

Michigan Law Review

Volume 90 | Issue 6

1992

Black Hills/White Justice: The Sioux Nation Versus the United States

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Recommended Citation

Martin J. LaLonde, *Black Hills/White Justice: The Sioux Nation Versus the United States*, 90 MICH. L. REV. 1433 (1992).

Available at: <https://repository.law.umich.edu/mlr/vol90/iss6/21>

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BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT. By *Edward Lazarus*. New York: HarperCollins. 1991. Pp. xvii, 486. \$27.50.

In 1980, the U.S. Supreme Court in *United States v. Sioux Nation*¹ awarded the Sioux \$106 million, concluding the nearly sixty-year-old Black Hills legal battle. To the Sioux, however, the ruling was a hollow victory; they rejected the judgment, holding to their claim that “the Black Hills are not for sale” (pp. 326, 351, 353-54, 373, 403-28).

In *Black Hills/White Justice*, Edward Lazarus, whose father² represented the tribal interests for over twenty years, succinctly relates the history of the Black Hills claim. The book contributes significantly to Native American legal history by tracing, in considerable detail, the legal maneuvering along the dispute’s meandering path. Nevertheless, Lazarus’ efforts to glorify his father taint his effort.³

Lazarus separates *Black Hills/White Justice* into three periods: the events leading to the Black Hills Claim (1775-1890), the early history of the claim (1890-1956), and the post-1956 era of judicial and legislative activity through the present (1956-1991). The first six chapters — describing events from the Sioux’s first encounter with the Black Hills to the massacre at Wounded Knee — provide background for the subsequent fifty years of legal wrangling. The remainder of the book tells two stories: first, the legal battles — mostly conducted in Washington, D.C. — for the Black Hills, and, second, the changes in the Indians’ way of life and in the U.S. government’s relationship with the Sioux.

The Sioux Tribe first came upon the Black Hills at the time of the American Revolution (p. 3). Encounters with expansion-minded America soon followed and ultimately led to the subjugation of the Sioux and their consequent removal to reservations. Military confron-

1. 448 U.S. 371 (1980).

2. Arthur Lazarus represented the Sioux from the late 1950s into the 1980s.

3. Lazarus may feel the need to laud his father because of the criticism the attorney received for allegedly blindly pursuing a money award and contingency fee instead of the Black Hills themselves. See Stuart Taylor, Jr., *Big Wampum for a Legal Tribe*, N.Y. TIMES, May 3, 1981, § 3, at 1 (“The lawyers, motivated more by the prospect of a big fee than the desire to right ancient wrongs . . . finally won a huge pot of money for their clients, from which they are to be richly rewarded themselves.”). In commenting on the \$10.6 million legal fee obtained by the Sioux’s attorneys, the author Peter Matthiessen states that “[t]he case had been won by the wealthy lawyer and lost by his poverty-stricken clients” PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE 528 (1983). *Black Hills/White Justice*, in contrast, tells a story in which attorneys get the best remedy available but their unreasonable and ungrateful clients find their result wanting and motives questionable. In addition, Lazarus does not spare the reader from hyperbolic praise for his father: e.g., “[s]mall and slight, ordinarily reserved, in court Lazarus transformed himself into a[n] assassin of professional credibility.” P. 281.

tation, however, did not ruin the Sioux; their inability to maintain the Indian's nomadic way of life was their undoing:

[T]hey had lost, not on the battlefield, but on their hunting grounds, where the buffalo no longer grazed, or at the army posts where a debauched but easy life weaned them from their habits. They were casualties in a war between two cultures, first made desperate and weary by a long and steady assault on their way of life, then broken by their consequent dependence on government annuity payments for survival.⁴

The Black Hills claim arose from two significant events: the signing of the treaty of 1868 that granted the Black Hills to the Sioux, and its subsequent abrogation by the United States in 1877. *Black Hills/White Justice* elucidates these two milestones.

Following increasing skirmishes through the late 1850s and early 1860s, the U.S. government decided to make peace with the Sioux rather than remove them by military force.⁵ After acceding to all the Sioux demands — “the only time in U.S. history the country had fought a war, then decided to negotiate a peace on the enemies’ terms” (p. 48) — the Sioux chiefs and U.S. government signed the treaty of 1868 to create the Great Sioux Reservation.⁶

The ensuing peace was short-lived. Discovery of gold in the Black Hills⁷ and Sioux resistance to reservation policy ultimately led the United States to a military solution (pp. 70-90). In 1877, the government “deliver[ed] the nation’s ultimatum, which, in its simplest terms, gave the Sioux the choice to die in battle, to die from starvation, or to surrender everything they held of value” (p. 90). The “agreement”⁸ was forced on the recalcitrant Sioux — only 10% of the tribe signed (p. 92) — and it took away the Hills in return for subsistence rations. This agreement formed the foundation for the protracted legal struggle between the Sioux and the U.S. government.

Lazarus maintains that from the outset the Sioux regarded their claim as seeking more than justice from their conquerors; the “Black Hills claim emerged as one of the few bridges to a cherished past” (p. 119). It became a “rallying point and rare source of hope” for a peo-

4. Pp. 36-37. The author states that Sioux dependence on the government began with their reliance on the white man’s guns, cooking utensils, and other items (p. 11), grew through the early reservation years when they resisted adopting agricultural life (p. 103), and continues today as the Sioux remain extremely impoverished (p. 420).

5. P. 43. To achieve this goal, some government officials advocated stepped-up military action while others, couching their arguments in moral declarations, pursued a reservation policy. The latter policy won out because “Americans had grown apprehensive after the Civil War about their army” (p. 42), feeding the Indians was cheaper than fighting them (p. 43), and the reservation system “was ideally suited to a nation [the United States] that yearned for expansion with honor” (p. 45).

6. Fort Laramie Treaty of Apr. 29, 1868, 15 Stat. 635 (1869).

7. General Custer, in clear violation of the 1868 treaty, led an expedition into the Black Hills and discovered gold in 1874. Pp. 72-75.

8. Act of Feb. 28, 1877, 19 Stat. 254 (1877).

ple otherwise facing the loss of their culture (p. 133). During gatherings the tribal elders would pass "the torch of accusation to the next generation, and vest[] in their children and grandchildren the power of their people's tragic history to inspire the compassion of their conquerors" (p. 120).

Lazarus relates a number of obstacles the Sioux faced in initiating their claim. Although they remained unversed in legal interpretation (pp. 121-22), the tribe knew that the government had somehow cheated them. This was verified when the Sioux discovered the government's violation of the three-fourths voting requirement for land sales.⁹ Yet the government banned the tribe from securing legal assistance (p. 124), and, even if they secured counsel, sovereign immunity protected the U.S. government. The Indian Bureau — which held trustee-like responsibility for the tribe's well-being — offered little assistance to overcome these problems (p. 125). Lazarus lucidly explains the paradox of the government's position toward the Sioux: "No nation could serve effectively both as guardian of the claimant and as prospective defendant in the claimant's litigation. On [the] Black Hills, the Indian Bureau was a reluctant advocate indeed" (p. 135).

Despite these obstructions, the Sioux undertook a lobbying effort to persuade enactment of a bill allowing the Court of Claims to hear their grievances (pp. 132-33). On June 3, 1920, Congress passed the Sioux Jurisdictional Act¹⁰ to reward the Indians for their patriotic contribution in World War I and to facilitate assimilation of the tribes: "Past injustices, the Wilsonians believed, whether real or imagined, made poor soil for good citizenship to take root" (p. 131). Despite these lofty goals, the legislation limited potential recovery; it provided only monetary remedies, barred interest on the judgment, and allowed government offsets — the deduction of money it spent supporting the Sioux from any judgment it might have to pay them (pp. 137-38). The Sioux were nevertheless pleased to possess an opportunity to present their case.

Lazarus' extensive description of lawyers' roles, which distinguishes *Black Hills/White Justice* from other historical treatments of the subject,¹¹ begins with his description of the origin of the legal battle (pp. 138-40). After Congress passed the jurisdictional act, attorneys with the gleam of Black Hills gold in their eyes maneuvered to obtain the Sioux business. Ralph Case, who Lazarus depicts as an affable and sympathetic attorney who romanticized the U.S. judicial

9. See Art. XII, 15 Stat. at 639. The text of the Fort Laramie agreement is reprinted at pp. 433-49.

10. Act of June 3, 1920, 41 Stat. 738 (1920).

11. See, e.g., VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 1-24, 40-45 (1983); Matthiessen, *supra* note 3.

process, emerged from the disarray as co-counsel with three other attorneys.¹² Case filed the Black Hills money claim on May 7, 1923, forty-seven years after the taking of the Hills.¹³ He based the action on stories gathered from the Sioux — accounts of the government's offering food and blankets as bribes, intimidating the tribe members, and offering liquor to weaken Sioux wills — showing that the tribe members unwittingly signed the treaty of 1877.¹⁴ Nearly twenty years later, the Supreme Court declined review of the Court of Claims decision against the Sioux.¹⁵ The Indians had come to know the sluggish pace of white justice.

Lazarus asserts that Case lost the opening skirmish of the legal war by relying too heavily on facts and too sparingly on legal analysis. Case's 500-page statement of fact "was an impassioned work . . . , more the creation of a crusader than a lawyer" (p. 167). In contrast, his legal brief, submitted almost three years later, ran a mere eighteen pages and inadequately covered the pertinent law (pp. 168, 173). Such sparse legal analysis presented few prospects for success before a court that had previously been miserly in its remedies for broken treaties (p. 168). The brief did not address the government's best arguments: the limitations of the 1920 Jurisdictional Act and the application of key precedent.¹⁶

In 1946, Congress breathed new life into the Black Hills claim by enacting the Indian Claims Commission Act (ICCA),¹⁷ which formed a commission to consider a broad range of Indian grievances. Case, advancing similar legal arguments, lost before the commission.¹⁸ Finally recognizing Case's incompetence, the Sioux replaced their attorney of thirty-five years. The Sioux initially struggled to find new

12. Pp. 138-43. After selection, the attorneys determined the distribution of the fees: "Bandit gangs would have had an easier time dividing up their loot than these lawyers" (p. 144).

13. P. 146. See MATTHIESSEN, *supra* note 3, at 31 (arguing that the money claim was filed despite Case's awareness that "his clients sought the return of" the Black Hills); Edward A. Adams, *Whose Land Is It, Anyway?*, NATL. L.J., Aug. 3, 1987, at 20, 22, 24.

14. P. 155. "In truth, the hundreds of pages of Sioux recollections, fifty years removed from the facts, were sometimes self-contradictory, other times made of whole cloth. . . . Still, taken collectively, to the Indians and to a sympathetic advocate like Case, the stories amounted to an irrefutable indictment of the United States for deceit, coercion, and, ultimately, theft." P. 155.

15. In an obscure opinion — "a masterpiece of judicial obfuscation" (p. 175) — the Court of Claims apparently dismissed the claim for lack of jurisdiction. *Sioux Tribe v. United States*, 97 Ct. Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943). Arguments about whether they had actually reached the merits would remain largely unresolved. P. 176. One reason for the decision may have been the court's reluctance to grant one tribe a \$750 million settlement during the costly World War II. P. 177.

16. P. 173; see *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (establishing Congress' plenary power to manage Indian lands).

17. Indian Claims Commission Act of 1946, ch. 959., § 1, Pub. L. No. 79-726 (omitted from 25 U.S.C. § 70 on termination of the Commission on Sept. 30, 1978, pursuant to Pub. L. No. 94-465, sec. 2, 90 Stat. 1990 (1976)).

18. *Sioux Tribe v. United States*, 2 Ind. Cl. Comm. 646 (1954), *aff'd.*, 146 F. Supp. 229 (Ct. Cl. 1956).

counsel willing to take up their botched claim. Eventually, six of eight tribal councils hired the firm Strasser, Spielberg, Fried and Frank, whose practice dealt extensively with Indian law. The firm revived the claim by attacking the source of its infirmity; in a motion to vacate and remand, accepted by the Court of Claims,¹⁹ the attorneys vigorously argued that the Sioux had in effect lacked legal representation.²⁰

The two leading attorneys on the case, Marvin Sonosky and Arthur Lazarus, initially took "a 'kitchen sink' approach to the Sioux claims" (p. 239). They fought Case's relinquishment of certain claims and his acknowledgment of fifty-seven million dollars in government offsets. After convincing the Justice Department to try the case on the merits²¹ and overcoming the ICCA's footdragging, counsel for the Sioux finally began a new trial in 1961 (p. 248). Lazarus describes the stratagems of the Sioux's attorneys in interesting blow-by-blow detail. First, the lawyers developed legal arguments based on the unconscionability of the government's actions and, more importantly, on the notion that the Black Hills affair constituted a taking without just compensation.²² Next, they undertook the difficult process of determining the fair market value, as of 1877, of the usurped Indian land (pp. 275-85). Finally, Sonosky and Lazarus fought the government's *res judicata* defense based on the 1942 Court of Claims opinion (p. 317).

The claims commission decision²³ "gave the Sioux a great victory on the one hand and then took almost all of it away with the other" (p. 319). The commission rejected the *res judicata* defense and valued the hills at close to what the Sioux's counsel had sought. Liberal government offsets, however, threatened to negate the potential remedy (p. 324). To avoid this result, Sonosky and Lazarus shifted their battle to Congress, seeking to amend the ICCA Act of 1946 to exclude most of the government offsets.²⁴ The Sioux's attorneys lobbied the House, Senate, and White House and argued that "the government committed two wrongs: first, it deprived the Sioux of their livelihood; secondly, it deprived the Sioux of their land. What the United States gave back in

19. *Sioux Tribe v. United States*, 182 Ct. Cl. 912 (1968).

20. Pp. 228-29. Lazarus describes the motion: "Ralph Case's representation of the Sioux was so 'grossly incompetent,' the record he established so 'distorted and empty,' his arguments so 'erroneous and untenable,' his briefs so 'inaccurate and wholly misleading,' that 'for all practical purposes, these Indians were without legal representation.'" P. 228.

21. P. 240. Lazarus criticizes the Justice Department's role as an "over-zealous" advocate, to the detriment of Congress' goal to resolve the tribal claims "fairly and expeditiously." P. 241. The government was in pursuit of "procedural (if not substantive) justice." P. 240.

22. Pp. 266-75. Lazarus recounts the attorneys' reinterpretation of the 1868 treaty that acknowledged Sioux ownership rights in contested lands. They reasoned that because the government had seized the Hills in 1877, the Agreement was null and void for lack of consideration.

23. *Sioux Nation v. United States*, 33 Ind. Cl. Comm. 151 (1974).

24. These included "food, rations, or provisions," which effectively constituted almost all of the government's offsets. P. 330.

rations should not be stretched to cover both wrongs" (p. 330). After convincing congressional members that the bill did not show undue preference to the Sioux, Congress passed a unique amendment to the ICCA that cleared the way for a monetary judgment.²⁵

Victory would have to wait. On appeal the Court of Claims reversed the ICCA's *res judicata* ruling.²⁶ After the Supreme Court denied review, the Sioux's counsel again found themselves on Capitol Hill pressing Congress "to waive a scrupulously honored legal defense, *res judicata*, so that a single tribe might reassert a legal claim already fifty-three years in litigation, and at a potential cost to the United States of more than \$85 million" (p. 347). They overcame arguments that a waiver of the defense would set bad precedent and would lead to "congressional interference in judicial business" by showing the unique and technical nature of the proposed waiver and by appealing to "the tragic story behind the Black Hills claim" (p. 352). After a long and arduous campaign (pp. 356-57, 360-65), the *res judicata* waiver became law in 1978.²⁷

The Court of Claims reheard the case (pp. 367-70, 373) and entered judgment for the Sioux (p. 375); the Supreme Court affirmed.²⁸ In an ironic twist of events, the Sioux tribal governments rejected the monetary remedy (p. 404), demanding the actual return of the Black Hills.

Throughout his recounting of the legal battle, Lazarus describes the changing attitudes of the Sioux toward the Black Hills claim. When Sonosky and Arthur Lazarus first took over the case, the Sioux still held out hope that the Black Hills claim was a path to wealth.²⁹ In the 1960s, a new generation of Sioux leaders, reacting to the tribal termination policy of the 1950s, sought to exercise their sovereignty rights.³⁰ A faction of growing importance developed its own interpretation of the 1868 treaty; its members "preached the gospel of Indian nationalism: a tale of genocide and resurrection in the form of absolute tribal sovereignty" (p. 293).

The newly formed American Indian Movement (AIM) led the group. Lazarus castigates AIM by referring to them as "militants"

25. P. 336. Act of Oct. 27, 1974, Pub. L. No. 93-494, 25 U.S.C. § 70(a) (1976).

26. *United States v. Sioux Nation*, 518 F.2d 1293 (Ct. Cl. 1975), *cert. denied*, 423 U.S. 1016 (1975). The author extensively recounts the legal arguments presented to the Court of Claims on both sides of the issue and briefly discusses the Court's opinion. Pp. 336-45.

27. Act of Mar. 13, 1978, Pub. L. No. 95-243, 92 Stat. 153 (omitted from 25 U.S.C. § 70 on termination of the Commission on Sept. 30, 1978, pursuant to Pub. L. No. 94-465, sec. 2, 90 Stat. 1990 (1976)).

28. Pp. 381-401; *see* *Sioux Nation v. United States*, 601 F.2d 1157 (Ct. Cl. 1979), *aff'd.*, 448 U.S. 371 (1980). The author details the legal conflicts and the process by which the Court decided the claim.

29. MATTHIESSEN, *supra* note 3, at 31; *see also* pp. 232-33, 235-36, 250.

30. The book has a decidedly negative image of the Indian reform movement that began in the late 1960s. *See* ch. 12.

(pp. 293, 294). His rhetorical gesture is reminiscent of the treatment of earlier natives who fought for their rights and were thus branded as "hostiles" or "renegades."³¹ Deriding them as "a bunch of city Indians talking about the old ways as though they knew something about them" (p. 296), he blames them for divisiveness within the tribes.³²

In addition, Lazarus defends the tribal governments established under the Indian Reorganization Act from AIM's criticisms.³³ Although admitting that these governments "were often poorly, and sometimes dishonorably, run" (p. 294), "AIM's criticisms were wide of the mark. On most reservations, even those with poor leadership, tribal self-rule was real, not a sham; leadership was elected, not imposed" (p. 295). The tribal governments lacked experience in self-rule, Lazarus asserts, but understood the limits on their power:

Tribal leaders sought self-determination as pragmatists coping with military impotence, political weakness, and almost total economic dependence on the federal government. They accepted, or at least accommodated themselves to, the overarching jurisdiction of the United States; they searched for autonomy or justice in its institutions, according to its legal rules. And they accepted, or at least accommodated themselves to, the historical process by which individual Indians had become full citizens of the United States, fought in its wars, and partly shared its destiny. [p. 296]

Lazarus' views of tribal politics presume the legitimacy of the tribal councils created under the Indian Reorganization Act. The Act filled the perceived void in Indian political organization with a system of governments based on a white American model. The Act also established parties with whom the U.S. government could deal; intra-tribal factionalism had often obscured who held tribal power in the past.³⁴ Before the passage of the IRA, however, the tribes already possessed identifiable governments — the Black Hills Treaty Council being one example.³⁵ "Traditional Indians" generally dominated these shadow governments, and they decried the recognized tribal councils for "imposing white institutions on the tribes."³⁶ Lazarus disparages

31. See, e.g., MATTHIESSEN, *supra* note 3, at 76.

32. Pp. 294-311. For a more sympathetic view of AIM, see MATTHIESSEN, *supra* note 3, at xxiv ("whatever AIM's origins, excesses, and mistakes, [its] warrior spirit . . . restored identity and pride to thousands of defeated people and inspired attempts to resurrect the dying languages and culture."). Matthiessen also notes that AIM "was eventually endorsed by spiritual leaders of many Indian nations who saw these young militants as the last . . . hope of their people." *Id.* at 40.

33. Indian Reorganization Act, 25 U.S.C. § 461-79 (1988).

34. Pp. 160-61. See DELORIA & LYTLE, *supra* note 11, at 15; Robert F. Berkhofer, Jr., *Cultural Pluralism Versus Ethnocentrism*, in *THE AMERICAN INDIAN AND THE PROBLEM OF HISTORY* 35, 39 (Calvin Martin ed., 1987) [hereinafter *PROBLEM OF HISTORY*]; Vine Deloria, Jr., *Revision and Reversion*, in *PROBLEM OF HISTORY*, *supra*, at 84, 88.

35. Deloria, *supra* note 34, at 88.

36. DELORIA & LYTLE, *supra* note 11, at 15; see VINE DELORIA, JR. & CLIFFORD LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY*, 232-

the role of the traditionals, describing the nonrecognized leadership as factional and beholden to a vanished past.³⁷ Apparently, he felt it necessary to attack those elements of the Sioux nation that opposed the just compensation claim.

The Commission's 1974 decision to grant just compensation to the Sioux³⁸ "alerted the militants to an irreconcilable conflict between their strict adherence to the terms of the 1868 treaty and the Sioux nation's half-century old effort to attain compensation for the Black Hills" (p. 325). The militants contended that the 1868 treaty defined the relationship between the Sioux and the United States and had granted the Black Hills to the tribe. "Seeking compensation for the taking of the Black Hills was not only logically absurd, it represented a capitulation to U.S. treaty breaking, a sellout to white and capitalist notions that land and money were interchangeable, or, more crassly, that the Sioux and their lands could be bought" (p. 325). The Sioux attorneys initially disregarded this sentiment because the "elected tribal councils still stood firmly behind the claim" (p. 326).

The conviction that "[t]he Black Hills are not for sale" (p. 373) drew a broader and louder following throughout Sonosky and Lazarus' representation. "Traditionals" soon criticized Sonosky and Lazarus for their pursuit of just compensation. The Sioux elders accused the attorneys of seeking a waiver of *res judicata* so that they could increase their contingency fee (p. 354). These allegations recurred, and eventually the Black Hills Sioux Nation Council called for the replacement of the attorneys — a request that carried no weight because the organization had no official authority. Later, after the no-sale view swept the elected tribal governments, tribal councils refused to renew the attorneys' contracts. Nevertheless, Sonosky and Lazarus saw the case through to its conclusion (pp. 373, 403).

Lazarus stresses two arguments in support of the just compensation strategy. First, Sonosky and Lazarus "saw no inherent incompatibility in accepting money and seeking land" (p. 359). After receiving just compensation, the Sioux could seek return of religiously or culturally significant parts of the Black Hills from Congress. Second, the Sioux simply could not obtain the Black Hills through judicial proceedings. Although the Sioux believed they could recover the Hills by arguing that they had not been taken for a public purpose as required

33, 242-43 (1984); Deloria, *supra* note 34, at 88 ("When traditional Indians raise complaints about the high-handed tactics of the Bureau of Indian Affairs in getting the tribes to adopt the IRA, or accuse the existing tribal government of being a white man's government, they have a great deal of historical fact behind their arguments . . .").

37. Pp. 162-63, 186, 353-55. *But see* DELORIA & LYTLER, *supra* note 11, at 1 ("The perspective of the non-Indian, generally colored by the uncritical acceptance of cultural evolution as the definitive experience of our species, has rarely coincided with the view from the reservation."); MATTHIESSEN, *supra* note 3, at xxxii-xxxiii.

38. *Sioux Nation v. United States*, 33 Ind. Cl. Comm. 151 (1974).

under the Fifth Amendment,³⁹ Arthur Lazarus argued that “no federal court ever had prevented, much less rescinded, a governmental taking on the ground that it was not for a public use. And regardless of the merits of . . . [the] public use argument, Lazarus was certain that no federal court would even listen to [the] theory” because federal statutes forbade the return of Indian land.⁴⁰

Furthermore, the book contends that the true reason the Sioux rejected a monetary award was that they would lose the “sustaining myth that they had never given in to the white man’s deceptions . . . [and] would . . . end forever their century-old grievance against the United States and diminish their status as still defiant victims of its expansion” (p. 376). This opinion, coupled with the belief that a money award was the best available judicial remedy, leads to Lazarus’ conclusion that the Sioux should accept the judgment and get on with their lives.

A reader might infer from its title that a book called *Black Hills/White Justice* would be sympathetic to the Sioux Nation’s struggle to regain their Sacred Black Hills. Lazarus’ effort falls short of such sympathy. Instead, his account makes the Sioux look irrational and unappreciative of the “justice” that his father obtained through an arduous legal struggle.⁴¹

That Lazarus is writing about his father colors his authorial per-

39. U.S. CONST. amend. V (“nor shall private property be taken for public use without just compensation”).

40. P. 372. But Milner S. Ball argues:

The Black Hills afford an example of curable wrong. . . .

. . . .

. . . Their counsel, inexplicably, acceded to the proposition that the United States could legally abrogate the Fort Laramie Treaty and that the United States held title to Sioux and all Indian land. . . .

. . . [T]he courts are not confined to money damages. They and the Congress could respond with flexibility. They could return the land, certainly at least those considerable portions of it that are public and are held by the federal government. Moreover the voice of the Sioux can certainly be better heard in the judicial process through a different quality of legal representation.

Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2301-02 (1989); see also Ward Churchill, *The Black Hills Are Not For Sale: A Summary of the Lakota Struggle for the 1868 Treaty Territory*, 18 J. ETHNIC STUD. 127, 135 (1988) (arguing that “[t]he game had always been rigged, and the legal strategy had (predictably) proven quite unsuccessful in terms of either achieving *Lakota* objectives or even holding the U.S. accountable to its own professed system of legality”).

41. The author introduces the book in a compassionate manner, pronouncing:

This book tells th[e] Black Hills history. It tells of an aboriginal people’s movement to a new homeland on the great plains, and of how a burgeoning nation from the east conquered that people and took its land; it tells of a great legal battle — fought mainly by white men in the white man’s courts — as the conquered sued the conqueror over the sins of empire. And it tells of an impoverished people seeking to reclaim their heritage through the sometimes tender conscience of the nation that robbed them of their way of life.

P. xvi. By the end of the book, however, his tone has changed:

As for the Sioux, the claims process has encouraged them to evade any real responsibility for repairing the tragic condition of their lives. They have come to believe that their status as victims, their sense of grievance, is their greatest source of strength and only hope for unity.

spective,⁴² yet this is not the only factor that may lead the reader to question the author's loyalties.⁴³ First, as Lazarus demonstrates, the American system of justice habitually slighted Native Americans (pp. 241, 248). Yet he ignores the Sioux's counsel's role in this defective structure.⁴⁴

Second, in a related issue that Lazarus does not explore, ethnocentric biases can complicate the attorney-client relationship. Although the attorney, raised and trained in the dominant culture's system of justice, may feel he or she is pursuing the best solution available, the minority client may not agree.⁴⁵

Native American conceptions of justice in land claims are substantially influenced by their view of land. In general, Native Americans "understand the intrinsic value of land as the sustenance of [their] culture."⁴⁶ The Sioux were not trying to regain a lost measure of wealth or a resource that through productivity would yield riches; they were trying to recapture their sacred connection to nature: their cultural identity.⁴⁷ They continue to be unwilling, after years of governmental allotment policy and tribal termination efforts, to betray this heritage.

And in this belief the Sioux have abandoned any meaningful attempt to control their own destiny in favor of rhetorical claims to sovereignty and independence.

P. 428.

42. The relationship of Lazarus to his father also provides the important benefit of unique insights into the legal maneuvering on the case. P. 467. At the very beginning of the book, the author puts the reader on notice of his special relationship to the subject. P. ix.

43. For insight into the problem of ethnocentric bias in writing Indian history, see Calvin Martin, *The Metaphysics of Writing Indian-White History*, in *PROBLEM OF HISTORY*, *supra* note 34, at 27.

44. See, e.g., Harvey D. Rosenthal, *Indian Claims and the American Conscience*, in *IRREDEEMABLE AMERICA: THE INDIAN'S ESTATE AND LAND CLAIMS* 35, 67-68 (Imre Sutton ed., 1985) [hereinafter *IRREDEEMABLE AMERICA*]; Adams, *supra* note 13, at 21, 24-25.

45. That the attorneys were hired on a contingent basis may further influence their amenability to pursue the client's wishes that do not involve a potentially large monetary remedy. The attorney may find it difficult to follow the adage that "[a] lawyer must, within the established constraints on professional behavior, maximize the likelihood that the [client's objectives will be attained]." Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 *CAL. L. REV.* 669, 673 (1978).

46. *Prolegomena*, in *IRREDEEMABLE AMERICA*, *supra* note 44, at 36. One Indian perspective was summarized as follows:

The government is always making laws, so many laws, every day new laws. Then they break every one. They use the law to cheat people, but that is not the Indian way. We have one law, God's law: to live on this earth with respect for all living things, and to be happy with what God has given to us.

MATTHIessen, *supra* note 3, at 529 (quoting Chief Fools Crow); see also DELORIA & LYLTLE, *supra* note 11, at 1 (discussing Indian notions of law and justice).

47. See JERRY MANDER, *IN THE ABSENCE OF THE SACRED: THE FAILURE OF TECHNOLOGY AND THE SURVIVAL OF THE INDIAN NATIONS*, 315-16 (1991) ("[T]he lawyers have been oblivious to what the Indians truly want, which is to retain land rather than be paid money. The land is the Indians' economic, cultural, and spiritual base . . . land is what permits them to remain Indians. The lawyers, however, seem always to go for the money"); *IRREDEEMABLE AMERICA*, *supra* note 44, at 4-7. For Lazarus' description of the sacred nature of the land to the Sioux, see pp. 7-8; see also Richard Pemberton, Jr., "I Saw That It Was Holy": *The Black Hills and the Concept of Sacred Land*, 3 *LAW & INEQ. J.* 287, 292-93.

The Sioux counsel chose to ignore the supplication of their clients and hid behind the rationalization that they represented the legitimate interests of the Sioux as expressed by the tribal councils that had hired them.⁴⁸

Lazarus appears rash in his quick dismissal of the Sioux's possible opportunities to pursue the return of land through the judicial system.⁴⁹ As it stands, however, the judgment in *Sioux Nation* has quieted title to their claims and left the Sioux resentful that their conquerors may peacefully rest with the false belief that justice has been realized. One may agree with Lazarus that the Sioux should stop playing the victim.⁵⁰ Alternatively, one could accept the intuition of a noted scholar of Native American history who recently wrote about the misperceptions regarding Native American protests:

Some [Native American] voices . . . may appear to be complaining about the loss of land, the loss of a way of life or the continuing propensity of the white man to change the terms of the debate to favor himself. But deep down these are cries about dignity, complaints about the lack of respect.⁵¹

Black Hills/White Justice ignores these cries; however, the reader who keeps Lazarus' partisanship in mind will find his effort an important and engaging account of the Sioux claim.

— Martin J. LaLonde

48. One of Lazarus' main points, that the Sioux *did* accept their attorneys' pursuit of the money award as the appropriate strategy, may be attacked from two perspectives. First, the tribal governments that approved this strategy were arguably illegitimate; they represented the U.S. government's interests more than those of their Sioux constituents. See *supra* notes 33-37 and accompanying text. The "traditionals," whose views eventually prevailed in the tribal governments, held to Crazy Horse's admonition that "[y]ou do not sell the land the people walk on." P. 417. Second, the disempowered Sioux may have felt they had no other option but to accept money. See, e.g., Adams, *supra* note 13, at 24.

49. For other strategies that could have been pursued, see Ball, *supra* note 40, at 2301-02.

50. P. 428. Lazarus also describes the Sioux's alternative recourse for their grievances through Congress. Pp. 414-27.

51. Vine Deloria, Jr. *Foreword*, in NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM THE PROPHECY TO THE PRESENT, 1492-1992, at XXII (Peter Nabokov ed., 1992).