

THE INCORPORATION OF ALASKAN NATIVES UNDER AMERICAN LAW: UNITED STATES AND TLINGIT SOVEREIGNTY, 1867-1900

Sidney L. Harring*

The legal history of Indian and White relations in Alaska is largely unrelated to parallel developments in the rest of the United States. While twentieth century federal Indian law generally applies to Alaska in the same manner as it does to the rest of the country, nineteenth century law did not. In fact, the major nineteenth century cases had little impact in Alaska.¹ Because no laws dealt specifically with Alaska native land, no cases arose. Moreover, no treaties were ever made with Alaska natives, and many provisions of the Indian Trade and Intercourse Acts² did not govern trade between Whites and Alaska's tribes. Thus, in the nineteenth century, Alaska natives lived under the same law as Alaska Whites. They were denied any kind of special status, either as tribal sovereigns or as wards dependent on federal protection. In the twentieth century, however, the status of Alaska tribes changed. While the same formal law applies in Alaska, it applies in the context of a distinct structure based on nineteenth century legal policy choices. For example, the tribes in Alaska have no reservations but hold land as "native corporations" under the Alaska Native Claims Settlement Act (ANCSA).³ These holdings are tenuous and exist in a context reminiscent of the termination policy of the 1950s.⁴

* Associate Professor of Law, City University of New York Law School at Queens College. The research for this Article was funded by a Rockefeller Foundation Senior Fellowship at the McNickle Center for the History of the American Indian, Newberry Library, Chicago, Illinois; a Professional Staff/Congress City University of New York Faculty Research Grant; and a National Endowment for the Humanities Travel to Collections Grant.

1. *U.S. v. Kagama*, 118 U.S. 375 (1886), *Ex parte Crow Dog*, 109 U.S. 556 (1883), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), are unquestionably the leading nineteenth century United States cases in Indian law. Both *Worcester* and *Crow Dog* held that Indians had a substantial measure of sovereignty. *Kagama*, while not overtly denying this, held that Congress had plenary power to legislate in the area of Indian affairs and could unilaterally abrogate that sovereignty.

2. Intercourse Act, ch. 161, 4 Stat. 729 (1934).

3. 43 U.S.C. § 1601 (1982). The legal status of Alaska natives is the subject of only one full-length analysis. D. CASE, *ALASKA NATIVES AND AMERICAN LAWS* 14 (1984). See also F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 739-70 (1982 ed.) (containing a brief summary of the current status of Alaska natives, with heavy emphasis on the ANCSA); Comment, *The Alaska Native Claims Settlement Act: An Illusion in the Quest for Native Self Determination*, 66 OR. L. REV. 195 (1987). ANCSA represents the twentieth century continuation of the policy of separating Alaska Indian policy from the rest of the United States.

4. Briefly, ANCSA divided a settlement of forty-four million acres of land and nearly a billion dollars among thirteen native corporations, each owned by natives given their heritage in the form of

In order to provide a better understanding of both the history of federal Indian law and Alaska's unique situation, this Article focuses on the legal incorporation of the Tlingit, a sovereign people at the time of the United States' purchase of Alaska in 1867, into American law. It performs both a doctrinal analysis, from the standpoint of American law, as well as an ethnographic inquiry, from the perspective of the Tlingit.⁵ The Article first examines the development of a distinct legal status for Alaska natives—a process of great importance when one considers the impending Alaska native land crisis which followed ANCSA.

The Article next explores how the distinct legal status of Alaska natives structured Tlingit and White relations in Alaska in the late nineteenth century, the early years of American rule. Finally, it considers the impact of American law on Tlingit sovereignty.

A. *The Tlingit and Their Relationship With the Russians*

The sale of Alaska to the United States by the Russians could not be understood by native people: the Russians had never tried to convince the Tlingit that the Russian czar "owned" the land. Rather, the Russians operated a relatively unintrusive trading operation based at Sitka, which probably never involved more than five hundred Russians and used only a few parcels of land for trading posts.⁶ Indeed, the entire White population of Alaska at the time of the American acquisition numbered no more than three hundred.⁷ Neither the Tlingit nor any other native Alaskan people engaged in any treaty-making process with the Russians, nor sold the Russians any land. Moreover, although the Russians made territorial claims of ownership to England, Spain, and the United States, they did not assert such claims to Alaska natives. An experiment with collecting a "tribute" from the natives, an imposed tax, was abandoned because native resistance was so great that collecting the tax undermined the fur trade.⁸

shares of stock. For the twenty years after 1971, this stock cannot be exchanged, but beginning in 1991, it can be sold on the open market. In general, these native corporations have not been successful as economic units, and, given the complex social objectives that they must have, it is doubtful success in economic terms is even possible. The danger after 1991 is that these corporations will be alienated from native control, a parallel with the "termination policy" of the 1950s, when a number of prosperous tribes were legally "terminated" as tribal entities, surviving as state citizens owning their property in the open market. On the termination policy generally see Wilkinson & Biggs, *The Evolution of the Termination Policy* 5 AM. INDIAN L. REV. 139 (1977).

5. Under Chief Justice John Marshall's language in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), American Indian sovereignty was not extinguished by conquest, but retained by the native people as "domestic, dependent nations." Marshall's argument that European land claims applied to other European powers but did not extinguish Native title applied not only to the original states, but also to the relationship between colonial powers and Native people in all parallel situations, obviously including Alaska.

6. H. BANCROFT, *HISTORY OF ALASKA, 1730-1885* (1886).

7. L. BEARDSLEE, *REPORTS RELATIVE TO AFFAIRS IN ALASKA* 13 (1882).

8. Gibson, *Russian Dependence upon the Natives of Alaska*, in *RUSSIA'S AMERICAN COLONY* 77 (S.F. Starr ed. 1987); Liapunova, *Relations with the Natives of Russian America*, in *id.* at 105. It may be a truism here to say that the Tlingit had no need for any concept of ownership of land. Thus, for the Russians to have a trading relationship with the Tlingit based on principles of mutuality and equality, and at the same time assert title in international relations against Great Britain, Spain, and the United States was inconsistent in theory, but of no practical consequences as far as the Tlingit were concerned.

In the nineteenth century, the Tlingit, numbering perhaps 8,000 of Alaska's 30,000 native people, formed a profitable trading relationship with the Russians.⁹ The plentiful supply of furs, together with the rich fishing opportunities in the Pacific Northwest, made Tlingit society wealthy, complete with a distinct class system, unlike most other native societies in North America.¹⁰ The Tlingit lived in permanent villages composed of large wooden houses with totem poles in front facing the Pacific Ocean. When the Russians began to fish in Alaskan waters, the Tlingit simply enlarged their already vast network of trading relationships with other Indian tribes to include them. This became a highly profitable trade for the Tlingit, one which did not produce either a dependent relationship nor any sense among the Tlingit that they were a conquered people.¹¹ Pavel Golovin, in common with numerous other Russian officials, described them as heavily armed with guns and knives, making Russians afraid to go among them and leaving Russian communities in a constant state of siege.¹² This fear served Tlingit economic interests, for the Russians were unable to trade directly and had to rely on Tlingit middlemen.

At the time of the Alaska purchase these villages had already begun a process of consolidation, although several distinct villages remained. Moreover, the prosperity of the fur trade altered power and clan relationships in Tlingit society, leading to previously unknown concentrations of population. Nearly 1,000 Tlingit gathered around Sitka and an equal number near Wrangell, gaining access to the wealth and power that came from closer association with Russian traders.¹³ The Tlingit built a hierarchical social order based on the accumulation of wealth and a class system based on the inheritance of that wealth.¹⁴ This wealth was originally based on fishing and the processing of fish and fish oil for trade. Russian and American traders augmented that trade with European trade goods which the Tlingit traded at great profit to interior tribes for furs.¹⁵

The original social organization of the Tlingit was based on two subdivisions, Raven and Eagle, each of which had perhaps twelve clans also named after animals.¹⁶ Every clan was represented in thirteen territorial

9. F. DE LAGUNA, *UNDER MOUNT SAINT ELIAS: THE HISTORY AND CULTURE OF THE YAKUTAT TLINGIT 170-80* (1972). The Tlingit are closely related to other Northwest coast peoples—Haidas, Bella Coolas, Kwakiutls, and nearly fifty others occupying 2,000 miles of coastline from Oregon to Alaska. See C. WALDMAN, *ATLAS OF THE NORTH AMERICAN INDIAN* 37-38 (1985), for a complete listing of Northwest Coast peoples, together with a map showing their respective lands. The Tlingit occupied a far greater area than any other Northwest coast people, nearly the whole of the Alaska panhandle.

10. H. BANCROFT, *supra* note 6, at 401-20.

11. *Id.*

12. P. GOLOVIN, *CIVIL AND SAVAGE ENCOUNTERS* 84 (1983). For other, but still consistent, early Russian views of the Tlingit see K. KHLBNIKOV, *COLONIAL RUSSIAN AMERICA* (1976) and P.A. TIKHMENEV, *A HISTORY OF THE RUSSIAN-AMERICAN COMPANY* (1978).

13. Averkieva, *The Tlingit Indians*, in *NORTH AMERICAN INDIANS IN HISTORICAL PERSPECTIVE* 321, 325 (E. Leacock & N. Lurie eds. 1971). L. BEARDSLEE, *supra* note 7, at 13, estimated that 100 to 200 Tlingit lived in Sitka during the summer and 500 to 600 during the winter. A number of others lived in outlying villages near Sitka.

14. Averkieva, *supra* note 13, at 325-29.

15. *Id.* at 323-25.

16. *Id.* at 325-26. In the South the two phratries were the Raven and the Wolf, although the same system existed.

groups called qwans. Each qwan consisted of one hundred to one thousand members, living in one to three permanent winter villages that occupied its own distinct territory along a stretch of Pacific coastline.¹⁷ Although Americans often mistook these territorial units for distinct tribes and therefore distinguished among different Tlingit qwans, all were Tlingit people.¹⁸

Each local village was composed of members of different clans, living in one or more clan houses. The house of the "Bear" clan might consist of a man, perhaps some brothers, spouses, nephews, and nephews' children. Offices in the clan were hereditary, but in avuncular Tlingit society, the power of a chief passed to his sister's youngest son, the youngest nephew.¹⁹ Each house contained ten to forty individuals. Some property, such as houses, big canoes, and fishing, hunting, and berry-gathering territory, was held communally, other property, however, such as slaves, coppers, blankets, weapons, and valuable shells, was privately owned.²⁰ Thus, considerable private wealth could be held within a system primarily based on communal property.²¹

Every Tlingit village had a number of chiefs with different ranks based both on clan lineages and on wealth, with the wealthiest chief in each village having the highest rank.²² Structured inequality permeated Tlingit society; while some entire clans were wealthy, other clans were poor. Early Russian observers characterized wealthy Tlingit as "petty princes" and described the chief of Sitka as "so elated . . . with pride, that he made no use of his legs for walking, but was invariably carried on the shoulders of his attendants, even on the most trifling occasions."²³ Many of these attendants, somewhere between ten and thirty percent of Tlingit society in the mid-nineteenth century, were slaves, who were also property that could be inherited.²⁴

While relations with the Russians were generally peaceful, they were conducted at arm's length by parties that never fully trusted each other. Each side punished the other for transgressions of their respective legal traditions, a process that involved a small scale series of attacks and retaliations.²⁵ In 1802, however, the Tlingit attacked and burned Sitka, which the Russians recaptured the following year. Although the causes of that attack are not clear, it was rooted in Tlingit resentment of the Russian assertion of political authority over the Indian tribes which upset traditional power relationships.²⁶ Thus, at the time of American acquisition of Alaska the Tlingit had a long tradition of successfully defending their sovereignty against Whites.

17. *Id.* at 326-27.

18. *Id.*

19. *Id.*

20. *Id.* at 327-28.

21. *Id.* at 328-29.

22. *Id.* at 326, 329.

23. *Id.* at 331.

24. *Id.* at 329-31.

25. Sherwood, *Ardent Spirits: Hooch and the Osprey Affair at Sitka*, in IV JOURNAL OF THE WEST 304, 304-07 (1965).

26. *Id.* at 305.

B. *American Legal Jurisdiction Over Alaska Natives*

There is probably no setting in which the extension of American law over native Americans can be studied in as much detail as that over the Tlingit in the Alaska panhandle during the early years of Alaska's incorporation into the United States. Because that process occurred very late in the history of American and Indian relations, and in a remote area with clearly defined populations, this meeting of two legal traditions can be reconstructed with great clarity. In addition, more extensive documentation of this process exists than in any other parallel situation in America.²⁷

1. *Early Indian Country Jurisdiction in Alaska*

Until Alaska's "Organic Act" of 1884²⁸ provided some measure of local government, including a federal district court sitting at Sitka, Congress paid little attention to the legal status of either Alaska or the Indians living there. Alaska's original legal status under the United States, created by an Act of Congress on July 27, 1868,²⁹ was as a "customs district," occupied by two sets of American authorities—customs collectors and a small military force. No distinct law for Alaska existed. Instead, all violations of law in Alaska were cognizable in any district court in the United States.³⁰

Nothing in the 1868 Act made any provision for the administration of Indian affairs in Alaska, or provided any legal basis for doing so. The third article of the treaty ceding Alaska to the United States, however, twice raised the rights of "uncivilized tribes," once to exclude them from citizenship and once to prospectively make them "subject to such laws and regulations as the United States may, from time to time, adopt."³¹

This treaty language, while making clear that the "uncivilized tribes" were to be treated differently from the Whites, raised more questions than it answered. For example, on one hand, it appeared to confer citizenship on Indians who were not members of "uncivilized tribes." While on the other hand, it appeared to make those "uncivilized tribes" subject to future laws passed regarding their status, but not to any existing laws governing Indian affairs. No language in the congressional debates indicated that either of these issues, nor for that matter any other issue regarding the Indian tribes, was directly raised in discussion. Rather, the treaty consists of boilerplate language provisions designed to leave the issues to future resolution. In the context of this important treaty, neither the United States nor Russia really cared about the status of "uncivilized tribes."³²

27. Probably the major reasons this is true are: (1) the extensive government investigations done in Alaska; and (2) the presence of an active weekly press, which regularly reported the news in great detail.

28. Ch. 53, 23 Stat. 24 (1884).

29. Collection of Duties, tit. 34, ch. 1, U.S. Rev. Stat. §§ 2591-2593 (1873-74).

30. The early legal status of Alaska is analyzed in G. SPICER, *THE CONSTITUTIONAL STATUS AND GOVERNMENT OF ALASKA* 24-45 (1924).

31. The treaty language is quoted from Knapp, *A Study Upon the Legal and Political Status of the Natives of Alaska*, 39 AM. L. REG. 325, 328 (1891). At the time Knapp wrote this article he was the governor of Alaska.

32. As important as Knapp thought this language was, none of the major cases defining the status of Alaska natives appeared to turn on interpretations of the distinction between "civilized and

The uncertainty regarding the Indian tribes' status is more evident in light of a letter written in 1869 from Secretary of State Seward to his Secretary of War.³³ Seward, quoting Chief Justice Marshall's opinion in *Worcester v. Georgia*,³⁴ stated that it was clear that when new territory was added to the United States, existing laws fully governed there.³⁵ In addition, Seward cited Marshall's language concerning "dependent Nations" and the "Indian commerce clause" and concluded that these concepts applied to Alaska.³⁶ Seward's view was consistent with an 1855 Attorney General's opinion that declared that "Indian Country" was not limited by specific boundaries but "it applies in general to such portions of the acquired territory of the United States, as are in the actual occupation of the Indian tribes, and wherein their title of occupancy has not been extinguished . . ."³⁷ As a result of Seward's letter, the War Department exercised full "Indian Country" jurisdiction over Alaska, forbidding the importation of liquor, regulating the sale of molasses to make liquor, and restricting the sale of firearms.³⁸

2. Judge Deady Redefines the Legal Status of Alaska Natives

The War Department policy was thrown into complete confusion by Federal District Judge Matthew P. Deady's decision in *United States v. Seveloff*,³⁹ the first criminal case to reach the federal courts from Alaska. Judge Deady heard the case in his Portland, Oregon courtroom.

Seveloff involved an arrest by military authorities of Ferueta Seveloff, a Sitka "Creole," on charges of selling liquor to "one John Doe, an Indian," and of distilling spirits without paying taxes.⁴⁰ The government's theory of

uncivilized tribes," evidently because all of the tribes were assumed to be "uncivilized." Still, this "uncivilized tribes" language was often quoted by legal authorities. See *In re Sah Quah*, 31 F. 327 (D. Alaska 1886); *Kie v. United States*, 27 F. 353 (C.C.D. Or. 1886); *United States v. Kie*, 26 F. Cas. 776 (D. Alaska 1885) (No. 15,528a).

33. Seward's letter is quoted in *Brief on the Subject of the Jurisdiction of the War Department over the Territory of Alaska*, H.R. EXEC. DOC. NO. 135, 44th Cong., 2d Sess. 5 (1876), reprinted in 1639 UNITED STATES SERIAL SET [hereinafter *Brief on Jurisdiction*]. This brief contains all known documents relative to the legal status of Alaska in 1876. Evidently, it was compiled by the War Department in support of its exercise of jurisdiction over Alaska and in response to Judge Deady's holdings.

34. 31 U.S. (6 Pet.) 515, 559 (1832).

35. *Brief on Jurisdiction*, *supra* note 33, at 5.

36. *Id.*

37. 7 Op. Att'y Gen. 295, 296 (1855).

38. *Brief on Jurisdiction*, *supra* note 33, at 4-6. It is important to note that no matter what the legal argument was concerning whether Alaska was "Indian Country," the Army acted as though it was. The events in Wrangell in 1869 show very clearly the extent of military authority in Alaska. For example, military law was used at Wrangell to hang Scun do for the killing of a White civilian. See *infra* text accompanying notes 118-26. This hanging was clearly illegal under an interpretation of the law handed down six years later in *In re Carr*, 5 F. Cas. 115 (D. Or. 1875) (No. 2,432) (discussed *infra* at text accompanying notes 60-63). Obviously, Scun do lacked the access to lawyers and the federal court that Whites in Wrangell enjoyed and could not make the same appeal that won Carr his freedom.

Two opinions of the Attorney General clearly refer to Alaska as "Indian Country," but did so in the context of liquor sales. See 14 Op. Att'y Gen. 327 (1873); 16 Op. Att'y Gen. 141 (1878).

39. 27 F. Cas. 1021. (D. Ore. 1872) (No. 16,252). Arguably, the fact that the United States Attorney proceeded on Seward's theory of Alaska's status as Indian Country further establishes the fact that the government believed it to be so.

40. The term "Creole" was used in Alaska to refer to persons of mixed Russian and native ancestry. The majority of the 360 American citizens in Sitka during this period were Creoles. L. BEARDSLEE, *supra* note 7, at 13, 17.

the case was simple: the United States Attorney had properly indicted Seveloff for violating section 23 of the Indian Intercourse Act of 1834⁴¹ by alleging that the defendant "did unlawfully introduce spirituous liquors, to wit, whiskey, into the Indian country, to wit, the Island of Sitka, Alaska, United States of America."⁴² The government based its argument both on the fact that Alaska was inhabited by Indians, and upon Seward's assertion that all acts of Congress applying to Indians extended over Alaska as soon as it was acquired from Russia.⁴³ Judge Deady disagreed and held that Alaska was not Indian country.⁴⁴ For Deady, the mere fact that a country was inhabited or owned in whole or in part by Indians did not make it Indian country within the purview of the Trade and Intercourse Acts. Instead, the Indian Trade and Intercourse Acts of 1834 was a "local act" applying only to country where Congress specifically extended it.⁴⁵

In his reasoning, Deady cited and closely followed an earlier Oregon Supreme Court case, *United States v. Tom*,⁴⁶ which held that the Act of 1834 was a local law extending only over territory under the dominion of Congress at the time of its enactment. The *Tom* court noted that the western boundary of the United States ended at the Rocky Mountains until 1846.⁴⁷ Therefore, the court ruled that Oregon Territory was not "Indian Country" under the Trade and Intercourse Act of 1834. Adopting this rationale, Deady concluded that neither was Alaska.⁴⁸

The more difficult argument for Deady was section 1 of the original Alaska Act of 1868 which extended "the laws of the United States relating to customs, commerce, and navigation" to Alaska.⁴⁹ The language of this Act clearly appeared to embrace the Indian Trade and Intercourse Acts of 1834 which was grounded in the commerce clause of the United States Constitution and which was intended to regulate commerce with the Indian tribes.⁵⁰ Deady's analysis here was specious. He began by asserting that the Act of 1834 applied unless there was evidence of a congressional intent not to extend the Act. Deady then fabricated an implicit intent not to apply the Act to Alaska, without providing even a modicum of legislative history to support this determination.

Deady based his conclusion on two factors. First, he argued, surely wrongly, that Congress's use of "commerce" meant "commerce between foreign nations and several states" and not "as a sort of police regulation to preserve the Indians from the injurious consequences of unrestricted inter-

41. Intercourse Act, ch. 161, 4 Stat. 729 (1934).

42. *Seveloff*, 27 F. Cas. at 1022.

43. *Id.*

44. *Id.* at 1024.

45. *Id.*

46. 1 Or. 27 (1853).

47. *Id.*

48. *Id.* at 27-28. *Tom*, in turn, relied partially on *American Fur Co. v. United States*, 27 U.S. (2 Pet.) 358 (1829). For an analysis of American Indian policy in Oregon at the time of *Tom*, see Coan, *The Adoption of the Reservation Policy in the Pacific Northwest*, 23 OR. HIST. SOC. Q. 1 (1922).

49. *Tom*, 1 Or. at 27-28.

50. For an analysis of the early history of the Indian Trade and Intercourse Acts, see F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834* (1962).

course with the White population.”⁵¹ Second, he pointed out that elsewhere in the Act of 1868, Congress gave the President the power to regulate the importation of spirits into Alaska.⁵² This, Deady contended, was inconsistent with Congress’s view that Alaska was already Indian country.⁵³ Deady conceded that this view was “subject to correction,” but noted that if Congress had intended the Indian Trade and Intercourse Act to apply to Alaska it should have expressed that intent in the Act of 1868.⁵⁴

As to the second charge, distilling spirits in Alaska without paying taxes, Deady’s holding was again troubling. He reasoned that because only the laws regulating “customs, commerce and navigation” extended over Alaska, the court had no jurisdiction at all over the charged crime, which did not fall into any of those categories.⁵⁵ Again, although it is arguable whether the distillation of whiskey was “commerce” within the definition intended by Congress, in all likelihood it was, especially in the context of a broad act for the administration of a new territorial acquisition. In the meantime, Deady’s opinion meant there was no criminal law in effect in Alaska.⁵⁶

The United States government did not endorse Judge Deady’s opinion on the status of Alaskan criminal law. On the contrary, in response to the *Seveloff* decision, Congress quickly passed a law extending the liquor control provisions of the Indian Trade and Intercourse Acts to Alaska.⁵⁷ In addition, ten months later, the Secretary of War, William Belknap, asked for clarification of the issue from Attorney General George Williams. Williams responded with an opinion holding that Alaska was indeed “Indian Country” and that no spiritous liquor could be introduced there without War Department authority.⁵⁸ The resulting confusion left the military authorities in Sitka and Wrangell in the uncomfortable position of having orders to carry out liquor laws applicable to “Indian Country” in the district of a federal judge who previously held that the laws were inapplicable because Alaska was not “Indian Country.” The military resolved this dilemma simply by acting extra-legally: routine criminal matters were either punished summarily by short-term incarceration in the military lock-up or were left to

51. While a few Southern states in the immediate context of the Cherokee and Creek removals argued for a narrow scope of federal jurisdiction over the Indian tribes through the Indian Trade and Intercourse Acts, it became well established in the first half of the nineteenth century that the scope of federal regulation of “commerce” with the tribes was very broad and included the regulation of virtually every phase of White interaction with the Indian tribes. See *id.* Chief Justice Marshall wrote expansively of this power in *Worcester*: “The Constitution confers on Congress the powers of war and peace, of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions,” 31 U.S. at 557, and it was thereafter interpreted in an expansive way by the federal courts. Thus, Deady’s narrow interpretation, coming in the late nineteenth century, was inconsistent with the prevailing view of the time.

52. *Seveloff*, 27 F. Cas. at 1024.

53. *Id.*

54. *Id.*

55. *Id.* at 1025.

56. This is true because of Judge Deady’s holding that all laws enacted prior to the purchase of Alaska did not extend there unless specifically so stated by Congress.

57. See *Brief on Jurisdiction*, *supra* note 33, at 8.

58. 14 Op. Att’y Gen. 327 (1873).

the Indians' customary law.⁵⁹ However, it was soon clear that this state of affairs could not last.

3. *The Legal Authority of the Military in Alaska*

Military authorities arrested John A. Carr, the United States Collector of Customs in Wrangell, in September of 1874, and charged him with introducing spirits into Alaska in violation of section 20 of the Indian Trade and Intercourse Acts.⁶⁰ The authorities kept Carr in a military jail until December 19th, when Carr filed a writ of habeas corpus. Carr was then conveyed to Judge Deady's court in Portland.⁶¹ Deady found that Congress possessed the authority to extend the Indian Trade and Intercourse Acts to Alaska and to empower the military authorities to enforce that law.⁶² Nevertheless, Deady concluded that when military personnel acted under this grant of congressional authority, they did so merely as "police officer[s], marshall[s], or constable[s]." Thus, they were civil officers acting pursuant to civil law, not military law. Civil law provided that a civilian in military custody had to be transferred to a civilian jurisdiction within five days of his arrest or be released. Since Carr had been in custody for over ninety days he had to be set free.⁶³

In a companion case, Deady dismissed related charges against Hugh Waters, an Army officer charged under the Indian Trade and Intercourse Acts with trading without a license.⁶⁴ Deady, consistent with his narrow view of the Trade and Intercourse Acts in *Seveloff*, held that only those provisions of the Acts dealing with liquor enforcement were extended to Alaska and that, therefore, Waters did not need a license to trade with the Indians.⁶⁵ Waters subsequently sued his superior officer James Campbell, who was in command of United States forces in Alaska, for false imprisonment. Waters alleged that he was "residing and doing a lawful business, trading in goods, wares and merchandise, at Fort Wrangle [sic]" when arrested, a call-

59. Message From the President of the United States, S. EXEC. DOC. No. 33, 44th Cong., 2d Sess. (1876), reprinted in 1664 UNITED STATES SERIAL SET [hereinafter Message]. This document is a report on the incidence of military imprisonment of civilians in Alaska. For all the care in the tabulation of the exact dates of hundreds of illegal military confinements, the report leaves out the military execution of Scun do, evidently the only such execution in Alaska. See *infra* text accompanying notes 118-26.

The Army, while knowingly acting contrary to the highest federal courts that had passed on the legal status of Alaska, also generated its own law on the status of Alaska in the form of an opinion written by H. Clay Wood, Assistant Adjutant-General of the Department of the Columbia, the military department which included Alaska. After a long analysis, Wood concluded that Alaska was, in fact, Indian Country, dismissing Deady's opinion in *Seveloff* as "fine, metaphysical, and vague reasoning." Letter From H. Clay Wood to Brigadier General O.O. Howard (Dec. 16, 1875), printed in Message, *supra*, at 49-56. Thus, in its own view, the Army did not act illegally, but simply ignored an incorrectly decided case.

60. See also Carr, 5 F. Cas. 115. This case raised in Washington the whole issue of the legality of military law in Alaska and led to several congressional inquiries into the matter. Letter From the Secretary of War Re: the Case of John A. Carr, S. EXEC. DOC. No. 24, 44th Cong., 1st Sess. (1875), reprinted in 1629 UNITED STATES SERIAL SET.

61. Carr, 5 F. Cas. at 116.

62. *Id.*

63. *Id.*

64. Waters v. Campbell, 29 F. Cas. 411 (D. Or. 1876) (No. 17,264).

65. *Id.*

ing far different than that of a professional soldier.⁶⁶

John Williams was the subject of another Deady opinion further limiting the authority of the United States in Alaska.⁶⁷ In a dispute with another man, Williams shot his victim five times. He was arrested by the Navy and sent to Portland for trial. Deady dismissed the charges, however, when he found no general laws of the United States prohibiting "assault with a deadly weapon."⁶⁸ As long as Alaska was subject to the laws of no other jurisdiction, only federal criminal laws applying to the entire country had effect.⁶⁹ Deady observed that while sections 5339 and 5341 of the United States Code prohibited both murder and attempted murder "in any district or country under the exclusive jurisdiction of the United States," there was no corresponding statute regarding assault with a deadly weapon.⁷⁰ Thus, Deady left Alaska with little protection of the criminal law.

4. *The First Federal Trials of Tlingit*

Not surprisingly, Judge Deady's remarkable record of reversals did not extend to Tlingit brought before his court, a coincidence that embarrassed Navy Captain Beardslee, who had recently become the highest American authority in Alaska.⁷¹ Nor was it missed by the Tlingit, who took it as evidence of the bias of White justice. On January 1, 1879, at a bay not far from Sitka, Kot ko wot and Okh kho not shot Thomas Brown to death, evidently with robbery as the motive.⁷² Despite the distances, the wheels of justice turned quickly, and the two received a one-day trial in Portland on April 15th. After a short deliberation, the jury convicted Kot ko wot of murder and acquitted his partner. Deady then sentenced Kot ko wot to be hanged and afterward, to be dissected by a local medical school.⁷³ The execution proceeded as scheduled.

66. *Carr*, 5 F. Cas. at 121. Both the *Carr* and *Waters* cases reveal the complete breakdown in military discipline in Alaska during the 1870s. In the ordinary course of military discipline a junior officer would not have occasion to sue his superior officer for interfering with his prosperous trading business. Military government in Alaska became a national scandal that probably speeded up Organic Act government. See Sherwood, *supra* note 25, at 312-13.

67. *United States v. Williams*, 2 F. 61 (D. Or. 1880). The *Williams* case is described in detail in L. BEARDSLEE, *supra* note 7, at 25-27. The file of the case is held in Record Group 21, United States District Court, Oregon, Case No. 865 in the National Archives, Seattle Branch.

68. *Williams*, 2 F. 61.

69. *Id.*

70. *Id.*

71. Navy Captain L.A. Beardslee was given military command of Alaska in May, 1879. His instructions were very broad, including "looking out for the citizens of the United States and rendering them such protections as may be required" as well as to

study the situation of affairs in that Territory, and use [my] utmost endeavors to restore and establish permanently harmonious relations between the White settlers and the native Indians of the Territory to which I am authorized (there being no governing power or code of laws in existence in the Territory) to use my own discretion in all emergencies that might arise.

L. BEARDSLEE, *supra* note 7, at 11.

72. *United States v. Kot ko wot and Okh kho not*, Judgment No. 487 (D. Or. 1879). This unreported case is held in Record Group 21, United States District Court, Oregon, in the National Archives, Seattle Branch. For a discussion of the former arrest see L. BEARDSLEE, *supra* note 7, at 14-15.

73. Judge Deady himself mentions the cases briefly in his diary, M. DEADY, PHARISEE AMONG PHILISTINES 278-79 (M. Clark, Jr. ed. 1975).

Three years later Ki ta tah, another Tlingit, met the same fate in Deady's court, again for the robbery and murder of two White men.⁷⁴ These were the only executions Deady ordered in his then thirty years on the federal bench.⁷⁵ Both cases received cold and matter-of-fact entries in Deady's personal diary. Kot ko wot, the first person the judge ever sentenced to death, was not even remembered by name.⁷⁶ Ki ta tah's proper name made it into Deady's diary, probably because Deady witnessed Ki ta tah's "mangled remains on the dissecting board" when Deady coincidentally went to the medical school to deliver a lecture.⁷⁷

These two murder cases involved Tlingit who killed Whites. To deal with cases involving killings between Tlingit, the government of the United States had a de facto policy, throughout the early 1880s, of recognizing Tlingit law and leaving such matters to tribal justice. For most military commanders this was a matter of simple expediency: sheer distances to Oregon courts combined with the weakness of federal authorities in Alaska and the strength of the unconquered Tlingit dictated such a policy.⁷⁸ Navy Captain Beardslee, however, adopted a more sophisticated and culturally sympathetic procedure. He had great respect for Tlingit law and actually relied on Tlingit legal principles in his law enforcement role in southeastern Alaska in 1879 and 1880.⁷⁹ Of course, neither of these policies was based on the legal doctrines emanating from Deady's court.

5. United States v. Charles Kie: *The Judicial Origins of a Separate Indian Policy for Alaska*

The confusion over the status of the Indian tribes in Alaska could not be expected to last indefinitely. While Judge Deady had clearly done everything within his power to limit the application of any American laws pertaining to Indians in Alaska, he was not able to set forth any alternative view of the legal status of the native people there. The case that gave him the opportunity to do so occurred in the context of a national debate about the right of the Indian people to their own law. In 1883, the United States Supreme Court decided *Ex parte Crow Dog*, holding that Indians living in "Indian Country" retained their own laws as an attribute of their sovereignty and thus possessed exclusive jurisdiction over crimes occurring on the reservation.⁸⁰ Prior to *Crow Dog*, neither Judge Deady, nor any White Alaskans, had recognized a right to sovereignty among Alaska natives. For the Tlingit, however, the question of the formal recognition of their sovereignty

74. United States v. Kitatah (D. Or. 1882), Judgment No. 640. This unreported case is also held in Record Group 21, National Archives, Seattle Branch.

75. M. DEADY, *supra* note 73, at 278-79, 393-94.

76. *Id.* at 393-94.

77. *Id.*

78. Beardslee provides the best report on local law enforcement in Alaska in 1880 in L. BEARDSLEE, *supra* note 7, at 11-27. The general demoralization and incapacity of the American military in Alaska should be clear from the *Carr* and *Waters* cases discussed *supra* notes 60-66 and accompanying text. See generally W. HUNT, *DISTANT JUSTICE: POLICING THE ALASKA FRONTIER*, chs. 1 & 2 (1987); Naske, *The Shaky Beginnings of Alaska's Judicial System*, 1 W. LEGAL HIST. 163 (1988).

79. See generally L. BEARDSLEE, *supra* note 7.

80. 109 U.S. 556.

by American law was not an issue because American authorities had never attempted to apply their law in intra-Tlingit matters. The *Kie* case represented a change in this policy.⁸¹

Charles Kie and his wife, Nancy, lived in the Indian "ranch" at the outskirts of Juneau. Nancy began to spend more and more time in the White village, becoming friendly enough with Whites to complain about Kie's treatment of her. Evidently, incensed by Nancy's complaints and her general conduct with Whites, Kie grabbed her from the back and brutally stabbed her in the abdomen, leaving her dead in broad daylight in the middle of the Tlingit village. The Tlingit declined to punish Kie because under their tradition, he had the right to kill her for adultery as her conduct provided evidence of adultery.⁸² Local Whites, however, were infuriated with Kie's cold-blooded conduct and his open defiance of American law. They prevailed upon the United States marshal to arrest Kie and charge him with murder. Accordingly, Kie, old and syphilitic, was taken to Sitka for trial.⁸³

Kie's trial, held in Alaska's new federal district court created under the Organic Act of 1884,⁸⁴ passed without incident, for the openness of the defendant's action left no question that he was guilty of some offense. A White jury convicted Kie of manslaughter and he was sentenced to ten years in prison and fined one hundred dollars.⁸⁵ The jurisdictional issue, however, was raised before trial in the form of a demurrer, when Kie's attorney, citing *Crow Dog*, argued that the American courts had no jurisdiction over crimes between Tlingit.⁸⁶ Thus, *United States v. Kie* became one of the first cases after the *Crow Dog* decision to squarely place the issue of the extent of Indian criminal jurisdiction before a court.

Judge McAllister, newly appointed as Alaska's first federal district judge, in a poorly reasoned opinion, closely adhered to Judge Deady's four preceding cases, defining the question solely as "whether Alaska was Indian country."⁸⁷ In deciding that Alaska was not, Judge McAllister ignored the important language in *Crow Dog* that provided a broad definition of "Indian Country" that would have included Alaska.⁸⁸ Supreme Court Justice Matthews, in his *Crow Dog* opinion, was aware that the definition of "Indian Country" was imprecise and meant different things in different contexts. Nevertheless, he defined "Indian Country" in such a way as to include Alaska Indians within the scope of the *Crow Dog* doctrine. His was an expansive definition, both simple and functional and designed to implement the principles laid down in *Crow Dog*. According to Justice Matthews, "Indian Country" included "all the country to which the Indian title has not been

81. The Tlingit communities adjacent to American villages were referred to as "ranch" or "ranche" by local White Alaskans. Sitka, Wrangell, and Juneau were all adjacent to Tlingit qwans that became enlarged due to the increased commercial activity of the White settlements.

82. *Kie*, 26 F. Cas. 776. The appeal to Deady's court is printed as *Kie*, 27 F. 351. The court files of the case, Judgment No. 1065, are held in the National Archives, Seattle.

83. The facts of the case can be found in the original case file, held in Record Group 21, National Archives, Seattle Branch.

84. Organic Act, ch. 53, 23 Stat. 24 (1884).

85. See *supra* note 83.

86. *Kie*, 26 F. Cas. 776.

87. *Id.* at 777-79.

88. *Id.*

extinguished within the limits of the United States, even when not within a reservation . . . and notwithstanding [that] the formal definition in that act has been dropped from statutes."⁸⁹

This definition addressed the very same formalistic rules of statutory construction that Judge Deady previously used to hold that Alaska was not "Indian Country."⁹⁰ The United States Supreme Court's broad definition was a deliberate attempt to limit the ability of local courts, including federal district courts and territorial courts to weaken the *Crow Dog* doctrine.⁹¹

While Judge McAllister overlooked the fact that *Crow Dog*'s definition of "Indian Country" directly threatened the underpinnings of Deady's whole line of cases limiting the definition of "Indian Country" in Alaska, Judge Deady, hearing *Kie* on appeal, did not. He recognized the direct challenge to his "Indian Country" decisions regarding Alaska. In an opinion that still has a negative impact on the rights of Alaska natives, Deady retraced all of his old steps, changing his definition of "Indian Country" to take into account Justice Matthews' broader definition.⁹² Then, for good measure, he mooted the case to prevent its appeal to the United States Supreme Court.⁹³

In his seminal opinion, Deady first addressed the Supreme Court's complete departure from the limitations imposed by the Indian Trade and Inter-course Acts' definition of "Indian Country." Deady observed that the Court's new definition was even more narrow than the Acts' and would always leave Alaska law distinct from the rest of American law. Falling back on a wholesale territorial determinism approach, Deady argued that the *Crow Dog* case "arose in Dakota, a territory acquired from France in 1803, while the anomalous condition of Alaska was not probably considered by the court."⁹⁴ Deady further observed that the Court always treated Alaska distinctly separate from other states in all references to Indian law unless it took the direct cognizance of the Alaskan situation. This kind of logic fragmented and regionalized Indian law because of an assumption that the wide variety of political relationships underlying Indian treaties and Indian policy could not be recognized into a single cohesive formulation.⁹⁵

But Deady was too smart to rest his opinion solely upon his own bad reasoning. Instead, he directly addressed the question of Indian title to Alaska for the first time, seizing upon the language of Justice Matthews which required the Indian title to be "unextinguished" for a country to be

89. *Crow Dog*, 109 U.S. at 561-62.

90. See *supra* text accompanying notes 42-44.

91. Elsewhere, I argue that throughout most of the nineteenth century the states did not automatically concede jurisdiction over the Indian tribes to the federal government. Rather, there was considerable conflict between the federal and state courts concerning their respective jurisdiction over the tribes. It was not until the 1880s that the federal authorities finally gained supremacy. *Crow Dog* and *Kagama* were the key cases of this period, and both cases had a major impact on increasing the scope of federal jurisdiction, not only over the Indian tribes, but over the states as well. S. HARRING, *CROW DOG'S CASE: AMERICAN INDIANS AND AMERICAN LAW IN THE LATE NINETEENTH CENTURY* (forthcoming).

92. *Kie*, 27 F. 351.

93. *Id.*

94. *Id.* at 352.

95. *Id.*

"Indian Country."⁹⁶ Deady began by pointing out that Americans acquired title to Alaska from the Russians, who, unlike the Americans, did not make treaties with Indians.⁹⁷ Rather, "at the date of this cession Russia owned this country as completely as it now does the opposite Asiatic shore . . ."⁹⁸ Deady used this historical observation to extend the reach of his earlier cases. Thus, Alaska not only failed to constitute "Indian Country" because the language of the Trade and Intercourse Acts did not apply to it, but Alaska also did not fit within the definition of "Indian Country" because the Americans acquired the Russian title to the land, thereby extinguishing the Indian title.⁹⁹

Possibly realizing that it might not be enough to rest his decision on the enlightened Indian policy of the Czar of Russia, Deady found a legitimate reason to reverse the judgment of the lower court on narrow, technical grounds, claiming the district judge improperly computed a twenty-five dollar fine that was an insignificant part of Kie's ten-year sentence. Deady then remanded the case to the Alaska District Court where Kie was again sentenced to a seven-year prison term. There is no record, however, that he was ever imprisoned.¹⁰⁰

Alaska natives felt the impact of Deady's holding in the most direct way: they were deprived of their sovereign right to apply their own laws to disputes between native people and were made fully subject to all of the Organic Act laws in the Territory of Alaska.¹⁰¹ Thus, under territorial law they were governed by the same laws as Whites. At the same time, however, they were deprived of most of the protections afforded the tribes under federal Indian law which, because it was based on either treaty rights or the Indian Trade and Intercourse Acts, did not apply to Alaska. With no special federal protection, or even recognition of their status as members of native tribes, Alaska natives were nevertheless fully exposed to local law and legal institutions. These laws could be applied unimpeded to natives in all situations and could be used as a powerful weapon in the process of assimilation, as well as for broader social control and land deprivation purposes. Judge Deady, clearly knowledgeable of the political burden of Indian sovereignty in the territories, dealt a terrible blow to the rights of the Alaska natives by using federal law to deprive them of their sovereign right to be ruled by their own law.¹⁰² The impact of Deady's decisions continues to be

96. *Id.*

97. The inhabitants of the ceded territory, as prefer to remain therein, with the exception of the uncivilized tribes, shall be admitted to all the rights, advantages and immunities of the citizens of the United States, and shall be maintained and protected in the full enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country.

Id. at 354.

98. *Id.*

99. *Id.* at 354-58.

100. *Id.*

101. While we have seen that only a few federal laws applied to Alaska in the 1870s, the Organic Act changed this situation by applying the laws of the State of Oregon to Alaska. Thus, after 1884 the Tlingit faced a full range of White laws governing all aspects of social life.

102. Judge Deady served thirty-four years on the bench of the United States District Court in Oregon, and rendered many Indian opinions. While the exact motivation for his determination to

felt to this day.¹⁰³

C. *Tlingit Law Meets American Law: The Legal Structuring of Tlingit and American Contact in Southeastern Alaska*

Intense conflict took place in Southeastern Alaska between 1867 and 1884 when Alaska began to operate a formal legal system under the Organic Act.¹⁰⁴ This conflict is well documented and provides a unique insight on the legal structuring of Indian and White relations in a region which, except in rare and dramatic situations, was largely beyond the reach of American law.¹⁰⁵ All of the existing evidence suggests that Tlingit law was predominant in this region between 1867 and 1884. It was only with the substantial White immigration in the 1880s and 1890s that American law was able to assert supremacy over Tlingit law, for it was only then that the United States had both sufficient political power and a legal infrastructure adequate to do so.¹⁰⁶

Ironically, prior to the influx of White settlers even the American authorities often applied Tlingit law to difficult conflict resolutions, believing it would be more effective than imposing or trying to impose American law.¹⁰⁷ Much of the conflict between Americans and Tlingit concerned either disputes over the application of law with both Tlingit and Americans rejecting the right of the other to apply either law to them or political or economic sovereignty that, in turn, was closely intertwined with legal principles.¹⁰⁸ The scope of this conflict equalled the level of Indian and White violence in other parts of America in external appearance, but was so carefully structured by both sides that casualties were very low, although they did occur.¹⁰⁹

keep "Indian Country" status from the Alaska Natives is unknown, it seems clear that, as a longtime resident of Oregon, he was fully aware of a similar debate over the extension of "Indian Country" status to Oregon in the early 1850s. From his perspective, "Indian Country" status adversely affected White settlement by giving Indians a separate status. For an analysis of Deady in the context of his Chinese cases, see Mooney, *Matthew Deady and the Federal Judicial Response to Racism in the Early West*, 63 OR. L. REV. 561, 584-86 (1984).

103. The cumulative effect of Deady's opinions was to deprive Alaska natives of the same right to sovereignty over their political affairs that Indians in the rest of the United States had. The final result of this is both political disarray and the Alaska Native Claims Settlement Act. See generally D. CASE, *supra* note 3.

104. The cases discussed in this section represent only those cases that came to the attention of American authorities. Still, they represent a great deal of violence for a region with a population of not more than 13,000 people.

105. There were, for example, a number of congressional reports on matters of public order in Alaska. Many of these are cited in both the last section and this section.

106. Without a local code of laws there was not even the possibility that American law would replace Tlingit law. The failure of the Americans to provide either a code of laws, or a set of legal institutions, represents a complete default to either pre-existing institutions, which were all Tlingit, or to de facto systems of local law, such as might be created by communities of miners or soldiers.

107. This, of course, does not mean that such Americans had any level of respect or understanding of Tlingit law. Rather, their motivation was most often simple expediency.

108. This theme is developed *infra*, in the next three sections.

109. Much of this violence is detailed herein. For the small population, the fact that both Sitka and Wrangell were at times threatened by Tlingit hostilities, that two Tlingit villages were shelled by the United States Navy, and that a dozen or more intra-racial killings occurred over a twenty-year period illustrates a very high level of conflict. Clearly, however, casualties were deliberately kept low by both sides. For example, before the United States Navy shelled Angoon, the Tlingit were given time to leave. Similarly, the Tlingit always killed Whites one or two at a time, conforming such killings to Tlingit law requiring that revenge be kept in balance with the nature of the offense.

This section first considers the outlines of Tlingit law in order to gain a better understanding of the legal order operating in Alaska at the end of the nineteenth century. Second, it turns to an analysis of Tlingit and American conflict during this period, with a focus on how law, both Tlingit and American, structured that conflict.

1. *Tlingit Law*

Although Whites characterized Tlingit law, as well as other native law, as based on "revenge," this clearly was not the case.¹¹⁰ Instead, the Tlingit regularly used "peace ceremonies" to settle both local and interclan disputes that might lead to feuds or warfare.¹¹¹ These ceremonies were initiated along clan lines by men married to women of the other clan or family involved in the dispute.¹¹² Thus, attempts to negotiate peace began with a recognition of the interrelatedness of all Tlingit peoples.¹¹³

The men who served as peace negotiators were trusted with very responsible positions. These intermediaries were charged with determining what compensation the other side demanded. They then carried the message back to their own clan and arranged for the actual performance of the agreement, in either goods or human lives.¹¹⁴ Within the same moiety, the settlement of disputes always took the form of the exchange of property and never involved blood.¹¹⁵

The Tlingit had a very definite sense of peace and justice, and believed that such notions of justice should extend to the Whites that came into their land.¹¹⁶ Accordingly, a repeated pattern in Tlingit and White relations arose. The Tlingit tried repeatedly to restore their traditional sense of justice through their own laws, but were frustrated by continual White interference with those efforts. This conflict often led to violence.¹¹⁷

110. A simple "revenge" analysis of Tlingit law permeates all of the press accounts in Tlingit homicides discussed in detail in Part D of this Article. L. BEARDSLEE, *supra* note 7, at 15, adopts this view as well.

No comprehensive analysis exists of the various Indian legal systems existing in North America before White contact. But, on contact, Whites in general adopted this simplistic "blood feud" analysis as the core of Indian law all over the country. This view is taken by modern students of Indian and White relations, when they take any view of Indian law at all. See, e.g., Y. KAWASHIMA, *PURITAN JUSTICE AND THE INDIAN: WHITE MAN'S LAW IN MASSACHUSETTS, 1630-1763*, at 5 (1986). The problem with such analysis is that both the British and European legal codes are also rooted in simple notions of revenge as well. See S. JACOBY, *WILD JUSTICE* (1986). See also Miller, *Choosing the Avenger: Some Aspects of the Bloodfeud in Medieval Iceland and England*, 2 *LAW & HIST. REV.* 159 (1987).

We need to look beyond these simple roots at other levels of complexity of both Indian and American legal systems. F. DE LAGUNA, *supra* note 9, at 592-93.

111. The nature of this peace process is described in F. DE LAGUNA, *supra* note 9, at 593: "... [P]eace does not mean cessation of fighting, the imposition and acceptance of conditions of surrender; it means restoration of lawful relationships, settlement of claims for loss and injury, and reestablishment of equity."

112. *Id.*

113. This is a central theme of Oberg, *Crime and Punishment in Tlingit Society*, 36 *AM. ANTHROPOLOGIST* 145 (1934).

114. F. DE LAGUNA, *supra* note 9, at 593.

115. *Id.* at 594.

116. *Id.*

117. It should not be surprising that the Tlingit attempted to restore order to the chaos that

2. *Early Conflict Between Tlingit and American Law*

Two of the best-known conflicts between the Tlingit and Americans led to the shelling of Tlingit villages by the United States Navy. In the first incident, a White laundress at Fort Wrangell intervened in an 1870 dispute between a Tlingit man and his wife. The Tlingit man, Si-wau, angry at this interference, seized her hand and bit off the woman's finger.¹¹⁸ An Army lieutenant with a detachment of twenty men was sent to bring Si-wau in. A Tlingit named Scutd-doo directed them to a house where Si-wau was waiting with several other Tlingit. Si-wau refused to go with the officers and rushed the line of officers, shouting "kill me, shoot me" and trying to take a gun from a soldier.¹¹⁹ The officer hit Si-wau in the head with his sword to stun him. In the process, however, the soldier "inadvertently" gave a prearranged signal to fire; Si-wau and Esteen, another Tlingit, were hit. Si-wau was killed instantly and Esteen was badly wounded.¹²⁰ After an altercation with Tow ye at, a subchief, the soldiers removed the two Tlingit to the military fort. Unfortunately, detailed events of this encounter were not recorded, but it seems probable in light of later events that Tow ye at demanded payment for the death.¹²¹

Within an hour after the altercation, residents heard gunfire and found Leon Smith, a trader, shot to death in front of his store. A detachment of troops was sent under a flag of truce to demand that the Tlingit village turn over the murderer for punishment. The troops were met by Tow ye at in paint and a fighting costume. He refused to turn over the murderer and defiantly responded to military threats by stating that if they fired on the village he would die in his house.¹²² Several hours later, after the deadline for the surrender of the murderer passed, the army opened fire on the Tlingit village with two cannons, one from the fort and one from the hills behind the fort. The Tlingit returned the fire with muskets. In the middle of the next day, a white flag appeared on the house of Shakes, a principal chief, and the army saw the Tlingit coming toward the fort with Scutd doo, who appeared to break away and escape.¹²³

This ruse did not affect the Army, which demanded that the wife and sub-chief of Scutd doo be turned over as hostages to insure the delivery of the murderer. When the two hostages were handed over the bombardment ceased. A few hours later, the murderer surrendered. Scutd doo was given a military trial and hanged three days later. His body was kept hanging all day as a warning to the Tlingit, but that night it was cut down and returned to the tribe for a funeral.¹²⁴ Although the military chose to treat the inci-

Whites brought to Alaska by applying their law to the Whites. For a parallel analysis of one aboriginal war in Australia, see G. REID, *A NEST OF HORNETS* (1982).

118. S. EXEC. DOC. NOS. 67 & 68, 41st Cong., 2d Sess. (1870), reprinted in 1406 UNITED STATES SERIAL SET. Another account of this event can be found in Sherwood, *supra* note 25, at 309-10.

119. S. EXEC. DOC. NOS. 67 & 68, *supra* note 118.

120. *Id.*

121. *Id.*

122. S. EXEC. DOC. NO. 67, *supra* note 118; Sherwood, *supra* note 25, at 307-08.

123. Sherwood, *supra* note 25, at 307-08.

124. *Id.*

dent under American law as an individual act of murder, there is no question that Scutd doo acted for his clan in killing Smith.¹²⁵ The act was probably not one of simple revenge, but to impress upon the Americans the importance of respecting Tlingit law.¹²⁶

America's military command in Sitka managed to become involved in a parallel situation and also destroyed a Tlingit village.¹²⁷ In a comedy of American incompetence, a visiting Chilcat chief was received at dinner by American commander General Jefferson Davis and was given a present of two bottles of whiskey. On the way back to the Tlingit camp, a sentry challenged the Chilcat chief, kicking him when he refused to yield. The chief then kicked the sentry and took his rifle back to his camp. A detachment of soldiers was sent to arrest the chief, but was repulsed in a skirmish. The chief later submitted to American authority and was locked in jail. In the meantime, a Kake canoe entered Sitka harbor, and a sentry, acting under orders imposing a curfew on Indians in Sitka during this trouble, fired on the canoe, killing two Kake warriors.¹²⁸

The Tlingit demanded payment for both of these affronts. The Chilcat affair was settled easily when a Sitka trader was seized in Chilcat territory, with the Chilcats demanding payment, in money or in life, for their injury in Sitka.¹²⁹ The trader, after acting as a peacemaker and trying to mediate with General Davis, paid thirteen blankets and a coat, thus settling the matter amicably for about fifty dollars. The Kake, however, failing to receive compensation, killed two White traders. General Davis proceeded to Kake and attacked and burned the village, destroying twenty-nine houses and a number of canoes.¹³⁰

In the ensuing years these situations occurred with increasing frequency, and while Whites usually did not pay, they sometimes did, implicitly recognizing Tlingit law. Because White payment was usually problematic, these events always created tension. One 1872 incident put the entire Sitka garrison under arms and on full alert over compensation for the value of an egg broken by a soldier.¹³¹ In at least one situation, however, the United States government appeared to acknowledge its responsibility for a death and paid according to Tlingit law. A chief was sent to Oregon as a witness in the trial of some White men and, for an unknown reason, committed suicide while en route.¹³² Since, under Tlingit law the United States was responsible for his death because he was in their custody, his slave threw gunpowder in the

125. The Tlingit response to the military shooting followed by requirements of Tlingit law. A peacemaker made a demand on the Americans for justice, and one American was killed to keep the relationship between the parties in balance. While we have no record of the Tlingit taking another life for Scun do, it is conceivable that they did take an isolated trapper or miner years later.

126. From the Tlingit standpoint, permitting soldiers to come to the Tlingit community, threaten Tlingit people, shoot indiscriminately into the village killing a Tlingit, and then face no organized Tlingit reaction would have been unthinkable and also proof of the impotence of Tlingit political institutions.

127. Sherwood, *supra* note 25, at 308.

128. *Id.* at 308-09.

129. *Id.* at 310.

130. *Id.*

131. *Id.*

132. L. BEARDSLEE, *supra* note 7, at 14.

ship's engine in an effort to blow the vessel up. Captain Beardslee returned the body with a payment of one hundred blankets in an effort to ingratiate himself with the Tlingit.¹³³

Perhaps the most famous conflict between the Tlingit and Americans occurred in 1882, attracting national attention to Alaska. The revenue cutter Corwin shelled two Tlingit villages for reasons similar to earlier events, indicating the emergence of a pattern in these conflicts. At the same time, an American whaling ship was whaling in the bay at Angoon, called Hootsnoo by the Tlingit. One of the bombs used in whaling exploded by accident, killing a Tlingit shaman employed by the whaling company as a crewman.¹³⁴ Outraged Tlingit demanded compensation of two hundred blankets and seized whaling boats, equipment, and two Whites as hostages until such payment could be arranged. The seizure of hostages in such cases was in keeping with traditional Tlingit law. The Tlingit treated the hostages honorably to demonstrate the good will of the clan. Thus, the two Whites, trusting that good will, had nothing to fear. The captain of the whaling fleet, however, was not interested in settling the matter according to Tlingit customary law and escaped in a tugboat to Sitka, calling upon on the United States Navy to "teach the Tlingit a lesson."¹³⁵

Obviously, the Navy did not have to do as the captain asked, for it could have recognized Tlingit law and the whaling company's civil responsibility to make good on the death. But Navy Captain E.C. Merriman wanted to teach the Tlingit a "severe lesson," so he took a company of marines, a howitzer, and a gatling gun and sailed to Angoon.¹³⁶ As soon as Merriman anchored in the harbor, the Tlingit released the hostages and the property. Merriman, in turn, captured some Tlingit "ringleaders" and demanded four hundred blankets in tribute, twice the number the Tlingit demanded of the Whites. The Tlingit were defiant, unsubdued, and refused to pay. Merriman responded by firing his cannon, first destroying forty canoes and later burning the village. The Navy expedition then shelled a nearby village and a landing party burned all the houses, except for a few belonging to Indians known to the Navy as "friendly."¹³⁷

William Morris, a collector of customs who accompanied the expedition, filed a report on the incident.¹³⁸ He made clear that the whole action

133. *Id.*

134. Letter from the Secretary of the Treasury in Response to the Alleged Shelling of Two Villages in Alaska, H.R. EXEC. DOC. NO. 9, 47th Cong., 2d Sess. pts. 1-4 (1882), reprinted in 2103 UNITED STATES SERIAL SET. For a detailed description of this event see *id.* pt. 1, at 1-3; pt. 2, at 1-2; pt. 3, at 1-4; and pt. 4, at 1-2.

135. *Id.* pt. 1, at 2-3; pt. 2, at 2.

136. *Id.*

137. *Id.*

138. It has been a custom for many years in this territory, when an Indian has been killed or injured by another, or by a white man, for his surviving relatives to demand of the hands of the parties who injured him a certain payment or tribute, consisting generally of blankets. When this levy is made it means potlatch (pay) or die. It has been attempted by the Navy to break up this practice, but without effect.

Shortly previous to the case at bar, whilst an Indian was cutting down a tree for the Northwest Trading Company . . . The tree fell and killed him. Immediately a certain number of blankets were levied as a fine upon the company by his relatives, and payment demanded. The company refused, of course. Matters remained *in statu quo* until the Ad-

was aimed at stopping the Tlingit from applying their laws to Whites. Tlingit custom had, in his view, forced Whites to pay for a number of Tlingit deaths. Morris went on to emphasize that the Tlingit were surly, impertinent, insolent, and "saucy toward Whites" and did not fear the authority of the government. As a result, the fact that the Tlingit insisted on applying their laws to Whites who worked among them became a major issue in the struggle for political domination of Alaska.

Merriman's actions were not without controversy. The image of the Navy shelling an Indian village had a powerful impact all across the country.¹³⁹ For example, Congressman James Budd of California characterized these actions as "proceedings unworthy of a drum-head court martial" and accused the Navy of making and executing laws: Merriman was "judge, jury, and sheriff."¹⁴⁰

3. *The De Facto Recognition of Tlingit Law: Tlingit and White Relations in Sitka During the 1870s*

The Tlingit's insistence that their law be applied at Angoon in defiance of the United States Navy reveals that the Tlingit remained defiant and unsubdued, sovereign in their own belief, well into the 1880s. The military destruction of Tlingit villages was the federal government's response to the Tlingit's claims of sovereignty. Navy Captain Beardslee arrived in Sitka immediately after the "Sitka Affair," which marked a low point in Tlingit and American relations.¹⁴¹ Moreover, this incident was an international embarrassment because the United States government was unresponsive even though the residents of Sitka had petitioned the British for a gunboat to protect them from a feared Tlingit massacre.¹⁴² Not surprisingly, the whole incident began with a conflict between Tlingit and American law.

In 1879, Sitka was a very rough place, more or less under Tlingit control. Its population included no more than eighty Whites and two hundred "Creoles," the latter by all reports a demoralized and drunken group.¹⁴³

ams Captain Merriman arrived . . . and complaint was made by . . . the superintendent of the company. He informed the Indians that in future no such payments should either be demanded or enforced as far as white men were concerned; that if they persisted . . . he would punish them severely, and that in this instance the company would and should not pay. They submitted with bad grace.

Id. pt. 2, at 1-2. Thus, Tlingit law was clearly seen as a threat to American economic interests. American companies employing Tlingit workers faced liability under Tlingit law for their accidental death, but not under American law.

139. *Id.* pt. 2, at 2.

140. J. BUDD, ALASKA—NEEDED INDIAN POLICY IN PAPERS ON ALASKA (a bound volume of miscellaneous documents on Alaska in Newberry Library, Chicago). Budd's remarks were made on the floor of the House of Representatives on May 13, 1884.

141. L. BEARDSLEE, *supra* note 7, at 13-27.

142. Sherwood, *supra* note 25, is the standard account of this event, the "Osprey affair." The Osprey, a British warship, was available at Victoria, British Columbia because the British had a very aggressive policy of using gunboats to dominate the coastal Indian tribes of British Columbia. See Gough, *Official Uses of Violence Against Northwest Coast Indians*, in COLONIAL BRITISH COLUMBIA IN PACIFIC NORTHWEST THEMES: HISTORICAL ESSAYS IN HONOR OF KEITH A. MURRAY 43 (J. Scott ed. 1978); Gough, *Send a Gunboat! Checking Slavery and Controlling Liquor Traffic Among Coast Indians of British Columbia in the 1860s*, 69 PAC. N.W.Q. 4 (1978). British Indian policy in British Columbia clearly had an impact on American Indian policy in Alaska.

143. L. BEARDSLEE, *supra* note 7, at 13-27.

The Sitka Indian population numbered about eight hundred and was the center of an active trading circle of other Tlingit peoples that often attracted more Tlingit to Sitka.¹⁴⁴ In 1877, the United States Army pulled out of both Sitka and Wrangell, never really recovering from its inept management in 1869 and 1870. The Tlingit reacted by tearing down the stockade at Sitka and burning it for firewood. For all practical purposes, the Tlingit did not respect the sovereignty of the United States over them, but believed they existed as co-equal peoples in a trading relationship.¹⁴⁵

Liquor, however, corrupted the equality of this exchange process.¹⁴⁶ Although Alaska was officially dry, there was smuggling of liquor and heavy local manufacture of "hooch," named after the Hoochinoo Tlingit, a local people demoralized by the product.¹⁴⁷ Hooch was made in crude stills from molasses and almost any other available ingredient. Federal raids often destroyed forty stills in a single village without affecting the trade at all.¹⁴⁸

Because of the power inequality, Tlingit law prevailed amidst this disorder and events unsettling to local Whites often occurred. When, on one occasion a White and a Tlingit got so drunk that the Tlingit died, his family demanded retribution from both the drinking partner and the merchant who sold the liquor. After negotiation, the Tlingit were paid \$250 and liquor.¹⁴⁹ In a killing between Tlingit, Indians searched various White houses looking for the murderer. The execution of a Tlingit witch, carried out in plain view of White society, but with no regard for White law or custom, distressed local Whites even more.¹⁵⁰

Two events precipitated the "Sitka Affair." In the first, Kiksatis, an aggressive Tlingit qwan who did not defer to American authority, killed a White resident of Hot Springs, a nearby settlement. Chief Annahootz, of Sitka, sent two of his Indian policemen to arrest the perpetrators. They brought back two men from the second most powerful Kiksati clan. In a second, unrelated incident another Kiksati, the sole survivor of the drowning of five Kiksati crewmen on a trading vessel, unsuccessfully tried to collect compensation from the ship's owners in San Francisco.¹⁵¹ He then returned home, demanding the back wages of the five men from local authorities who were also unwilling to make restitution.¹⁵²

From the Kiksati standpoint, two of their men were in jail for killing one White man, while five of their men were dead with no compensation.¹⁵³ As a result, the exchange between the two peoples was not in balance.

144. *Id.* at 13.

145. *Id.* at 13-15.

146. Sherwood, *supra* note 25, details the history of hooch manufacture in the Sitka area. See also E. LEMERT, *ALCOHOL AND THE NORTHWEST COAST INDIANS* (1954) (a pioneering sociological analysis of the effect of liquor on Northwest Coast Indians that includes some historical analysis). Although the Tlingit situation was not addressed specifically by Lemert, it is likely that his analysis would also apply to the Tlingit.

147. Sherwood, *supra* note 25.

148. *Id.*

149. *Id.*

150. *Id.* at 324-25.

151. *Id.* at 327-28.

152. *Id.*

153. *Id.*

Katlean, their aggressive chief, threatened to kill five shopkeepers in Sitka unless the money was paid. When a drunken brawl later ensued in the Sitka Tlingit ranch, word spread among Whites that Katlean's men were attacking the local Tlingit.¹⁵⁴ A small attack aimed at freeing the Kiksati murder suspects was repulsed with one Tlingit injured.¹⁵⁵ Alarmed residents met the next day and sent a message asking for British help.¹⁵⁶ The British dispatched the man of war, Osprey, with six cannons and 141 men.¹⁵⁷ A few weeks later, the Osprey was reinforced by the United States Navy.¹⁵⁸ The whole affair was an overreaction on the part of local Whites to their powerlessness at the hands of the Tlingit. It was this situation that Navy Captain Beardslee encountered when he arrived in Sitka.

Beardslee carried important and upsetting news of the execution and dissection of Kok wa ton.¹⁵⁹ The Tlingit were not upset about the result of Kok wa ton's execution—he had killed another man and that man's people were entitled to retribution—but they were upset by the circumstances of the trial and by the dissection of the body. The Tlingit reasoned that the presence and connection of one's family and clan at the settlement of the offense was necessary to ensure justice and observed that no one was at Kok wa ton's trial to represent his people.¹⁶⁰ Nevertheless Kok wa ton's execution, by Tlingit standards, ended the matter, as both sides were even. But by dissecting Kok wa ton he was injured in his afterlife, a punishment that went beyond his offense.¹⁶¹

Beardslee was unimpressed with the Creole population at Sitka, calling them vile characters and emphasizing their dishonesty, laziness, and drunkenness.¹⁶² Following in the footsteps of military commanders before him, he recognized that, although he had no legal power to arrest a citizen or inflict punishment, he had no choice but to assume responsibility for doing both. This put Beardslee squarely at odds with Judge Deady's various rulings on the legality of such arrests. Beardslee recognized he possessed no legal authority, but he acted nonetheless, knowing that few citizens could reach the federal court in Oregon.

These arrests were well-documented due to congressional interest in the legal affairs of Alaska following Deady's decisions.¹⁶³ Between 1872 and 1875, the military in Sitka recorded 147 "confinements" of Whites and Cre-

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 329-30.

158. *Id.* at 331.

159. L. BEARDSLEE, *supra* note 7, at 15-16.

160. This man was hung upon the testimony of two of his enemies; he was in a strange country, where he had no friends, and had he not been guilty it would have been the same, he could not have proved it. What is to hinder any one of us from being treated in this same way? He was guilty and it was right that he be killed, but he was entitled to a fair trial.

L. BEARDSLEE, *supra* note 7, at 15.

161. *Id.*

162. *Id.* at 13.

163. L. BEARDSLEE, *supra* note 7, at 16-18. Beardslee was fully aware of the legal impact of Deady's decisions for he discussed them in his reports. *See id.* at 19-21, 26-27, 43.

oles, and two hundred "confinements" of the Tlingit.¹⁶⁴ This is a high number of jailings for a community of no more than eight hundred people, although many of those arrested were repeat offenders.¹⁶⁵ Such military arrests were not merely symbolic assertions of power or routine police actions intended to remove people from drinking situations. They were highly intrusive in the daily life of the residents of Sitka, both Tlingit and Whites.

Beardslee spent much of his time trying to form a civil government for Sitka's White community, while maintaining the belief that the Tlingit community was well governed by Chief Annahootz.¹⁶⁶ After noting that several violent White assaults went unpunished by the law, Beardslee became convinced that Tlingit law was a more reliable system than his own for providing justice in frontier Sitka. In one case, John Williams, a miner, shot another miner five times after a drinking bout. A heavy guard was posted to prevent an outraged community from lynching Williams until he could be transported to Oregon for trial. Judge Deady, as noted earlier,¹⁶⁷ found that no law covered "assault with a deadly weapon" in Alaska, and released Williams.¹⁶⁸

4. Captain Beardslee Recognizes Tlingit Law

For Beardslee the release of Williams was irreconcilable with the conviction and hanging of Kot ko wot and made it impossible to explain American law to the Tlingit.¹⁶⁹ As a result of this experience, Beardslee decided that he had no choice but to conduct his work in Alaska acting under "Indian Country" statutes.¹⁷⁰ This extended the general laws of the United States to "Indian Country," but that extension of jurisdiction did not apply to crimes committed between Indians.¹⁷¹ In effect, Beardslee adopted a course specifically at odds with Judge Deady's opinions and set about to support and strengthen Tlingit customary law as the most efficient way to insure order in Alaska.¹⁷² The use of force under such conditions would not work because the Tlingit were so strong and independent. Moreover, in Beardslee's view, the violence of the previous year was caused by Whites

164. For example, one "Drunken Lizzie" was jailed nine times in 1875—all for various drunk and disorderly offenses. Her sentences, all imposed extra-legally, ranged from three days to 37 days. In all, she spent 85 days in jail during the year. Message from the President of the United States Re: Military Arrests in Alaska During the Past Five Years, S. EXEC. DOC. NO. 33, 44th Cong., 1st Sess. (1876), reprinted in 1664 UNITED STATES SERIAL SET.

165. Based on a population of 800, the data reflects the jailing of about 12% of the population each year, about eight times the current American arrest rate of about 1.5% per year.

166. L. BEARDSLEE, *supra* note 7, at 2-3.

167. This case is discussed *supra* at text accompanying notes 61-64.

168. L. BEARDSLEE, *supra* note 7, at 25-27.

169. *Id.*

170. *Id.* at 43-47. Beardslee sets this position forth with considerable clarity, and a remarkable sense of Tlingit ethnography. He clearly knew he was acting inconsistently with Deady's decisions, but never acknowledged that he was acting illegally. Rather, he based his actions on his own interpretation of the federal law contained in the "Indian Country" statutes. For a history of federal criminal jurisdiction in "Indian Country," a doctrine originating in 1790 and surviving to this day, see Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

171. L. BEARDSLEE, *supra* note 7, at 46-47.

172. *Id.* at 46-48.

ignoring Tlingit law.¹⁷³

In the Sitka area, Beardslee's policy led to the immediate appointment of Chief Annahootz and four other tribal leaders as policemen for the Tlingit ranch. They were to preserve order in the ranch by arresting all drunken Tlingit who entered the adjacent White village.¹⁷⁴ These Tlingit police, however, were forbidden to arrest Whites or to collect rewards for catching deserters in order to avoid inciting resentment by White citizens.¹⁷⁵ The police thereafter kept order in the ranch without White assistance, a substantial task in light of regular drunken riots in the ranch and "weekly" stabbings.¹⁷⁶

Together with three Tlingit policemen and no military assistance, Beardslee made a raid on three Tlingit ranches at nearby Hunter's Bay, destroying forty stills. About twenty Tlingit joined the effort, and the crowd grew larger as the owner of each smashed still joined in to smash the stills of his competitors. Beardslee, pleased with the success of this raid, overlooked the fact that by joining in the destruction of smaller stills, the Tlingit inevitably protected larger stills.¹⁷⁷ Thus, it appears that the Tlingit seized on a part of the form of White law, in this case the police function, to protect tribal activities.

Beardslee was not above the raw use of imposed American law in a show of power, as evidenced by his decision to try a powerful Tlingit for an offense against another Tlingit, in violation of his own policy. Big Charlie, a well-known Tlingit who was often drunk and dangerous, had raped a Tlingit woman. The Tlingit did not take cognizance of the crime. Moreover, Charlie had tried to kill a military sentry several years before in retaliation for being punished by General Davis.¹⁷⁸ For Beardslee, this indicated a lack of respect for American authority and a more general feeling among the Tlingit that the Americans were afraid of the Tlingit.¹⁷⁹ Beardslee summoned the chiefs to a counsel and tried Charlie. After the tribal counsel convicted him, it imposed "severe punishment." When Charlie had served his term, he was given a job with the Navy and became "one of the best behaved Indians in Sitka."¹⁸⁰ Word of the trial spread far and wide among the Tlingit and American justice became more respected.¹⁸¹

When pushed to the limit of his authority, however, Beardslee hedged. He was confronted with at least one Tlingit killing.¹⁸² One Tlingit caught another in an adulterous relationship with his wife, and shot the man to death. Upon hearing this, a brother of the dead man sought out and killed his brother's murderer. White authorities seized the killer and an accomplice, but Beardslee declined to either try the case or to send the accused to

173. *Id.* at 48. Beardslee's report is full of references to "brave" Tlingit and "vile" Whites.

174. *Id.* at 46.

175. *Id.*

176. *Id.*

177. *Id.* at 47.

178. *Id.* at 48.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 75.

Oregon for trial.¹⁸³ The two deaths left the two families even, with the two corpses burned under the same blanket, so the killer was released.¹⁸⁴

Beardslee knew he was on shaky legal ground. On one hand, he relied on simple expediency since he had no funds to send a criminal to Oregon for trial. On the other hand, however, he denied that a judge sitting in Portland who did not know the customs of the Tlingit could responsibly exercise jurisdiction. Thus, while appearing to challenge Judge Deady's jurisdiction, Beardslee actually rested his judgment on the impossibility of Deady acting "justly." He was also concerned that trying a Tlingit murderer would only lead to the killing of a White in retaliation.¹⁸⁵

Beardslee's decision not to invoke American law in a murder case was not only a conscious and important choice but it was the logical outcome of his policies. While United States authorities were in nominal control, Beardslee was aware of Tlingit knowledge that the Americans were weak, and he kept the scope of his intervention limited.¹⁸⁶ He used Tlingit police to keep order in the Indian ranch because it was more efficient and less inflammatory than sending the marines there, but Beardslee did not particularly care what disposition the Tlingit police made.¹⁸⁷ Riot and disorder were common in the Tlingit ranch, but Whites were most concerned with drunken Indians in their White village.¹⁸⁸ While Beardslee intervened in an Indian rape, punished Creole wife beaters with imprisonment on bread and water, and occasionally smashed stills, he treaded very lightly on Tlingit sovereignty, even placing the traditional Tlingit chiefs in charge of the Indian police.¹⁸⁹ Given that this was the situation in Sitka, the seat of American power, Tlingit political authority was almost unchallenged elsewhere in Alaska. Major events in both Wrangell and Juneau, then named Harrisburg, show the fragility of American authority.¹⁹⁰

A group of Kootznoo Tlingit visited Wrangell on a trading expedition

183. *Id.*

184. *Id.*

185. "I am sure that it is not in the power of any United States judge to decide justly a case involving Indian customs, laws, and evidence, unless he has made a careful study of such matters, and is furnished with full and complete evidence." *Id.* at 75.

186. *Id.* at 46.

187. *Id.*

188. This was the single most important cause of the Osprey Affair. Sherwood, *supra* note 25, at 328.

189. L. BEARDSLEE, *supra* note 7, at 44-45.

190. The fragility of American authority was a major theme of Beardslee's report.

If by a mistake we won the ill-will of the Indians, it would have been impossible for me, with the force at my disposal, to prevent outrages or punish the perpetrators . . . Fully conscious that, should our course in handling them be such as to excite the opposition of the Indians, our physical force would not prove equal to the task of subduing them, it was deemed advisable that our efforts should be directed to obtain control of them with their good will and consent, instead of trying to do so against it, and to avoid taking any steps which would redound to the injury of whites at Sitka if left again without protection, or which would tend to increase the dangers to such men as sought the interior on prospecting trips . . .

Id.

"According to Indian law, the man who gets another drunk is responsible for the acts committed by him while in that state, and for his life if he dies or is killed. Thus, at the very root of the difficulty I found the acts of bad white men." *Id.* at 45.

and began to manufacture "hooch" for trade in the interior.¹⁹¹ Sticheen Tlingit tried to suppress this traffic by force and several were killed and wounded on both sides. The Kootznoos sent back to their village for reinforcements, while local Whites set up a "committee of safety" and barricaded themselves in their town.

A missionary sent a Sticheen policeman to arrest the Kootznoos. The Kootznoos did not recognize his right to give them directions, so they beat him up. The injured police officer's clan then set about to revenge the beating and the Kootznoos sent a young man to receive a beating to set matters right. Unfortunately, angry Sticheens beat the young man too severely, and when the Kootznoos rushed to his rescue, a general fight broke out. After the Kootznoos retreated, their village, used as a trading residence by visiting tribes generally, was burned by the Sticheens.¹⁹²

To Beardslee the whole affair was the fault of local Whites, who incited the Sticheens to violence in an effort to further their own interest in weakening trading competition.¹⁹³ The destruction of the village angered all local tribes who thereafter avoided Wrangell for trading. Beardslee believed that Whites should learn more about and interfere less in Tlingit local customs.¹⁹⁴ He evidently felt that the Kootznook possessed a traditional right to use the trading village and believed the Sticheens had no authority to regulate Kootznook affairs.

Local Whites in Sitka were alarmed once again when three large war canoes of Kootznoos arrived in Sitka to demand compensation from the Kiksatis for the death of a woman due to hooch. Although the Kiksatis were more powerful by far, they consented to negotiate a fair settlement of the case.¹⁹⁵ Chief Katlaan, who brought on the Osprey affair with his pursuance of his claim against the Americans, paid the twenty blankets decided upon and the Kootznoos departed in peace.¹⁹⁶ Beardslee later visited the Kootznook village and threatened to punish the tribe if they renewed the trouble in Wrangell even though he clearly believed the trouble was not their fault. The Kootznook agreed to this on the condition they be allowed to fight the Sticheens if they came to Kootznook territory.¹⁹⁷

Beardslee's most complex mediation was between the Chilcats and the Chilcoots, who were not only in conflict with each other, but also in conflict with a growing population of White miners on the mainland.¹⁹⁸ A series of shootings between the tribes left many scores to settle, both with each other and with Whites.¹⁹⁹ In addition, increasing exposure to corrupt and brutal traders and miners destabilized relations on the northern reaches of Tlingit land.

Beardslee assembled chiefs from both sides to resolve the dispute.

191. *Id.* at 50-54.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 54-55, 69.

196. *Id.*

197. *Id.*

198. *Id.* at 71-73.

199. *Id.*

Klotz-Kutch, chief of the Chilcats, declared that it was right to settle, claiming that he "would rather pay two hundred blankets than have a long war about a bad man not worth a hundred."²⁰⁰ But the trouble could not be settled without the consent of the families of the dead men. Finally, the chiefs agreed that they would personally pay whatever amount was finally decided, and this concluded the matter.²⁰¹

Beardslee's work lasted only a year and a half. Nevertheless, his policy of stabilizing authority in the Alaska panhandle by building a foundation of honorable relations between Americans and Tlingit and his deferral to Tlingit authority as much as possible were highly successful practices. Clearly, contradictions existed in this policy, but Beardslee struck what appeared to be the only responsible compromise possible under the circumstances. He also sent no criminal cases south to Judge Deady's court. Thus, at least in a de facto sense, he brought local government to Alaska. Moreover, also in a de facto sense, he recognized Tlingit law in cases between Tlingit. Because of the great distance to Judge Deady's court, and the small and poor White population in Alaska, Beardslee's extra-legal recognition of Tlingit law escaped legal challenge. Thus, while there was a well-developed and unique Alaska legal doctrine for the pre-Organic Act of 1884 period, denying the Tlingit any legal rights in their own country, there was also a very clear set of government actions ignoring that law and recognizing Tlingit sovereignty. Both of these inconsistent policies were passed on to Alaskan authorities with the arrival of self-government in 1884.

D. *Tlingit Law Under the Purview of American Courts: Sah Quah and the Specter of Tlingit Slavery*

The passage of the Organic Act placed both an administrative apparatus, headed by an appointed governor, and a federal legal apparatus, in the form of a United States District Court, and all supporting officials, in Sitka, still a community of not more than three hundred American citizens, two hundred of whom were Creoles.²⁰² This Act made the full application of American justice possible for the first time.

The creation of a federal legal institution in Alaska was the result of a well-organized campaign by Alaskan businessmen and missionaries which directly reflected their view of an "Indian problem" merged with a "law and order problem."²⁰³ They regarded the routine disorder of Sitka and other Alaska towns as a major obstacle to the expansion of commerce, a pretext directly parallel to the pretense operating in the Indian Territory in Oklahoma.²⁰⁴ The great distance to Oregon made it impossible to continue

200. *Id.*

201. *Id.* at 73.

202. Some of the debate over Alaska's Organic Act can be found in Report of the Committee on Territories, S. REP. NO. 457, 47th Cong., 2d Sess. (1882), reprinted in 2006 UNITED STATES SERIAL SET. On the role of the "Organic Act" in creating Alaska's judicial system, see G. SPICER, THE CONSTITUTIONAL STATUS AND GOVERNMENT OF ALASKA (1924).

203. The process of lobbying for an "Organic Act" for Alaska is described in J. PADDOCK: ALASKA: A HISTORY OF ITS ADMINISTRATION, EXPLOITATION, AND UNDERDEVELOPMENT 65-113 (1924).

204. At the same time this debate was occurring regarding the application of new United States

to subsume Alaska within the Federal District of Oregon. In addition, the rising value of gold and other natural resources further heightened the importance of the court. The twin scandals of the Osprey Affair,²⁰⁵ and the exposure of the "Alaska ring," a corrupt monopoly on fur trading in western Alaska, contributed towards making law and order for the territory a major issue.²⁰⁶ Finally, the agitation of Alaska missionary Sheldon Jackson and the Presbyterian hierarchy, who wanted legal protection for their mission work, was also politically important.²⁰⁷

1. *Early Congressional Consideration of the Legal Status of Alaska Natives*

There is no question that Congress was aware of the legal position of Indians in Alaska. Senator Butler explained in his Report of the Committee on Territories precisely why the language of the law did not distinguish the Indians' legal status from that of the Whites: the Indians in Alaska were "industrious and well disposed," and "no different treatment of them was advised."²⁰⁸ Butler went on to observe that giving Indians the same status as Whites worked well in British Columbia.²⁰⁹

Similarly, Senator Benjamin Harrison, in another Report of the Committee on Territories, directly referred to the need to extend American law to the Alaska natives for their "defense and enlightenment."²¹⁰ The fact that Indian land had "not yet been the subject of negotiation or inquiry" was, for Harrison, another reason for extending jurisdiction to Alaska, so that land use could be regulated.²¹¹

As congressional discussion continued, it was clear that a new Indian policy was being formulated, not only for Alaska, but for the entire United States. In the debate on the Organic Act, Congressman Budd of California raised the question of legal extension of the assimilationist policy of Indian reformers to Alaska, putting Indians on the same legal footing as Whites. Budd strongly advocated a policy of alienating Indian land and holding Indi-

laws to Alaska, there was a parallel debate over the extension of federal laws to the Indian Territory. See M. WARDELL, *A POLITICAL HISTORY OF THE CHEROKEE NATION, 1838-1907*, at 308-11 (1937). While there was no direct connection between the two situations, it seems clear that where local Whites saw Indians in political and legal power, the Whites raised the "law and order" issue.

205. Sherwood, *supra* note 25.

206. W. HUNT, *supra* note 78, at 180-86.

207. *Id.* at 16-22.

208. *Id.*

209. The Indians of this section [southeastern Alaska] number about 7,000. They are industrious and well disposed, except when under the influence of liquor. They have evinced anxiety to be educated, and to come under the white man's law, and no different treatment of them and the whites is advised. This plan works well in British Columbia, and the natives are self supporting and civilize rapidly.

Report from the Committee on Territories, S. REP. NO. 457, 48th Cong., 1st Sess. 4 (1883), *reprinted in* 2006 UNITED STATES SERIAL SET.

210. Harrison stated: "[t]he weakness and ignorance of the native population strongly appeal to us for defense and enlightenment in defense of extending law to Alaska, [meaning that native 'defense and enlightenment' was one of the purposes that law was to serve]." Report from the Committee on Territories, S. REP. NO. 3, 48th Cong., 1st Sess. 1 (1883), *reprinted in* 2173 UNITED STATES SERIAL SET.

211. *Id.* at 2.

ans fully accountable under American law.²¹² Congress, divided by its debates regarding Indian policy in the rest of the United States, decided to keep Alaska natives under the same law as Whites. Congress thus avoided, at least in Alaska, the difficult legal and moral issues raised by the sovereign legal status of Indians in Indian policy for the rest of the United States.

Congressman Budd's view, the same as that of the Indian Rights Association (the leading organization of Indian reformers), was never wholly adopted by Congress. There was, however, a substantial body of congressional opinion favoring the wholesale extension of American law to Indians. Unable to get that viewpoint incorporated into the law for the rest of the United States, Congress achieved this result in Alaska virtually by default. Other Congressmen supported Budd's approach but without any of the humanitarian pretexts of the Friends of the Indian. For example, the Report of the House of Representatives Committee on Territories recommended a court system for Alaska in 1880 that was explicitly racist.²¹³ Thus, by simply avoiding recognition of the sovereignty of Alaska natives, Congress made these people fully subject to American criminal law with no recognition of tribal law.²¹⁴

2. *Habeas Corpus Actions to Free Tlingit Children From Missionary Schools*

Legal affairs in Sitka soon degenerated into a maze of incompetence and corruption, the result of both the poor quality of presidential patronage and the conflict among local Whites over the legal allocation of Tlingit property. The first major Tlingit case handed down by the new federal district court after the Charles Kie murder case directly challenged the authority of the Presbyterian mission school in Sitka to hold Tlingit children for educational purposes.²¹⁵

United States Attorney Haskett encouraged a number of Creoles to sue

212. As to Indian matters my views are few. Individual responsibility and land in severalty are the true foundation stones of a just and effective Indian policy. Give them the protection of the law; require of them its strict observance When an Indian commits a murder hang him; when he commits any other crime punish him. Punish the white who injures the Indian and the Indian who injures the white.

J. BUDD, *supra* note 140, at 3.

213. Certainly no one can deny the fact that the white citizens of Alaska are the only persons up there who can have the least appreciation or understanding of our legislative, executive, and judicial system of law and order, and they are the only ones to whom we can intelligently apply these legal provisions. Any one at all acquainted with Indians and their life will at once admit the futility of attempting to treat those people to courts of justice or trials by jury; the Eskimo are positively out of the question in this connection, while the Aleutians have never known the need of a lawyer or asked for a court.

It is the 250 white citizens of Alaska only who are deprived of those legal rights and privileges and protection that the committee must keep in mind as they frame a bill for the establishment of additional courts . . . and for their protection and relief.

COURTS OF JUSTICE IN ALASKA, H.R. REP. NO. 754, 46th Cong., 2d Sess. 2-3 (1880), *reprinted in* 1936 UNITED STATES SERIAL SET.

214. *Id.*

215. S. Jackson, A Statement of Facts Concerning the Difficulties in Sitka, Alaska, in 1885, at 1-3 (1886). This account, along with newspaper reports in the *Alaskan*, are the only remaining accounts of this dispute. Jackson's account is completely consistent with that of the *Alaskan*, but both were opposed to the existing court officials. Jackson also kept a scrapbook of clippings on the incident. It is held in the Sheldon Jackson Papers of the Presbyterian Historical Society, Philadelphia.

the Presbyterian mission, charging that the mission took land belonging to the community.²¹⁶ While land titles were unclear in Alaska, the missions were expressly granted 640 acres under the Organic Act. Presbyterian missionary Sheldon Jackson had appropriated the best land in Sitka, and blocked expansion of the village in one direction in order to create a large mission and school. But in the process, the missionaries, outsiders, and Protestants alienated local (and Orthodox) Creoles.²¹⁷

Although the lawsuit over land use was important in itself, matters quickly escalated as local political forces aligned with the Creoles.²¹⁸ Jackson was subpoenaed to appear as a witness before a grand jury just as he was planning to leave Sitka. He was arrested boarding a ship and held just long enough for the ship to depart.²¹⁹ As if arresting a politically powerful missionary was not inflammatory enough, the court began to issue writs of habeas corpus on behalf of Tlingit families seeking to remove their children from the mission school.²²⁰ This began when a woman of "questionable character" claimed to be some relative, perhaps a cousin, of an orphan girl enrolled in the school. Although the woman had no papers or proof of guardianship, the court issued a writ of habeas corpus removing the child from the mission school without allowing school officials to be heard.²²¹

Judge McAllister, continuing an early line of local decisions on Tlingit legal rights, issued a far-reaching ruling providing (1) that verbal contracts to enroll students in the school were not binding, (2) that Indians could not make contracts with Whites, and (3) that the school had no right to restrain students there for any reason.²²² The ruling destroyed discipline at the

216. It is still unclear exactly why the new federal authorities chose to become involved in a dispute with the Presbyterian mission school as almost their first order of business. This may have been simply a dispute over the exercise of political power in the new territory because Sheldon Jackson, the head of all Presbyterian missions in the West, was a leading force in Sitka, having established a large mission there in 1880, and by 1884 operating a mission school under government contract for over 100 Tlingit children. Jackson had powerful political connections and had been a moving force in getting federal law extended to Alaska. W. HUNT, *supra* note 78, at 16-22, details the early years of the court, and shows that the problems were general and not specific to Sheldon Jackson and the Presbyterian Mission. Still, given that court officials must have known of Jackson's immense political power and his role in the passage of the "Organic Act," it is difficult to explain why they chose to engage in a legal assault on the mission. One possible explanation is racism, the resistance of local Whites and Creoles to a program for the education of Tlingit children. Another is direct political conflict between one group of White politicians responsive to local interests and jealous of the missionaries, a powerful presence in Sitka, who had taken the best land for their mission, and behaved in an arrogant manner toward local Creoles. Naske, *supra* note 78, at 172-77.

217. S. Jackson, *supra* note 215.

218. *Id.* at 1-3.

219. *Id.* at 13.

220. *Id.*

221. *Id.* at 10. Jackson made an issue of the fact that the Tlingit relative of the child did not have "papers" to prove her relationship. Obviously, virtually no Tlingit had any form of legal documents to prove such relationships.

222. *Id.* at 13. Without a formal analysis of contract law, it seems that Judge McAllister was clearly wrong about the first two points in his ruling and probably right about the third. Moreover, he probably rendered a correct decision in holding that the school could not hold children against their parents' will.

As soon as this writ was issued, the court proceeded to issue a second. In this case an Indian "sorcerer," accused by Jackson of having "sold" his twelve-year-old girl after enrolling her in the mission school, came to take the child back. The school superintendent refused, even after the father offered to exchange a son for the girl and then offered \$10 to buy her. Failing that, the father hired two Tlingit to capture the girl, but after a week of hiding in the woods waiting for an opportunity,

school because any child "corrected" by the missionaries could simply leave.²²³ Many Tlingit parents took advantage of this opportunity to take their children out of school, evidently encouraged to do so by local Whites, but probably also with sufficient reasons of their own.

The school's atmosphere was rife with additional controversy. For example, one child in the school died of pneumonia and the story spread that a matron at the school had bewitched the girl. Within a few days, forty-seven of the students were withdrawn by their parents.²²⁴ In addition, a warrant for assault and battery was issued for a teacher who used corporal punishment against a student.²²⁵

Jackson then exercised his powerful political connections in a successful campaign to remove the whole Organic Act government and replace it with one more suitable for his needs. Judge McAllister was amazed at how fast Jackson succeeded in accomplishing his objective.²²⁶ In the process, Jackson's attitude towards Tlingit society became well-known, emphasizing a dark view of Tlingit life.²²⁷ Jackson, deeply rooted in the ethnocentric culture of his day, regarded Tlingit society as evil—full of slavery, witchcraft, prostitution, superstition, liquor, violence, and disease.²²⁸ He felt that salvation for the Tlingit lay in an education, one that separated children from their parents and from their diseased and corruption-ridden communities.²²⁹ With the swift dismissal of the old government, there was no question that a group of Whites who favored using the local law to force the assimilation of the Tlingit were in control of Indian policy in Sitka.²³⁰

The former laissez faire policy, which emphasized a trading relationship between two sovereign societies and a minimal White effort to dominate Tlingit society, was replaced by a program of assimilation. This new policy

the two were captured. Thereupon, the father also filed for a writ of habeas corpus. *Id.* at 10. These habeas corpus petitions were evidently decided orally, for there is no written record of these opinions.

223. *Id.* at 10-12.

224. *Id.* See also Naske, *supra* note 78, at 176.

225. S. Jackson, *supra* note 215, at 10-12.

226. Some of this campaign can be seen in *id.* at 15-33, in the form of reprinted letters by powerful people in support of Jackson.

227. *Id.* at 10-12.

228. *Id.*

229. The rise of this reform Presbyterian group into the domination of Alaska politics can be seen in T. HINCKLEY, *ALASKAN JOHN G. BRADY, MISSIONARY, BUSINESSMAN, JUDGE AND GOVERNOR, 1878-1918* (1982).

230. *Id.* It should not be surprising that the law of habeas corpus as applied to Tlingit children in missionary boarding schools in Alaska changed under the new administration. Judge Dawson, relying on the testimony of the missionaries in *In re* Petition of Can-Ah-Couqua, 29 F. 687, 689 (1887), held:

It is the experience of those who have been engaged in these Indian schools that, to make them effectual as disseminators of civilization, Indian children should, at a tender and impressionable age, be entirely withdrawn from the camp, and placed under the control of these schools. It is quite obvious that to permit the parents of these children to place them in school under an agreement that they shall remain there for a determinate period, and then withdraw them at their own pleasure, would render all efforts of both the government and missions to civilize them abortive.

These Alaska Indians are dependent allies, under the protection of the laws, and subject to such restraints in their tribal relations as may be deemed necessary for their own welfare, promotion, and protection, and they must recognize the binding force of their obligations

required the destruction of Tlingit social, economic, cultural, and political institutions as a necessary step in the incorporation of the Tlingit people as menial workers, into the White Alaskan economy. Jackson, James Brady, a former missionary turned businessman and politician, and other Presbyterians led the effort to enforce the policy of assimilation.²³¹

The missionaries, in defense of their work, presented many examples of girls they rescued from prostitution, who were then forcibly returned to their parents and subsequently re-sold into a life of prostitution to support their relatives.²³² Related to prostitution, in the narrow-minded missionary view, were plural marriages.²³³

Jackson also popularized a number of stories about witchcraft and slavery that were even worse than those about prostitution, disease, and starvation. These stories, taken out of context, played important roles in the forced assimilation of the Tlingit. They were used to justify both a closed school system and legal intervention into Tlingit society, which included the imposition of American law over the Tlingit and the corresponding destruction of Tlingit law.²³⁴ Regular accounts of witchcraft surfaced because the Tlingit had an elaborate set of spiritual values that included witchcraft, but such incidents seldom came to the cognizance of the courts. Whites, including the missionaries, found Tlingit treatment of those accused of witchcraft abhorrent and regularly rescued witches. A few Tlingit executions of witches were reported in the press and held out as examples of the evil of Tlingit society and the need for stronger measures to repress tribal traditions.²³⁵

3. *Sah Quah: The Use of a Tlingit Slavery Case to Discredit Tlingit Society*

Tlingit society's persecution of witchcraft paralleled many Indian societies in North America and was not subject to much notice from the courts. However, a Tlingit slave case played an important role in defining Tlingit society as immoral, uncivilized, barbaric, and fit only for extermination. *Ex parte Sah Quah*, the only Indian slavery case in North America to come before the courts, was among the boldest of American legal attacks on the traditional law of Native Americans. While doctrinally not a significant case, *Sah Quah* represented a major White intrusion into Tlingit society, revealing a great deal about both Tlingit and White relations in Sitka and about the changing internal dynamics of Tlingit society in the face of the extension of White authority over their people. Once *United States v. Kie*²³⁶ was decided, *Sah Quah* was an easy case, and the district court had no

231. T. HINCKLEY, *supra* note 229.

232. *Id.*

233. S. Jackson, *supra* note 215, at 10-12.

234. *Id.*

235. *Id.* at 11; Alaskan, July 14, 1888, at 4; July 13, 1889, at 4; Feb. 28, 1891, at 4; June 30, 1886, at 3. One shaman was convicted of murder for killing a witch. That case is discussed *infra* at text accompanying notes 312-18.

236. In *Kie*, the Alaska federal district court held that neither the doctrine of *Crow Dog*, nor the Major Crimes Act reached Alaska, because Native Americans there had no sovereign right to their own laws. *Kie* is discussed *supra* at text accompanying notes 74-90.

trouble finding that the traditional right of Tlingit to take and hold slaves violated the thirteenth amendment.²³⁷

The exact origin of *Sah Quah* is obscure, but there can be no question that it was a carefully chosen test case, deeply rooted in the assimilationist policies of the leading American members of the Sitka community.²³⁸ Just as the Creoles used Tlingit grievances against missionaries in their own struggle for political and economic recognition in Sitka, the White reformers seized upon a pitiful Tlingit plaintiff, Sah Quah, to induce the local court to write a strong opinion condemning Tlingit society and culture that would attract national attention.²³⁹ Surely, the specter of Tlingit slavery was the most potent point of condemnation possible in the 1880s, more compelling than witchcraft or murder.²⁴⁰

At the hearing for his petition for a writ of habeas corpus, Sah Quah took the stand, claiming to be a Haida who was kidnapped as a boy by Flatheads, taken by them to British Columbia, then sold to Chilcats, and finally sold to Yakutat.²⁴¹ He described a life of poverty until a man took pity on him and brought him to Sitka. In response to the direct question, "Are you the slave of this man?" Sah Quah answered, "He is my father." Attorney Clark followed up with the question, "Is he your master, also?" Sah Quah replied, "He is my father." Seemingly undaunted, Clark tried again: "Is he really your father?" To which Sah Quah answered an unequivocal, "Yes, sir." Perhaps sensing he was not even meeting the burden neces-

237. 31 F. 327.

238. The case had all the makings of a collusive case. Sah Quah appeared in court represented by attorneys W. Clark and Major M.P. Berry, a local politician and former collector of customs. He appears to have taken no interest in the case—he would not fully admit to being a slave, and did not appear to want any change in his status. His alleged owner, Nah ki klan, refused to defend his ownership status, but federal Judge Lafayette Dawson would not let the lack of a party stand in the way of this landmark case—he appointed the U.S. attorney, M.D. Ball, to represent Nah ki klan. Ball, who certainly did not represent his client's interests in any real sense, conceded that Sah Quah was held as a slave, a fact that was not proved in court. The alleged owner did not testify.

Sah Quah's habeas corpus hearing is summarized in the *Alaskan*, May 8, 1886, taking up all of pages one and four. While we will never know the exact process that brought the case forth, from the transcript it appears that Sah Quah sought out Attorney Clark in another matter, asking for a "paper," a form of reference that Tlingit often received for trading or social purposes. Clark then brought the slavery action. It seems clear that both witchcraft and slavery were of considerable concern to local Whites, and many would have been interested in getting a clear court ruling as a precedent to legal intervention in these areas.

239. It may be belaboring the obvious to point out that virtually all nineteenth century cases defining the status of Indians were framed by White attorneys, often without consulting their clients. It is important to remember the purpose of the constitutional "case or controversy" requirement of article III of the Constitution: it is designed to insure that a legal question is properly framed by requiring that the parties representing both sides have a substantial and important stake in the case. In *Sah Quah* no one represented the Tlingit interest in the case. In retrospect, it is possible that Nah ki klan might have won the case by (1) denying the facts introduced in evidence; and (2) developing an argument about the complex and paternalistic Tlingit family structure that showed that Tlingit slavery was not "slavery" within the meaning of the thirteenth amendment.

240. While Indian witchcraft and murder were routine stories in the national press, this was the only Indian slavery case ever reported.

241. The unpaginated transcript is held as Civ. Case No. 35, Record Group 21, Alaska District Court, in the National Archives, Seattle. There is no information on the purpose of the making of the transcript—not only was no appeal of the court's order taken, but Nah ki klan, being represented by the U.S. attorney, did not even have control over whether an appeal would be taken, and all parties present must have known that the issue would not be appealed. Perhaps, the transcript was made simply because of the importance of the case.

sary in a kangaroo court, Clark continued: "How does it happen you are a Haida if your father is a Sitka Indian?" Sah Quah responded, "The White man is same as Indian, they adopt children." After several more tries, Clark tried a more direct approach: "Have you considered yourself a slave of this man ever since you left Yakutat?" Sah Quah responded, "No."²⁴²

The rest of the case did not proceed much better. Trying to bolster a weak case, Clark called Marchia, a Tlingit woman. In response to the outright question, "You were once a slave, tell me about it." She responded, "I am bashful." Later, she admitted being a slave as a little girl, but claimed not to know how she became a slave. Nor did she know when she had become free, but thought it was about two years earlier, after her master finished building a house.

The last witness was Chief Annahootz who was not very helpful. Perhaps surprisingly, and very indicative of the political ends of the case, the initial inquiry of Annahootz focused on Tlingit political life and involved questions as to whether the Tlingit political structure was tribal or familial. The phrasing of the questions reflected the prosecutor's ignorance of the ethnography of the Tlingit. Annahootz was asked if a chief was chief of the tribe or only of his family, to which Annahootz correctly claimed only to be chief of his family. Status in a tribe was not based on political position but on prestige as head of the richest family.²⁴³ Following this line of questioning was an inquiry into Tlingit justice: if a person was killed, did the tribe or the family pay? Again, the answer was the family.²⁴⁴

Annahootz was then asked whether slavery existed. He admitted that it had, but claimed it existed "a long time ago." He described a system of constant warfare and testified that it was formerly the custom to identify slaves by putting their eyes out. He vehemently denied that the Tlingit presently held slaves.

The evidence was weak and had little to do with the legal arguments of either side. Clark made an elaborate argument that Tlingit slavery had existed from time immemorial and was a scar on the face of American civilization. Not finding evidence of these facts to introduce in his case, he pulled

242. But the court saved Clark. Judge Dawson interrupted, "That is unnecessary as slavery is admitted." Thus, if U.S. Attorney Ball had not conceded the issue "on behalf of his client" and based his defense on the legality of Tlingit slavery, even the fact of slavery might not have been established in *Sah Quah*.

But Clark still would not give up, and he managed to get closer to the issue. First he tried, with a complete lack of success to get Sah Quah to accuse his master of blinding him with a club. Sah Quah claimed to have injured himself while hunting bear—hardly consistent with the image of a slave. Sah Quah denied ever asking for his freedom, and also denied ever having been threatened by any Indians over his testimony.

Finally, Sah Quah admitted that he had been sent by his attorney to ask his master for his freedom, and had done so. The master had promised to free Sah Quah when he finished building a house in the fall of the year. Sah Quah admitted having told his attorney that he was a slave and that he wanted a "paper" so he could be his own master. *Id.*

243. *Id.*

244. When questioned about the current law of the Tlingit, he claimed that only the Sitka Tlingit recognized White man's law, and that all the others "stick to their own law." Annahootz was the last witness, and this was all the evidence that Sah Quah's attorneys provided to support their writ of habeas corpus.

information freely from ethnological sources.²⁴⁵

Clark's argument had three distinct foci. First, he advocated a policy of the imposition of American law as a means of the Tlingit's "advancement to civilization." Second, the thrust of his legal argument was a strong anti-slavery position rooted in the thirteenth amendment. He argued that the amendment forbade slavery anywhere in the United States, among any people. Third, recognizing that both *Crow Dog* and the Major Crimes Act contained language recognizing the sovereignty of Indian tribes, Clark tried to distinguish between the family and the tribe to show that the Alaska Indians were outside the scope of federal Indian law because they were families and not tribes.²⁴⁶

United States Attorney Ball, playing the role of the losing attorney in a collusive case, made the only credible argument possible for Nah ki klan, although in all probability he knew full well that his argument would be irrelevant to the final decision.²⁴⁷ Ball based his case on two issues: first, the thirteenth amendment was never intended to apply to Indian tribes; and second, the "uncivilized tribes" of Alaska were clearly left by the treaty of acquisition to be provided for in future laws of Congress, and no laws had altered their status.²⁴⁸ The Major Crimes Act, according to Ball, applied to Alaska and by specifically enumerating several crimes had purposefully omitted slavery.²⁴⁹

Judge Dawson's opinion contained no surprises.²⁵⁰ He sharply rejected both of Ball's arguments in an opinion focused on two basic and unrelated issues. First, he once again traced the short history of "Indian Country" legislation for Alaska and held, consistent with Judge Deady's opinions, that *Crow Dog* and the Major Crimes Act never applied there. While the Brule Sioux had a history of "supremacy and independence" recognized by the United States in a treaty stipulation, the Indians of Alaska did not. Second, in a holding that broke new ground and is still unique in American Indian law, he held that the thirteenth amendment applied to the Indian tribes because of a clear policy pronouncement by Congress to abolish slavery within the territorial limits of the United States.²⁵¹ Judge Dawson then granted the writ and Sah Quah was set free. Nah Ki Klan did not appeal the case.²⁵²

In retrospect, the *Sah Quah* decision presented a great distortion of Tlingit society. Even if slavery was the most vulnerable of Tlingit institutions in American eyes, the institution was so different from American Negro slavery that it could not be realistically compared.²⁵³ The institution

245. This included White residents among the Tlingit whose statements were "provided the judge" even though they were not legally put in evidence.

246. Alaskan, May 8, 1886, at 1.

247. *Id.* at 1, 4.

248. *Id.*

249. *Id.*

250. The full text of the opinion was printed in the Alaskan, May 8, 1886, at 4.

251. *Id.*

252. Perhaps because he lacked money for his own counsel, perhaps because no Tlingit saw anything to gain by such an appeal, perhaps because the Tlingit distrusted the whole American legal process.

253. J. AVERKIEVA, *SLAVERY AMONG THE NORTH AMERICAN INDIANS* (1966); F. DELAGUNA, *supra* note 9, at 469-75.

was based on Tlingit family hierarchies of wealth and power and was rooted in a long tradition of raiding neighboring villages. Slaves seized in these raids were loosely incorporated into Tlingit families. Although slavery was quite extensive among these peoples in the early 1800s, in some estimates amounting to thirty percent of the total population, it was dying out by the end of the century. Both the Russians and Americans disapproved of slavery and the institution had declined significantly by the 1880s.²⁵⁴

Although some estimates put the slave population in the 1880s at ten percent of the Tlingit population, that figure is almost certainly too high.²⁵⁵ For those remaining slaves, it was not even clear that being a slave had much meaning.²⁵⁶ Rather, the slaves functioned as adopted members of families who could not easily be turned away. The institution survived into the twentieth century and probably disappeared primarily because of changes in the Tlingit economy and political structure.

Ex parte Sah Quah made it clear that Americans in Alaska were deeply involved in a struggle to destroy Tlingit society and assimilate its people as useful citizens of the White community of Alaska. The powerful image of the Tlingit as a "slave society" was the most striking negative image of the Tlingit that local Whites could muster, an image that justified almost any White intrusion into Tlingit society. The court in *Sah Quah* dug up this sad remnant of a great and complex native society to prove that the Tlingit community was barbarous beyond redemption, in desperate need of American law's civilizing influence.²⁵⁷

E. *The Imposition of American Law on the Tlingit Accelerates, 1886-1900*

The *Kie* and *Sah Quah* cases were the first cases in which Alaska's district court considered the status of the Indians living in the territory, and both occurred within the first year and a half of the operation of that court.²⁵⁸ During the next fifteen years, many more cases arose, and Ameri-

254. F. DELAGUNA, *supra* note 9, at 469-75, analyzes changes in the Tlingit slavery institution over time. She believes that the last slaves in Yakutat, a far more remote place than Sitka, were freed about 1900. *Id.* at 470.

255. Probably even remote estimates of the actual slave population are impossible. In his census of Sitka, Commander Glass gives a slave population of 17, or two percent of the total Tlingit population of 721. Sherwood, *supra* note 25, at 302. In 1861, Lieutenant Wehrman of the Russian Navy reported 49 slaves at Yakutat among a total Tlingit population of 380, or about 12%. It is probable that both estimates are inaccurate, for the Tlingit social structure was complex and slavery difficult to see and count. See also R. OLSON, SOCIAL STRUCTURE AND SOCIAL LIFE OF THE ALASKA TLINGIT 53 (1967) (estimate of 10%); Averkieva, *supra* note 13, at 329 (lists the range of estimates at 10% to 30%, but does not make an estimate of her own).

256. For example, *Sah Quah* did not live in his master's house, nor evidently provide any labor for his master. If he lived independently and did no work for his master, then what did "slavery" mean under those conditions? Alaskan, Oct. 23, 1886, at 4.

257. Here it is important to say that the Whites in Sitka, consistent with the White ethnocentrism of the day, came to believe very negative things about Tlingit society. The fact was that *Sah Quah* was physically such a pitiful sight, with his eye put out. He would not admit on the witness stand, however, that his eye had been put out either as punishment or to identify him as a slave. Rather, he claimed to have lost it in a fight with a bear.

258. Ward McAllister, Jr., was appointed the first Federal District Judge for Alaska on July 15, 1884. He arrived in Sitka "several months later." Naske, *supra* note 78, at 168-71. *Kie* was decided in May, 1885, and *Sah Quah* in May, 1886.

can law was fully extended to all Tlingit in Alaska.²⁵⁹ These developments tracked the rapid White migration to Alaska and within ten years, by the mid 1890s, the Tlingit were a minority in their own land.²⁶⁰ The most extensive interaction between Whites and Tlingit moved from Sitka to the gold rush area north of Juneau and Skagway. This was the land of the Chilcats with whom Beardslee tried so hard to make contact. Due to the federal district court's presence in Sitka, this difficult period in Indian and White relations was perhaps more legally structured than any similar experience in the United States. Alaska fully applied the "law for the Indians" policy that Indian reformers argued was the key to solving the Indian problem in late nineteenth century America. But the Tlingit still resisted the application of American law.²⁶¹

1. *The Failure of American Law to Protect the Tlingit*

One major element of the "law for the Indians" policy as the legal solution to the Indian problem was juridical equality, the application of the same law to Indians and Whites. The White murder of a Tlingit in a whiskey riot on Douglas Island occurred soon after the *Kie* case. This whole series of events illustrates a great deal about the legal structuring of Tlingit and White relations at the time, revealing both the limits of imposed American law and the continuing force of Tlingit law.

Newtown, a small White settlement, was developed on Douglas Island around a mine and an "Indian ranch" of the lowest sort which supplied some labor to the mine. James Thompson started a "music hall" in a house in Newton with an elaborate front. "[O]rgies attended by drunken Indians and frequently drunken Whites" occurred there.²⁶² There were numerous attempts to close the place, which was completely illegal under Alaska's liquor laws. One night several Tlingit became drunk and demanded more liquor from the proprietor, William Pierce. When he refused, he was hit in the head and face, but the Tlingit were forceably ejected in the process. A few minutes later these Tlingit returned and stormed the building, throwing stones at the front and breaking all the windows.²⁶³

259. Here, it should be noted that the legal foundation for this intervention was entirely laid out in *Kie* and never changed thereafter.

260. Through the 1880s, White migration to Alaska was largely due to fishing and commercial activity. By the 1890s, mining became the major industry in Alaska, and Juneau replaced Sitka as the major commercial center. The Klondike Gold Rush of 1898 extended the White population far inland.

261. As a general rule, the process of the incorporation of native people into Western legal systems has most often occurred in frontier areas, beyond the scope of legal process. This was, for example, the situation in Alaska prior to 1884. But after the "Organic Act" native people in Alaska were faced with a process of incorporation into American society that was closely regulated by the ordinary course of law. Both Tlingit and Whites were under exactly the same law and legal process, the courts were readily accessible to both natives and Whites, and legal institutions had both the will and capacity to intervene in Tlingit life. Pieces of this process had occurred before in American history, for example between the Puritans and the Indians, but while the Puritans claimed full jurisdiction over the Indians they lacked the police capacity and the political strength to carry out an aggressive policy of legal intervention to structure the forced assimilation of the Indians. Y. KAWASHIMA, *supra* note 110, at 125-79.

262. Alaskan, Oct. 29, 1886, at 4.

263. *Id.*

In the midst of this melee two pistol shots were fired. One struck Kluskeetz, a quiet man not involved in the affair, killing him instantly.²⁶⁴ The other struck a White tug captain, who, upon hearing the noise, stepped out in front of another saloon nearby. George Foster, who was in the same saloon as the captain, headed up the beach to get a doctor. He was set upon by a band of drunken Tlingit and severely beaten, but later rescued by a group of Haida. In the meantime, Pierce escaped to Juneau by boat, raised a posse of a dozen miners, and returned. By then the situation had quieted down, although a deputy with the posse arrested one man for selling beer.²⁶⁵ The little village of Newtown reportedly looked like a village through which a conquering army had passed. The liquor sale business there had completely ceased.

Although five Tlingit claimed they saw Pierce fire the shots out of the window of his saloon, a coroner's jury composed of Pierce's White neighbors found that the shots were fired by "parties unknown." By then, however, the event was notorious throughout southeastern Alaska, and the legal authorities brought eleven cases stemming from the incident before the courts. In one case, Shorty, a Tlingit, was indicted for "malicious destruction of property." Moreover, Pierce was charged with murder. In addition, seven other Whites were charged with selling liquor in violation of territorial prohibition laws.²⁶⁶ While these nine cases were taken to Sitka for trial in territorial court, two Tlingit were convicted in the Juneau magistrate court of assaulting Pierce.²⁶⁷ Two other Whites were also convicted in Juneau of "selling liquor to Indians" and given four and five month sentences.²⁶⁸

There is no question of the quality of the justice applied in these cases. Those against whom inadequate evidence of sale to Indians was gathered, but who were "known to be in the liquor trade," were ordered to leave town.²⁶⁹ Judge Dawson ordered federal marshalls to "put to the torch" any building where liquor sales to Indians occurred thereafter. Although the order was patently illegal, Dawson claimed that the doctrines of "necessity and self-defense" would sustain his authority.²⁷⁰

The legal principles under which Newton's Kake qwan lived were the subject of considerable speculation among the Whites. Of all the Tlingit peoples, the Kakes were still among the most removed from American authority.²⁷¹ Moreover, the Kake distrusted White justice, and clearly did not expect Pierce to be punished for his crime. Neither did the local press; the *Alaskan* remarked that "whatever the evidence, it may not be possible to convict Pierce of murder in the first degree."²⁷²

It was immediately clear that under Tlingit law some White man must be killed because of the White murder of a Tlingit. A brother of Kluskeetz

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* One was fined \$50, the other sentenced to 60 days in jail.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*; see also, *Alaskan*, Dec. 4, 1886, at 4.

was heard by local Whites to say that unless Pierce was executed for the murder, he would kill a White.²⁷³ The brother reportedly also hired a lawyer, John F. Maloney, to make sure that Pierce was prosecuted. American legal process was explained to Kluskeetz's brother, but it is not clear that he understood it, and he apparently thought it was too slow. Pierce also hired Maloney to represent him. Judge Dawson reprimanded Maloney for attempting to represent both sides of the case and ordered him to return the Tlingit's fee.²⁷⁴

Several days after Kluskeetz's brother's remark was overheard, Jack Welch, a miner and carpenter, disappeared. A full search was organized but no trace of him was ever found. At the same time, the brother also disappeared, and for local Whites there was no doubt that Welch was killed by the Tlingit.²⁷⁵ In White terms, such a killing was explained with a simple "revenge" analysis,²⁷⁶ but for the Tlingit this kind of action sought to "restore a natural balance."²⁷⁷

A Kake delegation went to Sitka to see the governor about the case, concerned that Pierce might be punished less severely than a Tlingit would be. They entered Sitka harbor in four canoes singing songs, the Tlingit's traditional approach to an important meeting between villages.²⁷⁸ The leader of the Kake delegation put the matter simply: "When an Indian kills a White man you hang him; now a White man kills an Indian. If you want to prove to us that your laws are just and intended to protect as well as punish us, you must hang this White man who killed our brother."²⁷⁹ The *Alaskan* characterized this as a great dilemma because at the time the court was considering releasing Pierce on his own recognizance while he awaited trial, and few in Sitka thought you could convict a White man on the testimony of five Indian witnesses.²⁸⁰ The paper urged that no effort be spared in the prosecution of this case because Pierce's acquittal could leave the Tlingit with only one opinion about American justice.²⁸¹

Under American law, Pierce's due process rights could not be abridged. However, the operation of that same system could not work an actual equality of justice because the system was, in fact, unequal and racist.²⁸² Alaskan Whites would not hold each other legally accountable for crimes against Tlingit. Notwithstanding these social circumstances, the jury acquitted

273. *Alaskan*, Dec. 4, 1886, at 4.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* Surely this was not an unreasonable concern with two Tlingit hangings in recent memory. The *Alaskan* sympathetically noted that the Kake were in a difficult position: on one hand, they were held rigidly accountable for violations of an American law they had little understanding of and knew to be prejudiced against them; on the other hand they had never seen the fair application of American law against someone who had injured Tlingit. Thus, American law seemed unfair and one-sided, a mere instrument of American power with much less honesty and legitimacy than their own law. *Id.*

280. *Id.*

281. *Id.*

282. *Alaskan*, Nov. 26, 1887, at 4.

Pierce a year later after deliberating for twenty-three minutes.²⁸³

2. *Tai-Ka-Et's Potlatch*

Another major case involving a White crime against a Tlingit ended the same way as the Pearce trial did, but was partially saved by a plea bargain.²⁸⁴ F.L. Bangs, a trader, arrived in Wrangell in a small sloop carrying twelve boxes which contained four hundred blankets and numerous Tlingit artifacts worth a fortune in Tlingit society. Suspicions were aroused and the property turned out to belong to Tai-ka-et, an old man who cached the items for a potlatch. Bangs and two accomplices were arrested and sent to Juneau for trial. Judge Dawson's charge to the jury made it clear that the Tlingit had a property right in cached goods recognized under American law.²⁸⁵ The jury acquitted one defendant, but deadlocked on two others. As a result, the United States attorney quickly made a deal with the defendants: if they would restore 250 blankets and pay Tai-ka-et one hundred dollars, he would *nolle prosequere* the case.²⁸⁶ Although Tai-ka-et had filed a civil suit to recover the blankets, he could not post sufficient bond for the court to hold the articles pending trial. Under the circumstances, both the defendants and Tai-ka-et agreed to the plea bargain. Moreover, Tai-ka-et was reportedly pleased that the American authorities restored a good part of his property.²⁸⁷ The case clearly shows that American authorities were determined to protect Tlingit property rights when they could, even if this meant resorting to some extra-legal compromise.

3. *The Imposition of American Law in the Prosecution of Intra-Tlingit Offenses*

While one might expect American law to be actively involved in incidents involving both Tlingit and Whites, the intervention of American law into Tlingit life was based on considerations of power and domination that had nothing to do with how the Tlingit characterized White justice. By the early 1890s some very clear examples of the extension of the policy first developed in *Kie* arose. Perhaps the most revealing example is the case of Jim, of the Auk gwan, who killed his wife, Jenny, in their village sixty miles north of Juneau.²⁸⁸

In many ways the case was a repeat of the *Kie* case. Jim seized Jenny in broad daylight in the center of their summer camp and stabbed her for adultery in the presence of two White miners. Generally, the case would have gone unnoticed by American law, but the miners reported the events in Juneau, and a deputy marshall set out to investigate. Upon landing at the Auk camp, the interpreter revealed the purpose of his mission. The Auks then seized rifles and fled to a long house on a hill. One man was sent forth to parlay with the Whites, and, on being asked to surrender, Jim responded:

283. *Id.*

284. Alaskan, Oct. 30, 1886, at 1.

285. *Id.*

286. *Id.*

287. *Id.*

288. Alaskan, Aug. 6, 1887, at 1; July 30, 1887, at 4.

"No, the whole matter is settled. It is none of the White man's business."²⁸⁹ After some more negotiations, the Auks agreed to return to Juneau in their own canoes and the two parties proceeded down the coast. As they passed the main Auk village near Juneau, however, the Tlingit went ashore "to get new clothing." Once ashore, they refused to return to their canoes.²⁹⁰

The deputy marshall reappeared with the marshall, who took up the matter with the chief. The chief adamantly refused to surrender Jim even after the marshall threatened to take him with force. The marshall returned to Juneau and held a public meeting. It was decided that an attack by a small group of men would be risky and that the whole village, en masse, should proceed to the Tlingit village the next day and take Jim. They requested assistance from the Alaska Mill and Foundry Company mine across the bay and the company sent thirty rifles and one thousand rounds of ammunition.²⁹¹ They asked the Tlingit once more to give up Jim, but the Tlingit responded defiantly and were seen taking rifles up to a fortified log house.²⁹²

Two chiefs came down to Juneau, expressing concern about the women and children. They indicated they did not wish to fight, but that they could not induce the others to give Jim up.²⁹³ They were directed to move women and children to Douglas Island, and several canoes were evacuated. Some sixty or seventy members of the tribe remained fortified in their village and 125 armed Whites set out for the Auk village. They surrounded it and gave the Auks ten minutes to surrender Jim. The Tlingit remained defiant, but as the White vigilantes moved in from all sides, the Tlingit surrendered. Jim was sent to Sitka for trial.²⁹⁴

The Auks reported that Jenny might have been kicked by Jim but that he did not stab her. Her body was cremated, so no further evidence existed. Jim was sentenced to seven years in the federal prison at McNeil Island, Washington, but was pardoned by the President in the spring of 1889 after serving about a year and a half for his crime.²⁹⁵

The above case illustrates much more than a symbolic resistance of the Tlingit to the imposition of American law on intra-tribal matters. The spectacle of an entire, fully armed White town surrounding an Indian village to seize a prisoner conjures up a vivid picture of the dynamics of power relations in Alaska at that time.

4. *Continued Tlingit Adherence to Traditional Law*

There are several more such cases from the same period.²⁹⁶ In one, the Presbyterian mission at Klawack requested a gunboat in the spring of 1888 to protect the mission's interference in Tlingit legal matters.²⁹⁷ In early win-

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* The pardon is reported in the *Alaskan*, June 15, 1889, at 3.

296. *Alaskan*, May 19, 1888, at 1.

297. *Id.*

ter the mission rescued a girl accused of witchcraft from four Hanegahs. All winter the Hanegahs made determined, but unsuccessful, efforts to seize the girl back. In the spring, a larger party of Hanegahs returned with a party of Haidas. While the Haidas remained in their canoes singing war songs, the Hanegahs, armed with long knives, came ashore to negotiate the surrender of the girl. Trouble was averted when the girl's brother paid the Hanegahs in blankets, and the Indians defiantly left after treating the mission with great derision.²⁹⁸

In another case the same year, Whites had to abandon the entire Chilcat territory after Whites killed the Chilcat chief, Klanaut, and a Sitka Tlingit. The Chilcats taunted the Sitkas, accusing them of being afraid to act independently of the Whites.²⁹⁹ They demanded of the Sitkas two bodies of members of their tribe in recompense, thus holding the Sitkas responsible for the White killings. This, by implication, forced the Sitkas under traditional law to restore the balance by taking two White bodies to prove themselves capable of acting independently of White authority.³⁰⁰

American officials took this matter seriously enough to issue a proclamation instructing all concerned that their only redress was in a United States court.³⁰¹ Perhaps the proclamation was issued to mollify the Sitkan Tlingit who were left in a very bad position intertribally by the Chilcat's demand, even though it was a just demand under Tlingit law.

In a third case, White intervention in a witchcraft incident in Juneau illustrated similar resistance on the part of Tlingit defending their law and also the simple lack of communication between the two legal systems.³⁰² An Indian policeman, Joe, found an old man tied up as a witch and arrested two men for the crime. The men were fined twenty dollars in magistrate court and were given a lecture. The next day the old man disappeared and the two men were brought back into court. Joe recovered the old man from a deadhouse in an old Auk village some miles from Juneau. In court, the old man claimed that he was a witch and that Joe's wife had joined with him in doing harm to people. Joe's wife then tried to hang herself, but was cut down before she died. The two men who tied up the old witch told the court that they each paid twenty dollars for the privilege of punishing the witch,

298. *Id.*

299. Alaskan, June 30, 1888, at 4.

300. *Id.* The Chilcats appear to have been particularly resistant to American authority. On March 2, 1889, the Chilcat chief Koo-ta-wat, who boasted of having killed seven men, was convicted in Sitka of having bitten off the ear of Indian Tom. Judge Keatley took the occasion to address a courtroom filled with Tlingit:

I want to say a word to you native people here about the laws that you are to obey. You are required to obey the laws which the United States have placed over you . . . If one Indian shoots, or beats another Indian or cuts or bites his nose or ear off, he must be punished for it, according to the American's law; and it will not do to pay for the wrong in blankets or money . . . If the Indian who does a wrong of that kind, pays the other Indian for it, in blankets, it will not help him out of the trouble. The American officers can still come and arrest him, and bring him into the court . . . If one of your chiefs or headman tell you that you can kill, or hurt, or cut, or beat another Indian, or do anything of that kind and go clear, after you have paid blankets for it, he tells you what is not true.

Alaskan, Mar. 9, 1889, at 1.

301. Alaskan, Mar. 9, 1889, at 1.

302. Alaskan, Apr. 20, 1889, at 4.

and they wanted to do it right. They were sent to jail.³⁰³

Just as Tlingit witchcraft continued despite the interference of American law, so did other forms of traditional Tlingit justice. This is perhaps best illustrated by American attempts to settle a dispute with a fourteen-year history.³⁰⁴

The Sitka and Takous disagreed over liquor at a tribal gathering at Wrangell sometime around 1877. A Sitka was killed and a Takou was wounded. The Takous paid sixty blankets at the time to settle the matter. In 1891, however, just before a Takou journey to Sitka, the Takou man injured fourteen years earlier died. Arriving in Sitka, the Takou argued that he died of injuries sustained in that conflict. Thus, the two tribes were equal, and the Sitkas should return the sixty blankets.³⁰⁵

Governor Knapp,³⁰⁶ anxious to avoid trouble and to assert the supremacy of American law in resolving all conflicts, sent an Indian policeman to mediate the matter.³⁰⁷ Not surprisingly, he found that the Sitkas owed the Takous nothing and told the Takous not to enter the village upon threat of jail sentences. The Takou sailed a short distance down the coast and landed at a Ko-kwan-ton village beyond the jurisdiction of the Sitka police. Once outside of the punitive authority of American law and with the intermediation of the neutral village, the Sitkas and Takous negotiated a settlement. The sixty blankets were returned, minus five kept in payment for another Sitka injured for whom no payment was received.³⁰⁸ After the exchange was completed, a dance was held and the Takous returned home without incident. Thus, despite American interference in the case, the Tlingit settled the matter in accord with traditional law.³⁰⁹

In still other cases, American law seems to have silently acquiesced in the face of Tlingit law. For example, at the Tlingit village at Hoonah one Tlingit attacked the wife of another.³¹⁰ After a long chase through the village the attacker cornered the woman in her house and broke down the door with an axe. The woman's husband shot the attacker and killed him. The village met in council and decided that custom demanded the life of the husband, who gave himself up and was killed. Although the exact date of the incident is unclear, there was no cognizance of the case in the American courts. It is clear that many Tlingit cases escaped the attention of American law simply because they occurred without any American witnesses.³¹¹

303. *Id.*

304. *Alaskan*, May 21, 1891, at 3.

305. *Id.*

306. *Id.* The fact that Governor Knapp was confronted with this Tlingit dispute and two large, armed bands of Tlingit in Alaska's capital city, seven years after the Organic Act, is testimony to the continued strength of Tlingit sovereignty. The Tlingit did not feel that they had to make demands under their law out of the reach of American authority. Rather, they felt free to do so even in the American capital.

307. *Id.*

308. Evidently, the Sitkas returned exactly the same blankets. They were unhappy with them, because they were of a cheap quality, and it had been determined to save them and pay them back to the Takous the next time a settlement for damages had to be paid. *Id.*

309. *Id.*

310. This incident was retroactively reported in 1889 as occurring a "few years ago." *Alaskan*, Apr. 20, 1889, at 3.

311. *Id.*

5. *The Trial of Scun-Doo, a Chilcat Shaman*

The trial and conviction of Scun-doo, a Chilcat witch-killer, epitomizes the use of American criminal law for a purpose that merged both immediate political needs and long-range assimilationist goals.³¹² The witchcraft and slavery issues ranked as the two strongest indictments of the traditional laws of the Tlingit people. Although the press reported a number of such cases,³¹³ they seldom came within the reach of the courts. Scun-doo's case is probably a simple example of being in the wrong place at the wrong time.

The Chilcat were at the head of the water route from North America to the Klondike gold fields. Although the actual gold rush did not occur until 1898, substantial American and Canadian activity existed in the area by the mid-1890s. The Chilcats strongly defended their lands, and there were many confrontations with miners and with American authorities. Gunboats were sent several times, but Chilcats, unlike most of the Tlingit peoples, had access to the interior and could escape American authority.³¹⁴

Scun-doo was known to American authorities as one of the most powerful Chilcats.³¹⁵ He possessed great wealth, supposedly from payments in blankets for his services as a witch-killer. Moreover, he was a strong defender of traditional Chilcat ways and opposed every extension of American authority over the Tlingit. A man of perhaps fifty-five who "looked seventy" and had bright red hair, he must have been an imposing figure. Due to rumors that he was responsible for the deaths of many witches, he was arrested and tried for one of the deaths.³¹⁶

When Scun-doo was summoned on the death of a chief, he beat drums, chanted incantations, and identified a woman in the tribe as the cause of the death. Upon his order she was seized, bound, and kept for ten days without food until she died. According to Scun-doo, that settled the matter.³¹⁷ Somehow, word of the events got out, and although there were no White witnesses, Scun-doo fled into the interior. Upon returning home some time later, he was arrested and taken to Juneau for trial where he was convicted of manslaughter and sentenced to three years in San Quentin.³¹⁸

Probably the less said about the quality of the evidence in such cases the better. No one can say exactly how Tlingit witnesses were used in trials like these, although one gets some idea from the transcripts of the habeas corpus hearing of Sah Quah.³¹⁹

One case, however, reached the United States Supreme Court. In

312. *Alaskan*, Feb. 9, 1895, at 3.

313. The *Alaskan* repeatedly carried lurid stories of Tlingit witchcraft.

314. *Alaskan*, Feb. 9, 1895, at 3.

315. *Id.*

316. *Id.*

317. *Id.*

318. Although the *Alaskan* thought that San Quentin might be a bit hard on him, there was no question of the necessity of the sentence. "He threatened the miners of Chilicoot and the Chilkat Pass, and was a disturber. Besides, it was felt an example had to be made of him to the other Tlingit." *Id.*

319. See *supra* text accompanying notes 226-32. The transcripts of the Sah Quah and the Tla-koo-yel-lee testimony are the only transcripts of Tlingit testimony that I have located. It clearly shows a process where the Tlingit either did not understand the questions they were being asked, nor were their answers responsive. Similarly, the attorney's questions were hardly designed to elicit the

United States v. Tla-koo-yel-lee,³²⁰ the defendant was convicted of murder and twice sentenced to hang by a federal district court in Sitka.³²¹ Although the only evidence against the defendant consisted of statements from his wife, Tlak-Sha, and another man, Ke-Tinch, the trial court refused to permit a line of questioning establishing that Ke-Tinch and Tlak-Sha had become lovers as soon as Tal-koo-yel-lee was arrested and that their relationship might have provided them with a reason to perjure themselves to convict the defendant.³²² The United States Supreme Court reversed on evidentiary grounds, observing that "[t]he mind is oppressed with a painful doubt as to the soundness of the verdict rendered by the jury."³²³ When the prosecution could not produce additional witnesses on retrial, the case was dismissed.³²⁴

F. *The Governorship of James Brady and the Development of an Assimilationist Policy for the Tlingit*

Governor James Brady represents an anomaly in Alaskan politics, as well as an architect of Tlingit and White relations. Appointed by President McKinley in 1897, Brady served three terms as Governor of Alaska and was credited with providing a stable administrative framework for the Territory. In dealings with the Tlingit, Brady was clearly fully committed to a policy of assimilation, much like the modern Indian reformers of the era.³²⁵ Unlike these reformers, however, Brady had complete political authority over Alaska natives.³²⁶

Due to his experience as a Presbyterian minister, a trader, and a federal magistrate in Sitka, Brady was very familiar with the Tlingit. As magistrate, Brady learned firsthand of the problems of ranch Indians when he sentenced

relevant information. Yet, in the end it did not seem to matter. Judge Dawson's conclusions appear to have been preconceived.

320. 167 U.S. 274 (1897).

321. See *id.* at 275-77 for details of the case. See also *Alaskan*, June 11, 1897, at 1.

322. *Tla-koo-yel-lee*, 167 U.S. at 276-77.

323. *Id.* at 278.

324. *Id.* There is evidence that due process standards for Tlingit were systematically violated by the Alaska courts. In August, 1886, U.S. Commissioner (later Governor) James Brady was faced with a case involving the arrest of Klanat, second chief of the Chilcats, by Governor Swineford. Klanat was charged with "intimidating and extorting" Whites, arrested without a warrant, and taken by the Governor hundreds of miles by ship to Sitka and arraigned in Brady's court. The *Alaskan*, commenting on charges that due process had been violated, wrote:

[T]hose who know the Indian character feel that, in this country certainly, where communication is at such long range and long interval, and the means of securing justice so scant, officials cannot always, in dealing with the aborigines, be bound by the strict technicalities of the law. The protection of the Whites from Indian aggression is far more important than any sentimental reverence for the red man's particular privileges. He cannot understand technical points of law, but the manifestation of a purpose to make him do justice and to avoid outrage by hauling him up at once and decidedly is a thing which he can understand and appreciate. If we are always to stand back and wait for full forms of the law to be carried out with the Indians, serious trouble might result, and an example like this is an excellent thing to put in every now and then in order to keep them in mind to behave properly. Governor Swineford's action was expedient and therefore right.

Alaskan, Aug. 14, 1886, at 2. Thus, we can imagine that Tla-koo-yel-lee's conviction for murdering a White trader was at least expedient.

325. T. HINCKLEY, *supra* note 229.

326. *Id.*

hundreds to jail terms.³²⁷ His commitment to a policy of assimilation was all-embracing. In a letter to the Secretary of the Interior in 1902, Brady argued for organizing Tlingit into militia companies.³²⁸ In support of his proposal, he cited the degree to which the Tlingit were integrated into full legal relations with Whites.³²⁹ His courts not only decided civil matters between Tlingit, but also granted divorces.³³⁰ Similarly, Brady insisted that Tlingit children attend the same schools as White children in spite of some racist opposition to the practice.³³¹

But Brady also knew that the Tlingit were very resistant to giving up traditional ways. When he heard that a young witch was staked out on the beach to drown in the tide he personally took a revenue cutter to Hoonah, cutting the witch loose with two hours to spare and taking the witch home with him.³³² Twice, he took a gunboat to Yakutat to rid the village of a troublesome shaman, but both times the man was shielded by the village, clearly indicating a degree of traditional Tlingit solidarity.³³³ Claiming that the regular potlatch ceremonies were wasteful, Brady vigorously condemned the institution. Nevertheless, in 1904, he used government funds to throw a giant potlatch on the condition that it be the last one.³³⁴ Brady also tried to get one of the old Tlingit villages protected under America's 1906 Antiquities Act,³³⁵ although the notion that a decaying Tlingit village represented an important part of American heritage was too much for Congress.³³⁶ In addition, he also pushed for the abolition of Alaska prohibition on the ground that it was a total failure.³³⁷

The depth of Brady's belief in the assimilationist view is demonstrated in a tragic transcript of a meeting between Governor Brady and Tlingit chiefs at Juneau in late 1898.³³⁸ The transcript is a remarkable document because of its insight into two competing visions of the Tlingit future. Brady insisted on the need for assimilation, very often in reference to comparisons with the dependent, decaying Indian cultures in the rest of the United States.³³⁹ But while those comparisons may have been powerful for Brady, they were meaningless to the Tlingit who knew nothing of other native tribes and whose history was sovereign and independent.

American law structured the Sitka meeting. The chiefs were brought to

327. Hinckley, *We Are More Truly Heathen than the Natives: John G. Brady and the Assimilation of Alaska's Tlingit Indians*, 11 *WORLD HIST. Q.* 37, 44-45, 50-51 (1980).

328. *Id.* at 50.

329. *Id.*

330. *Id.*

331. *Id.* at 51.

332. *Id.*

333. *Id.*

334. *Id.*

335. An Act for the Preservation of American Antiquities, ch. 3060, 34 Stat. 225 (1906).

336. Hinckley, *supra* note 327, at 52.

337. *Id.* at 48.

338. Hinckley, *The Canoe Rocks—We Do Not Know What Will Become of Us: The Complete Transcript of a Meeting Between Governor John Green Brady of Alaska and a Group of Tlingit Chiefs, Juneau, December 14, 1898*, 7 *WORLD HIST. Q.* 265 (1970). Chief Shoo-we-Kah of Juneau stated, "we are like a certain man in a canoe. The canoe rocks, and we do not know what will become of us." *Id.* at 278.

339. *Id.* at 267.

Juneau to serve as witnesses in court against Whites accused of "selling liquor to Indians," the classic paternalistic American crime that had such a dramatic impact on native society.³⁴⁰ Brady, however, was blind to the imperialistic forces interconnecting the Tlingit with the rest of America's native people.

The Tlingit chiefs consistently said the same thing. They observed that while they were not as powerful as White people, they had laws, traditions, families, and a way of life they wanted respected.³⁴¹ While the Tlingit were willing to let the Whites live in Alaska, they wanted some land where they could continue their traditions and be left in control of their own lives.³⁴² The Tlingit chiefs pointed out that this was not a lot to ask but, was instead, only what was reasonable.³⁴³ The Tlingit thus attempted to negotiate a workable legal framework with Brady but, for the Tlingit, no White legal principles remained consistent.³⁴⁴

All the Tlingit told similar stories. Shoo-we-Kah recounted how he lived at Juneau in 1880 and that when White American authorities came to Sitka, he went over to them and was given a paper. White men would come among the Tlingit, and the Tlingit agreed to take good care of them. The Tlingit expected the White men to take good care of them in return. But the White men did not act as expected. Instead, they took the land, cut down the trees, killed or stole dogs, and hired Tlingit as policemen but did not pay them.³⁴⁵ Charlie, also of Juneau, pointed out that all the creeks with salmon were claimed by Whites, and every creek where the Tlingit lived was claimed by the Treadwell Gold Mining Company.

[O]ur people feel very bad [about] the way the White men act. They never tell us what they are going to do . . . and they put notices on the premises. And if you make a complaint and go into court, we are notified that it is too late now, that the paper is recorded and nothing can be done.³⁴⁶

Brady did not want to hear any of this. He berated the Tlingit for wanting to hold on to their old customs and asked them if they wanted to be put on an island, under the authority of an Indian agent "to keep them straight," or whether they wanted to live among the Whites, "obey the White men's laws[, and] have all the privileges that he has."³⁴⁷ Then, in language revealing a deep ignorance of the crime even then occurring with the lands of the Five Civilized Tribes, Brady gave the Tlingit a brief lecture on Alaska land laws.³⁴⁸ "Anybody can buy a mine. . . . The land commissioner has decided that the Indian can take up a quartz claim, record it, and hold it."³⁴⁹

340. *Id.* at 268.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 278.

345. *Id.* at 277-79. "You talk lots; white people promise much but [Tlingit] do not derive any benefit from it." *Id.* at 279-80.

346. *Id.* at 281-82.

347. *Id.* at 283-87.

348. *Id.* at 286.

349. *Id.* at 286-88.

Similarly, if any Tlingit would take and improve land—plow the ground, make fences, build a home—then he would hold that land, too. But the Indian could not hold the whole district. For Brady, these land laws were fair and neutral and would equally protect the rights of the Tlingit.³⁵⁰ When Brady's speech concluded, the meeting ended.³⁵¹

Clearly, the two sides did not understand each other, but no one can truly believe that the Tlingit left thinking that they could hold land according to the White man's law or that, if they could, it would give them a meaningful existence. Nothing in the subsequent history of the Tlingit in Alaska in the next century indicates that the Tlingit were wrong. The Indians did not take up and record mining claims,³⁵² a fact that proves the fiction of juridical equality between Tlingit and Whites in Alaska.

G. Conclusion

The doctrine of tribal sovereignty, which played a critical role in shaping federal Indian policy until the end of the nineteenth century, had no impact in Alaska. Similarly, a whole range of paternalistic, ostensibly protective federal legislation that applied to "Indian Country" under the Indian Trade and Intercourse Acts did not apply to Alaska. The reason for the Alaska exception was not initially grounded in federal Indian policy in Washington, but in Northwest territorial politics. While the national government took little interest in Alaska, Northwesterners had enough recent experience in territorial government to recognize that any special "Indian Country" status for Alaska natives was a liability to local whites. By the 1880s, however, this locally based policy of keeping the Tlingit distinct in status from other natives in the United States, merged with the assimilationist policy of Indian reformers who sought to extend the full force of American law to Indians all over the United States. Alaska, to which "Indian Country" jurisdiction had been removed, therefore became one place where the Indian reformers did not have to fight to change existing law.

Judge Matthew Deady of the federal district court in Portland, with jurisdiction over Alaska until 1884, singlehandedly determined the legal status of Alaska natives with a series of rulings inconsistent with both existing federal Indian policy and with the actual intent of the Department of the Interior regarding the legal status of Alaska natives. None of Deady's rulings was ever appealed to the United States Supreme Court. No Alaska native had either the resources nor sufficient confidence in American legal institutions to do so.

As a result, Alaska native policy became largely territorial in its content and control. Instead of having Indian agents administering the Indian po-

350. *Id.*

351. *Id.*

352. None of the histories of the Tlingit reports that the tribe took advantage of any juridical rights to claim individual pieces of land for mining claims or for any other purpose. Given this hundred-year history of refusal to exploit their mineral resources, it is perhaps ironic that the Tlingit hold substantial undeveloped oil and gas reserves. See Jones, *Black Gold and the Tlingit Indian Village of Yakutat, Alaska: A Case Study of Alaska's Outer Shelf Oil and Gas Resources and the Federal Trust Responsibility to Native Alaskans*, 24 WILLAMETTE L. REV. 565 (1988).

lice, authority over these important forces fell to the territorial governor. The Indian ranches that grew up alongside White towns were under the direct control of local Whites. Distant Indian villages were ordinarily outside of the reach of White authority, but armed parties of local miners were occasionally raised to augment regular police forces in imposing American law on even the most remote Tlingit villages.

The Tlingit of southeastern Alaska had a very strong social order and the ability to resist American intrusions into their institutions. Much of the early trading relationship with both Russians and Americans was on Tlingit terms. Moreover, the Tlingit remained undefeated and were a military threat to the Americans until well into the 1890s. Similarly, the Tlingit regularly sought to punish Whites for violations of Tlingit law, a rare occurrence in the rest of the United States outside of the Indian wars.

A comparative analysis of the fate of the Tlingit because of their unique legal status as Alaska natives, and the fate of Indians in the rest of the United States is beyond the scope of this study and, to a great extent, is still unwritten. The long delay in resolving the legal status of Alaska Indians in the twentieth century is itself testimony to both the power of White territorial politics and to the Tlingit ability to resist attacks on their traditional institutions. The Tlingit became impoverished in relation to Alaska Whites, but the prosperity of the commercial fishing industry, an industry that employed Alaska natives from the 1880s, left the Tlingit wealthy compared to American Indians in general.

In any case, there can be no question that the Tlingit wrote a good part of their own legal history on their own terms. The legal history of the incorporation of the Tlingit under American law cannot be written only in terms of the cases that Judge Deady decided. It must also be written from the standpoint of the Tlingit who passed their own laws on White cases and then resisted the imposition of American law on their society. Even without a formally recognized American legal doctrine of tribal sovereignty, the Tlingit were sovereign and repeatedly acted as a sovereign people.

