

A PERFECT COPY: INDIAN CULTURE AND TRIBAL LAW

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Introduction

Leech Lake Ojibwe novelist and University of Minnesota literature professor David Treuer declared in his new book of literary criticism that “Native American fiction does not exist.”¹ The *New York Times* described the book as “a kind of manifesto, which argues that Native American writing should be judged as literature, not as a cultural artifact, or as a means of revealing the mystical or sociological core of Indian life to non-Natives.”² Treuer uses the trickster story “Wenebozho and the Smartberries”—in which the Anishinaabe trickster Wenebozho³ tricks a not-so-smart Indian guy into eating small, dried turds by calling them “smartberries”⁴—as the punch line to his argument focusing on Turtle Mountain Band Chippewa writer Louise Erdrich.⁵ In short, Treuer alleges that American Indian novelists claiming to represent American Indian culture are frauds.

¹ DAVID TREUER, *NATIVE AMERICAN FICTION: A USER'S MANUAL* 191 (2006).

² Dinitia Smith, *American Indian Writing, Seen Through a New Lens*, N.Y. TIMES, Aug. 19, 2006, at B9.

³ Alternate spellings based on regional dialects include “Waynaboozhoo,” EDWARD BENTON-BENAI, *THE MISHOMIS BOOK: THE VOICE OF THE OJIBWE* 29 (1979) (Indian Country Press, Inc. 1981); “Nanabush,” JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* 17 (2002); and “Nanabozho,” *Nanabozho, in OJIBWA NARRATIVES OF CHARLES AND CHARLOTTE KAWBAWGUM AND JACQUES LÉPIQUE, 1893-1895*, at 25 (Arthur P. Bourgeois ed. 1994).

⁴ TREUER, *supra* note 1, at 50-52 (quoting Rose Foss, *Why Wenaboozhoo Is So Smart*, 4 OSHKAABEWIS NATIVE J. 33-34 (1997)).

⁵ See *id.* at 29-68 (criticizing LOUISE ERDRICH, *LOVE MEDICINE* (1993)).

This paper reviews David Treuer's critique of Indian novelists in the context of Indian culture and tribal law. The basis for Treuer's argument that "Native American fiction" does not exist⁶—that good writing by American Indian authors that appears to bring to life the culture of American Indian people is not like that at all, but instead is just a very good copy of Indian culture—has a great deal of application to the debates over the use of tribal customary law in tribal courts. One goal of modern Indian tribal governments is to restore tribal customary law as an important piece of the legal infrastructure of Indian tribes in order to preserve the lifeways and law ways of Indian people, a critical part of preserving and advancing Indian cultures. Tribes and their judges recognize that the customary law of their ancestors is difficult to discover and apply – tribal customary law, for many tribal communities, exists only as a memory. Treuer's argument is that Indian writers invoke Indian culture as a "memory," not "reality," or "the *longing for culture*, not its presence"⁷—and all of this is not authentic culture. Treuer's views on Indian literature have a great deal to say about the discovery and application of tribal law. Likewise, theorizing about tribal customary law provides an important counterweight to Treuer's thesis. This paper attempts to discuss and reconcile these competing views.

I. Culture and the Law

Law and culture are inextricably intertwined. As Lawrence Rosen wrote, "[L]aw does not exist in isolation. To understand how a culture is put together and operates, therefore, one cannot fail to consider law; to consider law, one cannot fail to see it as part of culture."⁸ H.L.A. Hart's theory of primary and secondary rules⁹ has special import in any discussion of the relation between culture, literature, and the

⁶ TREUER, *supra* note 1, at 191.

⁷ David Treuer, *Smartberries: Interpreting Erdrich's Love Medicine*, 29 AM. INDIAN CULTURE & RES. J. 21, 35 (2005) (emphasis added).

⁸ LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* 5 (2006).

⁹ See generally H.L.A. HART, *THE CONCEPT OF LAW* 77-96 (1961).

law. The “primary rules” component of Professor Hart’s work derives from a cultural framework—or as he termed it, “the idea of obligation.”¹⁰ “[P]rimitive communities,” Professor Hart theorized, were examples of societies that lived under primary rules of obligation, “where, though there are dissidents and malefactors, the majority live by the rules seen from the internal point of view.”¹¹ These primary rules stem from the culture itself, or from the past.¹² The primary rules settle into what Professor Hart referred to as “secondary rules,” those legal rules that operate as “remedies” to the defects in primary rules that tend to make primary rules unenforceable and unworkable in the complexity of modern society.¹³ These secondary rules offer certainty, flexibility, and efficiency to the primary rules.¹⁴ In Ronald Dworkin’s paraphrasing of Hart’s model, “[T]he combination of first-order standards imposing duties and second-order standards regulating the creation and identification of those first-order rules is a central feature of paradigmatic legal systems.”¹⁵ Or, put another way by legal anthropologist E. Adamson Hoebel, “[A]ll systems of law, whatever their content and unique dynamics, must have some essential elements in common.... We must have some idea of how a society works before we can have a full conception of what law is and how it works.”¹⁶

¹⁰ HART, *supra* note 9, at 79; *see also id.* at 85 (“Rules are conceived and spoken of as imposing obligations when the general demand for conforming is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.”).

¹¹ HART, *supra* note 9, at 89.

¹² *See* Martin Krygier, *Law as Tradition*, 5 LAW & PHIL. 237, 240 (1986) (“Every tradition is composed of elements drawn from the real or an imagined past.”); *id.* at 241 (“In every established legal system, the legal past is central to the legal present. Like all complex traditions, law records and preserves a composite of (frequently inconsistent) beliefs, opinions, values, decisions, myths, rituals, deposited over generations.”).

¹³ *See* HART, *supra* note 9, at 89-95.

¹⁴ *See* HART, *supra* note 9, at 91-93.

¹⁵ Ronald Dworkin, *Hart and the Concepts of Law*, 119 HARV. L. REV. F. 95, 100 (2006).

¹⁶ E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* 5 (1961).

Justice Holmes' lectures "demonstrate[d] that the concept of liability [for example] as it occurs in both criminal law and the law of torts originates in a moral impulse and invokes a moral standard . . ." ¹⁷—that is, culture.

Like culture, law must be flexible. One of the "defects" Professor Hart identified in a society governed by primary rules is the "static" character of first-order rules. ¹⁸ Primary rules take a *slow* route to change—their "growth" from custom to rule and their eventual "decay" to anachronism. ¹⁹ Professor Hart's remedy for the static character of primary rules was for societies to adopt rules of change. ²⁰ The unconscionability defense (allegedly borrowed by Karl Llewellyn's study of the Cheyenne Indians ²¹) arose as a means to combat the formulism and harshness of common law contract doctrine. ²² 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. To the extent that law and culture are not four square with each other (broadly speaking, of course), law is illegitimate. ²³

Consider a foreign visitor or an Indigenous community member living under the American legal régime, a problem in a legal system that does not take into consideration the values of the outsider. Ginnah Muhammad, a devout Muslim, wore a veil to court in a small claims case in Hamtramck, Michigan,

¹⁷ ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 295 (1985) (citing OLIVER WENDELL HOLMES, *THE COMMON LAW* 23, 25, 33 (Mark DeWolfe Howe ed. 1963 (1881))).

¹⁸ HART, *supra* note 9, at 90.

¹⁹ HART, *supra* note 9, at 90.

²⁰ See HART, *supra* note 9, at 93.

²¹ See ROSEN, *supra* note 8, at 30.

²² See generally E. ALLAN FARNSWORTH, *CONTRACTS* § 4.28, at 298 (4th ed. 2004). Cf. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 60-62 (1983).

²³ See Jerome E. Bickenbach, *Law and Morality*, 8 *LAW & PHIL.* 291, 292 (1989). Cf. RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW DEMOCRATIC DEBATE* 94-98 (2006) (moral legitimacy of governments); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 202-03 (1997) (legitimacy of decisions rendered in accordance with judicial ideologies).

where the judge threw out her case because she refused to remove the veil and he would not be able to see her face.²⁴ A federal district court took jurisdiction over a claim brought against a tribal community attempting to resolve internal disputes through traditional measures of temporary banishment or exclusion.²⁵ American laws derive from Anglo-American values as expressed in the original understanding of the Constitution or the Bill of Rights, or in the common law or torts or contracts or criminal laws.

Ultimately, that systems of law codes enacted by legislatures and common law doctrines applied by judiciaries originate with a community's culture should be noncontroversial. Even the so-called "primitive" societies, Lévi-Strauss proved, had law:

Given the crucial role that marriage rules play in the organization of human affairs, it follows that no society, including those of indigenous peoples and settles, can be fairly characterized as being less rule-governed than any other. Thus, humans could never have lived in a state of nature as posited by Social Contract theorists, nor could any society exist that was "so low on the scale of social organization" as to be "incommensurate" with any other as supposed by *In re: Southern Rhodesia*.²⁶

According to Professor Rosen, widely varying kinds of cultures have adopted doctrines of law that look suspiciously

²⁴ See Steven Lubet, *Veiled Truth*, THE AMERICAN LAWYER, March 1, 2007, available at: <http://www.law.com/jsp/tal/PubArticleTAL.jsp?hubtype=Inside&id=1172570587864>.

²⁵ See *Quair v. Sisco*, 359 F. Supp. 2d 948 (E.D. Cal. 2004); see also *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 889 (2d Cir.) ("The respondents urged at oral argument that 'treason,' though a criminal act in our judicial system, is not necessarily 'criminal' in a traditional nation such as the Tonawanda Band. We doubt that this appeal to cultural relativism is relevant to our inquiry."), *cert. denied*, 519 U.S. 1041 (1996).

²⁶ Michael Asch, *Lévi-Strauss and the Political: The Elementary Structures of Kinship and the Resolution of Relations between Indigenous People and Settler States*, 11 J. ROYAL ANTHROP. INST. 425, 434 (2005) (quoting *In re: Southern Rhodesia* [1919] A.C. 211 (Eng. P.C.)).

like unconscionability, for example,²⁷ showing that even what anthropologists would have called “primitive” societies could generate rules that “civilized” societies could borrow. The next section will demonstrate the general history of American Indian tribal law in the context of the history of federal-tribal relations. Under this relationship, the United States transformed law-borrowing and sharing into a one-way street of imposition and dominance over Indian tribes.

II. The Emergence of Tribal Courts and Tribal Law

A. Tribal Law

Indian nations have always lived in accordance with their own laws and norms, but the intervention of Euro-American nations in the western hemisphere has all but destroyed the understanding of these rules. Many indigenous laws and norms were incorporated into the languages and stories of Indian communities.²⁸ Stories and rules had meaning and relevance to Indian people so long as they were tied to a particular territory.²⁹ Colonization wiped much of that understanding away. The classic example is the so-called *Crow Dog* case, involving a political murder in Indian Country.³⁰ When the tribal community refused to execute the murderer and instead adopted a traditional punishment consistent with the community’s needs, American Indian

²⁷ See ROSEN, *supra* note 8, at 30-34 (noting the Cheyenne Indians and the nation of India as examples, not to mention the United States).

²⁸ See generally KARL N. LLEWELLYN & E. ADAMSON HODEL, *THE CHEYENNE WAY: CONFLICT AND CASELAW IN PRIMITIVE JURISPRUDENCE* (1941); BRUCE G. MILLER, *THE PROBLEM OF JUSTICE: TRADITION AND LAW IN THE COAST SALISH WORLD* (2000); WATSON SMITH & JOHN M. ROBERTS, *ZUNI LAW: A FIELD OF VALUES* (1954); Richard Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 J. L. & ECON. 1 (1980).

²⁹ E.g., KEITH H. BASSO, *WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE* 37-70 (1996); Melissa L. Meyer, “*We Can Not Get a Living as We Used To*”: *Dispossession and the White Earth Anishinaabeg, 1889-1920*, 96 AM. HIST. REV. 368 (1991).

³⁰ Ex parte Kan-gi-shun-ca (Crow Dog), 109 U.S. 556 (1883).

agents demanded a federal prosecution.³¹ And when the Supreme Court held that federal courts had no jurisdiction in Indian Country (because it would be unfair to apply American “civilized” laws to “savage” Indians who would have no hope of understanding or complying with them³²), the federal government enacted the Major Crimes Act,³³ extending federal criminal jurisdiction and American criminal law values into Indian Country.³⁴ Federal criminal justice values began to replace tribal justice systems.³⁵

The United States further brought “justice” to Indian Country by enforcing law and order codes against Indian people.³⁶ The codes, enforced by “courts of Indian offenses,” were intended to guarantee federal control over Indian people and eliminate tribal religious and cultural practices.³⁷

³¹ See Secretary of Interior, Annual Report at 9 (1884), reprinted in DAVID H. GETCHES, CHARLES F. WILKINSON, & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 157 (5th ed. 2005); Sidney L. Haring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 223 (1989).

³² *Kan-gi-shun-ca*, 109 U.S. at 405-06; cf. ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 109 (2005) (showing how the *Kan-gi-shun-ca* Court reasoning was used later by then-Justice Rehnquist to divest Indian tribes of criminal jurisdiction over nonmembers in *Olyphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210-11 (1978)).

³³ Act of Mar. 3, 1885, ch. 341, 23 Stat. 385, codified as amended at 18 U.S.C. § 1153.

³⁴ See Russel Lawrence Barsh & James Youngblood Henderson, *Tribal Courts, the Model Code, and the Police Idea in American Indian Policy*, 40 LAW & CONTEMPORARY PROBLEMS 25, 26-49 (1976); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 790-809 (2006).

³⁵ See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 110-16 (1984).

³⁶ See DELORIA & LYTLE, *supra* note 35, at 113-16. See, e.g., *United States v. Clapox*, 35 F. 575 (D. Or. 1888) (upholding the regulations promulgated by the Secretary of Interior known as the “law and order codes”).

³⁷ See *Clapox*, 35 F. at 577 (“These ‘courts of Indian offenses’ are ... educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are

American boarding schools and religious missionaries, all funded and controlled by the United States, contributed to the destruction of tribal languages and religions.³⁸ The dispossession of Indian lands eradicated tribal learning as well by removing Indian people from their sacred places, away from where their cultural histories were tied.³⁹

In 1934, Congress enacted the Indian Reorganization Act that authorized Indian tribes to “reorganize” under the model of local and municipal governments.⁴⁰ While most of the benefits of the theory of reorganizing Indian tribes did not inure to the tribes until at least the 1970s for a variety of reasons,⁴¹ after 1934, stated Congressional policy tended to favor tribal government systems. The implementation of the Act suffers from continuing federal bureaucratic control and intervention even to the present day, but the Act serves as the critical governing document of the relationship between Indian tribes and the federal government. While the Bureau of Indian Affairs once mandated boilerplate tribal constitutions that limited tribal government authority and structure,⁴² the Bureau

gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.”)

³⁸ See, e.g., J.D.C. Atkins, *The English Language in Indian Schools*, reprinted in *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1800-1900*, at 197-206 (Francis Paul Prucha ed. 1973) (advocating for the replacement of Indian languages with English).

³⁹ For histories of the dispossession of Indian lands, see STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005) and LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005).

⁴⁰ Wheeler-Howard Act (Indian Reorganization Act), 48 Stat. 984-988 (1934), codified as amended 25 U.S.C. § 461 et seq.

⁴¹ See, e.g., Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 *YALE L. J.* 348 (1953) (detailing the actions of the Bureau of Indian Affairs in stifling tribal governance development); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 *MICH. L. REV.* 955 (1972).

⁴² See Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination At Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 *GONZ. L. REV.* 81 (1993-94).

now grants broader leeway to tribes to determine their own constitutional foundation. While the Bureau once retained all but complete control over tribal affairs by retaining secretarial veto power over all tribal government actions,⁴³ now tribal governments are freer to make their own laws with less Bureau intervention.

B. Tribal Courts

Tribal courts and tribal common law have made an impressive comeback in the latter half of the 20th century and beyond. Well over 200 tribes now have a functioning tribal court system and most of the remaining tribes are in the process of developing a tribal court system. And these tribal courts are not necessarily copies of state and federal courts. They follow their own court rules and tribal constitutions, statutes, and regulations. Outside of the criminal law context,⁴⁴ none of these decisions are reviewable on the merits by state or federal courts.⁴⁵ The final decision of the highest tribal court is final and complete.

Tribal court systems existed from the beginning of the Indian treaty period. The Cherokee Nation long has had a tribal court system from the Treaty of Hopewell period from the late 1700s to the Removal era, and then again from the early 1840s until the United States terminated the Nation.⁴⁶ The Bureau of Indian Affairs created Courts of Indian Offenses, later often referred to as CFR Courts, to dispense law and order rulings.⁴⁷ The courts were not indigenous in any way, as they were used by Indian agents to enforce the

⁴³ See, e.g., Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061 (1974) (describing the Secretary of Interior's control over the leasing of Indian lands).

⁴⁴ See 25 U.S.C. § 1303 (extending the Great Writ to tribal criminal cases).

⁴⁵ See *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

⁴⁶ See generally RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* 120-67 (1975).

⁴⁷ See Christine Zuni, *Strengthening What Remains*, 7 KAN. J. L. & PUB. POL'Y 17, 20 (1997).

notorious law and order codes and stamp out Indian religious and culture.⁴⁸

The emergence of tribal courts and tribal law in the latter half of the 20th century is a result of a series of political and legal factors. In 1959, during the Termination Era, the Supreme Court decided *Williams v. Lee*,⁴⁹ which held that tribal courts have exclusive jurisdiction over cases arising in Indian Country where the defendant is a reservation Indian.⁵⁰ The Court explicitly recognized that tribes have the right to make their own laws and be governed by them.⁵¹ In 1968, Congress enacted the Indian Civil Rights Act.⁵² The Act operated as a severe restriction (from Congress's point of view) of tribal sovereignty by requiring tribal governments to follow a series of restrictions on their authority – the so-called Indian Bill of Rights.⁵³ In 1978, the Supreme Court in *Santa Clara Pueblo v. Martinez* held that tribal courts could interpret the Indian Bill of Rights in accordance with tribal customs and traditions.⁵⁴ As important, the Court held that the civil rights protected in the Indian Civil Rights Act could be enforced against the tribe only in a tribal forum, such as a tribal court.⁵⁵ By the 1990s, Congressional policy favored the development and jurisdiction of tribal courts nationwide.⁵⁶

⁴⁸ FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 21 (1995) (describing how the federal government drove the “core of the culture ... into a shadow existence”).

⁴⁹ 358 U.S. 217 (1959).

⁵⁰ *See id.* at 223.

⁵¹ *See id.* at 220 (“Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”).

⁵² 25 U.S.C. § 1301 et seq.

⁵³ 25 U.S.C. § 1302.

⁵⁴ 436 U.S. 49, 71 (1978) (“Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.”).

⁵⁵ *See id.*

⁵⁶ *See* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 147-50 (2006).

C. The Problem of Tribal Customary Law

In the present era, tribal governments and tribal courts face an interesting dilemma—tribal legislatures are freer now than ever before to enact statutes, ordinances, and regulations that originate with Indian people and culture, or what I have referred to as “Indigenous legal constructs,”⁵⁷ for lack of a better term. 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. But these lawmakers often borrow large chunks of state, local, or federal law to fill up tribal code books.⁵⁸ In many instances, a major tribal statute constitutes a few sentences indicating that the tribal government will follow state law in a particular field, such as probate law or commercial law.⁵⁹ The Anglo-American cultural and legal values that shaped and informed the development of these statutes is brought unencumbered into tribal law without much consideration of the impacts. To be fair, in many of these instances, there are very good pragmatic reasons for importing state and federal law. Tribes under financial and time limitations might be required by a lender to adopt the Uniform Commercial Code, for example.⁶⁰ In many other instances, however, tribal lawmakers carefully consider and construct tribal statutes to meet critical tribal community needs with culturally relevant legal and political solutions. The rise of

⁵⁷ Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUSTON L. REV. 701, 720-21 (2006).

⁵⁸ See Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J. L. & PUB. POL’Y 357, 359-60 (2006).

⁵⁹ *E.g.*, 9 GRAND TRAVERSE BAND CODE § 201(a) (“The Grand Traverse Band adopts the laws, codes, ordinances, and other instruments of the law of the State of Michigan to the extent these instruments, laws, codes, and ordinances do not conflict with appropriate federal law or Tribal codes, ordinances, and laws in force now or enacted in the future.”).

⁶⁰ See Singel, *supra* note 58, at 360.

tribal statutes intending to protect cultural property is a great example.⁶¹

But all too often, tribal lawmakers take the easier route of borrowing Anglo-American legal constructs. Many of these statutes languish on the books, with the tribal community underutilizing them because they have little or no meaning or relevance to the community. Tribal government is, like all government, reactionary, meaning that tribal lawmakers have time only for reacting to issues and problems that arise. It is rare when tribal governments have the opportunity to act progressively, anticipating problems and enacting solutions to them. The wiggle room recognized under federal Indian law often goes unfilled. Perhaps part of the problem is that the very idea of lawmaking via legislation and rules promulgation is not Indigenous.

Concurrently, tribal courts face similar circumstances. Tribal judges have enormous discretion and opportunity to find, announce, and apply tribal customary and traditional law.⁶² But only a few tribal courts take this opportunity on a consistent basis.⁶³ There are many factors that play into this, including the fact that litigants before tribal courts rarely make their arguments in reliance on tribal customary law. Moreover, tribal customary law is notoriously difficult to discover and understand by judges trained in Anglo-American law, even for those who are tribal members. Finally, tribal customary law often appears to have little to say about disputes in modern tribal communities.

In short, there is a dearth of customary and traditional law in modern tribal law. While traditional legal theory could offer

⁶¹ See generally Angela R. Riley, "Straight Stealing": Toward an Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69 (2005).

⁶² See Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. ___ (forthcoming 2007), manuscript at 9-16, available at http://works.bepress.com/matthew_fletcher/5.

⁶³ See Steve Aycock, Thoughts on Creating a Truly Tribal Jurisprudence, compiled in Indigenous Justice Systems of North America, 2nd Annual Indigenous Law Conference, Michigan State University College of Law (March 17-18, 2006) (on file with author).

numerous solutions to alleviating the crisis, American Indian literary criticism offers a different view.

III. "A Perfect Copy" of Tribal Customs

David Treuer's remarkable book of literary criticism offers a powerful critique of Native American literature; namely, that *there is no such thing*. Professor Treuer rejects three tenets of Native American literature; first, that "Native American literature contains within it links to culturally generated forms of storytelling;"⁶⁴ second, that "Native American literature reflects the experience of Native Americans in the United States;"⁶⁵ and third, "Native American literature acts out, by virtue of its cultural material, a tribally inflected, ancient form of 'postmodern' discourse."⁶⁶ Emphasizing the third point, Treuer argues that the novels of Louise Erdrich, for example, "are not made up of ... Indian life. *Love Medicine* is created through a stunning array of literary techniques, sourced mostly from Western fiction. The real miracle is that with these foreign tools Erdrich convincingly suggests Ojibwe life."⁶⁷ Indian novelists like Erdrich, according to Treuer, are selling a "copy" of Native American life. And "[w]e would never pay \$43 million for a copy of Van Gogh, even if it were a perfect copy."⁶⁸

Professor Treuer's thesis has much to offer in the theory of the discovery and application of tribal customary law in tribal law and tribal jurisprudence. One could roughly apply Treuer's framework on literature to tribal law, almost with a find-and-replace method. While there are limitations to this exercise, it is worthwhile to try. Consider the three tenets that Treuer rejects.

Begin by contemplating "Native American literature does not contain within it links to culturally generated forms of storytelling," the first tenet reworded to conform to Treuer's

⁶⁴ TREUER, *supra* note 1, at 191.

⁶⁵ TREUER, *supra* note 1, at 192.

⁶⁶ TREUER, *supra* note 1, at 192.

⁶⁷ TREUER, *supra* note 1, at 67.

⁶⁸ TREUER, *supra* note 1, at 193.

point. Treuer's proof is Erdrich's *Love Medicine*, where all the Indian characters speak English (a "beautiful and terrible deficit") and "the very structure of the stories they tell, and their contents, are not only modern, they are 'Western.'"⁶⁹ To put Treuer's critique another way, perhaps too glibly, is to say that there can be no "Native American novels" because Indian people living in the culture do not (did not) tell cultural stories in the form of a novel, let alone in English.

Consider Treuer's second tenet, that "Native American literature does not reflect the experience of Native Americans in the United States." Treuer argues that literary critics who treat Native American novels as "historical" documents have missed the point.⁷⁰ As the critical example, Treuer's points to the assertion by one critic that James Welch's *Fools Crow*⁷¹ is "the closest we will ever come in literature to an understanding of what life was like for a western Indian..."⁷² Treuer goes to a great deal of trouble to prove that *Fools Crow* is not historically accurate, nor could it be under any circumstances.⁷³

Apply these tenets to tribal law and you have "Tribal law does not contain within it links to culturally generated forms of adjudication" and "Tribal law does not reflect the experience of Native Americans in the United States." These are both valid statements, as shown in Part II. 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. Indian people,

⁶⁹ TREUER, *supra* note 1, at 66.

⁷⁰ See TREUER, *supra* note 1, at 192 (quoting CLEANTH BROOKS & ROBERT PENN WARREN, UNDERSTANDING POETRY: AN ANTHOLOGY FOR COLLEGE STUDENTS iv (1938)).

⁷¹ JAMES WELCH, FOOLS CROW (1986).

⁷² TREUER, *supra* note 1, at 78 (quoting Dee Brown). This quotation appeared as a book jacket blurb.

⁷³ See generally TREUER, *supra* note 1, at 77-107.

with the possible exception of certain insular tribal communities, have been forced to move on from the customs and traditions of their ancestors. Tribal law does not and cannot recreate tribal history or culture perfectly. So far, we are four square with Professor Treuer.

Treuer's third tenet offers more difficulty: "Native American literature does not act out, by virtue of its cultural material, a tribally inflected, ancient form of 'postmodern' discourse." Treuer describes the meaning of this tenet, in part, as thus: The novels of American Indians are not American Indian culture; instead, they are very good copies of American Indian culture. And the better the writer, the better the copy will be. Writers like Louise Erdrich, Leslie Silko, James Welch, and Sherman Alexie are very good at their craft (which involves using a westernized, Anglo-American set of literary tools), according to Treuer, and they use their skills to make the very best copies. But their work can never be part of Treuer's "cultural patrimony."⁷⁴ Treuer concluded, "Our written literature in English is responsive to a set of historical circumstances, inventive in its evasiveness, rich in its suggestive capabilities, but ultimately, it is not culture."⁷⁵

Seen in this light, Treuer's third tenet offers an analog to the status of modern tribal law, codes, and jurisprudence. Other than in limited enclaves such as the Navajo Nation, the Hopi Tribe, and other insular tribal communities where the first language spoken is tribal, the law of Indian tribes is in English. Tribal customary law and traditions as understood and lived by ancestors has been eroded by centuries of invasion, ethnocide, and grief. The tribal statutes enacted by modern tribal legislatures can be informed by tribal customary law, perhaps, but they cannot reproduce that law in the written form of the English language (let alone the legalese of Indian lawyers). The tribal courts can find, announce, and apply customary common law in their opinions (although they rarely do), but they cannot restore customary law to its place as the lifeway or law way of any tribal community. Tribal

⁷⁴ TREUER, *supra* note 1, at 198.

⁷⁵ TREUER, *supra* note 1, at 197.

communities can attempt to circumvent the Anglo-American style of adversarial adjudication (an atrocity in small, insular communities⁷⁶) through the development of alternative dispute resolution mechanisms, such as pan-Indian-style peacemaker courts.⁷⁷ Like Treuer's novelists, the best that modern tribal governments can do is to make very good copies. Regardless of whether these legal structures are good copies of custom and tradition or whether they involve radical changes away from Indigenous paradigms, these legal structures stand on their own as necessities in modern tribal life. And, like Treuer in the context of literature would say, these developments are important, even welcome.

But Professor Treuer goes further—argues that these “very good copies” are not Indian culture at all. While singing the praises of the work of Erdrich, Welch, and others in the Indian literature canon, he also whispers fraud.⁷⁸ Would he also whisper fraud when confronted with modern tribal law?

IV. Reconciliation ... and a Critique

So far, we have accessed the law of American Indians and the novels of American Indians as two parallel tracks. In my description of tribal law and to Professor Treuer's description of Native American literature, there are numerous parallels. First and foremost, both can never be anything more than copies of the real thing. Modern tribal law for the large majority of Indian tribes consists of the borrowing of Anglo-American legal constructs, language, and values by tribal

⁷⁶ See Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 250 (1994).

⁷⁷ See Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875 (1999).

⁷⁸ To be clear, Professor Treuer mostly does not allege that the authors are committing fraud themselves, but that the literary critics that read and publicize these works through their scholarly papers and book jacket blurbs commit a kind of fraud when they make the representation that the work of Erdrich, Welch, et al., is a genuine expression of Indian culture. See, e.g., TREUER, *supra* note 1, at 31 (Herth D. Sweet Wong); *id.* at 32 (Allan Chavkin). However, with his exposition of Forrest Gerard's known fraud, *The Education of Little Tree*, to Sherman Alexie's *Indian Killer*, Treuer all but screeches fraud. See TREUER, *supra* note 1, at 159-89.

communities. And while tribal courts and legislatures may intend to recreate tribal customary law in the context of these borrowed laws and rules, that attempt can never be complete—and certainly not in the context of the English language. There is no realistic chance of the complete restoration of the customs and traditions as they existed prior to first contact. The link between American Indian culture and tribal law will have to be made in the context of Anglo-American legal constructs and values.

Professor Treuer's analysis of Native American literature reaches a similar conclusion. American Indian novelists writing in English, using Western literary techniques, cannot hope to *be* culture, they can only hope to become a compelling reproduction of culture through the intense longing and desire for culture. But Treuer's reading goes further into a normative judgment about the novels of American Indian writers. He argues that American Indian novelists are committing a form of literary fraud by writing "Native American literature" when in fact they do not *live* in the culture and do not *speak* the language. Treuer's "cultural patrimony" is represented by someone like himself, who lives part of the year in Indian Country and is fluent in the language of his community.⁷⁹

Professor Treuer bridged the gap between his work on the literature of American Indians and the paradox of tribal law and governance by asserting that the flaw with the novels of American Indian writers who do not speak the language also infects tribal government. He has recently written that tribal sovereignty as understood by tribal governments that conduct their business in English is "peculiar."⁸⁰ It stands to reason,

⁷⁹ See, e.g., DAVID TREUER, *THE TRANSLATION OF DR. APPELLES: A LOVE STORY* (2006); DAVID TREUER, *THE HIAWATHA* (1999); DAVID TREUER, *LITTLE* (1995).

⁸⁰ David Treuer, *Jibwaa-ozhibii'igewin*, 30 *AM. INDIAN Q.* 3, 7 (2006). The entire statement reads, "With few exceptions—the Southwest and some communities in Canada—our tribal communities are governed in English. Our tribal councils conduct business in English, write their by-laws and constitutions in English, and debate issues in English. Clearly our tribal languages do not influence tribal governance as, such—even though we might be sovereign—it is a peculiar kind of sovereignty." *Id.* Cf. TREUER,

given Treuer's stance on novels written in English by American Indian writers, that he views tribal government as a mere "copy" of traditional (and therefore ideal) tribal governance. Or, in other words, to take his argument to its logical conclusion, as he did with Sherman Alexie,⁸¹ it is reasonable to assert that he views tribal government as a fraud as well.

The argument that tribal governments are frauds has a great deal of logical and rhetorical weight. Tribal governments tend to govern by majority rule, under the terms of governing documents (written in English) that tend to grant enormous political power in the hands of a few tribal members that have little or no inherent competence for the work they have been elected to do. Indian lawyers (some of them members of the community) have incredible persuasive authority to order tribal leaders around and to write the laws (again, in English) that cabin whatever traditional governance values remain. It is likely that no reservation Indian or a close relative or friend has not been adversely impacted by a decision from one of these new-style tribal governments. Tribes are engaged in active disenrollment of tribal members based on strained readings of membership criteria (and some would say greed). Tribes fire qualified tribal members from tribal government jobs for arbitrary and capricious (read: political) reasons. Tribes engage in business development that will impact the environment. Tribes donate money to dirty state and federal politicians and lobbyists. David Treuer is not engaged in offering solutions to tribal governance problems, but his writings suggest that one solution would be a return to traditional governance, placing a premium on traditional tribal culture, where every word spoken is in the language and every action taken is consistent with tradition and custom.

supra note 1, at 199 (referring to "the mistake of the common loon (incidentally the chieftain clan among the Ojibwe) who answers his own call echoed back from the next lake over, and, unaware of the mistake, is urged to call again, and again—only to remain eternally thwarted.").

⁸¹ See TREUER, *supra* note 1, at 159-89.

But this vision of American Indian culture is not one I am willing to buy. And, frankly, it would appear, neither would Professor Treuer. This “cultural patrimony” is not my own and, in fact, is not anyone’s. In this world, American Indian culture is static and rigid, unwilling and unable to grow and to preserve itself. It is Professor Hart’s ancient society governed by primary rules, with no means to change. It is the same understanding of tribal culture that anti-Indian fishing and hunting opponents use when they assert that Indians should not be able to fish with modern boat and net technology or hunt with modern weapons.⁸² It is the same view of tribal culture that many non-Indians have—or, as Treuer writes, “Somewhere along the way—in the eighteenth century perhaps—Indians became associated with a very specific set of virtues.”⁸³ Indian people took the goods they received from the French, English, and Americans in trade to make their own lives easier, leading anthropologists to argue that they were no longer Indians.⁸⁴ They made their own additions and subtractions from the culture.⁸⁵ Much of the history of the survival of Indian people and communities in the face of genocidal and assimilative American Indian law and policy can be framed this way: Sometimes Indian people traded away their traditional religion and language in order to remain in their homelands; sometimes Indian people traded their

⁸² See, e.g., *State v. Gurnoe*, 192 N.W.2d 892, 899 (Wis. 1972) (holding that Indian treaty rights could only be exercised using the technology of Indian people at treaty times); cf. *United States v. Washington*, 384 F. Supp. 312, 362, 402 (W.D. Wash. 1974); Karen Ferguson, *Indian Fishing Rights: The Aftermath of the Fox Decision and the Year 2000*, 23 AM. INDIAN L. REV. 97, 145-46 (1998).

⁸³ TREUER, *supra* note 1, at 73.

⁸⁴ See D’ARCY McNICKLE, *NATIVE AMERICAN TRIBALISM: INDIAN SURVIVALS AND RENEWALS* 7-11 (rev. ed. 1973).

⁸⁵ See generally D’ARCY McNICKLE, *THEY CAME HERE FIRST* 283 (rev. ed. 1975) (“Indian societies did not disappear by assimilating to the dominant white culture, as predicted, but assimilated to themselves bits and pieces of the surrounding cultural environment. And they remained indubitably Indian, whether their constituents lived in a tight Indian community or commuted between the community and an urban job market.”).

homelands away in order to retain their religion and language.⁸⁶ Flexible Indian communities with the intention of surviving by adapting had a better chance of avoiding extinction than those who did not adapt.⁸⁷ Moreover, the religions and languages did not disappear altogether; they went underground and are being resurrected to the extent possible. And Indian tribes continue to take every measure possible to restore their traditional territories to tribal membership. As a means of survival, Indian people appear to occupy what Richard White called a “middle ground” within American culture.⁸⁸

Professor White’s “middle ground” was both a territory and a cultural mixture that included much of the Great Lakes region during the 17th and 18th centuries during a time when traditional tribal communities and French fur traders interacted and overlapped.⁸⁹ When the cultures first met, the “new people

⁸⁶ Compare, e.g., JAMES A. CLIFTON, *THE POKAGONS, 1683-1983: CATHOLIC POTAWATOMI INDIANS OF THE ST. JOSEPH RIVER VALLEY* (1984) (Pokagon Band of Potawatomi Indians) with, e.g., JAMES A. CLIFTON, *THE PRAIRIE PEOPLE: CONTINUITY AND CHANGE IN POTAWATOMI INDIAN CULTURE* (1977) (Citizen Potawatomi and Prairie Band Potawatomi Nation).

⁸⁷ See McNickle, *NATIVE AMERICAN TRIBALISM*, *supra* note 85, at 4 (“Only the Indians seemed unwilling to accept oblivion as an appropriate final act for their role in the New World drama. Caught up in succeeding waves of devastating epidemics and border wars as settlement moved westward, the Indians retreated, protecting what they could, and managing to be at hand to fight another day when necessity required it. They lost, but were never defeated.”).

⁸⁸ RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815*, at ix-x (1991).

Gerald Vizenor’s theory of “survivance” is a tempting explanation as well, but not as satisfying because it does not account as well for the meaning created by the mixture of these Indian and Anglo-American cultures, nor does it account for the endgame where Indian people returned to the status of the “exotic” or “other.” See generally GERALD VIZENOR, *MANIFEST MANNERS: NARRATIVES OF POSTINDIAN SURVIVANCE* (1994); Gerald Vizenor, *Native American Narratives: Resistance and Survivance*, Address at North Dakota State University (April 22, 2005). Cf. Malea Powell, *Rhetorics of Survivance: How American Indians Use Writing*, 53 *COLLEGE COMPOSITION AND COMMUNICATION* 396 (2002).

⁸⁹ See generally WHITE, *supra* note 88, at 50-93.

were crammed into existing categories in a mechanical way,” with Indians classified as savages and the French classified as manitous.⁹⁰ Because neither side could accomplish their goals by force, “[t]he middle ground grew according to the need of people to find a means, other than force, to gain the cooperation or consent of foreigners.”⁹¹ According to White, “the central and defining aspect of the middle ground was the willingness of those who created it to justify their own actions in terms of what they perceived to be their partner’s cultural premises.”⁹² The two sides sought out aspects of “congruence” in their respective cultures for this purpose, sometimes leading to what outsiders what consider “ludicrous” interpretations, but “[a]ny congruence, no matter how tenuous, can be put to work and take on a life of its own if it is accepted by both sides.”⁹³ White’s conclusion has powerful import for analyzing Treuer’s theory of “cultural patrimony”: “Cultural conventions do not have to be true to be effective any more than legal precedents do. They only have to be accepted.”⁹⁴

Treuer’s view of his “cultural patrimony” compels him to question a tribal government conducting its official business using the language of the “conqueror”⁹⁵—English—but his view exemplifies a fundamental naïveté about where tribal governments exist in the American political system.⁹⁶ Indian tribes are efficient and effective implementing agents of federal law and policy as they administer, for example, large federal housing, health care, roads construction, law enforcement, education, and general administrative projects in accordance with complex federal spending regulations.⁹⁷

⁹⁰ WHITE, *supra* note 88, at 51.

⁹¹ WHITE, *supra* note 88, at 52.

⁹² WHITE, *supra* note 88, at 52.

⁹³ WHITE, *supra* note 88, at 52-53.

⁹⁴ WHITE, *supra* note 88, at 53.

⁹⁵ Cf. *Johnson v. McIntosh*, 21 U.S. 543, 588 (1823).

⁹⁶ See generally Alex Tallchief Skibine, *Redefining the Status of Indian Tribes within “Our Federalism”*: *Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006).

⁹⁷ E.g., Native American Housing and Self-Determination Act, 25 U.S.C. §§ 4101 et seq.; Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450a et seq. See generally COHEN’S HANDBOOK OF

Tribal governments must be able to listen and speak to federal employees and officers and to the Congressional and Executive branch leadership. As explicated in Part II, tribal governments had little choice in the face of physically dominant and oppressive American legal, political, and cultural attacks but to react to this process by adapting Anglo-American legal constructs. Some tribes have performed this ongoing task better than others. Every day, tribal leaders and Indian lawyers face down the federal government, state governments, county commissioners, school boards, waste management districts, and so on. Tribal leaders make decisions and tribal judges make law in this context. Failure to govern in this context is political death. It would be easy in the abstract to value "authenticity" above adaptation and to reject or disparage anything claiming to be authentic that does not square with some traditional Indian's "cultural patrimony."⁹⁸ It would be easy but simply wrong. No community can survive by ignoring the outside world or through stubborn inflexibility. Of course, there are and will always be those in the federal government who will refuse to listen and speak to tribal governments. And there are and will always be Indian people who will refuse to listen and speak to the federal government. Both types of outsiders are tolerated by those in the middle ground, but they are utterly ineffective in the modern version of the "middle ground," where legitimate attempts at understanding and congruence are the currency of survival.

The "middle ground" also provides an analytical tool useful in responding to Treuer's critique of the literature written by American Indians. Treuer himself admits that he has never seen a novel written entirely in an American Indian language.⁹⁹ Treuer focuses on how the work of Erdrich, et al. is interpreted by non-Indian literary critics, but he ignores how their work is interpreted (and enjoyed) by American Indians.

FEDERAL INDIAN LAW ch. 22 (Nell Jessup Newton et al. eds. 2005) (describing federal government services for Indians).

⁹⁸ TREUER, *supra* note 1, at 193, 198.

⁹⁹ See Treuer, *Jibwaa-ozhibii'igewin*, *supra* note 80, at 7.

And therein rests the fatal flaw of Treuer's critique of American Indian novels as culture—Treuer forgets how these writers speak to Indians. For the vast majority of American Indians who are members of Indian tribes and who live on or near Indian Country, the art of Erdrich, Alexie, Welch, Silko, and Treuer *is* the part of their culture that links reservation Indian people to urban Indians to non-Indians—the cultural “middle ground.”¹⁰⁰ Indian people would not exist without this part of their culture. It is to be valued, not attacked for being inauthentic. Professor Treuer denies that the work of American Indian writers in English is “culture,” but what else could it be? Indians do not stop being Indians because they cannot speak their language or recite the stories of their ancestors. If this were true, then genocide is all but complete. But writers like Louise Erdrich and Sherman Alexie and even David Treuer exemplify the viability, flexibility, and incredible staying power of American Indian people *and culture*.

Conclusion

There are many trickster tales told by the Anishinaabeg, most starring Wenebozho (in Treuer's preferred spelling) or Nanabozho. In one story,¹⁰¹ Nanabozho and his family are starving.¹⁰² After a series of failures in convincing (tricking) the woodpecker and muskrat spirits into being meals, Nanabozho convinces (tricks) several birds and kills them. He eats his fill, saves the rest for later, and takes a nap. During the night, men approach. Nanabozho's buttocks warn him twice:

¹⁰⁰ See, e.g., 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, 18-19 (2006) (referencing the opening of Sherman Alexie's film *The Business of Fancydancing* at a small, independent movie theater on the Grand Traverse Band's reservation).

¹⁰¹ This story is sometimes referred to as “The Duck Dinner.” BORROWS, *supra* note 3, at 46-54 (citing RICHARD M. DORSON, BLOODSTOPPERS & BEARWALKERS 49-50 (1952)).

¹⁰² See *Nanabozho in a Time of Famine*, in OJIBWA NARRATIVES, *supra* note 3, at 33, 33-35.

“Wake up, Nanabozho. Men are coming.”¹⁰³ Nanabozho ignores his buttocks and continues to sleep. When he awakens to find the remainder of his food stolen, he builds up his fire and burns his buttocks as punishment for their failure to warn him.

In arguing that “Native American literature” does not exist, Professor Treuer burns his own buttocks. While he claims to be making an attempt to avoid a claim that the work of Erdrich, Welch, Silko, Alexie, and so on are merely inauthentic,¹⁰⁴ Treuer’s argument, taken to its logical conclusion, denies the existence of *any* Indian culture. While perhaps Professor Treuer’s literary critique is intended to create a normative distinction between the novels of writers like Erdrich and Alexie (best-sellers) and his own (not), he puts the culture and art of all American Indians—and the law and politics of Indian tribes—in academic and intellectual jeopardy. Finally, very existence and viability of modern tribal governments—despite all their flaws from all the borrowing and imposition of Anglo-American legal constructs—disproves the normative truth of Professor Treuer’s theory. Indian people and Indian culture lives on in new and changing forms every minute. Such is survival.

Miigwetch.

¹⁰³ *Id.* at 35.

¹⁰⁴ See TREUER, *supra* note 1, at 193.