TELLING STORIES IN COUNCIL AND COURT: DEVELOPING A REFLECTIVE TRIBAL GOVERNANCE

*Leah K. Jurss**

I. INTRODUCTION

"You can't understand the world without telling a story. There isn't any center to the world but a story."[1]

For many indigenous peoples, *story* holds a multitude of meanings. There are old stories; throwback traditional stories;[2] stories that hold within them time immemorial. There are new stories; stories that modernize the old stories; stories that offer meaning from contemporary struggles. These stories build upon on one another, just as each word in a story builds upon the last, spiraling definitions, contexts, and purposes.[3] The storytellers of tribal communities in North America today reflect every identity found within the community—the elders, the leaders, the

* Clerk to the Honorable Roberto A. Lange, United States District Court for the District of South Dakota; J.D. Michigan State University College of Law, 2015; B.A. University of Minnesota, 2012. The views expressed in this Article are the author's alone, and do not in any way reflect or reveal the views of the author's employer or the United States government. Nimiigwetchiwi'aa geteyaajimo.

[1] Gerald Vizenor, as quoted in LAURA COLTELLI, WINGED WORDS: AMERICAN INDIAN WRITERS SPEAK 156 (1990).

[2] Term inspired by a line in Louise Erdrich's newest novel that encapsulates the reclamation of traditional culture in the modern era. LOUISE ERDRICH, LAROSE 49 (2016). ("Ojibwe girls, traditionally and now throwback traditionally, were taught from a young age not to step over things, especially boy things. Grandma's friend Ignatia Thunder, their traditional go-to elder, had told them all that their power might short out the boys' power. It was sexist, Josette said, another way to control the female. Snow semi-agreed. Emmaline went poker-faced. Maybe the Iron women weren't a hundred percent with the rule, but they still couldn't get themselves to forget about it.").

[3] LESLIE MARMON SILKO, *Language and Literature from a Pueblo Indian Perspective*, *in* YELLOW WOMAN AND A BEAUTY OF THE SPIRIT: ESSAYS ON NATIVE AMERICAN LIFE TODAY 48, 50 (1996) ("Many individual words have their own stories. So when one is telling a story and one is using words to tell the story, each word that one is speaking has a story of its own too.").

professionals, the healers, the children, and even the non-tribal members. These storytellers have a space within the community because of the "invocation of tribal sovereignty" spoken by generations past.[4] The opportunity is now available for these new storytellers to create, implement, and interpret tribal laws according to the stories they know, the stories they create, and the stories they have yet to learn.

Legal storytellers have a pivotal role to play in ensuring that a tribal viewpoint is incorporated into the new governance of tribes. With pressures to look like local, state, and federal governments, stories and storytellers can ensure that the needs and history of the tribal community are not lost with the changing of governmental systems. For most tribes in North America, the ability to return to a wholly traditional form of governance is impossible, if indeed one traditional form ever existed.[5] The federal funding that many tribes rely on to help fund essential services can require tribal governments to conform to certain standards that prohibit traditional governance.[6] The world exists as it does; there is no going backwards to the time before Columbus, there is only shaping the future of tribal governance to

---

[4] Matthew L.M. Fletcher, *Looking to the East: The Stories of Modern Indian People and the Development of Tribal Law*, 5 SEATTLE J. SOC. JUST. 1, 4 (2006).

[5] *See generally* JOHN BORROWS, FREEDOM & INDIGENOUS CONSTITUTIONALISM (2016).

> In my view, there is no timeless trait, characteristic, custom, or idea that is categorically fundamental to being Indigenous. The categories of Mi'kmaq, Abenaki, Cree, Haudenosaunee, Anishinaabe, Assiniboine, Dakota, Secwepmec, Salish, Nuu-Chah-Nuulth, Gitksan, Tlingit, Haida, Dene, Metis, Inuit, etc., are all context-dependent classifications. They are political, social, legal, linguistic, and/or cultural facts that are fluid and subject to change through time. . . . It is misleading to claim that Indigenous societies possess an unalterable central essence or core. This is what I label false tradition. While each category looks and feels relatively stable form the inside, if measured by short-term (centuries-long) metrics, changes in society, which may be gradual, can produce dramatic shifts over the longer term. . . . [T]raditions can be a valuable source of inspiration, guidance, and encouragement if they are seen as resources for thought and action. They can make life worth living. However, problems arise when traditions are treated as timeless models of unchanging truths that require unwavering deference and unquestioning obedience.

Id. at 3–4.

[6] Cody McBride, *Placing a Limiting Principle on Federal Monetary Influence of Tribes*, 103 CAL. L. REV. 387, 402 (2015).

serve the needs of the tribal community in the best way possible.

The incorporation of stories and storytelling into tribal government and legal systems is one way that this dichotomy between "traditional" and "modern" can begin to close. Stories make it possible for tribal culture to be incorporated into the existing government and legal systems, while also offering a space for tribal culture to continue to evolve. Including storytelling within the governing and legal processes can ensure that tribal laws reflect the community's understanding of problems and solutions, and that the future interpretation of those laws better reflect the worldview of the community that enacted them.

This approach can be implemented by tribal governments and legal departments where they currently exist. It can work to shift tribal legal departments away from revolving around the American model, and towards the creation of a new model that incorporates tribal-specific principles, yet still conforms to the requirements necessary for existence within the contemporary American legal system. The incorporation of named American legal principles into the modern tribal legal department does not, and arguably should not, follow the same path as in state and federal legal departments. In the words of Sherman Alexie,

Because you gave something a name
Does not mean your name is important.[7]

Stories can work to give a uniquely tribal name to the principles necessary for tribal governments and legal departments to function. This creative incorporation of stories into an area often considered inhospitable to creativity builds upon the centuries of creativity that tribal communities have employed to protect and practice their culture into the present.[8] The term *story* as it appears in this article refers to the "narrative[s] which reveal[] the origin, order, and meaning of the universe as it is understood and experienced by people in the society which passes it on."[9] This

---

[7] SHERMAN ALEXIE, *Introduction to Native American Literature, in* OLD SHIRTS AND NEW SKINS 4 (1993).

[8] Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot From the Field*, 21 VT. L. REV. 7, 44 (1996) ("Creativity is not always a hospitable word in law because it suggests, at least to some, departure from regularity and predictability as irreducible qualities of law. . . . Yet creativity—particularly in the historical context of oppression and colonialism—is absolutely central and cannot be so easily denied.").

[9] THOMAS W. OVERHOLT & J. BAIRD CALLICOTT, CLOTHED-IN-FUR AND OTHER TALES: AN INTRODUCTION TO AN OJIBWA WORLD VIEW 26 (1982).

includes the multitude of forms that stories can take,[10] as well as the rules by which a tribal community governs the use of its stories. The extent to which stories are formally or informally incorporated into tribal governance and law must necessarily be decided by each individual tribal community.

This article seeks to tie the use of narrative in written and oral advocacy in the American legal system with narrative use in tribal stories to show the usefulness of stories in modern tribal governance and legal systems. These stories can then better explain tribal laws for both tribal members and audiences unfamiliar with a tribe's history and culture. Part II explores the deep connection that many tribal people hold with their stories and the forms that modern storytelling can take, particularly the forms suited to incorporation within tribal governance. Part III links the doctrine of Law and Literature, which pulls the narrative form to the front of the practice of law, with the narrative use found in tribal stories. Part IV describes some of the ways that unanswered narratives and stories have negatively impacted tribal sovereignty. It then moves on to the task of creating a space for stories within tribal governments and legal departments, and identifies the most beneficial placements of stories. Finally, Part V concludes by recognizing that while the forms of tribal governments are always changing, incorporating stories can be an old–new way to ensure a positive reflection of a tribe's history and culture.

II. STORIES & TRIBAL PEOPLE

The importance of stories for indigenous[11] peoples around the world cannot be overstated. Stories in all of their forms are used to create the world.[12] Stories offer a line of demarcation that separates the individual from the community in order to create a sense of self, and a line of demarcation that separates the

[10] *See supra* note 1–4 and accompanying text.

[11] It is important to note that indigenous peoples are not the only ones for whom stories continue to hold vital importance. Family histories are told around the world to connect children with their ancestors, and parents continue to use stories from The Brothers Grimm to Pixar creations to instruct their children on morals and social etiquette.

[12] Heidi Kiiwetinepinesiik Stark, *Transforming the Trickster: Federal Indian Law Encounters Anishinaabe Diplomacy*, CENTERING ANISHINAABE STUDIES: UNDERSTANDING THE WORLD THROUGH STORIES 259, 260 (2013) ("Stories are how we make sense of the world.").

community from the world in order to create a sense of belonging.[13] Stories hold at their center a theme of relationships that can reveal the connection between the past and present, the self and community, and the natural and spiritual worlds.[14] Stories are instrumental in child rearing and the development of young adults.[15]

Resistances to assimilation and acculturation have been accomplished through the use of storytelling and story creation that preserves the old and creates the new.[16] Stories preserve the history of land and community within language,[17] while simultaneously creating a new path forward that brings all of creation along with it.[18] In this way, "[t]he act of writing, of

---

[13] Scott C. Idleman, *Multiculturalism and the Future of Tribal Sovereignty*, 35 COLUM. HUM. RTS. L. REV. 589, 592 (2004) ("While the particularism of the multiculturalists, for instance, generally rests on the view that race and culture are socially constructed and historically contingent, the particularism of Indian cultures frequently reflects a cosmologically-based view that the various races and cultures are intrinsically, objectively, and meaningfully different, and quite often that one's own tribe has in some manner been divinely chosen and endowed with a special character, destiny, or purpose.").

[14] N. Bruce Duthu, *Incorporative Discourse in Federal Indian Law: Negotiating Tribal Sovereignty through the Lens of Native American Literature*, 13 HARV. HUMAN RTS. J. 141, 141–42 (Spring 2000) ("Our oral tradition encompasses diverse stories, but within them are recurrent themes, chief among them the idea of relationships. Stories carry us through time and reveal our relationships to our historical selves, to others around us, and to the natural and supernatural world.").

[15] STORIES MIGRATING HOME: A COLLECTION OF ANISHINAABE PROSE 1 (Kimberly M. Blaeser ed., 1999) ("Story power has always been a vital part of native lives. Indian people don't really instruct their children; they story them. That is, not only tell them stories but encourage them to hear and see the stories of the world around them, admonish them to remember the stories, and inspire them to create and discover their own stories.").

[16] Simon J. Ortiz, *Towards a National Indian Literature: Cultural Authenticity in Nationalism*, 8 MELUS, Summer 1981, at 7, 10–11 ("[B]ecause of the insistence to keep telling and creating stories, Indian life continues, and it is this resistance against loss that has made that life possible.").

[17] Gerald Vizenor, *The Ruins of Representation: Shadow Survivance and the Literature of Dominance*, 17 AM. INDIAN Q., Autumn 1993, 7, 24 ("Tribal landscapes are heard, read, and the scenes and shadows are remembered in stories.").

[18] JACE WEAVER, THAT THE PEOPLE MIGHT LIVE: NATIVE AMERICAN LITERATURES AND NATIVE AMERICAN COMMUNITY 3 (1997) (quoting Leslie Marmon Silko, "Language forces meaning into existence. All barriers yield to language: distance, oceans, darkness, even time and death itself are easily transcended by language. We hear a story about a beloved ancestor from hundreds of years ago, but as we listen, we begin to feel an intimacy and immediacy of that long ago moment so that our beloved ancestor is very much present with us during the storytelling.").

creating, is a ceremony."[19] This new written ceremony can be as important as any other for tribal survival after the invocation of tribal sovereignty and autochthony.[20]

The authority of their ancestors gives these stories credibility. Because tribal stories assist in self-definition, they are critical to a tribe's survival as a separate people from their colonizers. Deprived of their stories, Indian cultures—and Indians as separate peoples—may disappear.[21]

As noted in the introduction, tribal stories can take many forms, from stories that tribal elders only tell at certain points of the year to stories that community members tell to explain their daily lives. The degree to which each type of story is incorporated in tribal governance and tribal legal systems depends solely upon the wishes of the community members regarding the best way to ensure that the worldview of the community is reflected in its laws, and in the laws' later interpretations. When a community begins the task of determining how to incorporate stories into government, it may find value in ensuring that the old stories are not privileged above the new. Each type of story has something important to offer in the task of contextualizing tribal laws within a community's worldview.

> The Stó:lō categorize oral narratives into sxwoxwiyam and squelqwel. Sxwoxwiyam are "myth-like stories set in the distant past." They usually explain how things came to be and how to "make things right for the present generation" (Carlson 1997, 2). Squelqwel are "true stories or news" describing "experiences in peoples' lives" (182). In Stó:lō and Coast Salish cultures the power of storywork to make meaning derives from . . . [the] way that the story is told, and how one listens to the story.[22]

---

[19] Fletcher, *Looking to the East, supra* note 4, at 1, 6.

[20] Vizenor, *supra* note 17, at 28 ("The shadows and language of tribal poets and novelists could be the new ghost dance literature, the shadow literature of liberation that enlivens tribal survivance.").

[21] Hope M. Babcock, *"[This] I Know from My Grandfather:" The Battle for Admissibility of Indigenous Oral History as Proof of Tribal Land Claims*, 37 AM. INDIAN L. REV. 19, 33 (2013) (footnotes omitted)*; see also* Andrew H. Fisher, '*This I Know from the Old People': Yakama Indian Treaty Rights as Oral Tradition*, MONT.: MAG. OF W. HIST., Spring 1999, at 2, 13–15.

[22] JO-ANN ARCHIBALD, INDIGENOUS STORYWORK: EDUCATING THE HEART, MIND, BODY, AND SPIRIT 84 (2008).

By listening or reading the stories that have been told, a tribal judge tasked with interpreting a tribal law, for example, has the ability to both gain insight into the historical context that led up to the passage of a law from the old stories, and insight into the contemporary needs of the community from the new stories.

Privileging the old stories above the new also can be detrimental to the goal of aligning and contextualizing tribal laws with tribal communities because of the centuries of assimilation and cultural upheaval that have led to a scarcity of old stories in some communities. The loss of language, missing a proper place and time for storytelling, and the entrenchment of western legal, educational, and social standards have led to a loss of meaning in some indigenous stories.[23] Traditional stories that are only told in a tribe's indigenous language often lose much of their meaning when they are translated into English;[24] this meaning loss can be permanent if there is a lack of fluent speakers.

By telling not just the old stories, but the new stories of tribal members, tribal governments can ensure that there is a continual creation of tribal culture. Including the stories of contemporary tribal members is in itself a creation act that keeps tribal culture moving into the future. The stories of individual tribal members, and stories of hypothetical tribal members with model and sub-model standards of behavior, can better illustrate the purposes for which a tribe is enacting a tribal law and can help to offer interpretive context to a tribal judge reviewing the law after a challenge.[25]

III. NARRATIVE USE IN LAW AND TRIBAL STORIES

The doctrine of law and literature is a relatively recent doctrine

---

[23] *See id.* at 7.

[24] *Id.*

> Indigenous stories have lost much educational and social value due to colonization, which resulted in weak translations from Aboriginal languages to English, stories shaped to fit a Western literate form, and stories adapted to fit a predominantly Western education system. The translations lose much of the original humour and meaning and are misinterpreted and/or appropriated by those who don't understand the story connections and cultural teachings.

Id.

[25] *Id.* at 79, 102–03, 105–06.

that seeks to understand the functions of narrative in the legal world.[26] The field's genesis is credited to the work of James Boyd White in the 1970s.[27] There are two major competing strands of the movement. The first proposes that the field can be viewed as 'law *as* literature,' offering an interpretation of the law according to the analytical tools used in reviewing and deconstructing works of literature.[28] The second proposes that the field can be viewed as 'law *in* literature,' offering an interpretation of law as it is present in works of literature both as a foil for understanding how society views the function of law, and to gain a deeper understanding of society itself.[29] Both are premised on the statement that legal culture is "the ideas, values, attitudes and opinions people in some society hold with regard to law and the legal system,"[30] and that "[l]anguage, culture, and justice are not speakable in the language of biological and social sciences."[31]

Instead, in this field law is understood as "one of the many narrative forms that generate material truth out of discursive fictions;"[32] in this way law and literature is closely related to the fields of critical legal studies and critical race theory.

By understanding law as discourse, CLS and CRT assert that

[26] The doctrine has had its own journal since 1989. *See* Richard H. Weisberg, *Editor's Preface*, 1 CARDOZO STUD. L. & LITERATURE I, I (1989).

[27] JAMES BOYD WHITE, THE LEGAL IMAGINATION xi–xii (1973).

[28] *See also* Thomas Morawetz, *Law and Literature*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 446, 448 (Dennis Patterson ed. 2010) ("[L]iterary and legal theorists have joined forces in considering whether meaning is implanted by authors or constructed by readers, how interpretive communities play their role in making communication through texts possible, and how one can determine the parameters of agreement and disagreement in text-based discourse."). *See generally* Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J. L. & HUM. 1, 36–37 (1988).

[29] *See also* Jay P. Moran, *How is Pynchon Related to the Law?*, 24 OKLA. CITY U. L. REV. 449, 452–53 (1991).

> This perspective is frequently taken by scholars who are troubled with the technical, procedural, and formalistic aspects of our legal system and who view literature as a necessary stabilizer, one that helps us to keep sight of the human aspects of law—passion, empathy, intimidation, jealousy, love—that are otherwise overlooked.

Id. See generally Weisberg, *supra* note 28, at 17–18.

[30] Laurence M. Friedman, *Is There a Modern Legal Culture?*, 7 RATIO JURIS 117, 118 (1994).

[31] Linda Ross Meyer, *Law Like Love?*, 18 LAW & LITERATURE 431, 436 (2006).

[32] Audrey Macklin, *Historicizing Narratives of Arrival: The Other Indian Other*, *in* STORIED COMMUNITIES: NARRATIVES OF CONTACT AND ARRIVAL IN CONSTITUTING POLITICAL COMMUNITY 40, 40 (Hester Lessard, et al. eds., 2011).

legal texts are *not* privileged documents that rise above issues of authorship and sociohistoric context and are somehow exempt from narrative analysis and interpretation. Instead, legal texts must be read as one reads a novel—with an awareness of their mode of production and careful attention to their language and the reality that language produces.[33]

The recognition of the narrative form in law and literature can help legal scholars to recognize that the narrative present in legal documents is a reflection of the culture that created and agreed to be bound by a law—extending well beyond the legal history of the enacting government.[34] Finding principles of narrative in statutory law can also illuminate how judges craft opinions by doing more than offering a written explanation of a confusing term. Judicial decisions can instead be seen as a "social event"[35] that reflects the past of the judge and the present of the community. Finding community narratives present in statutory law can ensure that judicial decisions rendered from the law incorporate a community's dynamics, which the decision will then form a part of after filing. Already an open philosophy of legal theory, the doctrine of law and literature is continually expanding its consensus on what the term 'literature' encompasses.[36] However,

---

[33] Amelia V. Katanski, *Writing the Living Law: American Indian Literature as Legal Narrative*, 33 AM. INDIAN L. REV. 53, 54 (2009).

[34] Peter Brooks, *The Narrativity of Law*, 14 LAW & LITERATURE 1, 9 (2002).

> At its most potent, the 'law and literature movement' summons the law to be accountable to a critique from outside its hermetic closure, one that insists that legal language and legal business as usual implicate master narratives, ideologies, and concepts that have a place in other domains of culture as well, and cannot be insulated and protected purely as legal terms of art.

Id.

[35] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935).

> A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say, as a product of social determinants and an index of social consequences. A judicial decision is a social event. . . . Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it.

Id.

[36] Greta Olson, *De-Americanizing Law and Literature Narratives: Opening Up the Story*, 22 LAW & LITERATURE 338, 359 (2010) ("If 'literature' remains in the title of new permutations of the interdiscipline, it is understood as something

the definitions, spaces, and scope of traditional legal analyses, scholarships, and doctrines differ from those same concepts present in tribal communities.[37]

This article conceptualizes the use of terms like law, story, narrative, and literature in ways that move past the Euro-American understanding, definitions, and etymologies of the terms, and instead imbibes the terms with their indigenous perspectives for incorporation into tribal governance. In Anishinaabemowin, to take one indigenous example, there are two words used for stories. *Dibaajimowin*, which is a narrative or story, but an inanimate noun, and *aadizookaan*, which is used to represent both sacred stories and spirits, and is an animate noun. That one Anishinaabemowin word for story is the same word for spirits shows the close link in Anishinaabe culture between stories and the spiritual world, and begins to explain why storytelling is so important in Anishinaabe communities. The word for law, *inaakonigewin*, is an inanimate noun, but has at its center *inaakonige*, an animate verb that includes conceptions of agreement along with making decisions and judgements. In contrast, the English etymology for the word law conveys meanings of setting things in place; of rights and privileges; and of regulations. The separation between these two terms aligns with the historical methods leaders used for decision making and setting social standards of behavior. Many native communities relied on a consensus method of governing, with dissenting members able to leave the geographic area and find another community;[38] in contrast, many non-indigenous communities were

beyond the traditional written literary text."). *See also* Frank Pommersheim, *Poetry, Law, & Poetry: Some Notes Toward a Unified Theory*, 9 TRIBAL L.J. 1 (2008) (compiling twenty points connecting law and poetry).

[37] *See* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 5, 38–39 (1997) (finding fault with the "radical multiculturalists" who believe "that western ideas and institutions are socially constructed to serve the interests of the powerful, especially straight, white men;" scholars who identify the "need for a basic redefinition of legal scholarship" that "goes beyond the narrow question of what topics legal academics should study" and moves into "fundamental issues about the role of reason in the creation of public policy"). In response, 'outsider scholarship' is one way to conceptualize the transition from traditional legal scholarship and doctrines to the scholarship and doctrines that are "characterized by a commitment to the interests of people of color and/or women, by rejection of abstraction and dispassionate 'objectivity,' and by a preference for narrative and other engaged forms of discourse"); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 685 (1992).

[38] *See, e.g.*, LUCY ELDERSVELD MURPHY, GREAT LAKES CREOLES: A FRENCH-

governed by rulers and councils who decided the law—dissenters were controlled and punished, often without the ability to leave.[39]

Narrative function in law serves a greater purpose than crafting a compelling opening statement for a jury because it can reveal the multiple underlying motivations and impacts of the law itself.[40] Not all the harms experienced by indigenous peoples, and all peoples of color, are recognized in the existing federal and state legal system; narrative can provide a language for communicating these harms.[41]

> What narrative does—specifically, what narrative does in assisting thinking about race and culture in lawyering—is resist the law of white spaces. . . . Whether it is in an institution where we teach or whether it is in a courtroom or whether it is the street—the common space that we all occupy—narratives and storytelling allow us to connect at a different level. . . . Storytelling has that ability; it has that power to transcend.[42]

Connecting on a different level through the stories in law[43] is possible when it is accepted that valid forms of law exist beyond those taught in law school classrooms.[44]

INDIAN COMMUNITY ON THE NORTHERN BORDERLANDS, PRAIRIE DU CHIEN, 1750-1860, 70 (2014) (citing examples of upper great lakes tribal communities in which "[c]onsensus was both a philosophy of community decision making and a goal to be reached in village meetings"); SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 14, 17 (1993) (offering an overview of the pre-contact governments of the Haudenosaunee, Muscogee, Lakota, Pueblos, and Yakimas).

[39] *See generally* MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995).

[40] *See* Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 805–06 (1994) (providing a detailed examination of Narrative as a function in legal scholarship, and the criticism it receives, especially when combined with Critical Race Theory).

[41] George A. Martinez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L.J. 683, 686 (Spring 1999). In this piece, Professor Martinez offers two cases where the harms experienced by people of color were not recognized by the United States legal system, but narrative could have been used to receive recognition for the harm. *Id.* at 685–86.

[42] Margaret Montoya & Christine Zuni Cruz, *Narrative Braids: Performing Racial Literacy*, 33 AM. INDIAN L. REV. 153, 171 (2009).

[43] Stark, *supra* note 12, at 261 ("Stories, in teaching us how to relate to one another, can also be understood as law.").

[44] BRENDAN TOBIN, INDIGENOUS PEOPLES, CUSTOMARY LAW, & HUMAN RIGHTS –

In addition to showing the presence of different meanings within a law, examining the narratives found in tribal laws and stories present much-needed context surrounding the law.[45] In this context-giving form, stories can be considered both "repositories for the cultural and historical knowledge, the values, and codes necessary for self-determination," and a place of creation of "legal theory and praxis."[46] The combination of the use of context-giving stories with traditional legal analysis can lead to a practice of law that is both more accurate and more expansive.[47] Tribal storytelling as legal narrative puts the tribal voice on the same level as the white American voice, which has all too often silenced tribal methodologies as inferior.[48] Tribal legal narratives can

---

WHY LIVING LAW MATTERS, at xx (2014) ("To come to this new law [new state of being via customary law] we must first shake off the ingrained belief that prescribed state law is in some way immutable.").

[45] Robin Paul Malloy, *Letters from the Longhouse: Law, Economics and Native American Values*, 1992 WIS. L. REV. 1569, 1569–70 (1992).

> I wanted to assemble letters from individual members of the Six Nations and publish them in the hopes that the letters would themselves provide valuable insight into personal and cultural value differences that shape our understanding of the legal, economic, political and social environment in which we live and operate as human beings. My hope is that the letters in this Article will tell an important story about Native People. It will be a story revealed through a series of independent revelations with which the reader will have to interact by continually adjusting to the authors' changing perspectives and styles. It will be a story told and retold through an introspective process requiring the reader to construct her own story of the connectedness between the letters. This will require the reader to be an active participant in a process that is not unlike that in which we knowingly and unknowingly engage everyday as we participate in the ongoing evolution of legal and economic culture.

Id. at 1577–78.

[46] Katanski, *supra* note 33, at 57.

[47] Olson, *supra* note 36, at 354. *See* Bodo Pieroth, *Recht und Literatur befruchten sich gegenseitig*, WESTFAELISCHE WILHELMS-UNIVERSITÄT MÜNSTER (Greta Olson trans., Aug. 7, 2000), http://www.uni-protokolle.de/nachrichten/id/61658/. ("In legal science one aims to achieve the greatest possible clarity, whereas literary studies aims to understand different levels of meaning."). *See also* Kristen A. Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N.D. L. REV. 605, 606 (2006) ("Contextualizing Indian law needs to occur in many ways. This article suggests only one: that the study of literature has the potential to contextualize certain Indian law cases.").

[48] *See* Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 HOW. L. J. 1, 8–9 (1996).

> By relying on voice and narrative methodology, Race Crits have

ensure that tribal law becomes "a significant strand in the national braid of jurisprudence, particularly as it relates to self-determination and pluralism,"[49] where it has previously been silenced through unanswered dominant narratives.

IV. INCORPORATING STORIES INTO TRIBAL LAW

By incorporating stories from the tribal community into tribal laws, legislative histories, and tribal court opinions, tribal leadership has the chance to forcefully correct the unanswered dominant narratives that are usually perpetuated about Indian tribes, both inside and outside of courtrooms. In this way, tribal governments can "usefully meet stories with stories, words with words."[50] Instead of stories used to silence the voices of tribal people,[51] stories can be used to bring about a comprehensive understanding of a community and its motivations:

Attention to narrative allows one to perceive more fully the meaning of tribal court jurisprudence not simply as the interplay of craft and culture but as something that reveals and explains a

---

> challenged legal academe's hidden paradigms, an institutional consensus which consciously and unconsciously embraces a white male voice and his values. This new critique developed an understanding that legal discourse and methodology are not neutral and objective. Rather, discourse and methodology are stories, i.e., narratives. In short, the Law's meaning is a purposeful story, and its methodology is a narrative that silently underwrites already existing dominant norms and values, an endorsement favoring a white male voice while marginalizing people of color and women.

Id.

[49] Pommersheim, *supra* note 8, at 38.

> Finally, the making of narrative often leads to a unique sense of voice. With this emerging sense of voice, the dialogue with state and federal courts potentially becomes increasingly exciting and meaningful. The tribal voice becomes a significant strand in the national braid of jurisprudence, particularly as it relates to self-determination and pluralism. . . . In many ways, it is the presence of voice that tells individuals and peoples that they are alive and that they matter.

Id.

[50] Gordon Christie, *Indigeneity and Sovereignty in Canada's Far North: The Arctic and Inuit Sovereignty*, 110 S. ATL. QTLY. 329, 330 (Spring 2011).

[51] Babcock, *supra* note 21, at 31 (footnotes omitted) ("As a result, stories, particularly the stories of minorities, struggle for a place in court. On the other hand, judges use stereotypes about minorities from stories to influence their judgments.").

people to themselves and others. . . . Narrative is critical to tribal self understanding not only in a cultural but in a legal sense as well. This element of narrative in tribal court jurisprudence also connects pointedly with the "story telling" tradition that is central to many tribal traditions.[52]

A. Detriments of Unanswered Dominant Narratives

There are scores of examples of dominant narratives being used to oppress tribal governments and marginalize tribal rights.[53] This use of stories and narratives in opposition to tribal peoples began with the earliest application of the doctrine of discovery, when the colonizing governments needed a persuasive reason to keep the land that they had encroached upon.[54] In order to move beyond these oppressive stories and narratives, both in federal Indian law and in tribal law, the stories used to marginalize Indian peoples must become visible.[55]

Williams argues that to address judicial misunderstandings of tribal legal systems and to argue successfully for the continuation of Indian nations before the highest court in the United States, tribal advocates and Indian law scholars must teach the justices that their reliance on "the Marshall model of Indian law" . . .

---

[52] Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L. J. 439, 457–58 (1999) (footnotes omitted).

[53] Stark, *supra* note 12, at 264 ("Law as story, in the United States, has frequently worked to oppress Indigenous peoples and transform Indigenous narratives by subjugating their stories within the nation-state, sometimes to the point of defining Indigenous rights out of existence."). *See* STORIED COMMUNITIES: NARRATIVES OF CONTACT AND ARRIVAL IN CONSTITUTING POLITICAL COMMUNITY (Hester Lessard et al. eds., 2011) (collecting essays that describe how stories and narratives have been used to subjugate the rights of people of color).

[54] Bain Attwood, *The Batman Legend: Remembering and Forgetting the History of Possession and Dispossession*, *in* STORIED COMMUNITIES: NARRATIVES OF CONTACT AND ARRIVAL IN CONSTITUTING POLITICAL COMMUNITY 189, 190 (Hester Lessard et al. eds., 2011).

> In the case of settler societies, colonizers have found it necessary to persuade others as well as themselves that the land they have appropriated as their basis is rightfully theirs. This is done in large part through the formation of legal stories of one kind or another, since the law plays a crucial role in creating boundaries between what is deemed to be legitimate and what is not.

Id.

[55] Duthu, *supra* note 14, at 184–85 ("The work of decolonizing federal Indian law can only proceed if interpreters of legal texts develop a consciousness about these narrative constructs in order to generate effective strategies to limit, if not totally eliminate, their tendency to suppress the expression of tribalism.").

"perpetuates a long-established tradition of stereotyping Indians as a savage, lawless race of legal inferiors."[56]

In *South Dakota v. Yankton Sioux Tribe*, the Supreme Court relies in part on a recorded statement from Commissioner John J. Cole during a confrontation between the United States and the Yankton Sioux Tribe regarding the passage of a land surplus act in 1894.[57] Used in the case to illustrate the application of a savings clause to annuity payments guaranteed under the 1858 Treaty,[58] the Commissioner's statement offers a reflection on the use of a dominant narrative to interrupt and replace a tribal narrative.

> I want you to understand that you are absolutely dependent upon the Great Father to-day for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes. . . . Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result? Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe.[59]

In the statement, Commissioner Cole is trying to persuade the Tribe to sell certain land to the United States, and threatens to take away the Tribe's pre-existing annuities if the Tribe refuses to sell.[60] The statement creates a new tribal history, one in which the Tribe's entire existence is dependent on annuity payments from

---

[56] Amelia V. Katanski, *Writing the Living Law: American Indian Literature as Legal Narrative*, 33 AM. INDIAN L. REV. 53, 74 (2008–09) (quoting ROBERT A. WILLIAMS JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 163 (2005)).

[57] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 346–47 (1998).

[58] *Id.* at 345–49.

[59] *Id.* at 346–47 (Council of the Yankton Indians (Dec. 10, 1892), transcribed in S. Exec. Doc. No. 27, at 74)).

[60] *Id.*

the United States.[61] The Commissioner's statement leaves out the vast tribal history prior to this confrontation, the role that the United States played in getting the Tribe to that moment, and the autonomy the Tribe has in determining its own existence moving forward. This unanswered narrative, particularly as it is situated within *Yankton Sioux*, tells the Tribe not only how they must live (dependent on government annuities), but how they are to exist.

This narrative of helplessness has been used to ensure reliance on the United States by tribes, and create pity, rather than respect, for tribes for centuries. James Kent, drawing from the writings of Alexis de Tocqueville, recorded the story of the vanishing Indian in his early writings on American law.

> "Who can assure the Indians," says Tocqueville, (De la Democratic en Amerique, t. 2. 298, 299,) that they will be permitted to repose in peace in their new asylum? The United States engage to protect them, but the territory which they occupied in Georgia was guaranteed to them by the most solemn faith. In a few years the same white population which pressed upon them in their ancestral territory, will follow them to the solitudes of Arkansas; and as the limits of the earth will at last fail them, their only relief will be death.[62]

In conceptualizing tribal governments as weak, dependent, and helpless, this largely unanswered myth recorded by Tocqueville and Kent has saturated federal Indian law with a presumption that the federal government knows best.[63] When Indian law manages to move beyond the vanished, another unanswered narrative takes its place. The captive narrative[64] has found a place

---

[61] *Id.* at 345–49.

[62] JAMES KENT, 3 COMMENTARIES ON AMERICAN LAW 491 (8th ed., William Kent 1854) (1828).

[63] *See, e.g.*, Christopher T. Foley, *The Timbisha Decision—A Familiar Story and Dangerous Precedent*, INDIAN L. RESOURCE CTR. (June 6, 2016), http://indianlaw.org/tst/timbisha-decision-%E2%94%80-familiar-story-and-dangerous-precedent ("This is a familiar story. The United States government claims to support tribal sovereignty and to respect self-government, but when it wants to overrule or take over a tribe it simply does so.").

[64] Captive narratives are considered one of the earliest genres of American literature. The first, *A Narrative of the Captivity and Restoration of Mrs. Mary Rowlandson*, details the experiences of Mary Rowlandson after her capture by the Narragansett tribe during Metacom's (King Philip) War. *See* MARY ROWLANDSON,

in the Supreme Court's discussion of the proper reach of tribal court jurisdiction.[65] Tribal court jurisdiction has existed relatively unhampered in instances where the non-tribal plaintiffs or defendants have the best ability to defend themselves,[66] or where American society has found fault in their actions.[67] Tribal jurisdiction's extensions and restrictions by Congress and the Supreme Court can be viewed, through one lens, as a desire that Mary Jemison never again be captured.[68]

Searching for alternate narratives does not have an end goal of discovering the story with the most objective truth,[69] but instead seeks to present multiple narratives that can reflect all aspects of the community, rather than one, unanswered, dominant narrative. This process continues along the path of decolonization by presenting representative histories[70] that could serve to change

---

A NARRATIVE OF THE CAPTIVITY AND RESTORATION OF MRS. MARY ROWLANDSON (1682); Elaine Showalter, *Dark Places*, N.Y. TIMES (June 6, 2013), http://www.nytimes.com/2013/06/09/books/review/tradition-of-captivity-narratives.html (offering a perspective on the obsession of captive narratives in current pop literature); WOMEN'S INDIAN CAPTIVITY NARRATIVES (Kathryn Zabelle DeRounian-Stodola ed., 1998) (collecting captive narratives); Elizabeth Cook-Lynn, *The Lewis and Clark Story, the Captive Narrative, and the Pitfalls of Indian History*, 19 WICAZO SA REV. 21 (2004) (exploring the problems in law and history created by captive narratives).

[65] N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353, 376 (1994) ("Oliphant's vision of justice in tribal courts for non-Indians is the judicial analogue to the American literary genre of captivity narratives.").

[66] *See* Montana v. United States, 450 U.S. 544, 565 (1981) ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

[67] *See* Violence Against Women Reauthorization Act of 2013, tit. IX, Pub. L. No. 113-4, 127 Stat. 54 (codified in scattered sections of 42 U.S.C.).

[68] After Mary Jemison was taken by a Shawnee and French raiding party, she lived with the Seneca and chose to remain with the tribe, rather than return to her Pennsylvanian home. JAMES E. SEAVER, A NARRATIVE OF THE LIFE OF MRS. MARY JEMISON (originally published 1824; reprinted June Namias, ed. 1992). In a painting portraying her capture, she is a shining beacon with blonde hair and blue eyes, framed by tribal members. Robert Griffing, *The Adoption of Mary Jemison*. Perhaps it is this fear, that the most "pure" American children will be captured, that causes the continual restriction of tribal court jurisdiction.

[69] Julie Cruikshank, *Discovery of Gold on the Klondike: Perspectives from Oral Tradition*, *in* READING BEYOND WORDS: CONTEXTS FOR NATIVE HISTORY 435 (Jennifer S. H. Brown & Elizabeth Vibert eds., 2d ed. 2003) ("The question of which versions [of the legal stories] are 'correct' may be less interesting than what each story reveals about the cultural values of its narrator.").

[70] Duthu, *supra* note 14, at 187.

> This suggests that rule-makers and advocates can find ways to influence the process of decolonization, in large measure by

perceptions of tribes and tribal members.[71]

B. A Place for Stories in a Tribal Legal System

Tribal laws are written with an understanding of the world that is different from the understanding that lies beneath state and federal laws. Including stories within tribal governance can help to impart a tribal background to the laws, especially when they will be viewed and interpreted by non-tribal members. Jill Doerfler, expanding upon LeAnne Howe's concept of tribalography, details how stories can contribute to this process.

> Tribalography is the idea that Native stories take all different forms and often combine aspects of history, memoir, law, and other things. Tribalography unseats history as this unbiased authority and allows us more control over our stories. It relates back to the idea of us creating our own past and our own future, and this idea that it isn't necessarily predetermined. . . . Stories provide us with infinite possibilities because we acknowledge that they have a creative aspect; they aren't lists of 'facts.'[72]

Heidi Kiiwetinepinesiik Stark has written about how stories can be used to illustrate a deeper understanding of the events surrounding treaty negotiations, if only "the creation stories of the

---

> employing discourses that consider the historical record truthfully and fully and are sufficiently skeptical of representations of Indigenous peoples that do not accord them or their institutions of self-government the dignity and respect they deserve.

Id.

[71] George A. Martinez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L. J. 683, 700 (1999) ("Although some may question whether counter narratives can transform the consciousness of dominant groups, there is philosophical support for the proposition that generating alternative visions of reality can advance racial reform."). *See also* Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 305 (2012) (offering strategies for defense lawyers to combat the implicit, unconscious biases against African American defendants).

[72] Jill Doerfler et al., *Bagijige: Making an Offering*, *in* CENTERING ANISHINAABEG STUDIES: UNDERSTANDING THE WORLD THROUGH STORIES xv, xxii – xxiii (2013).

state [are] met with stories of Anishinaabe diplomacy."[73] After an examination of the treaty record and the stories contained within,[74] Stark explains that the "story told by Anishinaabeg leaders at their treaty negotiations provides an alternate way of imagining the trust doctrine as a trust *relationship*."[75] This reinterpretation of federal Indian law can only occur after the story of the treaty is told, allowing for ultimately not a reinterpretation of the law, but a deeper understanding of its original meaning.

N. Bruce Duthu's concept of incorporative discourse is another that helps to frame a new understanding of tribal law that puts stories before courts who must interpret those laws. "[Incorporative discourse] embraces and combines the content of Indigenous knowledge, the experience and values of Indigenous Peoples, and the methodology of Indigenous narrative traditions (including oral forms) to form, along with non-Indigenous voices, a more polyphonic expression of human life."[76]

> Placing Indigenous narrative texts—be they historical or contemporary, polemical or fictional—alongside the prominent legal texts in federal Indian law permits a greater degree of textual interrogation precisely because they recall the dialogic nature of intersocietal relations and help steer us away from simplistic, inaccurate, or incomplete tellings and retellings of this nation's many formative stories.[77]

Duthu's article centers around the incorporation of stories as they exist in published literary narratives. This article calls for a broader appreciation of the role that stories can play in tribal governance. This use of stories is necessary because of the cultural

---

[73] Stark, *supra* note 12, at 260, 268 ("Throughout their treaties, the Anishinaabeg told stories of nations partnered in trust. It was in these encounters that the trust doctrine was initially imagined and breathed into life.").

[74] Professor Stark discusses the treaty record surrounding the 1846 treaty between the United States and the Ojibwe, Odawa, and Potawatomi. Stark, *supra* note 12, at 268–71. This was the sixth in a series of treaties that successively ceded more and more of the tribes' lands and forced portions of the populations further east. *Id.* The story of this treaty was centered around protection from hostile state citizens, but the tribes' story continued to remind the United States that they had already, and continually, offered protection to the tribes. *Id.*

[75] *Id.* at 271.

[76] Duthu, *supra* note 14, at 144.

[77] *Id.* at 165–66.

gulf that is all too often found between those writing tribal laws and those interpreting the laws. As Basil Johnston reflected, "Without the benefit of knowing the language of the Indian nation that they are investigating, scholars can never get into their minds the heart and soul and spirit of a culture and understand the Native's perceptions and interpretations."[78] While this reflection was pointed towards the academic fields, the interpretation holds the same weight when applied to the legal field, and perhaps has even more dangerous repercussions because of the force that the interpretation of statutes can have on individual lives and society as a whole—"A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."[79] Judicial articulation necessarily involves narration;[80] community-reflective tribal governance can responsibly shape that articulation. The call for context and empathy[81] in judicial opinions can be answered by providing that

---

[78] Basil H. Johnston, *Is That All There Is?: Tribal Literature*, *in* CENTERING ANISHINAABE STUDIES: UNDERSTANDING THE WORLD THROUGH STORIES 3, 5 (2013).

[79] Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1601 (1986).

[80] Jonathan Yovel, *Running Backs, Wolves, and Other Fatalities: How Manipulations of Narrative Coherence in Legal Opinions Marginalize Violent Death*, 16 LAW & LITERATURE 127, 150 (2004).

> Narration is not merely an instrument implemented by legal narrators for rhetorical purposes: it is the cognitive structure of adjudication. Granted, there is a rhetorical aspect to narration, as the judge-narrator must convince her readers not only of the validity of the legal doctrine she applies, but of the plausibility and attractiveness of the narrative she constructs in respect to their expectations and background assumptions.

Id.

Professor Yovel calls for fairness in judicial narratives in his article. *Id.* at 148.

> As long as narration is constitutive of justice it, too, must be subject to the fairness criteria that characterize our predominant requirement of law. The problem that justice faces is thus not narrativity itself but its abuse, whether intentional or not. Legal opinions cannot and should not be 'de-narrativized,' but they should apply to narration the same requirements of fairness that due process requires of legal rules and their 'application.

Id.

[81] Jody Freeman, *Constitutive Rhetoric: Law as a Literary Activity*, 14 HARV. WOMEN'S L. J. 305, 318 (1991).

> Although countless feminist and minority critiques have called on the legal system to be more sensitive to a 'multiplicity of voices,' we need concrete suggestions of how this might work. We need to move beyond arguments that judges must learn to hear stories more empathetically and pay more attention to context.

context to a judge before the time of interpretation arises. The need for this context is especially important if the judge is not a tribal citizen, or was not raised in that particular tribal community. In order to make decisions that positively influence a tribal community,[82] the judge needs to be connected with the values and needs of the community,[83] something stories can accomplish. Legal scholar Robert Cover coined the term "jurisgenesis" to describe a process whereby a community engages in "the creation of legal meanings."[84] Incorporating stories into tribal governance through tribal laws, legislative history, and judicial opinions is one way for the tribal community to participate fully in jurisgenesis, and take advantage of the law's ability to change as the community requires.[85]

Incorporating a tribal worldview and culture through stories necessarily raises the issue of the proper presence of culture in law. While allowed in specific instances,[86] oral history of tribal culture is generally disfavored in non-tribal courtrooms.[87] The active

---

Id.

[82] Pommersheim, *Coyote Paradox*, *supra* note 52, at 457.

> Tribal culture provides a context for legal craft to be persuasive because it takes into account tribal history and tradition in the process of legal decision making. Too often legal decision making and the legal system as a whole are seen as a purely formal system of rules and procedures that bear little relationship to the day to day life of people living on the reservation (or elsewhere for that matter.

Id. (footnotes omitted).

[83] Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140, 146–47 (1912) ("[T]he conception of law as a means toward social ends, the doctrine that law exists to secure interests, social, public and private, requires the jurist to keep in touch with life.").

[84] Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983).

[85] Matthew L.M. Fletcher, *A Perfect Copy: Indian Culture and Tribal Law*, 2 YELLOW MED. REV. 95, 98 (2007) ("Law's flexibility helps to ensure that law and culture remain consistent to the extent that law remains legitimate to the members of the community.").

[86] *Delgamuukw v. British Columbia*, 3 S.C.R. 1010 (1997).

> This appeal requires us to . . . adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past.

Id. at 1067. *See also* JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT 16 (2008).

[87] *See* United States v. Bryant, 769 F.3d 671, 673 (9th Cir. 2014), *reh'g denied,* 792 F.3d 1042 (9th Cir. 2015) (en banc), *cert. granted,* 136 S.Ct. 690 (2015), *rev'd*,

approach of including written stories into the governance of the tribe can work to ground and normalize a non-westernize ideology,[88] making it easier to incorporate oral history and customary law into the court system.[89] This incorporation is necessary for the continued furtherance of sovereignty and self-determination[90] in a legal era where those words are beginning to lose meaning.[91]

In the process of incorporating stories into a government record, tribal leaders and community members must avoid a "debilitating nostalgia"[92] that aspires to include only, and without question, the

---

136 S.Ct. 1954 (2016). *See generally* Babcock, *supra* note 21.

[88] Christine Zuni, *Strengthening What Remains*, 7 KAN. J. L. & PUB. POL'Y 17, 27 (1997).

> The process of incorporating customary law into a formal legal system will not be easy and will take the work of the judiciary, the litigants, and the tribe. If an active approach is not taken to support customary law, customary law will give way to other influences, such as state and federal law devoid of indigenous thought.

Id.

[89] TOBIN, *supra* note 44, at 83.

> The merging of customary law and positive legal instruments is part of a process of transition from a purely oral legal system into a mixed oral and written legal system and reflects in part the historic relationship between unwritten custom and written law in ancient times. What is crucial about this relationship, however, is the status given to customary law by tribal law systems.

Id.

[90] Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness-[Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L. J. 1, para. 46 (2000) ("The link between traditional law, self-determination and sovereignty is clear. The creation of laws by us based on our philosophies and approaches is fundamental self-determination. Self-determination demands that we articulate our own law.").

[91] Pommersheim, *Coyote Paradox, supra* note 52, at 444.

> The hazardous uncertainty of much current Indian law jurisprudence reveals a certain exhaustion of vocabulary. Key phrases such as tribal sovereignty, meaningful self-determination, and the government-to-government relationship no longer seem to suggest any common, substantive understanding that make mutuality and (incremental) advance possible. This cleft in the conceptual terrain suggests an impending paradigm shift without yet identifying any new paradigm.

Id.

[92] *Id.* at 444–45.

> Mr. Bigler was also quick to note that such endeavors must avoid the pitfall of a debilitating nostalgia. As he trenchantly

oldest ways of the community.[93] The stories incorporated must be reflective of the reality as perceived by tribal members[94]—necessarily including the old stories, but also how the old stories are experienced by the current community, and the new stories that tribal members are actively creating by living each day. Through this incorporation, tribal governments can accurately place the tribal governing and legal systems within the timeline of the community's history,[95] and offer a space for the community to exist as it does now, not how it did two centuries ago.

It is not only tribal community members that can find a home

> observed, all societies recognize golden ages in their mythological past. The danger of these constructs lies in their potential to create an empty longing for something that most likely never was. Their beauty is to suggest an ideal; a ground of aspiration from which to realize important (political) values of the past in a contemporary setting.

Id.

[93] *See, e.g.*, Glen Stohr, *The Repercussions of Orality in Federal Indian Law*, 31 ARIZ. ST. L. J. 679, 680 (1999).

> The battle between orality and literacy is a battle over what constitutes truth. The triumph of literacy is a triumph of certainty over reason. Perhaps for that reason, courts generally celebrate this victory. It is also a battle over how to remember, or what it is that constitutes history. This comment takes the position that the oral basis for Native American religions is the most important factor explaining the lack of success experienced by Indian Tribes and individuals attempting to use federal courts to protect sacred sites and to recognize the Indians' Free Exercise claims. Relying on the work of anthropologists, historians, and legal scholars, this Comment attempts to explore the complexities that surround the role of oral tradition in Federal Indian Law.

Id.

[94] Fletcher, *supra* note 85, at 105 ("Tribal lawmakers can now reach back into tribal values, culture, customs, and traditions to make laws that are meaningful to the tribal community, that are local solutions to local problems.").

[95] *Id.* at 108.

> Tribal legislation and jurisprudence often deviates in significant and substantive ways from Indian lifeways and law ways that Indian people living in the culture would not understand. Indian people prior to contact (and even for long after) did not resort to tribal courts to resolve disputes, nor did they often rely upon written prohibitions or restrictions on personal conduct, as exemplified by modern tribal codes.

Id. Babcock, *supra* note 21, at 30 (quoting Peter Brooks, *The Narrativity of Law*, 14 L. & LITERATURE 1, 1 (2002)) ("Stories occupy an important place in the law. Stories offer a space for litigants to explain 'the concrete particulars of their experience in a way normally excluded by legal reasoning and rule.'").

within stories.[96] At their current stage of development, many tribal courts are facing internal pressure to return to the "old ways,"[97] while facing external pressure to behave identical to non-Indian courts or have their legitimacy questioned.[98]

> Too often, the choice of tribal courts is posited as either the traditional way or the non-Indian way. . . .

---

[96] Christie Zuni Cruz, *The Pedagogy of American Indian Law: Toward a Pedagogy and Ethic of Law/Lawyering for Indigenous Peoples*, 82 N.D. L. REV. 863, 876 (2006).

> [I]ndigenous peoples even in our modern time operate according to a legal tradition, which has guided them since time immemorial. This legal tradition oftentimes is submerged beneath a modern government structure, and sometimes derails the lawyer's best laid legal plan; other times the principles imbedded in the American legal tradition derail the legal tradition, leaving confusion and frustration in the community in its wake.

Id.

[97] *See* Carey N. Vincenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134 (1995) http://www.nij.gov/topics/courts/restorative-justice/perspectives/pages/reemergence-tribal.aspx.

[98] *See, e.g.*, Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 422 (2014) (citing David Wolitz, *Criminal Jurisdiction and the Nation-State: Toward Bounded Pluralism*, 91 OR. L. REV. 725, 766 (2013)) ("[T]he reality and perception that tribal justice is too often unreliable, unfair, and immune to fundamental rights review undermines confidence in the tribe's jurisdiction—and makes widening the functional jurisdiction of tribes an uphill climb."); Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CAL. L. REV. 1499, 1557, 1557 n.370 (2013).

> [R]easonable concerns about fairness, bias, and unfair surprise exist when nonmembers, particularly those only marginally connected with the tribe, are haled into tribal courts as defendants. . . . These concerns can easily be exaggerated; empirical studies suggest that tribal courts have generally dealt fairly with nonmember defendants. . . . Nonetheless, it is reasonable to conclude that at least the potential for unfairness exists in any situation when a defendant is haled into a distant or unfamiliar court.

Id. Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 KAN. L. REV. 241, 246 (1998) (examining the issues in federal court review of post-tribal court exhaustion cases by recognizing that "tribal courts are in danger of serving merely as preliminary factfinders for federal district courts"); Jill Elizabeth Tompkins, *Defining the Indian Civil Rights Act's "Sufficiently Trained" Tribal Court Judge*, 4 AM. INDIAN L. J. 53, 55–59 (2013).

> Fierce criticism of tribal courts is not a recent phenomenon. Often the critic will paint all tribal justice systems with the same broad brush based on a single questionable ruling or practice of a single tribal court. Tribal courts have been scrutinized by members of Congress and by the federal courts.

Id. at 57.

> [R]eality is often more accurately described by a continuum characterized by shadings and degrees rather than by dichotomies that often suggest incompatible endpoints with no potential common ground in between. Dichotomies are often seductive because of their apparent simplicity, but this simplicity often comes at the high price of blinking a more textured complex reality.[99]

Developing a diverse approach to tribal courtroom procedures that incorporates stories within is essential for maintaining a connection with the community and with the non-tribal members that practice before the tribal court.[100] Stories can lessen the cultural barriers non-tribal attorneys face in identifying with their clients, making the community more accessible.[101] An accessible tribal governance system can also help to bridge the gap between tribal community members who have never left Indian country, and those who have left to later return.[102]

C. Mechanics of Incorporating Stories

The tribal council has an important role to play when it comes

---

[99] Pommersheim, *Tribal Court Jurisprudence, supra* note 8, at 43.

[100] TOBIN, *supra* note 44, at xix.

> This world of spirits, natural law and karmic justice is not a familiar ground or one in which many western trained lawyers are likely to feel comfortable. . . . The link to the spiritual informs customary law and has served as an important basis for the development of the underlying philosophical principles of law that help to make it such a rich source of legal diversity.

Id.

[101] *See id.* at 197 ("If customary law is to retake its rightful place in the legal structure it must first be understood. Any such process will need to rely heavily on translators; translators not just of language but also of legal concepts and their interpretation.").

[102] Although not a universal experience, many tribal members who have left their tribal communities for additional school and work experience are separated as "outsiders" upon their return, and face uphill battles to regain trust in their communities; others cannot find the careers they are educated for within their communities, and choose to remain in the larger metropolitan areas where they were educated. *See* James McKenzie et al., *Career Dilemmas Among Diné (Navajo) College Graduates: An Exploration of the Dinétah (Navajo Nation) Brain Drain*, 4 INT'L INDIGENOUS POL. J. 4, 13–14 (2013); Quintina Bearchief Adolpho, Navajo Nation Brain Drain: An Exploration of Returning College Graduates' Perspectives (June 1, 2015) (unpublished Ph.D. dissertation, Brigham Young University) 23, 26–27, *available at* http://scholarsarchive.byu.edu/cgi/viewcontent.cgi?article=6475&context=etd.

to preserving tribal culture in the current legal era,[103] and it must continue to pursue the role even amidst internal conflict.[104] There is a range of options when it comes to how tribal councils can incorporate stories into tribal governance, but all must begin within the council and the community, from the place where the community exists. As articulated by John Borrows, "It was good to be home, to have the land teach him again and trigger many memories. It was his legal archive."[105] It is only from within this cultural and legal archive that the useful stories can be told. Recognizing the impossibility of receiving total consensus on anything, tribal leaders hoping to include stories within their governing process should take care to include community members in the decisions regarding which stories illustrate which principles.

1. Legislative History

Non-tribal courts frequently look to a law's legislative history when interpreting ambiguous pieces of a law. Legislative history can reveal the purpose of a law, provide the intent of a particular provision as indicated by the drafter's words, and distinguish

---

[103] Fletcher, *Looking to the East, supra* note 4, at 4 ("Tribal governments must seek to govern in a manner that preserves tribal cultures to the maximum extent possible."). *See also* Pommersheim, *Coyote Paradox, supra* note 52, at 450.

> In such efforts big and small, tribal councils . . . have much to contribute to the ongoing project to decolonize federal Indian law. . . . [T]ribal council legislative initiatives need to continue to develop both sophistication and competence within tribal self-governance in order to achieve an internal coherence and justice in resolving the particulars of any case or legislative determination, and to marshal an eloquent, external call to the larger society to provide meaningful, structural equality and recognition.

Id.

[104] B.J. Jones, *The Independence of Tribal Justice Systems and the Separation of Powers*, http://law.und.edu/tji/_files/docs/bjones-jud-indep-memo.pdf, at 1.

> It must be remembered that contemporary tribal justice systems are relatively new institutions and tensions will continue to surface between them and tribal governments, especially in areas such as election disputes, political removal proceedings, and conflicts between tribal members and their governments, as well as conflicts between coordinate different branches of tribal government. *These tensions certainly existed in the early federal courts.*

Id. (emphasis added).

[105] JOHN BORROWS, DRAWING OUT LAW: A SPIRIT'S GUIDE 22 (2010).

between scenarios not imagined and those thoroughly discussed but ultimately discarded.[106] Including stories within legislative history to provide context to a tribal law, ordinance, or statute is perhaps the best way to balance the need for clearly written codes with the presence of a tribal viewpoint.

Faced with staffing and budget shortages,[107] developing a legislative history may not be high on a council's list of priorities. Some tribes include substantive legislative histories within their legislation,[108] while others include procedural adoption and amendment dates,[109] or include enacting resolutions that can serve the function of a legislative history.[110] Especially when combined

---

[106] *See generally* 70 A.L.R. 5 (originally published in 1931) (collecting cases and principles of legislative history use).

[107] Tribal justice systems are often severely underfunded for the needs of interpretation of the council's legislative decisions. *See* DEP'T OF JUSTICE, G.A.O. NO. 11-525, INDIAN COUNTRY CRIMINAL JUSTICE, at 21 (2011) ("[O]fficials at 11 of the 12 tribes we visited noted that their tribal courts' budgets are inadequate to properly carry out the duties of the court; therefore, the tribes often have to make tradeoffs, which may include not hiring key staff such as probation officers or providing key services such as alcohol treatment programs."); Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 180 (2004) (describing the need for increased funding in tribal justice systems and noting that the yearly operating budget for tribal justice systems averaged $181,800 according to a 2000 survey done by the American Indian Law Center); JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 110 (3d ed. 2016) ("[M]any courts are currently operating on tribal and federal funds which are not nearly comparable to similarly situated state courts. Tribal courts are under-funded and under-staffed because many tribes lack funds to adequately supplement federal funds to assist courts with the development of the court system and expanded tribal jurisdiction.").

[108] *See, e.g.*, WARM SPRINGS TRIBAL CODE § 432.001; MASHANTUCKET PEQUOT CODE, tit.4, *Legislative History*; CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION COURT CODE, App'x A, *Legislative History*. FOREST COUNTY POTAWATOMI COMMUNITY CODE, tit. 1, ch. 1–2, §1, *Notes* (1938) (note that Forest County also uses other methods of legislative history; *see* FOREST COUNTY, *infra* note 109).

[109] *See, e.g.*, FOREST COUNTY POTAWATOMI COMMUNITY CONSTITUTION, *Legislative History*; FLANDREAU SANTEE SIOUX TRIBAL CODE, tit. 29, *Legislative History* (2015); NORTHERN ARAPAHO CODE, tit. 3, *History* (2012); SWINOMISH TRIBAL CODE tit. 14, ch. 2, *Legislative History*; TOHONO O'ODHAM TRIBAL CODE, tit. 1, ch. 2 (2010); NISQUALLY TRIBAL CODE, tit. 47 (2009) (detailing historical and statutory notes for each section provided); GRAND TRAVERSE BAND CODE, tit. 7, § 1.03 (2007); HO-CHUNK NATION CODE, tit. 2, § 3, *Legislative History* (2003); SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE, ch. 85, *History Note* (1998); COQUILLE INDIAN TRIBAL CODE, ch. 211 (1996).

[110] *See, e.g.*, WHITE EARTH RESERVATION TRIBAL COUNCIL RESOLUTION, *Tribal Judicial Code Amendment* (Oct. 21, 2013) (adopting a code of judicial conduct for the Tribe by acknowledging that it was designed "to guide Judges of the White Earth Tribal Court"); HOPI TRIBAL COUNCIL RESOLUTION No. H-086-2012 (Aug. 28, 2012) (providing extended commentary on the procedure involved in passing the

with storytelling, there are many benefits to come from writing substantive legislative histories, and few drawbacks.[111]

A tribal legislative history that incorporates stories can take many forms. In the simplest version, the council could reach out to tribal community members for stories to include within the resolution enacting a specific piece of legislation. A brief illustrative story could then be placed before the "whereas" statements to offer context and added meaning to the legislation being enacted. For example, the tribal council could request stories about the river that runs through its reservation during the process of enacting an environmental ordinance that prohibits tribal businesses from dumping waste into the river. A personal experience story submitted by an elder tribal member that describes the river's appearance sixty-years ago, and compares it to the river's current appearance could be placed within the environmental legislation's resolution. Another simple way for tribes to continue the process of incorporating a tribal worldview within the legislation passed would be to include a link to the audio or visual record of tribal council meetings and legislative sessions where the law was passed. In that instance, for example, a tribal judge looking to interpret a code of ethics would have the opportunity to listen to the sessions in which the law was discussed and enacted. These sessions may contain the motivations behind the passage of the ethics code, and may also include stories from the tribal community about traditional ways of respect and honor, and the remedy for individuals that did not behave in a socially acceptable way. A tribe could also decide to write a full legislative history to be incorporated with each piece of legislation. This writing could include the individuals first sponsoring the legislation, the drafters and editors, and any substantive discussion that occurred before its passage. This more formal, written legislative history is also a place for the incorporation of

---

Hopi Rules of Civil Procedure, including how "the Hopi Law Enforcement Task Team held public hearings where it presented the proposed Hopi Code, fielded questions, comments and suggestions from the public and broadcast a recording of one of these hearings several times on Hopi Radio"); LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS RESOLUTION No. 121805-01 (Dec. 18, 2005) (adopting a code of conducts and ethics for the tribal council through recognition that "the citizens of the Waganakising Odawak Nation are entitled to expect that Tribal Council members shall conform their conduct to the highest ethical standards").

[111] *See* BORROWS, *supra* note 5, at 17 ("As Indigenous peoples, we cannot just theorize our way to freedom—we must act well in the world. We must more fully and responsibly own, relate to, and control how we interact with others.").

stories. Tribal council could bring a draft code setting aside funds for tribal member burials to an elder's council. In the process of receiving comments on the code, tribal council members could ask for stories to be included within the legislative history. Elders might include old stories of sacrifice from animals for humans during times of need, stories of honoring those who have moved to the spirit world, or stories of how the elders themselves want to be treated after their own passing.

A tribal legislative forum, as articulated by Douglas Endreson, is another way old and new stories could be recorded in the legislative history.[112] In a forum of this type, hearings are held "in which proponents and opponents of potential tribal legislative enactments can voice their views."[113] This allows for "the development of a record to sow the basis for tribal determinations on difficult issues," which would "enhance the credibility, understanding, and acceptance of tribal legislative decisions."[114] Within this forum, tribal council could open or close the hearing with a story—new or old—that details the importance of the legislation to the community enacting it.

A form of tribal legislative history included directly within a statute as an introduction or findings section is another way that tribal stories and worldview can be incorporated into tribal governance. The Fond du Lac Band of Lake Superior Chippewa recently enacted an ordinance designed to protect wolves, *ma'iingan*, from being hunted on the Fond du Lac Reservation,[115] amidst a debate about wolf hunting raging within the state of Minnesota and across the country.[116] Fond du Lac's ordinance begins with an extended findings section that serves as both a recounting of traditional teachings about *ma'iingan*,[117] and an

---

[112] Douglas B.L. Endreson, *Improving the Legislative Process in Indian Country Through Use of Tribal Legislative Fora*, 12 STAN. L. & POL'Y REV. 267, 267 (2001).

[113] *Id.*

[114] *Id.* at 268.

[115] FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA, Ord. No. 07/12, Ma'iingan Protection, ch. 3 (2012).

[116] *See generally* Jason D. Sanders, Comment, *Wolves, Lone and Pack: Ojibwe Treaty Rights and the Wisconsin Wolf Hunt*, 2013 WIS. L. REV. 1263 (2013).

[117] Ma'iingan Protection, *supra* note 115.

> (a) The Anishinabe and Ma'iingan (wolf) are brothers who have shared a special relationship since the Creation;
>
> (b) The Ma'iingan has been a teacher and companion to the Anishinabe from time immemorial;
>
> (c) The survival and well-being of the Ma'iingan and

overview of past state, federal, and tribal efforts to protect *ma'iingan*.[118] Similar efforts to incorporate traditional respect and teachings about *ma'iingan* into governance have occurred in other Anishinaabeg tribal governments.[119] A proclamation naming the White Earth Reservation a wolf sanctuary[120] serves as a legislative

> Anishinabe are inextricably bound;
> (d) In the modern era, the recovery of the Ma'iingan has coincided with the revitalization of the Anishinabe;
> (e) The Ma'iingan is an integral part of the Circle of Life and the ecosystem of the Fond du Lac Reservation, and must be respected as such[.]

Id. at § 102 (a)–(e).

[118] *Id.* at § 102(f)–(l).

[119] *See, e.g.*, *Wolf Protection Plan: Ma'iingan Gananaagitaawiminonaanig*, RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA (Nov. 2, 2015), https://files.ctctcdn.com/363c7c0d401/78e5c30d-97df-4954-9760-dabd0f2c0fb4.pdf; *Wolf (Ma'iingan) Management Plan*, RED LAKE BAND OF CHIPPEWA INDIANS (Sept. 14, 2010), http://www.redlakednr.org/Websites/redlakednr/files/Content/5523922/Wolf_Management_Plan_RED_LAKE_final_version.pdf; *Ma'iingan (Wolf) Management Plan*, BAD RIVER BAND OF LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS (April 3, 2013), http://www.badriver-nsn.gov/images/stories/image/WildlifeProgram/2013WMP_Final.pdf.

[120] *Declaration Designating the White Earth reservation as a Ma'iingan (Wolf) Sanctuary*, WHITE EARTH RESERVATION TRIBAL COUNCIL (Aug. 20, 2012), https://whiteearth.com/data/upfiles/files/Ma_iingan_Proclamation_4.pdf.

> [N]aming the White Earth Reservation in Minnesota a wolf sanctuary, where no wolves can be hunted or trapped, regardless of a quota system hunt set in place for the state of Minnesota).
> The Ma'iingan (wolf) has a special relationship with the Anishinabe. They are recognized as educators of the Anishinabe who teach hunting and working together as a family unit. The Anishinabe creation story explains that Ma'iingan is a brother to Original man. The two traveled together throughout the earth naming everything. When they had finished naming everything the Creator separated them and sent Original man and Ma'iingan on separate paths, but indicated that as brothers, what happened to one of them would also happen to the other.
> As brothers taking separate paths there are many similarities between Ma'iingan and Anishinabe. Both have extensive clan systems, both mate for life and raise their young in a family environment. Over time, both the Ma'iingan and the Anishinabe have shared a similar fate. Both have lost lands, both have been mistreated, both have been misunderstood ad both have been hunted. Yet, both have also survived. The recovery of the Ma'iingan population is viewed by the Anishinabe as a positive sign. Harm to the Ma'iingan population endangers the very being of the Anishinabe and threatens the health and welfare of the tribe.

Id.

history that tells the story of the *ma'iingan* in advance of a formal regulation in the Tribe's conservation code.[121] Each of these forms of legislative history move beyond the state and federal formats, and offers tribes the chance to continue the writing of their own histories and worldviews.[122]

2. *Courtrooms*

For tribes without a proactive tribal council, or one that does not wish to document its legislative history, tribal judges can play a role in bringing a tribal worldview into the governance system. The Navajo Nation frequently uses traditional stories in its judicial opinions, illuminating not only statutory Navajo law on a particular topic, but common law that has been continually in existence, presented in a manner accessible by all tribal members.[123] The presence of a story illuminating the traditional

---

[121] WHITE EARTH CONSERVATION CODE § 303.01 (2009), https://whiteearth.com/data/upfiles/files/conservation_code.pdf.

> Absolutely no hunting or trapping of wolves by Indians or non-Indians is permitted on any lands within the exterior boundaries of the White Earth Reservation. By formal action on August 20, 2012, the governing body of the White Earth Band declared all territory within the exterior boundaries of the White Earth Reservation a Ma'iingan or Wolf Sanctuary. No hunting or trapping of Ma"iingan [sic] shall be allowed within the original 1867 exterior boundaries of the White Earth Reservation.

Id.

[122] Fletcher, *Looking to the East*, supra note 4, at 5.

> The new stories depict Indian people doing good and evil in recent times, with a realistic bent concerning how Indian communities are now surrounded by a series of often hostile, alien, and dominant cultures. The old stories have translated into a form of Indian community law—the new stories should, in turn, be examined for their relevance to modern tribal law.

Id.

[123] Navajo Nation v. MacDonald (In re Certified Question II), No. A-CV-13-89, 1989 Navajo Sup. LEXIS 5 (Navajo Nation Sup. Ct. Apr. 13, 1989).

> The Navajo traditional concept of fiduciary trust of a leader (naat'aani) is just as relevant here. After the epic battles were fought by the Hero Twins, the Navajo people set on the path of becoming a strong nation. It became necessary to select naat'aaniis by a consensus of the people. A naat'aanii was not a powerful politician nor was he a mighty chief. A naat'aanii was chosen based upon his ability to help the people survive and whatever authority he had was based upon that ability and the trust placed in him by the people. If a naat'aanii lost the trust

Navajo concept of fiduciary trust in a published opinion illuminates the concept not only for the individuals affected by the opinion, but also for legal scholars, tribal members, and reviewing courts.[124]

The act of incorporating illustrative stories into tribal court opinions is a way for tribal governments and tribal members to learn from their literature—the literature created when stories are combined with interpretations of law.[125] In this way, tribal judges can continue to exercise principles of self-determination and sovereignty by maintaining a "cultural continuity with the past," while recognizing the societal changes occurring within the community, both culturally and legally.[126] By including the cultural touchstones of stories, tribal judges can clearly delineate when law is coming from within a community,[127] and when it is necessary to look to state or federal law principles to resolve a dispute.[128]

Finally, stories incorporated within courtroom advocacy offer another point to inject tribal governance with a tribal worldview. The presence of lawyers trained in American law schools creates a

---

> of his people, the people simply ceased to follow him or even listen to his words. The naat'aanii indeed was expected to be honest, faithful and truthful in dealing with his people.

Id. at 30.

[124] *Id.*

[125] Fletcher, *Looking to the East*, supra note 4, at 19 ("Literature informs and influences law and culture in subtle but significant ways. Indian people and tribal governments should learn from their own literature as well.").

[126] Pommersheim, *supra* note 8, at 24.

> Unlike issues of tribal court jurisdiction, which concern federal pressure 'from above,' issues of tribal custom and tradition involve cultural imperatives 'from below.' It is in this realm that tribal courts most ardently strive to maintain cultural continuity with the past by seeking to ensure that certain traditional values and processes continue to play a vital role in the daily judicial life on the reservation. Without such a commitment, disconnection from a central core of cultural meaning and tribal self-understanding will likely occur.

Id.

[127] Pommersheim, *supra* note 52, at 459 ("[T]ribal courts do not have the luxury of assuming that other judges who read and review their decisions are adequately informed about tribal judicial descriptions of tribal law itself. Tribal courts, wherever possible, have to go that extra mile to explain basic tribal law and values. Without such efforts, it becomes all too easy for federal courts to avoid a genuine engagement with tribal court decisions.").

[128] Ezra Rosser, *Customary Law: The Way Things Were, Codified*, 8 TRIBAL L. J. 18, 23 (2008) ("The true meaning of customary law comes across not only from cases decided upon it alone but also from cases in which custom is used by tribal courts to decide whether state and federal laws should be applied or used as reference points.").

need to ensure that advocacy is reflective of the tribal community it represents.[129] Stories could be (and often already are) used by parties in their affidavits, testimonies, narratives, and told to lawyers shaping written briefs and oral arguments to better reflect tribal culture.[130]

---

[129] N. SCOTT MOMADAY, THE WAY TO RAINY MOUNTAIN 33 (1969).

> A word has power in and of itself. It comes from nothing into sound and meaning; it gives origin to all things. By means of words can a man deal with the world on equal terms. And the word is sacred."). There can be considerable pushback to including indigenous languages, even when spoken in the community, in courtrooms. An exchange captured in *Arguing with Tradition* illustrates this.
>
> Judge: All right. Ms. Smith?
>
> Advoc: Your Honor there has been no numerous attempts to try to solve this matter (which is) unfortunately why we're here. I do have a request before I (can) continue to address this court is that, ahm I would like to have some of this (defended) in ah Hopi, ah simply because there are issues here that are land and tradition and board of directors and lower village and—and other people and things that are involved, that I think can only be expressed in my own language and in order to adequately represent my client, and be able to express myself in my language to you which you also understand.
>
> Judge: I can understand English as—ah perfectly well too.
>
> Advoc: Well exactly but what I'm saying is there are issues that I feel can only describe in Hopi because w—just like now, you know I' hapi yep-yep pu'himu [itam] *This truly here—here now is something [we]*
>
> Lawyer: Your Honor, I'm gonna object to ah—
>
> Judge: Just a second. Go ahead. . . .
>
> Lawyer: I'm gonna object to having any of this conducted in Hopi. Ms. Smith is perfectly capable to speak English and (this whole) court and ah the rules of this court are in English and (.) unless there is a need—a demonstrated need ahm where someone does not speak or understand Hopi ah—or—er English rather, where you need to have it done in Hopi ah it would be ah I think inappropriate. It would also be time-consuming to have translation and lead to ah ah misunderstanding.

Id.

JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT 101–03 (2008).

[130] Christine Zuni, *Strengthening What Remains*, 7 KAN. J. OF L. & PUB. POL'Y 17, 17 (1997).

> Customary law is extremely important to the future development of tribal Justice systems. Those involved in the tribal judicial systems must begin to articulate their thoughts on, and address customary law. Courts in Indian country and

CONCLUSION

> It was not a life circumscribed by a clock, stamp, fence, or road. But there was a law just the same, the Creator's law that still is. And with that law was the presence of ancestors, spirits, and magic. . . . The spirits and the magic traveled with the Ojibwe to their hunting camps, traplines, maple sugarbushes, across lakes, and into the small lodges warm with fires and stories. Forget the law, forget the magic and you will be reminded. . . . "Gaawiin wan endam gin asemaa," those old spirits whispered. "Do not forget your asemaa, your tobacco." The White man's law was different. The white man's law was all paper. . . . The white man's government would have flicked the Anishinaabeg aside, flicked them all aside with the stroke of a pen on a sheet of paper. Except the paper, the masiniaigin, was not the land and it was not the people and it was not the magic. It was just the paper.[131]

The space between the "white man's law" and the "Creator's law" is not so distinct as it once was. The changing makeup of tribal communities is part of a new tribal history,[132] one that is open to the old ways and the new.[133] This history embraces creativity and culture, and creativity within culture. Incorporating stories, old and new, into tribal governance is one way in which survival can continue.

> the individuals involved in those courts play an influential role in controlling the extent to which the legal systems will embody customary law. All those involved in the judicial field at the tribal level, from lay people to legal professionals, must become involved in this discussion. The use and development of customary law in our legal system rises or falls on the position taken by the Judiciary, the advocates and the litigants.

Id.

[131] WENONA LADUKE, LAST STANDING WOMAN 24 (1997).

[132] *See* BORROWS, *supra* note 5, at 18 ("We cannot afford to pour our futures into the mould of any one Western or Indigenous philosophy, theory, or approach. They may all be helpful.").

[133] Fletcher, *supra* note 85, at 118 ("Indian people and Indian culture lives on in new and changing forms every minute. Such is survival.").