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## An Indian Cannot Get a Morsel of Pork - A Retrospective on Crow Dog, Lone Wolf, Blackbird, Tribal Sovereignty, Indian Land, and Writing Indian Legal History

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**“AN INDIAN CANNOT GET A MORSEL OF  
PORK . . . .” A RETROSPECTIVE ON *CROW DOG*,  
*LONE WOLF*, *BLACKBIRD*, TRIBAL  
SOVEREIGNTY, INDIAN LAND, AND WRITING  
INDIAN LEGAL HISTORY**

Anthony G. Gulig\* and Sidney L. Haring\*\*

I. INTRODUCTION

*Lone Wolf v. Hitchcock*,<sup>1</sup> one of the many landmark Indian law cases wrongfully decided in the United States, can be discussed on a number of levels. One place to start is with the role that the case played in depriving many Indian tribes of their lands. *Lone Wolf*'s infamous holding that Congress has “plenary power” over Indians and can dispose of Indian lands at will is a decision that, more narrowly construed, refused to apply the Fifth Amendment’s Takings Clause to protect Indian property rights.<sup>2</sup> But another place to begin is with *Lone Wolf*'s place in Indian legal history. The contemporary field of federal Indian law is explicitly historical; it is one of the few areas of the law where cases over a hundred years old are routinely cited for legal principles that govern modern cases.<sup>3</sup>

Any legal history of *Lone Wolf*, or any other major case, should not focus on the holding of the case, a holding which is now discredited, but rather on the basic place of the Indian nation in the making of American legal history and, in turn, the meaning of that legal history to the Indian nations. Indian activity brought

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\*\* Professor of Law, City University of New York School of Law. The authors met while both were researching and writing about Native American history at the University of Saskatchewan. *In re Blackbird*, 109 F. 139 (W.D. Wis. 1901), the Wisconsin case of a Bad River Chippewa, John Blackbird, came up in an early conversation and it occurred to the authors that they were probably among the very few legal historians who had worked on the obscure case, for very different reasons. On an extended research trip to northern Saskatchewan to observe the criminal trials of numerous Cree and Dené before a traveling Saskatchewan Provincial Court, the authors kept returning to the question of what the “great cases” mean in the too often impoverished lives of native people today. The authors are still probing the meaning of that case, and using it to think about the meaning of Indian legal history.

1. 187 U.S. 553 (1903).

2. *Id.*

3. Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* 13-14 (Yale U. Press 1987).

thousands of cases to American courts in the nineteenth century and even more in the twentieth century. Such cases have a significant role in defining the place of Indian nations in relation to the American state, not just doctrinally, but also politically and socially. And this place does not turn on the narrow holding of each case. Rather, the cases take on symbolic meanings, often representing complex Native American positions on particular matters at particular moments in history. Some cases, like *Lone Wolf*, are carefully thought out and move forward in a deliberate way. Others, especially criminal cases, are more defensive, pursued by Indians hoping to avoid the death penalty or prison sentences, which too were often a death penalty for Indians in the nineteenth century.

What follows is our rethinking of the meaning of *Lone Wolf* as legal history through the examination of *Ex parte Crow Dog*<sup>4</sup> and *In re Blackbird*,<sup>5</sup> two very different cases in which the authors have become engaged. In *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*,<sup>6</sup> Sidney Haring brings to light American Indian sovereignty, tribal law, and United States law in the nineteenth century. While the book centers on one well-known "sovereignty case," it attempts a sweeping view of late nineteenth century cases in federal Indian law. But looking back at the book after ten years, questions arise, such as: What about the thousands of other contemporary late nineteenth century cases in Indian law? What do they mean? The broader question is: How do legal historians construct the categories of their various interpretive schemes? Particularly suspect here is the obvious problem of the "great case" approach to legal history, which suffers from the same difficulties as the "great person" (or "famous dead judges") approach to legal history. Because great cases like *Crow Dog* and *Lone Wolf* concentrate on primary source materials, they are relatively easy to write about. At the same time, these cases are landmarks in Indian legal history, and therefore they deserve close analysis. However, the focus of scholarship on a handful of major cases, which happen to become doctrinally significant, may distort our understanding of Indian legal history.

In *In Whose Interest? Government-Indian Relations in Northern Saskatchewan and Wisconsin, 1900-1940*,<sup>7</sup> Anthony Gulig takes a very different approach to legal history. Instead of focusing on any great case, the dissertation begins with the struggle of ordinary Indians going about their daily lives as the reservation era progressed, closing off their traditional ways of earning a living. This study also took a comparative approach by crossing the United States-Canadian border; however, for native people, a colonial border has no meaning in their different cultures.

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4. 109 U.S. 556 (1883).

5. 109 F. 139.

6. See Sidney L. Haring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge U. Press 1994).

7. See Anthony G. Gulig, *In Whose Interest? Government-Indian Relations in Northern Saskatchewan and Wisconsin, 1900-1940* (unpublished Ph.D. dissertation, Univ. Saskatchewan 1997) (copy on file with author).

Every Indian law case, great or unknown, begins with native people going about their ordinary daily lives in Indian communities. The final legal significance of each case is arbitrarily assigned by judges as they hand down the opinion, and by lawyers and legal scholars as they accord each new case with the legal significance they believe it deserves. At the outset, nothing in *Crow Dog*, *Lone Wolf*, *Blackbird*, or any other Indian law case determines the legal significance it will ultimately attain.<sup>8</sup> Put another way, any Indian fisherman might be the next Indian to bring an Indian sovereignty case before the United States Supreme Court. These cases are the ordinary manifestations of Indian life sovereignly lived.

## II. CROW DOG: TRIBAL LAW ON TRIBAL LAND

While the events described in prominent cases are, by their very nature, unique, powerful, and even heroic, there is an inherent distortion in any attempt to apply these themes more generally to the ordinary relationship between life and law for the half-million or so Indians living in the United States in the decades around the turn of the century. *Crow Dog*, the seminal 1883 sovereignty case decided by the Supreme Court, held unanimously, in an opinion written by Justice Stanley Matthews, that Indians had a sovereign right to their own law, in "Indian country."<sup>9</sup> Justice Matthews relied, quite easily, on the foundational "domestic dependent nations" language of Chief Justice John Marshall in *Cherokee Nation v. Georgia*,<sup>10</sup> decided almost fifty years earlier.

In *Crow Dog*, many policymakers were shocked as *Crow Dog*, a Brule Sioux who killed his chief, Spotted Tail, was held to be under the jurisdiction of Brule law and not American law, thereby vacating his Dakota Territory murder conviction and death sentence.<sup>11</sup> Under Brule law, tribal elders had already organized a ceremonial exchange of horses, blankets, and money, effectively settling the matter.<sup>12</sup> Accordingly, *Crow Dog*'s death penalty conviction was reversed and he was sent home where he lived a long life, on a far corner of the Brule reservation, proclaiming the superiority of traditional Indian ways, resisting allotment as long as he could, and denouncing the American assault on tribal life.<sup>13</sup> He had, in the view of many white Americans of the day, "gotten away with murder," and the case served as the basis for a Bureau of Indian Affairs ("BIA") assault on Indian customary law, setting the stage for the modern plenary power doctrine.<sup>14</sup>

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8. *Crow Dog*, 109 U.S. 556; *Lone Wolf*, 187 U.S. 553; *Blackbird*, 109 F. 139.

9. *Crow Dog*, 109 U.S. 556.

10. 30 U.S. 1, 16 (1831). It is impossible to determine exactly what Marshall had in mind as he constructed the legal status of Indians under the United States Constitution. See G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* (Macmillan 1988), especially chapter 10, *Natural Law and Racial Minorities: The Supreme Court's Response to Slaves and Indians*.

11. *Crow Dog*, 109 U.S. at 572.

12. Haring, *supra* n. 6, at 1.

13. *Id.* at 132-33.

14. *Id.* at 136-37.

The Indians' sovereignty in *Crow Dog*, of course, was never an issue limited to self-government or the narrow right to use their customary law. Rather, there is no sovereignty without land, and no sovereignty without Indians being able to fish and hunt, practice their religions, and enforce their own customary laws. Indeed, the underlying legal issues in the tribal conflict between Crow Dog's people and Spotted Tail's people were the growing influences of Indian agents and white politicians interfering in reservation affairs, as well as rumors of Spotted Tail's collusion with an approaching railroad.<sup>15</sup> The ultimate holding, that Brule law applied to this conflict,<sup>16</sup> meant that the Brule Sioux had the right to rely on their own legal and political traditions to resolve this conflict.

Legally, the underlying law of both *Crow Dog* and *Lone Wolf* is complex. The *Cherokee Nation* and *Crow Dog* line of sovereignty cases was undercut at the end of the nineteenth century with a line of plenary power cases beginning after *Crow Dog*. The Major Crimes Act,<sup>17</sup> *United States v. Kagama*,<sup>18</sup> and *Lone Wolf* were express declarations that Indian sovereignty is limited by the political power that the United States expresses through Congress. In *Cherokee Nation*, the Court held that Indians retained tribal sovereignty but that Congress could limit such sovereignty by the simple reality of the tribes' dependent relationship with the American state.<sup>19</sup> Bluntly, the Indian nations are sovereign unless Congress expressly and unequivocally decides to limit that sovereignty.<sup>20</sup> Under this notion, Congress can act in any way it chooses so long as its intent is clear.<sup>21</sup> Thus, Indian sovereignty, as a legal concept, is always in a tense, constant battle with American power. At the same time, just as the Supreme Court created the plenary power doctrine, it could presumably repudiate the doctrine at any time.

The concept of sovereignty implicitly includes land, because a nation can only exercise its sovereignty over some defined territory. The Supreme Court's decision in *Lone Wolf* was devastating not just because it threatened all remaining tribal lands, but because it also threatened tribal sovereignty, undercutting the whole political and cultural foundation of Indian nations—Indian cultures need room to live and grow. Indeed, among the many reasons nations possess sovereignty is their need to protect their unique cultures.<sup>22</sup>

15. *Id.* at 105-08.

16. *Crow Dog*, 109 U.S. at 407.

17. *Major Crimes Act*, 23 Stat. 385 (1885).

18. 118 U.S. 375 (1886). The Major Crimes Act of 1885 was Congress's response to the United States Supreme Court's *Crow Dog* decision. Congress explicitly took jurisdiction over "major crimes" occurring in Indian country. In *Kagama*, the United States Supreme Court upheld the Major Crimes Act on the basis that the Indian tribes were "communities dependent on the United States" and "wards of the nation," language which became the basis of a new "plenary power doctrine," which granted Congress the right to make laws governing Indians on the basis of their dependant status. *Id.* at 382-84.

19. *Cherokee Nation*, 30 U.S. at 16-17; *Lone Wolf*, 187 U.S. at 564-66.

20. The literature on the scope of the plenary power doctrine and the broader question of the scope of federal power over Indians is voluminous. See Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195 (1984).

21. See *Kagama*, 118 U.S. at 382; Felix S. Cohen's *Handbook of Federal Indian Law* 221-25 (Rennard Strickland et al. eds., Michie Co. 1982).

22. Richard A Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* 97-125 (Routledge 2000). Falk discusses the right to "self determination" in those pages, a right

### III. *LONE WOLF*: THE ATTACK ON INDIAN PROPERTY AND THE END OF THE "INDIAN TERRITORY"

*Lone Wolf* followed *Crow Dog* by twenty years, theoretically making *Crow Dog* precedent in *Lone Wolf*. *Lone Wolf* argued the proposition that the Kiowa were still sovereign and had a right to their law and, implicitly, a right to their land as well<sup>23</sup>—a good argument, but not an issue in the case. During the twenty years before these two cases, the "frontier," as Frederick Jackson Turner put it, was "closed."<sup>24</sup> These were very significant years in Native American history, for these were the years of the General Allotment Act (popularly called the "Dawes Act"),<sup>25</sup> which provided for the allotment of tribal lands to individual Indians as their private property with the excess land to be sold to whites.<sup>26</sup> The Dawes Act did not apply to all Indian Territory.<sup>27</sup> Allotment in specific areas of Indian Territory had to be secured by a special act of Congress.<sup>28</sup> The legality of such an act was the issue in *Lone Wolf*, but the underlying issue was the legality of allotment itself.<sup>29</sup> If *Lone Wolf* could sue and successfully block the allotment of his reservation, other Indians might do so as well.

At the time of *Crow Dog*, there was some discussion of admitting the Indian Territory, the home of *Lone Wolf*, to the United States as an Indian state.<sup>30</sup> By 1903, the year of the *Lone Wolf* decision, most of the Indian lands in what was then Oklahoma were, if not already alienated, well on their way into white hands.<sup>31</sup> While Indian lands were lost throughout the United States at a dizzying speed, the assault on tribal lands in Oklahoma rivaled the worst of these land thefts.<sup>32</sup> The Curtis Act<sup>33</sup> was the parallel of the Dawes Act for the Five Civilized Tribes,<sup>34</sup> and it also caused these rich Indian cultures to lose their land base because individual Indians were forced to take their allotments.<sup>35</sup>

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approximating what most Indian nations mean by "sovereignty." The confusion here comes with equating "sovereignty" with a right to "independence," which, while it may be a goal for many tribal peoples, raises extremely complex political and legal problems. *Id.*

23. Haring, *supra* n. 6, at 100-01.

24. Frederick Jackson Turner, *The Significance of the Frontier in American History, Annual Report of the American Historical Association for the Year 1893*, at 199-227 (St. Historical Socy. Wis. 1894).

25. *General Allotment Act (Dawes Severalty Act)*, 24 Stat. 388 (1887).

26. Janet A. McDonnell, *The Dispossession of the American Indian, 1887-1934*, at 7 (Ind. U. Press 1991).

27. 24 Stat. 388.

28. McDonnell, *supra* n. 26, at 7.

29. *Lone Wolf*, 187 U.S. at 568.

30. Haring, *supra* n. 6, at 60-72.

31. The Kiowa, Comanche, and Apache lands declined from 2.9 million acres before allotment to just above 3,000 acres by 1934. Blue Clark, *Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century* 95-96 (U. Neb. Press 1994). Angie Debo assesses the land loss of the "Five Civilized Tribes" alone by 1910 to be 15,794,351 acres of the previous holdings of 19,525,966 acres—about eighty percent of their land. Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* 51 (U. Okla. Press 1940).

32. See McDonnell, *supra* n. 26, at 10 ("Eighty-two percent of the allotted acreage was in Montana, South Dakota, North Dakota, Oklahoma, and New Mexico.").

33. *Curtis Act*, 30 Stat. 495 (1898).

34. The Dawes Act provided, essentially, that each Indian head of household receive 160 acres of land, each adult eighty acres, each child forty acres. After each Indian had taken up his allotment, the

Lone Wolf, a Kiowa chief, led a traditional faction (as Crow Dog did) trying to carve out an existence on his reservation that made the most of the new situation that the Plains Indians found themselves facing during the reservation era.<sup>36</sup> Lone Wolf's people were called "The Implacables" and they lived in the far north of the joint Comanche, Kiowa, and Apache reservation in southwestern Oklahoma.<sup>37</sup> Under the 1867 Treaty of Medicine Lodge Creek,<sup>38</sup> the Kiowa were guaranteed these lands forever, and after some resistance in the 1870s they successfully adapted to many reservation conditions. Lone Wolf's namesake, Lone Wolf the Elder, had been exiled in chains to Florida in 1875 for resisting military authority, raising the possibility of an Indian rebellion on the Kiowa reservation.<sup>39</sup> Lone Wolf the Elder finally returned to Oklahoma only as he was dying.<sup>40</sup>

Today, it is hard to describe the reservation life that Lone Wolf's people carved out. It is clear that they resisted the authority of the Indian agents, and that this resistance was seen as a serious problem in the years immediately after the Indian wars. The Implacables drove their horses across fenced and plowed fields, drove missionaries from the reservation, and derisively referred to the Indians who lived near the BIA agency and who collected government rations as "sugar eaters."<sup>41</sup> When the Indian agents distributed sheep in an effort to encourage farming, the Implacables shot the sheep.<sup>42</sup> At the same time, the Implacables rejected much of the BIA efforts to force assimilation, thereby making it difficult for them to make a living.<sup>43</sup> Leasing grasslands to Texas cattlemen provided, apparently, most of their income.<sup>44</sup>

In 1892, Congress, implementing the allotment process in western Oklahoma, sent three treaty commissioners to negotiate the cession of Comanche,

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rest of the land would be purchased by the United States Government and sold to white settlers. 24 Stat. 388. The breaking up of the land base of the Indian tribes represented a full assault on the tribe as a political institution, holding lands "in common." In the view of Congress, this "communism" kept Indians from assimilating into the prevailing American agricultural order. Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920*, at 147-87 (Cambridge U. Press 1989). The Indians of Oklahoma were exempt from the Dawes Act, but the policy was soon applied to them in other acts. Debo, *supra* n. 31, at 21-23.

35. Debo, *supra* n. 31. *And Still the Waters Run* is now the classic book on the history of the American assault on the "Five Civilized Tribes" of eastern and central Oklahoma. The Kiowa, Comanche, and Plains Apache reservations, at issue in *Lone Wolf*, were only indirectly part of this history because these lands were provided to the Comanche, Kiowa, and Apache by treaty, and then purchased by the United States from the Choctaws and Chickasaws. See Clark, *supra* n. 31, at 43, 53.

36. Clark, *supra* n. 31, at 2.

37. *Id.* at 20, 30.

38. *The Treaty of Medicine Lodge* (Oct. 21, 1867), 15 Stat. 581.

39. Clark, *supra* n. 31, at 27.

40. *Id.* at 27-30. Lone Wolf the Elder, Guipago, had bestowed his name on Lone Wolf, Mamay-day-te, in 1879, a traditional practice acknowledging his gratitude for the saving of his son in an earlier battle. *Id.*

41. *Id.* at 30.

42. *Id.*

43. *Id.*

44. See Clark, *supra* n. 31, at 34.

Kiowa, and Apache lands.<sup>45</sup> This action had nothing to do with the Kiowa, or with the government's frustration with Lone Wolf's people: all reservations were being allotted in a final assault on tribal existence.<sup>46</sup> The Kiowa's reservation was the last of ten visited by the Treaty Commission ("Jerome Commission").<sup>47</sup> On each of the other reservations, the Jerome Commission had successfully negotiated land cessions so that allotment could proceed.<sup>48</sup> The "unallotted" lands were sold to the United States Government and opened up to white settlement in the various "land rushes" for which Oklahoma is famous.<sup>49</sup>

The negotiations went badly, as elderly Kiowa reminded the Commissioners of the promises made at the Treaty of Medicine Lodge Creek, pointing out to the Commissioners that they were present and indicating to them that they knew they were being betrayed.<sup>50</sup> The Kiowa argued that not only was their current reservation guaranteed by the Treaty of Medicine Lodge Creek, but the small farms resulting from allotment could not support Kiowa families: nobody could make a living on 160 acres of dry southwestern Oklahoma land.<sup>51</sup> As negotiations faltered, an interpreter induced some of the Kiowa to sign various documents under false pretenses.<sup>52</sup> Others who signed apparently were not Kiowa.<sup>53</sup> If that was not enough, Commission Chairman David Jerome threatened them, stating that "Congress has full control of you, it can do as it is a mind to with you." Chairman Jerome further decreed, "Congress has determined to open this country."<sup>54</sup> But the Kiowa were not cowed: Apiatan, the nephew of Lone Wolf, denounced the deceit, cheating, and "fraud" of the Commission and Jerome

45. *Id.* at 35.

46. *See id.* at 32 (Oklahoma was seen as a new frontier for white Americans, a place of promise where they could get a piece of the land for their own).

47. *Id.* at 36.

48. *Id.*

49. Clark, *supra* n. 31, at 40-47; Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* 350-52 (U. Cal. Press 1994). Congressman Charles Curtis of Kansas, a mixed blood Kaw Indian, author of the Curtis Act, 30 Stat. 495, was a leading architect of the extension of allotment policy to the Indian Territory in Oklahoma. William E. Unrau, *Mixed Bloods and Tribal Dissolution: Charles Curtis and the Quest for Indian Identity* 108-56 (U. Kan. Press 1989). He believed that allotment was necessary to force the assimilation of the full bloods. *Id.* Ultimately, he ended up with 1,676 acres of Kaw lands awarded to him and his family through the allotment process. *Id.* at 141. Rather than have himself declared legally competent to administer these lands, he remained "incompetent" to manage his own legal affairs in the eyes of the BIA. *Id.* at 153-54. He was elected Vice-President of the United States in 1928. *Id.* at 150.

50. Clark, *supra* n. 31, at 40-43.

51. The fundamental failure of allotment policy was first determined by the simple fact that the farms were, in fact, too small to support anyone and the Kiowa, like the other tribes that objected, were completely right. Ironically, the farms were also too small to support white farmers either, creating the current crisis of abandoned farms on the Great Plains.

52. Clark, *supra* n. 31, at 46.

53. *See* 15 Stat. 581, especially articles 3 and 12. The Treaty of Medicine Lodge Creek stipulated that it could only be altered with the consent of three-fourths of the men in the tribe. *Id.* According to BIA records, of 562 male Kiowa, 456 had signed—enough to change the terms of the treaty. Prucha, *supra* n. 49, at 355. The Kiowa charged that there were more than 562 male Kiowa and that some of the signers were, in fact, white, meaning that the required signatures of three-fourths of the males were not obtained. *Id.*

54. Clark, *supra* n. 31, at 47; Jerome was clearly relying on *Kagama*.



responded, stating, "I will not be talked to that way," threatening the Kiowa leaders with jail.<sup>55</sup>

Jerome and his Commission returned to Washington where concerns about the fraudulent process he had used to negotiate the Kiowa land cession delayed Congress' allotment of Kiowa lands for eight years.<sup>56</sup> However, in 1900, Congress proceeded with this allotment.<sup>57</sup>

In a sense, the legal problems created by the hasty opening of lands in the Indian territory to white settlement may have been the beginning of Indian law as a distinct field of legal expertise. The specialized field of Indian law began in Oklahoma (and in nearby Kansas and Nebraska).<sup>58</sup> The first Indian law treatise<sup>59</sup> was designed to provide lawyers with highly specialized information that was needed to quiet "Indian title" in the complex land transactions that followed from the post-allotment disorder of hasty federal land sales and as poverty-stricken Indians sold their own allotments to white settlers. These dubious sales challenged the expertise of local lawyers. Angie Debo describes the process as one of wholesale theft, as lawyers and land sharks forged the signatures of absent, semi-literate, and illiterate Indians on thousands of deeds.<sup>60</sup> By the 1920s, millions of acres of Indian land in Oklahoma, including the land taken under *Lone Wolf*, was in white hands.<sup>61</sup> During this time, Oklahoma was also in the midst of an oil boom, making fortunes for thousands of people.

While *Lone Wolf* was an Oklahoma case, nothing in its holding was limited to Oklahoma. Indian lands all over the United States, following the holding of *Lone Wolf*, could be alienated by an act of Congress without compensation—and they were. Some Indian reservations were diminished by as much as ninety percent or more.<sup>62</sup> The process was so pervasive that it is impossible to say where the "high water mark" was, but perhaps it was in the 1953 case of *Tee-Hit-Ton Indians v. United States*.<sup>63</sup> In that case, an Alaska Tlingit village tried to stop the United States Government from clear-cutting their timber, and the United States Supreme Court, standing squarely on *Lone Wolf*, held that the government could dispose of Tlingit timber as it saw fit under the plenary power doctrine.<sup>64</sup> While the doctrine that the government can take Indian lands at will without compensation and without recourse to the Fifth Amendment's Takings Clause has apparently been at least partially repudiated, the plenary power doctrine is not

55. *Id.* at 47. Apiatan is also known as Wooden Lance. *Id.* at 46.

56. *Id.* at 50.

57. *Id.* at 52-54.

58. Haring, *supra* n. 6, at 6-7.

59. Samuel Thomas Bledsoe, *Indian Land Laws* (Pipes-Reed Co. 1909), is the first treatise on Indian law published in the United States. A 1913 edition was also printed. Lawrence B. Mills, *Oklahoma Indian Land Laws* (Thomas L. Book Co. 1924) (following Bledsoe).

60. See Debo, *supra* n. 31, at 92-125, especially chapter IV, *The Grafters' Share*, where the extent of the graft common in Oklahoma is explained.

61. *Id.* at 51.

62. McDonnell, *supra* n. 26, at 8; Clark, *supra* n. 31, at 95.

63. 348 U.S. 272 (1955).

64. *Id.*

only alive and well, but is also strong.<sup>65</sup> As long as the plenary power doctrine is strong, Indian lands are still subject to disposition by Congress under conditions that are not easy to define.<sup>66</sup>

*Lone Wolf*, like *Crow Dog*, was also an assault on tribal sovereignty. The underlying issue in *Lone Wolf* was the Kiowa nation's land rights under the Treaty of Medicine Lodge Creek.<sup>67</sup> Treaties, as agreements between nations, cannot be unilaterally altered. Therefore, under treaty law, if the Jerome Commission or the United States Government violated Kiowa treaty rights, the seizure of Kiowa lands would be illegal. But the Supreme Court held that treaty rights were also subject to the plenary power doctrine, so Congress could abrogate them at will.<sup>68</sup> For example, it did not matter whether or not three-fourths of the males had actually signed the Treaty of Medicine Lodge, as the document required, because Congress abrogated the treaty when it allotted Kiowa lands. The treaty process implicitly recognized tribal sovereignty—but Congress unilaterally abrogated it.<sup>69</sup>

Indian land alienation occurred in two distinct processes. First, the tribal lands not allotted to Indians could immediately be sold to white settlers by the United States Government on any terms it chose.<sup>70</sup> These are the familiar land lotteries and land rushes, also processes fraught with legal problems. Second, the lands that were actually allotted to Indians could also be sold by their Indian owners after a period of time, usually twenty-five years, in the free market—a license for graft and corruption and theft of Indian lands.<sup>71</sup> This was the logic of the agrarian myth, the Indian as yeoman farmer, who could own his lands in fee simple and have the same right to dispose of his land as the white farmers.<sup>72</sup> Much of this allotted land was sold to whites by the 1920s and 1930s, often with forged deeds as illiterate Indians sold off lands, including rich oil lands, by an X-mark made by a lawyer or land speculator.<sup>73</sup>

The *Lone Wolf* decision, while it came to the opposite result of *Crow Dog*, is no less anticlimactic. Legally, the decision simply rested on *Kagama* and the plenary power doctrine.<sup>74</sup> In spite of the United States Constitution's strong protection of property rights, the Court held that Indian lands were not protected by the Takings Clause of the Fifth Amendment because of Congress' plenary

65. Newton, *supra* n. 20, at 228-36.

66. *Id.*; Clark, *supra* n. 31, at 107-11. It is beyond the scope of this essay to conclude what the current doctrinal meaning of *Lone Wolf* actually might be, but Clark's conclusion is a good starting point.

67. *Lone Wolf*, 187 U.S. at 558-59.

68. *Id.* at 566-67.

69. Prucha, *supra* n. 49, at 350-58.

70. See generally Hoxie, *supra* n. 34.

71. *Id.* Once title to land allotted to Indians passed into fee simple, no further involvement from the BIA, local Indian agent, or other government official was required for the land to be sold to non-Indians. *Id.*

72. It is important to see that the allotment process occurred in these stages, meaning that Indian lands were being lost through the 1920s and 1930s from the residual effects of the original allotment. McDonnell, *supra* n. 26, at 7; see generally Prucha, *supra* n. 49.

73. See *supra* n. 60.

74. Clark, *supra* n. 31, at 73.

power over the Indian tribes.<sup>75</sup> The disposal of Indian lands was a political question, a policy choice that Congress could exercise as it saw fit. It opened up a land rush for Kiowa lands: there were already over 100,000 settlers waiting near Anadarko for their chance at Indian lands.<sup>76</sup> This was not the first land rush in Oklahoma, nor was it the last.<sup>77</sup> By 1907, Oklahoma was a state and most Indian lands were in white hands.<sup>78</sup> In 1900, the United States took title to 2,991,933 acres of Indian land on the Kiowa, Comanche, and Plains Apache reservation.<sup>79</sup> In addition, 445,000 acres were immediately allotted in severalty; 480,000 acres were initially set aside as common tribal grazing lands, but 100,000 acres of these lands were later allotted.<sup>80</sup> Other lands were set aside for government usage but 2,033,583 acres were purchased by the federal government for just over ninety-three cents an acre—about \$2,000,000—and then sold to white settlers.<sup>81</sup> Two-thirds of these Indian lands, over 2,000,000 acres, were immediately lost.<sup>82</sup> Moreover, other lands were also sold or otherwise alienated over succeeding years.<sup>83</sup>

But this is only the beginning of the succeeding history of the loss of Indian lands. The chaos and corruption of the allotment process and the practical result of the Supreme Court's simple holding that Congress could dispose of Indian lands at will cannot be exaggerated. The federal government was neither prepared nor had the political will to effectively control the allotment process in order to protect tribal lands. Incompetence and corruption were all too common. Indeed, a good part of the continuing litigation over the failure of the BIA to account for billions of dollars it holds "in trust" for both individual Indians and the Indian tribes stems from the failure of the allotment process.<sup>84</sup> The *Lone Wolf* opinion, like other Supreme Court opinions, is completely divorced from the immense human injury that follows from bad law.

#### IV. *BLACKBIRD*: INDIANS, LAW, AND MAKING A LIVING IN THE NORTHWOODS

Indian lands were not simply important as property, but they were places where Indians could live. Following from the tribes as sovereign nations, Indian land was a place for Indians to exist as Indians, to carry on their lives in ways consistent with their own unique cultures. While *Crow Dog* was about

75. *Lone Wolf*, 187 U.S. at 565-67; U.S. Const. amend. V.

76. See Clark, *supra* n. 31, at 66. In all, 165,000 people registered for 12,500 parcels. *Id.* The Chicago and Rock Island Railroad had built a special spur line to Fort Sill in July 1902 to accommodate the rush. *Id.* The railroad took in \$2 million in ticket sales. *Id.*

77. *Id.* at 89-94 (cites other Oklahoma land openings).

78. See generally Debo, *supra* n. 31 (detailing the history of the making of the state of Oklahoma from formerly Indian lands).

79. Clark, *supra* n. 31, at 54.

80. *Id.*

81. *Id.*

82. *Id.*

83. Several additional sales of lands, nearly 400,000 acres of predominantly pasture lands, held by the Kiowa, Comanche, and Apache followed in 1906 and 1907. *Id.* at 89-94.

84. *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R. Rpt. 102-499 (Apr. 22, 1992) (available in 1992 WL 83494).

sovereignty and *Lone Wolf* was about land, it is important to remember that both cases arose from Indian people carrying on their ordinary lives. It may be that the best window into these ordinary Indian lives in the early twentieth century is the thousands of hunting and fishing cases that can be found in the archives, cases that never became as important and well-known as *Crow Dog* or *Lone Wolf*.

In 1901, John Blackbird, a Wisconsin Chippewa, was an inmate of the Ashland County Jail, serving thirty days for netting suckers without a license on the Bear Trap Creek within the boundaries of the Bad River reservation.<sup>85</sup> Blackbird had fished the same spot for years and probably had a cultural right to his fishing grounds.<sup>86</sup> His netting operation was simple: he left a seine strung across the river during the spawning run in the spring.<sup>87</sup> Each night, he returned to the seine and removed that day's catch.<sup>88</sup> Bert McLaughlin, a state fish and game warden, discovered the nets and went looking for their owner.<sup>89</sup> Finding Blackbird in Odanah, an Indian community on the reservation, he asked him about the nets.<sup>90</sup> Blackbird readily admitted ownership.<sup>91</sup> It was a traditional Chippewa fishing place and Blackbird had no reason to deny his traditional fishing activity.<sup>92</sup> He was soon tried in the Ashland County Court, probably without a lawyer, and fined \$36.75, including court costs.<sup>93</sup> He went to jail for thirty days at hard labor in default of the fine.<sup>94</sup> To local whites, Blackbird's fishing methods were "unsportsman-like," depleting Wisconsin's natural resources.<sup>95</sup> But

85. *Blackbird*, 109 F. at 140.

86. Wisconsin's Chippewa ceded a vast portion of northern Wisconsin in two treaties (one in 1837 and the other in 1842). More than a decade later, in 1854, reservations were established as part of a treaty that ceded territory in Minnesota (*see infra* n. 107). *See generally Treaty with the Chippewa, 1837* (June 15, 1838), 7 Stat. 536, especially article 5; *Treaty with the Chippewa, 1842* (Mar. 23, 1843), 7 Stat. 591, especially article 2; *Treaty with the Chippewa, 1854* (Sept. 30, 1854), 10 Stat. 1109, especially article 2.

87. *Blackbird Arrested*, Ashland Daily Press (Ashland, Wis.) 1 (Apr. 23, 1901); *Blackbird*, 109 F. at 140.

88. This was a fairly standard and efficient means of fishing in the spring when the red horse, or suckers, were running in the streams on their way to their spawning areas. Judge Bunn notes this in his decision. *See Blackbird*, 109 F. at 145. The location of Bear Trap Creek was convenient for Blackbird. Bear Trap Creek meanders northwest from the border of Bayfield and Ashland counties, entering the Bad River reservation four miles south of Lake Superior and just over three miles southwest of Ashland, Wisconsin. *See generally* Edmund Jefferson Danziger, Jr., *The Chippewas of Lake Superior* 91-109 (U. Okla. Press 1979); Frances Densmore, *Chippewa Customs* 128-30 (GPO 1929).

89. *Blackbird*, 109 F. at 140.

90. *Blackbird Arrested*, *supra* n. 87; *Blackbird*, 109 F. at 140.

91. *Blackbird Arrested*, *supra* n. 87. Blackbird, knowing he was fishing within the boundaries of the Bad River reservation, had no reason whatsoever to deny the nets were his. To deny ownership was to surely lose them and the nets were valuable property, and costly to replace. There is nothing in the limited information about the case to suggest that the facts of Blackbird's fishing operation were in question.

92. Bear Trap Creek is part of the myriad streams and waterways that flow through the Bad River reservation into Lake Superior. The confluence of these waterways forms the fish and game-rich Kakagan Sloughs. Danziger, *supra* n. 88, at 91.

93. *Blackbird*, 109 F. at 140.

94. Gulig, *supra* n. 7, at 96-97.

95. Indian hunting and fishing methods were commonly seen as unsportsman-like by non-Indians. Indians, after all, were hunting and fishing for food, not sport. *See generally* Robert H. Keller & Michael F. Turek, *American Indians and National Parks* 3-17 (U. Ariz. Press 1998); Gulig, *supra* n. 7, at

Blackbird was not a sportsman—he was collecting food through the most efficient method. The jail sentence, while harsh, would teach Indian fishermen a lesson, forcing them to cease their traditional fishing practices.

Ordinarily, this would have been the end of the case but for considerations of federalism. United States Attorneys William G. Wheeler and Henry T. Sheldon had a duty to protect Indians from state incursions against their federally protected rights.<sup>96</sup> They appealed Blackbird's conviction and were opposed by E.R. Hicks, the Attorney General of Wisconsin.<sup>97</sup> The case reached the desk of Federal District Judge Romanzo Bunn, sitting 250 miles south of Madison, on a writ of habeas corpus.<sup>98</sup> There was no reason to appeal to the Wisconsin Supreme Court; it would easily have upheld the conviction, asserting state sovereignty.

In a long statement about the miserable poverty of Wisconsin's Indians, Bunn concluded, in perhaps a tongue-in-cheek criticism of state Indian policy, that "neither the state nor [C]ongress ever meditated any such cruelty" and released Blackbird.<sup>99</sup> The text of his opinion is a remarkable document in legal realism. The Bad River Chippewa were hungry, forced from their expansive hunting and fishing grounds back to a reservation that was probably devoid of game by the end of the nineteenth century.<sup>100</sup> Northern Wisconsin had been rapaciously logged, "cut-over" in the language of the day.<sup>101</sup> Every stick of commercial timber had been cut and sold, and by 1920 the despoiled lands were left behind as the same timber companies moved on to the Northwest.<sup>102</sup> The Chippewa, a nation of great hunters and fishermen, were left on their reserves, impoverished, with little local resources to sustain their traditional cultures.<sup>103</sup> The Bad River reservation, a product of the 1854 treaty negotiated at La Pointe ("La Pointe Treaty"),<sup>104</sup> Wisconsin, originally included nearly 125,000 acres along the south shore of Chequamegon Bay on Lake Superior. Wisconsin's Chippewas, landless after the 1837 and 1842 treaties, had survived a particularly cunning removal scheme and ultimately acquired four of the six current reservations in Wisconsin as part of a

133-171; Louis S. Warren, *The Hunter's Game: Poachers and Conversationalists in Twentieth-Century America* (Yale U. Press 1997).

96. *Blackbird*, 109 F. at 140.

97. Gulig, *supra* n. 7, at 98.

98. *Id.*; *Blackbird*, 109 F. 139.

99. *Blackbird*, 109 F. at 145.

100. See generally Danziger, *supra* n. 88; Harold Hickerson, *The Chippewa and Their Neighbors: A Study in Ethnohistory* (Holt, Rinehart & Winston 1970); Ronald N. Satz, *Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspective* (Wis. Acad. of Sci. Arts & Letters 1991).

101. See generally Robert Gough, *Farming the Cutover: A Social History of Northern Wisconsin, 1900-1940* (U. Kan. Press 1997); Robert C. Nesbit, *Wisconsin: A History* 459 (U. Wis. Press 1973).

102. This is, of course, the same territory covered by the great legal historian James Willard Hurst in his seminal *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Harv. U. Press 1964). Hurst, because he was not writing that legal history, left the Chippewa out of his work. Sidney L. Haring and Barry R. Strutt, *Lumber, Law and Social Change: The Legal History of Willard Hurst*, 1985 Am. Bar Found. Research J. 123.

103. Satz, *supra* n. 100, at 83-90; *Blackbird*, 109 F. at 145; Danziger, *supra* n. 88, at 91-133.

104. 10 Stat. 1109.

complex deal struck in the La Pointe Treaty.<sup>105</sup> But the La Pointe Treaty, negotiated more than thirty years before the Dawes Act, also included provisions for providing lands in severalty to the Chippewas.<sup>106</sup>

In 1901, two months before Blackbird was arrested, the Bad River reservation was officially brought under the Dawes Act, and up to eighty acres were carved out of the reservation land base for each adult who had not already received an allotment under the provisions of the La Pointe Treaty.<sup>107</sup> While the Bad River reservation did have the best available farmland, albeit limited, of the four reservations resulting from the La Pointe Treaty, and even though the BIA repeatedly and continuously sought to make the Bad River Chippewas agriculturalists, farming in the region was a dubious proposition at best.<sup>108</sup> On the business of allotment, or at least farming, Blackbird (like hundreds of others), who had received an eighty-acre allotment in 1899, voted with his feet or, more appropriately, his fishing nets.<sup>109</sup> Blackbird was the owner of an eighty-acre allotment, but there was simply no way, and many tried, for Indian people to earn a living off the land in northern Wisconsin at the turn of the century.

This was not lost on Bunn, who did what great judges do: he incorporated what he knew to be true into the logic of his opinion:

After taking from them the great body of their lands . . . it would be adding insult as well as injustice now to deprive them of the poor privilege of fishing with a seine for suckers in a little red marsh-water stream upon their own reservation. . . . These lands have from long time [sic] been their hunting and fishing ground. When an Indian cannot get a morsel of pork and white flour, a red horse or sucker from some stream where brook trout would never abide, boiled or roasted by a camp fire, is sometimes a luxury, to deprive him of which would be ungrateful in the extreme. I feel confident that neither the state nor congress ever meditated any such cruelty. . . .<sup>110</sup>

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105. Satz, *supra* n. 100, at 68-69; Gulig, *supra* n. 7, at 40-42.

106. 10 Stat. 1109. The most important part of the "deal" of the La Pointe Treaty was, among other things, the promise of Wisconsin reservations in exchange for the Mesabi iron range in northeastern Minnesota. Article 3 of the treaty allowed for eighty acres to each head of a household or single person older than 21 years of age. See Edmund Jefferson Danziger, Jr., *They Would Not Be Moved: The Chippewa Treaty of 1854*, 43 Minn. History 175, 175-85 (1973).

107. Blackbird was allotted only eighty acres, while Lone Wolf was allotted 160 acres because the size of allotments differed according to the government's determination of the amount of land the Indians needed to farm under different conditions, as well as other factors, such as family size. The size of these allotments in both cases was grossly inadequate for this purpose.

108. Satz, *supra* n. 100, at 69; F.J. Wojta, *Indian Farm Institutes in Wisconsin*, 29 Wis. Mag. of History 423-34 (1946).

109. Telephone Interview with David Farrar, Bureau of Indian Affairs, Ashland Agency (May 16, 2002).

110. *Blackbird*, 109 F. at 145. Much of the irony of this opinion might be lost on anyone who does not know that "suckers" are a bony and undesirable species of fish that are never caught or consumed by white fishermen. Bunn was clearly aware that the state of Wisconsin was prosecuting Blackbird for netting and eating fish that it had no need to protect, making the actions of state officials petty and mean. Suckers are considered a "rough fish" and as a result are not highly sought after by anglers fishing for sport. Bunn notes this in his decision. *Id.* at 145. "They are a fish that white men will hardly ever eat . . ." *Id.* He continues, stating "that the "prisoner's arrest was the result of overzeal on the part of a fish and game warden . . ." *Id.*

Of course, the state of Wisconsin, just like the Jerome Commission, clearly did “meditate any such . . . cruelty,” just as it clearly intended to add “insult” to an “injustice,” and the only factor distinguishing Blackbird’s case is that he was able to attract the attention of a Republican federal judge who was personally outraged by this injustice and had the courage to correct it with strong language directed at the relevant local officials.<sup>111</sup> Northern Wisconsin jails at that time held numerous Indian prisoners, many of them on similar hunting and fishing law convictions.<sup>112</sup> Wisconsin, as an attribute of its state sovereignty, could not abide by Chippewa sovereignty in 1901, and its local officials were boldly applying state laws to Indian hunting and fishing and other activities.<sup>113</sup> For various reasons, including reserving the game for white sportsmen, Wisconsin wanted to stamp out Indian hunting and fishing, and was completely unconcerned about the hardship this imposed on the Chippewa.<sup>114</sup>

*Blackbird* is not the only Indian hunting and fishing case in Wisconsin, nor can it even be said to be the most important one.<sup>115</sup> The state of Wisconsin claimed jurisdiction over all criminal offenses committed by Indians, anywhere in the state. While most of the cases were fish and game cases, the Wisconsin courts made no distinction. The issue was Wisconsin’s sovereignty, its claim of jurisdiction over all the lands within the state, including Indian reservations. The Wisconsin Supreme Court in *State v. Doxtater*<sup>116</sup> had first defended this assertion of jurisdiction in 1879, thirty years after statehood, but the issue had doubtlessly been coursing through county courts for years before it reached them. The Wisconsin Supreme Court held that the state of Wisconsin had taken jurisdiction

111. *Id.* at 145.

112. Satz, *supra* n. 100, at 88; Gulig, *supra* n. 7, at 96, 133-70.

113. Gulig, *supra* n. 7, at 96-132.

114. *Id.* at 133-70.

115. Hundreds of Chippewa, Menominee, Winnebago, and other Indians were imprisoned in Wisconsin for violating hunting and fishing laws over the course of the twentieth century. The only comprehensive data collected on Indian arrest statistics finds that at least 355 Chippewas were arrested for game law violations in thirteen northern Wisconsin counties between 1929 and 1940—likely thousands over the course of the twentieth century. Gulig, *supra* n. 7, at 131. Generally, chapter five, *A Terrible Injustice: The Wisconsin Conservation Commission and Chippewa Treaty Rights in the 1930s*, chronicles the extent to which the state pursues Chippewa hunters and fishermen. *Id.* The number of 355 Chippewas arrested in the 1930s alone comes from my doctoral research covering thirteen northern Wisconsin counties. *Id.* There are seventy-two counties in Wisconsin and five other Indian bands living in the state. These numbers were corroborated by matching names in the above-noted arrest reports with names on Chippewa tribal census roles. National Archives Record Group, Bureau of Indian Affairs, *Indian Census Rolls, 1885-1940*, at 75 (microcopy T 495, roll 232, Natl. Archives 1967). All tribes experienced a similar story, and thus the numbers, over the course of a century, would easily be in the thousands. See generally Robert E. Bieder, *Native American Communities in Wisconsin, 1600-1960: A Study of Tradition and Change* (U. Wis. Press 1995) and Larry Nesper, *The Walleye War: The Struggle for Ojibwe Spearfishing and Treaty Rights* (U. Neb. Press 2002). Each of these cases represents some event in legal history however we, as legal historians, categorize them. For every John Blackbird who actually got a sympathetic federal judge to let him out of jail, most of these Indians sat out their jail time and then, if they were lucky enough to be healthy, walked home. These records chronicle the length of sentence for all convicted of serious game violations (hunting out of season, possession of fish or game in excess of state sanctioned limits, and so on), most commonly between thirty and ninety days.

116. 2 N.W. 439 (Wis. 1879).

over Indians at statehood.<sup>117</sup> In any case, the Court pointed out, when a criminal defendant asserts a jurisdictional reason why he or she cannot be prosecuted, the burden is on the defendant to prove the lack of jurisdiction.<sup>118</sup>

Through this decision, a complex jurisdictional dispute between the federal government and the states over the nature of federalism in relationship to the Indian tribes was reduced to a burden on each Wisconsin Indian defendant to first raise, then successfully prove that the state of Wisconsin lacked jurisdiction.<sup>119</sup> The burden is impossible when brought by an uneducated Indian defendant, which is the reason Blackbird went to jail.

What is remarkable here is Judge Bunn's strong language. The result of the opinion was completely consistent with the federal Indian law of the day.<sup>120</sup> Judge Bunn doubtlessly knew about Wisconsin's jurisdictional claims over Indian reservations. By 1901, he had been on the federal bench for twenty-four years.<sup>121</sup> Originally from Ellicottville, New York, Bunn had "read law" in 1853, then moved west to Galesville, Wisconsin, where he practiced and was shortly elected district attorney.<sup>122</sup> After a year in the state legislature, he moved to Sparta and was elected judge for the Circuit Court of the Sixth Judicial Circuit in 1868. Bunn served in that position until President Rutherford B. Hayes appointed him Federal District Judge of the Western District of Wisconsin.<sup>123</sup> In his whole judicial career, he would have handled only a handful of Indian law cases, never enough to develop any kind of expertise, but it was not expertise that moved him in *Blackbird*: it was his humanity.<sup>124</sup>

Judge Bunn's action, as courageous as it was, only freed John Blackbird. The nature of federal habeas corpus jurisdiction is that each defendant has to bring his own writ, one at a time. In *State v. Morrin*,<sup>125</sup> Morrin, a fellow Chippewa from the nearby Red Cliff reservation, set his nets in Lake Superior in the spring of 1907 for exactly the same reason that Blackbird had: doubtlessly needing food.<sup>126</sup> Morrin, like Blackbird, also had an allotment.<sup>127</sup> While his act was essentially the same, the result was an important jurisdictional difference: while Blackbird had fished a creek on his own reservation, Morrin had fished Lake

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117. *Id.*

118. *Id.*

119. Haring, *supra* n. 6, at 50-51.

120. *Id.* at 51.

121. Federal Judicial Center, *Judges of the United States Courts* <[http://air.fjc.gov/history/judges\\_frm.html](http://air.fjc.gov/history/judges_frm.html)> (accessed May 22, 2002).

122. *Id.*

123. *Biographical Review of Dane County, Wisconsin, Containing Biographical Sketches of Pioneers and Leading Citizens* vol. 1, 252, 252-53 (Biographical Rev. Publ. Co. 1893).

124. Although Bunn, in his decision, does not explicitly identify his own humanity as his motive in setting Blackbird free, his intent was clear. Wisconsin had gone too far and he clearly hoped to mitigate the cruelty meditated by the state. See *Blackbird*, 109 F. at 145.

125. 117 N.W. 1006 (Wis. 1908).

126. Satz, *supra* n. 100, at 85.

127. Telephone Interview, *supra* n. 109.



Superior, off his reservation and within the jurisdiction of the state of Wisconsin.<sup>128</sup> Thus, Morrin's conviction was upheld—and he stayed in jail.<sup>129</sup>

In 1931, in *State v. Rufus*,<sup>130</sup> Wisconsin abandoned its claim of criminal jurisdiction over Indians for offenses committed on their reservations—fifty-two years after it had asserted it in *Doxtater*. But this decision would not have helped Morrin.

The reassertion of off-reservation Chippewa treaty hunting and fishing rights in the 1970s and 1980s vindicated Morrin's legal position, but not until after he was long dead.<sup>131</sup> It was 1983 before the statute that Blackbird was convicted under—asserting Wisconsin state jurisdiction over Indian hunting and fishing rights—was finally held inapplicable to the Chippewa who had a treaty right to hunt and fish—eighty-two years too late for Blackbird and presumably too late for his sons and daughters, even his grandsons and granddaughters.<sup>132</sup> So, we cannot say what Chippewa sovereignty meant to John Blackbird. His people, however, were still fishing and challenging Wisconsin state law over those eighty years.

John Blackbird may have lived in one of the tarpaper shacks that were so common in Indian communities in northern Wisconsin through the 1960s.<sup>133</sup> He could not eat Chippewa sovereignty; nor could he take back the treaty rights that the state of Wisconsin cruelly seized. But he did not passively accept his poverty: he fished and, presumably, also engaged in other activity to provide for his family's needs.<sup>134</sup>

The hunting and fishing rights cases are among the most important cases involving Indians asserting their sovereignty rights at the “grass roots” level. Yet hunting and fishing is, at the most basic level, about food. It is difficult to imagine

128. But the *Blackbird* case file was missing from the National Archives regional branch in Chicago. No one had any idea where it might be. One suspicion is that it might have been called up as part of the research for the well-known series of Wisconsin Chippewa “walleye” fishing cases in the 1970s and 1980s and then simply misfiled. The Ashland County Courthouse held no local record of the case either. The last resort was to the local newspapers, which produced one mention of the *Blackbird* case, a short article with insufficient detail to pursue the case further. *Blackbird Arrested*, *supra* n. 87. It was a dead end for a legal historian: no records exist of the case at all beyond the printed opinion. There could be no “Blackbird” chapter in *Crow Dog's Case* not because the case was not important enough, but because the documents were insufficient to support an entire chapter. Between the reported case, the newspaper account, and the context of Chippewa/Wisconsin relations, there was enough information to use the case to say something, to use it to write a small piece of legal history.

129. *Morrin*, 117 N.W. 1006.

130. 237 N.W. 70 (Wis. 1931).

131. The Wisconsin Chippewa litigation involves a series of cases. *United States v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978), began the process, and was reversed in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983) (holding that Wisconsin Chippewa Treaty rights had not been extinguished by statehood). More cases followed, until the Chippewa were restored their treaty rights to hunt and fish in their former lands. A history of this litigation is found in Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 Wis. L. Rev. 375; Kenneth D. Nelson, *Wisconsin, Walleye, and the Supreme Law of the Land: An Overview of the Chippewa Indian Treaty Rights in Northern Wisconsin*, 11 Hamline J. Pub. L. & Policy 381 (Fall 1990).

132. *Voigt*, 700 F.2d 341.

133. Tim Pfaff, *Paths of the People: The Ojibwe in the Chippewa Valley* (Chippewa Valley Museum Press 1993); Bieder, *supra* n. 115, at 201-03.

134. Gulig, *supra* n. 7, at 96-100; Danziger, *supra* n. 88, at 104.

that seventy years into our modern welfare state, Indians in 1901 were often hungry—as many still are today. And, because they still had the skills to “go to the land,” they did; this was probably an easier choice than hunger. Blackbird and the Chippewa were more fortunate than Lone Wolf and the Kiowa: the rapid settlement of the prairies extinguished from Lone Wolf and the Kiowa virtually all the game there—hunting for food was no longer a choice. And where they can, many Indians still hunt and fish for food today, with or without the sanction of the law.

Lone Wolf lost at every level; Blackbird was convicted and jailed by a state court, then won on appeal in federal district court.<sup>135</sup> While no one (to our knowledge) has ever counted up the results of the thousands of allotment-era Indian land cases that coursed through the various courts, it is likely that Indians lost most, if not almost all of them. Just as the state of Wisconsin sought to seize jurisdiction over Chippewa hunting and fishing from the federal government, most Indian land cases in the West were litigated in state courts.<sup>136</sup> As it was up to Blackbird to challenge the illegal assertion of state jurisdiction in his case, it was up to poverty-stricken and illiterate Indians to assert complex jurisdictional arguments in land cases brought in the state courts of Oklahoma, Kansas, Nebraska, the Dakotas, and every other state.<sup>137</sup> Legal historians still cannot describe this process, which is mired in hundreds of local archives. While some of the records are lost, most are not, and much of this legal history can still be written.

#### V. CROW DOG, LONE WOLF, BLACKBIRD, AND CLAPOX AS SOVEREIGNTY STORIES

There are hundreds of thousands of routine criminal cases that have defined the ordinary substance of Indian law on many reservations for more than a hundred years. There is a tragic legacy of crime and disorder, of obvious colonial origins, doing great damage to generations of Indian people, but these cases also hold important clues in the writing of Indian legal history. For example, in *United States v. Clapox*,<sup>138</sup> Clapox broke his girlfriend out of a BIA jail on the Umatilla reservation in Oregon—and in the process completely wrecked the jail.<sup>139</sup> He defended himself by arguing that the jail itself was illegal because BIA courts were not United States courts within the meaning of Article III of the Constitution.<sup>140</sup> While he was right about this doctrinal point, the legality of the BIA courts was

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135. *Blackbird*, 109 F. 139; *Lone Wolf v. Hitchcock*, 18 App. D.C. 515 (D.C. Mun. App. 1901); *Lone Wolf v. Hitchcock*, 19 App. D.C. 315 (D.C. Mun. App. 1902); *Lone Wolf*, 187 U.S. 553.

136. *St. v. Duxtater*, 2 N.W. 439 (Wis. 1879); *Morrin*, 117 N.W. 1006; *St. v. Johnson*, 249 N.W. 284 (Wis. 1933); *St. v. La Barge*, 291 N.W. 299 (Wis. 1940); *St. v. Sanapaw*, 124 N.W.2d 377 (Wis. 1963).

137. *Amos v. Johnson*, 19 P.2d 344 (Okla. 1933); *Chapman v. Tiger*, 356 P.2d 571 (Okla. 1960); *In re Now-Ge-Zhuck*, 76 P. 877 (Kan. 1904) (alias Tommy Walk-Kas).

138. 35 F. 575 (D. Or. 1888).

139. *Id.*

140. *Id.*

upheld on other grounds.<sup>141</sup> The legacy of this fight for Indian sovereignty was bought and paid for by these mostly anonymous and poor Indians. Even Lone Wolf and his chiefs, when they refused to agree to sell their lands, were threatened with arrest.<sup>142</sup> Many great chiefs went to jail on ordinary criminal charges. For instance, Sitting Bull was shot while “resisting arrest.”<sup>143</sup> Crazy Horse was bayoneted while in Army custody when he refused to let himself be locked in a cell.<sup>144</sup>

Yet another example is the case of Crazy Snake. At about the same time that Lone Wolf was challenging the sale of Indian lands after the allotment process, Crazy Snake and a large part of the Creek Nation tried to forcibly block allotment under the Curtis Act.<sup>145</sup> They rode about the Creek Nation, posting signs and resisting the allotment of Creek lands.<sup>146</sup> This resulted in the calling out of the Oklahoma National Guard, facing the specter of an Indian war.<sup>147</sup> Ultimately, Crazy Snake and hundreds of Creeks were indicted in federal court for “‘perporting’ [sic] to organize a government, and ‘perporting’ [sic] to make law for the Creek people,” an ironic indictment of Creek warriors banding together to protect both their land and sovereignty.<sup>148</sup>

Lone Wolf obviously had other choices besides challenging the allotment process in federal court, but in the end he lost as badly as Crazy Snake did. His choice to litigate was unusual only in that it was an allotment case. Indians had been litigating their cases throughout the nineteenth century.<sup>149</sup> Often these were criminal cases where the defendant had no choice because the litigation was imposed and defending was the only choice. At that time, Lone Wolf was accused of being a tool of the cattle interests that had grazing leases for Kiowa lands.<sup>150</sup> While it seems clear that cattle money financed some of the expensive litigation in *Lone Wolf*, it is wrong to believe that Lone Wolf was not able to make the critical choices controlling the litigation.<sup>151</sup> By the same token, the involvement of the Indian Rights Association in the case<sup>152</sup>—which also provided large sums of money—does not diminish Lone Wolf’s role. Neither Crow Dog, Lone Wolf, nor Blackbird most likely had access to Indians who had been to law school. In

141. *Id.* at 577 (the plenary power doctrine gave Congress the right to create “educational and disciplinary instrumentalities” on Indian reservations).

142. Clark, *supra* n. 31, at 47.

143. Haring, *supra* n. 6, at 176-82.

144. Mari Sandoz, *Crazy Horse, the Strange Man of the Oglalas: A Biography* (U. Neb. Press 1961); Haring, *supra* n. 6, at 107.

145. Sidney L. Haring, *Crazy Snake and the Creek Struggle for Sovereignty: The Emergence of a Creek Legal Culture*, 34 *Am. J. Leg. History* 365, 378 (Oct. 1990) (quoting Morris E. Opler, *The Creek “Town” and the Problem of Creek Indian Political Reorganization*, in *Human Problems in Technological Change* (Edward Holland Spicer ed., John Wiley & Sons, Inc. 1952)); 30 *Stat.* at 497-505.

146. Haring, *supra* n. 145, at 376; Haring, *supra* n. 6, at 94.

147. Haring, *supra* n. 6, at 94.

148. Haring, *supra* n. 145, at 378.

149. Haring, *supra* n. 6, at 34-36; Satz, *supra* n. 100, at 83.

150. Clark, *supra* n. 31, at 50-53.

151. *Id.* at 59.

152. *Id.* at 58.

turning to the law to protect their interests, they were turning to a “white man’s law.” While this choice clearly placed them, and all Indians, at a disadvantage, it was an area for struggle over Indian rights, as it continues to be today. Put another way, what choices did Lone Wolf have *other* than litigation? Violent resistance was a course rejected by almost all Indians after the 1880s, especially because of the overpowering military force of the United States. Crow Dog and Blackbird both went to jail. Lone Wolf’s namesake had his health ruined and his life shortened in a military prison in Florida. Suing Secretary of the Interior Hitchcock, in this context, was a pretty intelligent move.

It is for the Indian people and the Indian nations to decide what these cases mean, what to do with them as legal history. Lone Wolf took his case against allotment all the way to the Supreme Court. There he lost, in a sweeping judgment that swept away almost any legal argument that might block the allotment of Indian lands anywhere in the country. The decision has had a devastating impact on the Indian nations, but the fact that Lone Wolf lost does not mean that he was wrong to choose to defend his people’s lands in the court system.

#### VI. POVERTY AND SOVEREIGNTY

It has been said that Indians cannot eat sovereignty, implying that pursuing sovereignty in the courts is a misguided effort. Indian poverty stems from the loss of their lands and a lack of economic development. Returning to *Lone Wolf*, the loss of tribal lands impoverished most Indian nations as it destroyed their traditional economies.<sup>153</sup> The Indian nations, while sovereign, have not been able to exercise a full range of economic development options because of the tragic loss of their land base. This does not mean that sovereignty is now irrelevant; rather, it speaks to a “new sovereignty,” one giving the Indian nations real political choices that involve economic development. The task of restoring the Indian land base is daunting, but many tribes are working hard at it. The White Earth Chippewa, in Minnesota, have a project to buy back some of the white farms that dominate their prairie reservation: only about nine percent of the original reservation is still in Indian hands.<sup>154</sup> The Oneida Nation of New York State has a lawsuit seeking the restoration of some of their land taken in violation of eighteenth century treaty rights.<sup>155</sup>

And of course the sovereignty struggle soldiers on in many different forms, in many different cases. Within a few years of the conclusion of the “walleye cases” in Wisconsin,<sup>156</sup> won by the Chippewa in the Seventh Circuit Court of Appeals, the very same issue (which dealt with honoring the Chippewa treaties)

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153. Bieder, *supra* n. 115, at 151-94; Satz, *supra* n. 100, at 83-91.

154. Winona LaDuke, *Recovering the Land*, 25 *Envtl. Action* 15 (Fall 1993); *White Earth Land Recovery Project* <<http://www.welrp.org>> (accessed May 16, 2002) (describing the project’s purpose).

155. See generally George C. Shattuck, *The Oneida Land Claims: A Legal History* (Syracuse U. Press 1991).

156. *Voigt*, 700 F.2d 341.

was brought to the Supreme Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*.<sup>157</sup> Playing on fears of the continued widespread (although factually nonexistent)<sup>158</sup> Indian slaughter of fish and game, Minnesota relied heavily on support from sporting clubs and organizations in its litigation against Indian interests.<sup>159</sup> Across the upper midwest, Chippewa held their breath as the Court heard oral arguments in December of 1998 and prepared its decision in the months that followed. The issues at hand seemed defensible enough, at least to Fred and Mike Tribble, Minnesota Chippewa who revived the open legal struggle to assert their fishing rights twenty-five years earlier.<sup>160</sup> There should have been nothing new here—nothing for the Chippewa to be worried about.

Justice Sandra Day O'Connor delivered the opinion of the Court on March 24, 1999. "After an examination of the historical record," she wrote, "we conclude that the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty."<sup>161</sup> The Chippewa had won in the narrowest of victories in an absolutely straightforward judgment, recognizing well-established principles of treaty law.<sup>162</sup>

But the margin of victory raises the specter of a new *Lone Wolf* judgment, ending or diminishing all Indian treaty rights in the same way that *Lone Wolf* diminished Indian property rights. While the Court refused to even grant a writ of certiorari in essentially the same case in 1983,<sup>163</sup> it was now divided, five-to-four, on whether or not the Chippewas' treaty rights still existed.<sup>164</sup> Of course, hypothetical history is not really history at all, but had one more Justice joined in the dissent, the dissent would have become the opinion of the Court. Had that been the case, had just one more mind been swayed to dissent, a century's worth of fighting to defend Indian treaties, for a way of life, and a connection to the land, would have evaporated.

157. 526 U.S. 172 (1999).

158. For clear evidence undermining the myth that Indians have raped natural resources in their traditional activities, see U.S. Dept. of the Int., *Casting Light upon the Waters: A Joint Fishery Assessment of the Wisconsin Ceded Territory* (2d ed., Bureau of Indian Affairs 1993).

159. In Minnesota, as in the Wisconsin treaty rights cases, special interest groups bent on defeating the Chippewas in their legal battle to have their historic treaty rights recognized by the state, worked diligently against the tribes. In Minnesota, Proper Economic Resource Management ("PERM") took on the language and argument of Wisconsin anti-treaty rights groups like Protect American's Rights and Resources ("PARR"), and Stop Treaty Abuse ("STA"). See Satz, *supra* n. 100, at 105-06; Donald Lee Parman, *Indians and the American West in the Twentieth Century* 178-81 (U. Ind. Press 1994). PERM's goal was to raise 1.5 million dollars in support of Minnesota's effort to defeat the state's Chippewas in pursuit of their treaty rights in ceded territory. See PERM, *Home Page* <<http://www.perm.org/>> (accessed May 28, 2002).

160. Rick Whaley & Walt Bresette, *Walleye Warriors: An Effective Alliance against Racism and the Earth* 6-8 (New Socy. Publishers 1994).

161. *Mille Lacs*, 526 U.S. at 175.

162. Michael R. Newhouse, *Recognizing and Preserving Native American Treaty Usufructs in the Supreme Court: The Mille Lacs Case*, 21 Pub. Land & Resources L. Rev. 169, 186-87 (2000).

163. *Lac Courte Oreilles*, 700 F.2d 341.

164. *Mille Lacs*, 526 U.S. 172.

The reasoning of the minority ignored well-established federal Indian law, a part of which is a lengthy line of cases consistently recognizing treaty rights.<sup>165</sup> Although Justice Thomas wrote his own dissenting opinion, Associate Justices Scalia and Kennedy also joined Chief Justice Rehnquist in the dissent.<sup>166</sup> Rehnquist fixed on the failed and rescinded 1850 removal order, an issue dealt with at length in the *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*<sup>167</sup> case as well, as evidence that the rights identified in the 1837 treaty were long gone.<sup>168</sup> More importantly, the Chief Justice believed that the 1855 treaty included language that terminated the Chippewas' treaty rights.<sup>169</sup> And if that were not enough to settle the matter, Rehnquist was certain that Minnesota statehood, and the inherent state sovereignty that included, dissolved the treaty rights at hand.<sup>170</sup> Justice Thomas went further in his own dissenting opinion to argue that allowing the Chippewas' treaty right to continue is to specifically compromise state sovereignty—"any limitations that the Federal Treaty may impose upon Minnesota's sovereign authority over its natural resources exact serious federalism costs."<sup>171</sup> Chippewa sovereignty as embodied in their treaties was upheld by one vote.<sup>172</sup>

The unresolved question after *Lone Wolf* is the restoration of the land base of the Indian nations. Indeed, this is a question that almost cannot be posed because, in conventional wisdom, it is impossible to return Indian lands. Yet the depopulation of the Great Plains, together with the existence of a large federal land base, means that it is not impossible to begin addressing this impossible question. The Australian return of Uluru, formerly Ayer's Rock, one of the world's best known and most visited national parks, to the Anangu tribe, its traditional owners, has enriched Australia's national heritage, as well as the country's legal and political tradition.<sup>173</sup>

Crow Dog retreated to a far corner of the reservation, hoping to be left alone.<sup>174</sup> He was poor, but lived a life rich in his culture and imagination and, in

165. See generally Fay G. Cohen, *Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights* (U. Wash. Press 1986); Prucha, *supra* n. 49, at 385-408; Wilkinson, *supra* n. 3.

166. *Mille Lacs*, 572 U.S. at 208 (Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

167. 700 F.2d 341.

168. *Mille Lacs*, 526 U.S. at 208-26 (Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

169. *Id.* at 217.

170. *Id.* Rehnquist's opinion is best described as a crabbed and disingenuous interpretation of the Chippewa treaties, *id.* at 208-20, but, in contrast to Thomas, *id.* at 220-26, it is at least rooted in federal Indian law, and recognizing the underlying legality of Indian treaties.

171. *Id.* at 221. The irony of Thomas's argument here is that it is a non-sequitur: from the beginning of the American republic Indian rights have exacted serious federalism costs in relationship to the states. But the Indian tribes are sovereign governments within our federalist system and, therefore, state sovereignty over the Indian nations is expressly and deliberately limited. This is one of the core elements of John Marshall's formulation of the place of Indians within the United States political system in the Cherokee cases. White, *supra* n. 10, at ch. 10.

172. *Mille Lacs*, 526 U.S. 172.

173. Stanley Breeden, *Uluru: Looking After Uluru-Kata Tjuta, the Ananu Way* (Simon and Schuster 1994).

174. Haring, *supra* n. 6, at 1.

his old age, finally accepted his allotment before he died in 1911.<sup>175</sup> His people are still there, the subject of two books about their role in the American Indian Movement.<sup>176</sup> Lone Wolf, who also accepted his allotment, continued to be a leader of his people as well, living until 1923.<sup>177</sup> John Blackbird also died on his eighty-acre allotment in 1911.<sup>178</sup>

Any visitor to Indian country will hear the stories that accompany these cases. Often these legal issues had either been lost many years ago, or never even litigated. But they were still very much alive in these communities, ready to be litigated if the right set of facts arose. These cases, in short, are among the elements that define these various native people's relationships with both the federal government and their non-Indian neighbors. The assertion of sovereignty in these cases is a choice that native people make, a choice that has great meaning to them, whether they are poor or not.

Indian sovereignty at the time of *Crow Dog* seemed politically anomalous in the context of an expanding American nation. The assimilation era of the BIA mostly ignored the case; *Kagama*, while not overruling *Crow Dog*, restricted *Crow Dog*'s scope, limiting tribal law to "minor" crimes, the crimes not covered by the Major Crimes Act.<sup>179</sup> But it is clear from the context of *Blackbird* that Indians went hunting and fishing as an exercise of their sovereignty, even if the law forbade it.

Sovereignty, then, is lived in a number of contexts. For example, somebody thought of gambling as an assertion of sovereignty and opened a casino, and the economy of Indian America has as a result been transformed. It is not an accident that Indian gambling swept into an economic arena unoccupied by the adjacent states, providing billions of dollars in economic development to many Indian nations. In this sense, gambling is not a freely made choice as a mode of economic development; it is often the only choice. Others have shot eagles and Florida panthers, or just gone moose hunting out of season. None of us pick these arenas for the exercise of sovereignty. Indian gambling, which we do not particularly like, is none of our business.

This makes it clear that the "sovereignty story" is multi-dimensional and raises a number of potential problems. Somehow we have the sense that simply having the Indian nations still with us, still making decisions, and still asserting their sovereignty is a very good thing. Sovereignty or self-government, by definition, involves the right to make bad decisions. All nations make them.

The Supreme Court has, in recent years, produced an unfortunate line of Indian law cases that diminish sovereignty, beginning with *Oliphant v. Suquamish Indian Tribe*<sup>180</sup> and *United States v. Sioux Nation of Indians*.<sup>181</sup> *Oliphant* is perhaps

175. *Id.*

176. Leonard Crow Dog & Richard Erdoes, *Crow Dog: Four Generations of Sioux Medicine Men* (Harper Collins 1995); Mary Crow Dog & Richard Erdoes, *Lakota Woman* (Harper Collins 1991).

177. Clark, *supra* n. 31, at 114.

178. Telephone Interview, *supra* n. 109.

179. *Kagama*, 118 U.S. at 382-85.

180. 435 U.S. 191 (1978).

the most dangerous threat to tribal sovereignty of the recent cases, as it completely distorts the logic of tribal sovereignty. *Oliphant* is most famous for Chief Justice Rehnquist's quoting of an 1840s Justice Department Report for the proposition that Indian nations really do not have law because "[o]ffenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes . . . ."<sup>182</sup> *Sioux Nation* holds that the Black Hills were illegally seized in the early 1870s in violation of treaty rights—the event that gave rise to the Great Sioux War of 1876, most remembered for the Sioux's defeat of General Custer. But *Sioux Nation* also denies the basic remedy of restitution of those lands, even though they are almost entirely still federally owned and could be returned without displacing the non-Indian population.<sup>183</sup> These lands should be returned to the Sioux Nation, the same remedy that any common law landowner might expect after a fraudulent conveyance was adjudicated by the courts. Sovereignty is traditionally exercised over a defined national territory. Indian sovereignty cannot reach its full potential within America given the deprivation of Indian lands. For instance, the loss of the Black Hills diminished the Ogalala Nation.

The dismissive quality of these conclusions is apparent to all who work in Indian country: Indian law is much more modern, distinct, alive, and complex than what is written in this paper. It is a testimony to the strength of Indian sovereignty's roots in tribal society that such pronouncements by the Court do not do the kind of damage they might have in another era. Indian sovereignty never rested in winning Supreme Court cases, although winning is obviously better than losing. The Supreme Court's recognition of Indian sovereignty has strengthened the position of the Indian nations in our federal system. Cases that undermine that sovereignty weaken that position.

Sovereignty, while it is many things, is also the opposite of assimilation. At its most basic level, *Crow Dog* simply holds that one of the attributes of Indian sovereignty is the right to their own law in their own communities. This is fundamental: there are few Indian communities in Canada that would not like to replace the Mounties with their own police officers and courts, or even replace Canadian law with their own law. Law is fundamental in defining what any community stands for, and the right of Indian communities to make and use their own law is the embodiment of much of the hope for the future of native cultures as unique cultures in North America.

The authors are as conscious of the limits of tribal sovereignty as anybody, but sensitive to the idea that the various indigenous demands for sovereignty have been distorted and misunderstood, often deliberately.<sup>184</sup> Native people do not

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181. 448 U.S. 371 (1980).

182. *Oliphant*, 435 U.S. at 197.

183. Edward Lazarus, *Black Hills, White Justice: The Sioux Nation Versus the United States, 1775 to the Present* 385-402 (Harper Collins 1991).

184. Maivan Clech Lam, *At the Edge of the State: Indigenous Peoples and Self Determination* (Transnational Publishers 2000).



want to raise armies, make nuclear weapons, or pollute the rivers of neighboring countries. Instead, they want to carry on their own lives and their own cultures on their own lands.

#### VII. CONCLUSION: SOVEREIGNTY AND SOVEREIGNTY STORIES IN THE WRITING OF INDIAN LEGAL HISTORY

If there is any lesson to be drawn from *Lone Wolf*, *Crow Dog*, *Blackbird*, and the thousands of other Indian law cases, it is that they represent the determination of Indian people to carry their own law forward for new generations. This determination makes its own customary law, a lived law of Indian sovereignty. Modern human rights law incorporates this “law of the elders” as “customary law,” one of the basic sources of human rights law.<sup>185</sup> We remember reading sadly a few years ago the obituary of David Sohappy in the *New York Times*. It described his record as a “fishing rights activist”: he fished, and went to jail, and fished again, and told young people of their heritage and their right to fish.<sup>186</sup> By the time he died in his old age, his people had won substantial fishing rights. These legal rights were won the hard way, but they were won by native people who simply asserted their law as they understood it, even in defiance of United States law. To Sohappy and his people, they held these traditional fishing rights all along, under customary law, and the American courts were mistaken in depriving them of those rights. But David Sohappy, along with thousands of others, spent a lot of time in jail enforcing their traditional right to fish.

There can be no question that the legacy of poverty and exploitation in native communities is both unhappy and troubling. *Blackbird*, like Sohappy, is one of the uncounted thousands of Indians who spent time in jail for a petty offense—trying to get enough to eat. We cannot say whether *Blackbird*’s fishing represented sovereignty, or whether he was just hungry, or both. *Lone Wolf*, the Elder, rotted in a Florida prison on the suspicion that he might violently resist reservation life.<sup>187</sup> *Lone Wolf* represents one of the thousands of chiefs who tried, using different methods, to defend their lands. He chose to litigate, but others chose many other strategies. *Crazy Horse* fought.<sup>188</sup> *Crow Dog* killed his chief.<sup>189</sup> *Crazy Snake* attempted a coup against a tribal government that had, in his view, “sold out.”<sup>190</sup> Others used other strategies, many of them living in sovereignty stories, but lost to legal history.

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185. Sharon Helen Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (Theytus Books 1998).

186. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969), is one of the many Sohappy cases, most of which are unreported. The Sohappy family is discussed in Cohen, *supra* n. 165, at 134. David Sohappy, his son, David, Jr., and nephew, Bruce Jim, received five-year prison sentences for illegal fishing. *Id.*

187. Clark, *supra* n. 31, at 27.

188. Harring, *supra* n. 6, at 107.

189. *Id.* at 1.

190. See Harring, *supra* n. 145.

These sovereignty strategies do emerge in court cases, raised by Indian plaintiffs and defendants to represent and defend their legal positions. These strategies, even if desperate efforts to defend life or land—neither Lone Wolf, Crow Dog, nor Blackbird wanted to be in the position they were forced to litigate from—are both important and meaningful categories of analysis. They are, of course, not the only categories. But the legal arena has been an important area for struggle over native rights and we, as legal historians, have to try to follow the Indians who went there with their cases, great and small. Lone Wolf and his people symbolically carried some of their hopes and dreams into the United States Supreme Court, and that story is more important than the Supreme Court's opinion. They wanted to be left alone on what was left of their reservation to adapt on their own terms to a rapidly changing world.

