the purpose of arguing the Crow Dog case. This appointment effectively placed the Bureau

47. Letter from Henry Price to Indian Agent John Cook. (Apr. 27, 1882) (on file in the National Archives, Record Group 75. Records of the Bureau of Indian Affairs, Special Case 91).

48. Letter from Frank Washabaugh to Indian Agent John Cook (Apr. 7, 1882) (on file in the National Archives, Record Group 75; Records of the Bureau of Indian Affairs, Special Case 91).

of Indian Affairs against itself in the United States Supreme Court. The appointment further raised serious questions of ethics. In order to get funds, Plowman felt it necessary to ask the BIA to approve the arguments he intended to make. On March 30, one day after his initial appeal for money, and two days after Crow Dog's sentencing, Plowman, at the suggestion of U.S. Attorney Hugh Campbell, wrote the Secretary of the Interior detailing the legal questions that he intended to raise during the argument. A month later, Congressman R.L. Pettigrew wrote the Secretary on behalf of Plowman, requesting that the Department of the Interior request an appropriation of $5,000 for the defense. Meanwhile, in a letter dated April 28 Plowman gave Henry Price, Commissioner of Indian Affairs a detailed statement of his legal plans, estimating his actual costs in taking the case to the U.S. Supreme Court at $3,000 to $3,500, and modestly suggesting that "able council here" had estimated the value of his services in the case at $10,000.[49]

Ten months later, under the Sundry Civil Act of March 3, 1883, $1,000 was appropriated by Congress, and listed on the books of the BIA as "appeal Crow Dog case to United States Supreme Court." After a letter inquiring about his money, Plowman was appointed as a special agent on June 1, and gave bond in the amount of $1,000 for his work on the appeal. Meanwhile, an appeal had gone forth to the Territorial Court, which was totally ignored in all the correspondence concerning the financing of the appeal to the United States Supreme Court.[50]

It seems clear that there was little concern about the outcome

49. Letter from Plowman to Secretary of the Interior (Mar. 30, 1881); letter from Plowman to Henry Price, Commissioner of Indian Affairs (Apr. 28, 1882). (Both letters on file in the National Archives, Record Group 75; Records of the Bureau of Indian Affairs, Special Case 19). Two side points seem relevant here: one is simply that, in order to get the BIA to finance the appeal, Plowman fully provided them with an outline of his legal strategy, presumably for their approval, and for whatever reason, this action compromised Crow Dog's constitutional right to counsel. Second, the above file contains seven letters from Plowman, and three others specifically stating that they were written at his instigation, all requesting funds, although two also contain detailed discussions of the law as well. This constitutes all of Plowman's correspondence with the BIA. Again, this concern about money needs to be seen in the context of the fact that Plowman did very good legal work on the case, and that he was ultimately paid only $1000, a fraction of what his services were worth.

50. Letter from Commissioner of Indian Affairs Price to Secretary of the Interior (Apr. 10, 1883); letter from Secretary of the Interior Henry Teller to Commissioner of Indian Affairs Price (June 1, 1883) (both letters on file in National Archives Record Group 75; Bureau of Indian Affairs, Special Case 91).

of the intermediate appeal. The simplest example of this is to recognize that the appeal was brought to the same court, the First Judicial District Court, which acted both as a territorial court and as a federal district and circuit court. Judge G.C. Moody, who had tried Crow Dog, sentenced him to death, and denied the original demurrer of Crow Dog on jurisdictional grounds, also heard the appeal in October 1882, six months after the trial.

The perfunctory nature of the appeal does not mean that Plowman did not take the appeal seriously. His appellate brief testifies to the thoroughness of his work. He raised a variety of jurisdictional issues, challenged the sufficiency of the evidence, and alleged thirty-six errors in the court's jury instructions. Judge Moody, in his opinion, addressed three of these issues. First and most important, on the question of federal criminal jurisdiction over the Sioux, Judge Moody held exactly as he had during the trial. He followed the exact original argument of U.S. Attorney Campbell, formulated the week after the Spotted Tail killing, that the Sioux treaties of 1869 and 1877 had superceded federal recognition of tribal law in crimes between Indians. Second, he held that Pretty Camp was not competent to testify for her husband Crow Dog. Third, he held that the state's evidence was sufficient to prove murder because once having proved the fact of the intentional killing there was "a presumption of guilt . . . which must remain until proof sufficient to overcome such presumption shall be given by the defendant . . . It is not enough to raise a reasonable doubt whether such justification . . . be proven, for the presumption still remains. The court dismissed as "minor" all Plowman's remaining points, and remanded the case "with directions to carry the judgment into execution."[51]

The Supreme Court's Crow Dog Decision: A Tribal Sovereignty Decision Without Respect for Tribal Institutions

If we come to see a remarkable quality in the *Crow Dog* decision because of its attribution of sovereignty to American Indian tribal law, it is not because the Court had any great respect for Brule law, or in fact knew anything substantive about it. Mistakenly

51. Plowman's brief and argument before the Territorial Court is preserved in printed form, so one can be relatively certain of what the defense argued. South Dakota Historical Center Archives, *Crow Dog Trial and Related Papers*, Folder #1, Brief and Argument, 1882. The court's opinion is preserved as United States v. Kan-Gi-Shun-Ca (in English, Crow Dog) N.W. 437, (Oct. 28, 1882).

characterizing the case as one of "red man's revenge" (an assumption about Crow Dog's motives that we have seen is untrue), the Court hardly bothered to conceal a racist contempt for tribal institutions. Yet, at the same time, *Crow Dog* upheld Marshall's statement of tribal sovereignty from *Worcester*, a significant statement given the context of Indian-white relations in the 1880's. While the holding was based conservatively on narrow grounds, allowing no repeal defending traditional interpretations by implication of a treaty right, the court went beyond the scope of that decision and made important policy statements about the logic of allowing tribes to maintain their own legal institutions — even if the court plainly did not respect them and thought that ultimately they must give way to "civilization". Thus, the case is memorable because of both its strength and its weakness, and the Court's fundamental inability to come to terms either with the complexity of the reality that America and American Indians faced, or with any kind of legal strategy to give effect to tribal sovereignty.

No contemporary record in any archives has been located to say anything more than is now generally known about the unanimous Supreme Court decision, written by Justice Matthews, and delivered on December 17, 1883, fourteen months after the original appeal. Perhaps it is not necessary to know more to adequately understand the context of the opinion than that it was rooted in well developed concepts of federal Indian law, giving strong support to the traditional conception that treaties were between nations of people. Also, it interpreted the Sioux treaties of 1869 and 1877 in ways that gave greatest effect to Indian tribal sovereignty — in essence a conservative opinion from a conservative court. In many ways it is fair to see the *Crow Dog* opinion as representing a watershed, the divide where a traditional Indian policy that recognized the equality of tribal peoples and respected their national sovereignty first stood strongly against the rise of the new BIA policy of assimilation that was to dominate national Indian policy for the next fifty years. With the passage of the Major Crimes Act two years later, the sovereignty doctrine of *Worcester* gave way through the plenary power doctrine to a well-organized legislative campaign to transform traditional Indian society, and with it the legal basis for the recognition of tribal sovereignty.[52]

52. This transition is well-described by historians. For lawyers, it is the watershed between the treaty being the foundation of Indian law, and the statute taking the place of the treaty, beginning in 1871 when Congress formally ended the policy of treating with Indian tribes. *See* Clinton, *supra* note 4, at 955-62.

The Court's decision has two distinct parts. The first is a careful and detailed analysis of the language of the treaties that formed the basis of the prosecution's case. The second was a statement of national policy regarding tribal sovereignty and the law of tribal people that was an integral part of that sovereignty. The first of the treaty provisions to be analyzed contained the language: "if bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian . . . the Indians herein named solemnly agree that they will . . . deliver up the wrongdoers to the United States to be tried and punished according to its laws." This clause, according to Matthews, was taken out of context, and needed to be read after the clause which preceeded it, which provided for punishment by the United States of any bad men among the whites who committed any wrongs upon the Indians. This was a common provision for the prosecution of crimes between Indians and persons of other races, and was found in most of the treaties with Indian tribes. It did not refer to crimes committed between Indians of the same tribe.[53]

The second provision, from the treaty of 1877 involved the language "And Congress shall . . . secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person and life." The Court took this phrase to have nearly the opposite meaning ascribed to it by Judge Moody of the territory court, and the BIA:

> The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.

The Court went on in well-known language to describe this relationship in paternalistic terms: "as a dependent community who were

53. *Crow Dog*, 109 U.S. 556 at 567-68.

in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governing society."[54]

Obviously, this language is racist. The Sioux had a rich culture and had traditionally always been self-supporting and self-governing, hence there was not a need to "advance" them. But, mingled with this racist and paternalistic analysis was the Court's recognition of treaty rights, of a "contract" — historically by treaty — between two political entities with the equal power to enter into that contract. Behind this was clear language recognizing the tribe's natural right to maintain its own "order and peace" and to administer its own "laws and customs".

Finally, the court strongly stated the traditional defense of customary law for the Indian people:

> It is a case where . . . that law . . . is thought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them not by their peers, nor by the custom of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxim of the white man's morality.

While the racist language is obviously offensive, the strongest statement of the integrity of Sioux law emerges—a policy statement that strongly undermined the current assimilationist "law for the Indians" policy of the BIA.[55]

Yet, as Barsh and Henderson have pointed out, this language

54. *Id.* at 568-69.
55. *Id.* at 571.

had changed since the Cherokee cases of the Marshall court. There was a strong tone of racism, combined with a clear message that tribal law was somehow transitory, a mechanism to assist in the inevitable transition from savagery to civilization. Hence, while adopting Marshall's legal theories with a deep respect for tribal sovereignty the court was also implicitly adopting the assimilationist ideology of the day.[56] The result was a highly unsatisfactory fit.

There is no record of the number of cases of Indian killings which were directly affected by the *Crow Dog* decision. To the extent that many U.S. attorneys, such as the one in the Johnson Foster case, thought that Indians were beyond the reach of American criminal law, there appear not to have been many. Crow Dog returned to the Rosebud reservation to continue as a leader of the traditional faction, derisively labelled the "kickers" by the Indian agent. He resisted allotment, and left the reservation to join the Ghost Dancers in the Badlands in 1890. His agent repeatedly asked BIA authorities in Washington to remove Crow Dog from the reservation because he was a "troublemaker," sometimes requesting that he be taken to another reservation, and sometimes suggesting that he be imprisoned. According to the agents the reversal of his conviction was responsible for his arrogant attitude.[57]

The only Indian, besides Crow Dog, known to be released from prison directly because of the Supreme Court's decision was, ironically, Spotted Tail's son—also called Spotted Tail. On May 29, 1884, five months after the decision, Spotted Tail, Thunder Hawk, and Song Pumpkin had become involved in a dispute with White Thunder, evidently an extension of the same factional struggle that Crow Dog's case had arisen from. White Thunder had raided Spotted Tail's camp and taken seven horses and other property. Spotted Tail gave chase, and became enraged when he found several of his horses shot by the side of the road. Upon arriving at White Thunder's camp, Spotted Tail and his friends opened fire. In the exchange White Thunder and Song Pumpkin were killed, and White Thunder's father seriously injured.[58]

56. R. BARSH & J. HENDERSON, *supra* note 4 at 88.

57. This material on the later activities of Crow Dog is from R. Clow, The Rosebud Sioux: The Federal Government and the Reservation Years, 1878-1940, Ph.D. dissertation, Univ. of N.M., 1977, at 47-50, 55-59, 69-70, 77, 81-82, 84, 89-91, 120-21. Clow adopts the BIA view of Crow Dog characterizing him as having a "hostile and shiftless manner" and in so doing distorts the whole nature of the traditional struggle against the BIA and against Sioux who sought to accommodate.

58. Letter from James Wright, Indian Agent at Rosebud Reservation to Henry Price, Commissioner of Indian Affairs (May 30, 1884); letter from James Wright, Indian Agent

Showing something of how little the doctrine of stare decicis penetrated the BIA, the Indian agent ordered Spotted Tail and Thunder Hawk to proceed to Fort Niobara and put themselves in the custody of the military. Both were locked in the guard house. An extended exchange of letters and telegrams followed between the Agency and Washington over the disposition of Spotted Tail and Thunder Hawk.[59]

While the BIA proceded in a confused manner, the Sioux once more resolved the matter. The council held a trial and decided to allow Spotted Tail and Thunder back on the reservation, agreeing to take responsibility for their conduct. The council sent this information to the agent, who forwarded it to Washington, along with a letter from Spotted Tail and Thunder Hawk requesting to be "parolled" from the guard house. On September 2, the Commissioner of Indian Affairs, citing the clear precedent of *Crow Dog*, requested that the Secretary of the Interior order the release of the prisoners. The prisoners were released on October 4. Spotted Tail and Thunder Hawk had been imprisoned in the guard house for four months while the BIA had reluctantly given effect to the Supreme Court's holding in *Crow Dog*.[60]

Law for the Indians: The Major Crimes Act

The common understanding of the context of the Major Crimes Act of 1885, which extended the jurisdiction of federal courts to a list of seven serious crimes when committed among Indians in "Indian country," is that it was passed by Congress as a popular reaction against the *Crow Dog* ruling. Given that the account of Crow Dog's original arrest was in response to a popular outcry is completely false, we can already be on notice to also view this account with suspicion. The simple truth is that the BIA had been attempting to get such a bill through Congress since 1874. After 1880 this attempt had been in earnest, and had been joined by

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at Rosebud Reservation to Henry Price, Commissioner of Indian Affairs (Aug. 26, 1884). It is clear that Wright never accepted Spotted Tail's version of the facts, and was never sure of the cause of the killing.

59. Telegram from Commanding Officer, Fort Niobara, Nebraska to Adjutant General, Missouri Division (May 31, 1884). The National Archives maintains a file, "Spotted Tail, Junior Murder Case," Record Group 75, containing BIA correspondence relating to the case. All of the letters cited here are found in that file.

60. Letter from Charging Thunder and eight others to Secretary of War (July 30, 1884); letter from John Gibbs, Colonel, 7th Infantry to Assistant Adjutant General, Missouri Division (Oct. 10, 1884).

Eastern Indian reformers, especially the Indian Rights Association, which advocated an aggressive "law for the Indians" statute that would extend full state or territorial criminal and civil law to reservation Indians. The Major Crimes Act passed as a minor part of the Indian Appropriations Bill, with no significant debate, and in response to a "popular outcry" chiefly from powerful and vocal Indian reformers.[61]

The Senate had rejected the original 1874 bill precisely because it was inconsistent with existing notions of tribal sovereignty:

> The Indians, while their tribal relations subsist, generally maintain laws, customs, and usages of their own for the punishment of offenses. They have no knowledge of the laws of the United States, and the attempt to enforce their own ordinances might bring them in direct conflict with existing statutes and subject them to prosecution for their violation.[62]

Since the late 1870's virtually every annual report of the Secretary of the Interior and of the Commissioner of Indian Affairs had advocated the passage of a major crimes act. Interior Secretary Carl Schurz reported in his 1879 report:

> If the Indians are to be advanced in civilized habits it is essential that they be accustomed to the government of law, with the restraints it imposes and the protection it affords. To meet this necessity a bill was introduced at the last session of Congress providing . . . 2. That the laws of the respective States and Territories in which Indian reservations are located, relative to certain crimes, shall be deemed and taken to be the law in force within such reservations, and the district courts of the United States within and for the respective districts . . . shall have original jurisdiction over all such offenses committed within such reservations.[63]

61. The Indian Rights Association was founded in Philadelphia in December, 1882 by Henry Pancoast and Herbert Welsh. While there had been other Indian reform groups focusing on all kinds of humanitarian aims, the IRA believed that the Indians, themselves, were fully capable of assuming full citizenship but had been held back by protective and paternalistic practices. Thus, the full extension of law and legal rights to the Indians became a central theme in IRA work. Focusing extensively on the need for such legislation, the IRA came to have considerable success lobbying in Congress, and was a significant part of the "popular outcry" over *Crow Dog*. See PRUCHA, *supra* note 4 at 615. The best history of the IRA is W. HAGAN, THE INDIAN RIGHTS ASSOCIATION: THE HERBERT WELSH YEARS 1882-1904 (1985).

62. S. REP. No. 367, 43rd Congress, 1st Sess. 2 (1874).

63. SECRETARY OF THE INTERIOR ANN. REP. at 12-13 (1879).

The 1881 Annual Report of Schurz's successor Samuel Kirkwood, written before the killing of Spotted Tail repeated this argument, justifying it with reference to "Apache outrages":

> Further legislation is, in my judgement, necessary for the definition and punishment of crime committed on reservations whether by Indians in their dealings with each other, by Indians on white men, or by white men on Indians. A good deal of uncertainty exists on these points, which should be removed. It is also important that the liability of Indians who engage in hostile acts against the government and our people should be declared more clearly and fully. During the present year the Apaches have committed many outrages in New Mexico and Arizona . . . Are they prisoners or war criminals? Should not the liability of Indians thus engaged be clearly defined? Should not all crimes committed on reservations be clearly defined, the punishment thereof fixed, and the trial therefor provided in the United States Courts?[64]

Henry M. Teller, who succeeded Kirkwood repeated this request in the 1882 and 1883 Annual Reports. In the 1884 Annual Report, his successor L.Q.C. Lamar specifically used the *Crow Dog* case to justify the same measure:

> I again desire to call attention to the necessity for legislation for the punishment of crimes on the Indian reservations. Since my last report, the Supreme Court of the United States decided in the case of *Ex parte Crow Dog*, indicted for murder, that the district court of South Dakota was without jurisdiction, when the crime was committed on the reservation by one Indian against another. If offenses of this character cannot be tried in the courts of the United States, there is no tribunal in which the crime of murder can be punished . . . it will hardly do to leave the punishment of the crime of murder to a tribunal that exists

64. SECRETARY OF THE INTERIOR ANN. REP. 7-8 (1881). Kirkwood, in the same report also linked the destruction of Indian law with the necessity of destroying the tribal relation because it meant "communism":

> The tribal relation is a hindrance to individual progress. It means communism so interfers [sic] with the administration of both civil and criminal law among the members of the tribe, and among members of the tribe and non-members. The Indians should learn both to know the law and to administer it. They will not become law abiding citizens until they shall so learn.

Id. at 7.

> only by the consent of the Indians of the reservation. If the murder is left to be punished according to the old Indian custom, it becomes the duty of the next of kin to avenge the death of his relative or some one of his kinsmen.[65]

This account is, of course, a misstatement of Brule law—Crow Dog's case had been disposed of the day after the killing without any violence. Sioux law was fundamentally aimed at the peaceful resolution of social conflicts among the people, and not based on blood revenge, as, for example, Cherokee law was. But even this comparison oversimplifies the diversity and complexity of the laws of the Indian tribes.

This contextual sketch of the demands of the Interior Secretaries for "law for the Indians" can be seen as one important piece of a broader policy of assimilation. Yet a look at the more detailed statements in the Annual Reports of the Commissioners of Indian Affairs, takes the whole "test case" matter one step further. At the outset, one contradiction is obvious: if the interpretation of the jurisdiction of the federal courts put forth by U.S. Attorney Campbell in *Crow Dog* was so obvious, why had the BIA never persuaded any court to follow it? Moreover, in a parallel case, that of Johnson Foster, they had used exactly the same argument but could not take it to the Supreme Court because the local U.S. Attorney had taken the opposite view, that such jurisdiction did not exist, and had refused to prosecute the case. The Attorney General of the United States had sustained that view, refusing to undergo the expense of prosecution when the jurisdiction of the United States court was "so doubtful."[66]

The Johnson Foster case, like *Crow Dog*, was ideal as a test case, although for different reasons. While *Crow Dog* had the rare quality of involving an important chief under government protection, the Foster case represented an Indian killing that led to a legal atrocity by the standards of American law: because of jurisdictional complexities *no* court had jurisdiction over a cold-blooded murder. Robert Poisal, an enrolled Arapaho, had, with his sister-in-law, journeyed across the Indian Territory to enroll

65. SECRETARY OF THE INTERIOR ANN. REP. at 9 (1884). *See also* SECRETARY OF THE INTERIOR ANN. REP. (1882) at 8; SECRETARY OF THE INTERIOR ANN. REP. at xiii (1883).

66. Letter from J.R. Hallowell, U.S. District Attorney, Topeka, Kansas, to S.F. Phillips, Acting U.S. Attorney General (Aug. 14, 1883). All of the correspondence between the Department of Justice and the Department of the Interior concerning *Johnson Foster* is contained in S. Doc. No. 105, 48th Congress, 1st session (1884).

their children in a government school. As they returned, while passing through a wooded area on the Potawatomi reservation, Johnson Foster, a Creek, appeared standing silently by a tree. Without saying a word Foster fired a shot, instantly killing Poisal. His sister-in-law seized the reins and escaped.[67]

Because both parties were Indians, and the crime occurred in the Indian Territory, there was no federal jurisdiction, and the matter was solely within the jurisdiction of the Potawatomi tribe. But the Potawatomis, while having a set of legal traditions governing behavior within the tribe, had no legal apparatus capable of arresting or punishing an outsider for a serious crime. The Arapahos were outraged and threatened extra-legal action, but no tribe had any kind of "extra-territorial" jurisdiction over citizens of another tribe and therefore Foster was beyond their reach. The BIA had proceeded exactly as in *Crow Dog*, relying on the same statutory grounds (except that the same "bad man" language was part of a different treaty). The agency induced the Attorney General to instruct the U.S. Attorney for the Western District of Arkansas to arrange for Foster's trial. The local U.S. Attorney's doubt about the case testifies to the broad "test case" function of *Crow Dog*. However specious the argument, it was the spectacular nature of the killing of a friendly chief that was ultimately to move Congress, not the quality of the BIA's legal argument, which was specifically rejected in an ordinary murder case. Yet, in the 1883 BIA Annual Report, written while the *Crow Dog* case was on appeal, but not yet decided by the United States Supreme Court, it was the Foster case which was used as an example of the kind of legal atrocity that could arise under the existing state of white criminal jurisdiction over the Indian tribes, and not the *Crow Dog* case.[68]

The Foster case was not the only attempt of the BIA to extend American law to reservation Indians at this time. In two parallel

67. Letter from John Miles, Indian Agent, Cheyenne and Arapahoe Agency to Henry Price, Commissioner of Indian Affairs (Sept. 20, 1882) (in S. Doc. No. 105, 48th Congress, 1st session (1884)).

68. COMMISSIONER OF INDIAN AFFAIRS ANN. REP. at x-xv (1883). The Commissioner's Report on the *Johnson Foster* case ran to three full pages of small print—more attention in the BIA Annual Report than *Crow Dog* ever received, again, tending to show that the BIA was primarily seeking to advance a publicity-changed example of the freeing of some Indian murderer to move Congress. Johnson Foster took three pages because it was an insignificant case of a killing during a robbery, hence a hard case to move Congress on. *Crow Dog*, in which a chief allied with the government was killed, was made to order to generate reaction without substantial effort.

cases, the BIA had actively sought to have killings between reservation Indians tried in state courts. Spanish Jim, a Shoshone of a band that had never given up its ancestral homeland and moved to a reservation, killed a Shoshone woman in the vicinity of Belmont, in central Nevada. He was arrested, lodged in the county jail, and arraigned in front of a local judge. The state judge held that Nevada had no jurisdiction and ordered Spanish Jim released. The state's attorney, joined by the United States Attorney in Reno (with the legal responsibility of defending Spanish Jim's rights against state encroachment), appealed to the Nevada Supreme Court, arguing that Nevada had criminal jurisdiction over its Indian tribes, whether on or off reservation. The Nevada Supreme Court rejected their argument, holding that states had no jurisdiction over tribal Indians, not on tribal sovereignty grounds, but deferring to federal authority in Indian affairs.[69] The decision of the U.S. Attorney to go into state court to attack tribal sovereignty was made at the behest of Henry Price, Commissioner of Indian Affairs. Indian Agent John Mayhugh of the Duck Valley Reservation had written Washington for instructions in an earlier Nevada Shoshone killing, that of the wife of Chic-a-chops by Yen-decker near Elko in the summer of 1882. Mayhugh was "instructed" in a letter of July 27 to turn the case over to the "proper legal authorities of the county."[70]

Exactly the same process occurred in two killings on reservations of Oregon at the same time. In the fall of 1882 Kane Kelsey, and two other Siletz Indians, complained to the Secretary of War that they had been held for two years as prisoners in Fort Vancouver without trial and without charges being preferred against them. The Secretary of War asked the Commissioner of Indian Affairs for an investigation, questioning his own legal authority to hold

69. State v. McKenney, 18 Nev. 182 (1883). The collusion of the U.S. Attorney can be seen in the printed brief of the Attorney General of Nevada: "Relator's Points and Authorities" found in the original case file, held in the Nevada State Archives, Carson City. An account of the actual killing (including Spanish Jim's escape from jail) is in the Belmont, Nevada, *Courier*, Mar. 17, 1883; Mar. 24, 1883; Apr. 7, 1883; May 12, 1883; Sept. 8, 1883.

70. Letter from Henry Price, Commissioner of Indian Affairs, to John Mayhugh, Indian Agent at Duck Lake Reservation (Sept. 29, 1882); letter from Price to Mayhugh (Nov. 13, 1882) (both on file in vol. 37 of the "Letters Sent, Civilization Division" files of the BIA held in the National Archives). The Yan-decker (also spelled Yendecker) case is referred to in both letters. There are no county court records of the Yan-decker case, so it is not clear that Mayhugh followed Price's instructions.

the three. The Commissioner reported that the three had killed a witch doctor in July of 1880, and urged that the Army hold them until the state took jurisdiction. A lengthy series of letters to Agent E.A. Swan urged the agent to turn the three Indians over to the state for trial. Swan eventually did so, based on an unrelated case arising in the meantime in which Oregon had taken such jurisdiction. In March 1883 Tom Gilbert, a Grand Ronde Indian, was convicted in state court and sentenced to hang for the murder of Wapato Dave and his wife, two other Grand Ronde Indians, a crime committed on the reservation.[71] This BIA willingness to turn reservation Indians over to the states for trial reflects both the influence of the "law for the Indian" reformers, as well as the fact that the doctrine of tribal sovereignty was virtually non-existent in state courts.

But these examples of "legal atrocities", of Indians going unpunished for murder because of the savage character of tribal society, also had an opposite argument. Bishop H. Hare, an Episcopal missionary, had made an argument for the importance of extending American criminal law over the Indian tribes that also implicitly recognized the force of tribal law by reverse argument—because traditional law was being destroyed, the tribes were becoming disorderly:

> Civilization has loosened, in some places broken, the bonds which regulate and hold together Indian society in its wild state, and has failed to give the people law and officers of justice in their polace. This evil continues unabated. Women are brutally beaten and outraged; men are murdered in cold blood; the Indians who are friendly to schools and churches are intimidated and preyed upon by the evil-disposed; children are molested on their way to school, and schools are dispersed by bands of vagabonds; but there is no redress. It is a disgrace to our land. It should make every man who sits in the national halls of legislation blush. And, wish well to the Indians as we may, and do for them what we will, the efforts of civil agents, teachers, and missionaries are like the struggles of drowning men weighted

71. The Kane Kelsey case is the subject of eight letters and telegrams from BIA Commissioner Henry Price to various military and BIA officials. These are found in vol. 37 & 39 of the "Letters Sent, Civilization Division" files of the BIA, held in the National Archives, Washington, D.C. Oct. 4, 1882; Oct. 13, 1882; Oct. 19, 1882 (two letters); Mar. 14, 1883; Apr. 14, 1883. Oregon county court records do not record the ultimate disposition of either the Kelsey case or the one involving Gilbert.

> with lead, as long as by the absence of law Indian society is left without a base.[72]

This language, quoted as part of a later BIA commissioner's strong 1883 plea for such legislation, illustrates the relationship between the extension of criminal law to the Indians, and the broad assimilationist goals of the Indian service: the work of teachers and missionaries needed to be protected by the criminal law.

In this context, the Major Crimes Act of 1885 is not difficult to understand. While it was a clear departure from existing practice, it was consistent with the whole general trend of Indian policy, the move from a policy based on treaty rights recognizing Indian sovereignty to one of dependency and forced assimilation. A whole line of introduced legislation, and BIA administrative policy, going back ten years had laid a foundation for the Act. This does not mean that the particulars of the *Crow Dog* case were irrelevant. Rather, the facts of the case were tailor-made to prod Congress to action. *Crow Dog* represented the personification of the "bad" Indians that undermined Bureau of Indian Affairs' authority, attempting to lead their followers off the reservation and back to war, and in the process, gunning down a friendly chief who was well-known in Washington, and who had more or less supported BIA policy in spite of his dislike of the Carlisle Indian School. Given the instability of reservation life in the fact of BIA-introduced "factionalism", the Major Crimes Act was minimally required to protect BIA control.

All who have written on the Act have expressed amazement at the ease with which such a departure from existing policy passed through Congress, as an afterthrough on the Indian Appropriations bill. The discussion of the Act fills less than five pages of the Congressional Record, and those pages are largely filled with confusion over language. A discussion over a federal law prohibiting the sale of liquor to Indians going on in the same Congress received far more detailed discussion. This lack of attention testifies that while the Major Crimes Act may have been a sharp departure from existing Indian law, it was completely consistent with existing Indian policy.[73]

The discussion in Congress cannot even be called a debate. Judging from the measure's initial presentation by Congressman Cutcheon

72. COMMISSIONER OF INDIAN AFFAIRS ANN. REP. at xi (1883).
73. 16 CONG. REC. 934-36 (1885).

of Michigan of the Indian Affairs Committee, the bill was presented with a reasoning directly parallel to the BIA, borrowing language directly from the Commissioner's 1884 Annual Report:

> I believe it is not necessary for me to say that this amendment is in the direction of the thought of all who desire the advancement and civilization of the Indian tribes. It is recommended very strongly by the Secretary of the Interior in his annual report. I believe we all feel that an Indian, when he commits a crime, should be recognized as a criminal, and so treated under the laws of the land. I do not believe we shall ever succeed in civilizing the Indian race until we teach them regard to the law, but amenable to its penalties.
>
> We all remember the case of Crow Dog, who committed the murder of the celebrated chief Spotted Tail. He was arrested, tried by a Federal tribunal, and convicted of the murder, but the case being taken to the Supreme Court of the United States upon habeas corpus, it was there decided that the United States courts had no jurisdiction in any case where one reservation Indian committed a crime upon another. Thus Crow Dog went free. He returned to his reservation, feeling, as the Commissioner says, a great deal more important than any of the chiefs of his tribe. The result was that another murder grew out of that—a murder committed by Spotted Tail, Jr., upon White Thunder. And so these things must go on unless we adopt proper legislation on the subject.
>
> It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment. Under our present law there is no penalty that can be inflicted except according to the custom of the tribe, which is simply that the "blood avenger"—that is, the next of kin of the person murdered—shall pursue the one who has been guilty of the crime and commit a new murder upon him.[74]

The only trace of "outrage" or "popular pressure" in Cutcheon's statement is in language he borrowed from the BIA, language common to Indian Rights Association reformers as well. Cutcheon further undermines the "popular pressure" argument

74. *Id.* at 934. COMMISSIONER OF INDIAN AFFAIRS ANN. REP. (1884) at xiv-xv.

by apologizing for adding the measure onto the appropriations bill, acknowledging that it could not pass any other way, a direct acknowledgement of a low level of concern about the issue, especially in the Senate.[75]

Congressman Budd objected to including assault among the offenses, and it was agreed to omit the crime because the courts of Indian offenses were adequate for such crimes. Some members wanted to generally extend federal criminal law to include all crimes even including misdemeanors. Others were concerned about whether the law should be extended to include the tribes within the Indian Territory. The closest the matter came to policy debate is in the exchange which follows, which shows that Congress was at least aware of the threat of the bill to traditional Indian policy, if not Indian sovereignty:

> Mr. Hiscock: I would like to inquire of the gentleman from Michigan if he believes that all of these Indian tribes are in such a condition of civilization as that they should be put under the criminal law?
>
> Mr. Cutcheon: I think if they are not in that condition they will be civilized a great deal sooner by being put under such laws and taught to regard life and the personal property of others.
>
> Mr. Budd: This provision is as much for the benefit of the Indians as it is for the whites; because now, as there is no law to punish for Indian depredations, the bordermen take the law into their own hands, which would not be the case if such provision as this was enacted into law.
>
> Mr. Hiscock: That may all be true; but when we bring in a bill here year after year appropriating many millions of dollars to support and care for these Indians, and treat them as irresponsible persons, it seems to me that policy is not in the line of the policy indicated by this amendment, which proposes to extend to them the harsh provisions of the criminal law.
>
> Mr. Budd: We would like to change the policy of the Government in that respect.
>
> Mr. Hiscock: Then you had better defeat the present bill.

75. *Id.* at 934.

Mr. Budd: We can do it in the way we propose here without defeating the bill.

Mr. Cutcheon: We want to change the law a little in the direction of law and order.

Mr. Ryan: And civilization.

Mr. Cutcheon: Yes, and civilization.[76]

Budd was clearly mistaken about the current state of Indian law in his remarks about the need for the Major Crimes Act because of "Indian depredations", which were clearly under the scope of the "bad Indian" extradition clauses which had been a feature of virtually all treaties. Apparently Budd was also unaware that the Major Crimes Act applied only to crimes committed between Indians while actually on a reservation. He was not the only Congressman mistaken about the law.

Later Congressman Warner of Ohio asked whether the proposed amendment "conflicts with any treaty stipulations?" Incredibly, Congressman Cutcheon replied, "Not that I am aware of." Warner responded, perhaps sarcastically: "I think that ought to be known positively." Congressmen Ellis and Holman mutually apologized for "an infirmity of temper" and "improper language" in the debate, and withdrew now unknown language from the Congressional record. The discussion then turned to financial matters. The whole appropriations bill passed on a vote of 240 to 7, with 77 members (including Hiscock) not voting. The Senate, after even less discussion, passed a slightly narrower version of the Act. The two versions were reconciled in conference, and the Act became law on June 30, 1885.[77]

The Indian reformers, through the Indian Rights Association, had wanted a far broader law, which would eventually remove all racial distinction in the law and making Indians subject to the same law as Whites. This position, made famous in the "law for the Indians" writing of Harvard Professor James Thayer, followed the passage of the Major Crimes Act and was not part of the agitation for it. Thayer's position would have reduced the centrality of the BIA in its effective control over the Indian tribes through its protectionist and paternalistic policies, and had no support in Congress during the 1885 debate. The BIA was pleased

76. *Id.* at 936.
77. *Id.*

with the outcome, but argued that it would have no impact unless Congress appropriated funds to reimburse localities for the expense of bringing criminal actions under the law. This is further testimony that undermines the logic of the "popular outcry" motivation for the passage of the "Major Crimes Act": white officials near reservations were simply not interested in bringing actions under the new law.[78]

Brule Law: The Law of the Court Failed to See

Neither Justice Matthews' decision in *Crow Dog*, nor any debate in Congress over the Major Crimes Act, was in any way informed by knowledge of Brule Sioux law. While the Supreme Court was clearly informed of the fact that Crow Dog's case had been processed under the traditional laws of the tribe, nothing in the court's decision indicated anything but the most superficial understanding of that law, casting it in classic legal imperialist terms as primitive and eventually bound to give way to the superior force of civilization.[79] This ranks as a great watershed in American law, a missed opportunity to have incorporated something of the theory and substance of Indian law into American law, creating a pluralistic legal order.

We now know that the Plains Indians maintained a complex and intricate system of laws. The eighteen Plains Indian tribes, separated by ten languages, developed a remarkably homogeneous system of laws, very similar from tribe to tribe, although still distinct.[80] While our current knowledge of these legal systems is as extensive as any of the Indian tribes, it is still sketchy, and inadequate.[81] Full scale studies of the Cheyenne, Kiowa, and Comanche exist, based on detailed interviews with elderly informants in the 1930's.[82] No such studies were done by any of the Sioux peoples and that represents a tragic loss.

78. COMM. OF INDIAN AFFAIRS, ANN. REP. (1886).

79. *Crow Dog*, 109 U.S. 556 at 569-71.

80. There are a number of summaries of plains Indian culture. *See* Wissler, *Indians of the Plains* in AMERICAN MUSEUM OF NATURAL HISTORY, HANDBOOK (1927).

81. J. Provinse, The Underlying Sanctions of Plains Indian Cultures: An Approach to the Study of Primitive Law 29 (1934) (Ph.D. dissertation, University of Chicago). Provinse found that of the plains tribes only five had sufficient ethnographic data for a study of their legal orders: Dakota Sioux, Crow, Blackfoot, Assinboine, and Omaha.

82. Hoebel, *The Political Organization and Law Ways of the Comanche Indians.* 54 MEMOIRS OF THE AM. ANTHROPOLOGICAL ASS'N (1940); E. HOEBEL & K. LLEWELLYN,

The Sioux, along with virtually all of the other Plains tribes, attracted a great deal of attention from early ethnographers during the late 19th and early 20th centuries. But the focus of these studies was on their kinship structures and ceremonial life. Much of what we know about their legal systems dates from these studies, some of the classic works in American anthropology, but which testify to the ethnocentric vision of that discipline: the political and legal structures of these people were not as important as ceremonial matters.[83]

But what we know reveals a great deal. Sioux society was primarily organized at the band level. These bands survived entirely from hunting. Hence, the very life and death of people on a month-to-month basis depended on a good hunt. The hunt also required a migratory life, so camps were moved frequently. The governmental structure was based on a chief's council, which appointed head men for each band. The head men selected two sets of police, one for war and one for hunting. They were chosen as individuals and not based on membership with societies.[84]

Below the band level, the men were organized into various warrior societies that hunted together, made raids together, and performed certain ceremonial functions. In most Plains societies, police societies with broad foundations were based in these warrior societies. Characteristic of the Plains Indians were well-developed police societies with broad based power to perform a wide range of social functions. These are not unique to the plains Indian tribes, but are found only in a few tribes off of the plains. While these specialized legal/police functions took a variety of forms, most were based on some selection of entire warrior societies. The Sioux practice of selecting individuals for police duties based on individual prowess and not by society membership built a strong measure of individualism into their police function.[85]

Most often these functions were not permanently accorded individuals, but were assigned on a seasonal or some other temporary basis. This enabled legal/police functions to be held by a large proportion of the males in a band over time. Many early

THE CHEYENNE WAY (1941); Richardson, *Law and Status Among the Kiowa Indians*, 1 MONOGRAPHS OF THE AM. ETHNOLOGICAL SOC'Y (1940).

83. Provinse, *supra* note 81 at 28. A complete list of these ethnographic studies may be found in 192-97.

84. Provinse, *supra* note 81 at 34.

85. *Id.*

ethnologists saw the necessity of the successful hunt as providing the main reason these police institutions among the Plains tribes had so much in common. Clearly, the power of these police societies during the hunt and in hunt-related events, such as the orderly migration of the villages, was virtually without precedent among American Indians. The police societies patrolled the boundaries of the hunt, with broad authority to summarily punish violators. A brash young man who might try to attack too early to gain too much glory for himself might find his possessions destroyed, his horse killed, and suffer severe beating. Rare repeat offenders were often killed—shot from behind with no ceremonial formality whatsoever.[86]

While the biological necessity of the success of the hunt might well explain such structures, anthropologist John Provinse de-emphasized the importance of the hunt, finding that these legal structures pervaded all elements of band life and were as much devoted to the resolution of ordinary disputes. The exact legal content of these interventions is not clear. For example, the police societies may simply have coerced both parties into arriving at a private settlement rather than investigating the incident and applying tribally accepted rules to decide the case.[87]

The primary value in settling these disputes differed sharply from American law. There was no concern for punishment or retribution, or with applying any abstract notions of justice or morality. The goal was the termination of the conflict and the reintegration of all persons involved into the tribal body. For the hunt and the perpetual migration to succeed, all people had to work together, and to conform to one system of rules. For instance, the classic legal solution to the problem of the bold young man who attacked too early in the hunt would be this: if he became contrite and recognized the gravity of his mistake after being beaten and seeing his property destroyed by the police, his property might be replaced from the personal property of members of the police society. The young man was obviously invaluable as an aggressive warrior and hunter and would need a horse and hunting

86. *See generally* Bailey, *Social Control on the Plains*, in W. WOOD & M. LIBERTY, ANTHROPOLOGY ON THE GREAT PLAINS (1980); Humphrey, *Police and Tribal Welfare in Plains Indian Cultures*, 33 J. CRIM. L. & CRIMINOLOGY 147 (1942); MacLeod, *Police and Punishment Among Native Americans of the Plains*, 28 J. OF CRIM. L. & CRIMINOLOGY 181 (1937).

87. Provinse, *supra* note 81 at 60-61.

property—if he could be taught to follow the rules of the hunt. Thus, while the law was clearly punitive, it was at its core designed to reintegrate erring members back into the tribe.[88]

The members of the police societies were among the most disciplined and talented of the hunters and warriors. These societies had both policing and judicial functions. Actions that were taken were most often taken on the spot, without going to the council for authority or for any form of adjudication. Hence, the police societies were delegated a broad range of legal functions that both permitted and encouraged them to act quickly and decisively to assert control over a wide variety of situations, bringing offenders quickly back within the social sphere of tribal life.[89]

The specific process that occurred in both the homicide cases of Crow Dog and of Spotted Tail Junior—a meeting of a tribal council to arrange for a peaceful reconciliation with an ordered gift of horses, blankets, money, or other property—was one of a number of available mechanisms the Sioux used. Apparently, this process was rare and occurred in the context of the most serious of tribal disturbances. The council met for the purpose of reconciling the parties involved, not to adjudicate the dispute. Hence, the result of the two cases, the offering of property to one side by the other, does not indicate any substantive resolution of the merits of the case. Crow Dog had been in no way "convicted" by a tribal council.[90]

The offering of the property was also not "blood money", a payment to relatives to atone for the killing in a substantive way, or to take the place of blood revenge. It was more an offer of reconciliation, a symbolic continuing of tribal social relations. Often, in other cases, the recipients refused to take the offered property, a position that showed the tribe both their pride and their wealth.[91]

The police societies played a complex role in this council-based process as well, doing the footwork that made the reconciliation possible. They approached both parties to negotiate willingness

88. Humphrey, *supra* note 86 at 159-60.

89. MacLeod, *supra* note 86 at 185-99.

90. Provinse, *supra* note 81 at 67. The Sioux police performed both punitive and peacemaking functions, yet kept them distinct. Punitive actions occurred when an individual failed to recognize tribal authority. The fact that Crow Dog was not "punished" but the affair settled by negotiation of the peacemakers indicates that he was acting within the boundaries of tribal norms.

91. *Id.* at 70-72.

to make a settlement, and also enforced the settlement that was ultimately reached. While most often the police societies worked independently of direct council authority, they also regularly worked as the enforcement arm of the council.[92]

This is the legal system the Sioux had a right to use to adjust their internal disputes, a right upheld by the U.S. Supreme Court. It was obviously efficiently functioning in the early 1880's. The system had effectively settled two complex murder cases in a two year period. Contrary to the belief that factionalism destroyed the ability of tribal political processes to function, opposing factions were represented in both cases, and the cases were still effectively processed; tribal cohesion was maintained. The process, however, had to have a tribally accorded legitimacy in order to survive. It depended on the maintenance of the authority of traditional structures, which could use traditional legal norms to resolve disputes between opposing factions. Thus, many tribes functioned effectively in spite of years of factional struggle.

Conclusion

Crow Dog's case is remembered in legal history as a defamed tribal sovereignty case, the kind of case that produces a strong public and official reaction to change the law so that no case such as *Crow Dog* would ever occur again. The Major Crimes Act was intended to do just that. However, as Felix Cohen points out, "the force of the decision was not weakened, although the scope of the decision was limited."[93] *Crow Dog* survives as strongly as it does perhaps in part because it was as extreme an application of the principle of tribal sovereignty as could be imagined. Also, it survived the scrutiny of the United States Supreme Court in spite of immense BIA efforts to extend their vision of American law to the Indians as one key element in the forced assimilation of the tribes. In this sense the distortion of the facts and context of the case, a distortion that began the same day the killing occurred, may well have strengthened the ultimate impact of the case — giving the court the chance to uphold the principle of tribal sovereignty on the strongest facts possible.

92. Provinse, *supra* note 81. Chapters IV and V analyze in detail the full range of interaction between the police and plains Indian society.

93. COHEN, *supra* note 2 at 125.

We can never know the full story of Crow Dog's killing of Spotted Tail. The government's "political assassination" tale, as it emerged in their prosecution case, and in the BIA version of the case, is not supported by the evidence. The BIA was in search of a test case, and the bureau in Washington had been involved in at least three other test cases in the early 1880s. The BIA settled on *Crow Dog*, which, on its facts, had all the makings of a good test case. The attack on the honor of Crow Dog was also an attack on the traditional institutions of tribal Indians. The racist distortion of Brule law as "red man's revenge" did a great injustice to American Indians and their law. In retrospect there can be no question that Brule law provided a higher measure of justice in Crow Dog's case than American justice did, or could have. The Brule law provided a justice based on restitution, the continuity of a community and a tradition, rather than a justice based on increasingly higher levels of violence.

In addition to alerting the scholar to the historical and continuing role of the BIA in shaping federal Indian law, even to the extent of totally reshaping longstanding legal principles as we have seen here, the role of lawyers in structuring nineteenth century federal Indian law calls for systematic examination. Most often tribal Indians lacked effective counsel in shaping their legal arguments, a fact that gives federal Indian law an even more one-sided quality than even racism and legal imperialism might explain. Attorney Plowman won his case, but he cannot be said to have done the most effective job he might have done. Probably the *Black Hills Daily Times* paid more attention to the complexity of Brule law than Plowman, who made virtually no effort to educate any court on Brule law, although to his credit, he raised the issue.

Whether or not the doctrine of *Crow Dog* is separated from a poorly presented and deliberately distorted version of the case facts, that doctrine survives as a key tribal sovereignty case. It upholds the principle that the tribes have inherent sovereignty and through that sovereignty the right to their own law. Although limited in scope by the Major Crimes Act, this principle has enormous power, and great potential to liberate federal Indian law from its racist and ethnocentric past. If federal Indian law begins with the principle of tribal sovereignty, Americans gain a foundation for enriching the legal tradition of the North American continent with the legal traditions of native people. These legal traditions are recognized in *Crow Dog* as the right of American Indians.