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1992

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ESSAY

LIBERATION, DREAMS, AND HARD WORK: AN ESSAY ON TRIBAL COURT JURISPRUDENCE

FRANK POMMERSHEIM*

for Sherman Marshall**

Tribal courts and their jurisprudence are currently involved in a period of rapid growth and development. As part of this process of significant change, tribal courts need to build an indigenous jurisprudence of vision and cultural integrity. This endeavor includes the necessity to transcend the legacy of colonization, the poverty of theory concerning tribal sovereignty, and the "dilemma of difference." The tools for this undertaking include language, narrative and story, and innovative concepts of justice. In addition, the author contends that it is necessary to place these efforts within constitutional and international law horizons.

This Essay develops these themes within the context of federal hegemony, as well as the attendant challenge to the practicing tribal and judging bar. This is a challenge that must be met in order to realize an enduring tribal jurisprudence of meaning that maintains a cultural fidelity to the past, as well as achieving current aspirations. Finally, this Essay concludes that such potential achievements rest on the dreams and hard work of the committed individuals who work and practice within the tribal court setting.

I. INTRODUCTION

The two most important—and indeed complementary—projects in the field of contemporary Indian law are the decolonization of federal Indian law and the simultaneous construction of an indigenous version of tribal sovereignty and self-rule. This yoked endeavor also carries with it the need to extend the webs of belief about Indian law and tribal sovereignty

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within the state and national legal community, as well as within the dominant society as a whole.[1] In many ways, tribal courts are ideally situated to serve as a bridge between local tribal culture and the dominant legal system.

Tribal courts and their emerging jurisprudence constitute primary forces on both sides of this process. The seminal United States Supreme Court decisions in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*[2] and *Iowa Mut. Ins. v. LaPlante*[3] have created significant "breathing space" for tribal courts to articulate their own version of tribal sovereignty, while at the same time reserving significant federal judicial authority to review much of that decisionmaking.[4] It is therefore incum-

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1. This Essay seeks to explore a set of issues closely related to the situation of tribal courts committed to rendering justice on a day-to-day basis, while also seeking to realize important cultural and traditional values. It strives to peel off layers to get to the heart of what really matters: that an indigenous culture—particularly in its legal realm—might flourish on its own terms within a deferential, but not oppressive or condescending, national legal culture. This piece builds on my previous tribal court scholarship including, for example, *The Contextual Legitimacy of Adjudication in Tribal Courts, and the Tribal Bar as an Interpretive Community: An Essay*, 18 N. M. L. REV. 49 (1988), *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329 (1989), and *A Path Near the Clearing: A Short Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. __ (1992, forthcoming).

2. 471 U.S. 845 (1985) (holding that whether a tribal court has exceeded the lawful limits of its jurisdiction is a question that must be answered by reference to federal law, including federal common law, but that a federal court proceeding is proper only upon the exhaustion of tribal court remedies).

3. 480 U.S. 9 (1987) (holding that regardless of the basis of federal jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction).

4. This "breathing space" permits, but does not necessarily endorse, the results of tribal court analysis of the extent of its jurisdiction. In addition, there is some congressional concern about the scope of federal review of tribal court decisionmaking on the *merits* as opposed to basic questions of jurisdiction. This is particularly true in the context of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), and the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1984). *See, e.g.*, S. 517, 101st Cong., 1st Sess. (1990), which provides:

> (a) Compliance With Section 202.—Federal district courts shall have jurisdiction of civil rights actions alleging a failure to comply with rights secured by this act.
>
> (b) Any aggrieved individual, following the exhaustion of such tribal remedies as may be both timely and reasonable under the circumstances, or the Attorney General on behalf of the United States, may initiate an action in Federal district court for declaratory, injunctive or other equitable relief against an Indian tribe, tribal organization, or official thereof, alleging a failure to comply with rights secured by this Act.
>
> (c) In any civil action brought by an aggrieved individual, or by the Attorney General, the Federal district court shall adopt the 8 findings of fact of the tribal court, if such findings have been made, unless the district court determines that:

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bent upon tribal courts to insure that their decisionmaking withstands the rigors of federal review. Ultimately, however, the greater necessity is that such decisionmaking craft a jurisprudence reflecting the aspiration and wisdom of traditional cultures seeking a future of liberation and self-realization in which age old values may continue to flourish in contemporary circumstances. Much of this effort, if successful, will aid in both decolonizing federal Indian law and building an indigenous vision of tribal sovereignty.

Significant themes in the area of liberation include an examination of the role of language, stories, and justice in forging a unique jurisprudence of place and a culture of vision. While liberation is grounded in aspiration, its success depends in part upon understanding the shackles of colonization and the constraints of history. In addition, this unique jurisprudence must be placed in the context of constitutional and international law horizons. Finally, there is the need to ground all this analysis in the day-to-day hard work of the real people in tribal courts and in the cultural and sustaining world of their dreams. This constellation of concerns provides the fields of light and gravity for this article.

II. ROOTS: THE LEGACY OF COLONIZATION

The coming of European settlers and explorers to the Americas severely splintered much of the structure of indigenous tribal organization. From the very beginning of this Republic, federal government action and policy has sought economic and political advantage in its

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(1) the tribal court was not fully independent from the tribal legislative or executive authority;
(2) the tribal court was not authorized to or did not finally determine matters of law and fact;
(3) the tribal court permitted those subject to the Act, on issues of declaratory, injunctive or other equitable relief, to interpose a defense of immunity;
(4) the tribal court failed to resolve the merits of the factual dispute;
(5) the tribal court employed a factfinding procedure not adequate to afford a full and fair hearing;
(6) the tribal court did not adequately develop material facts;
(7) the tribal court failed to provide a full, fair, and adequate hearing; or
(8) the factual determinations of the tribal court are not fairly supported by the record, in which event the district court shall conduct a de novo review of the allegations contained in the complaint.

(d) In any civil actions brought under this Act the Federal court shall, whenever a question of tribal law is at issue, accord due deference to the interpretation of the tribal laws and customs.

Senator Hatch's proposed legislation initially was introduced in a different form as S. 2747 in the 100th Congress and has been reintroduced in the 101st Congress as S. 517 and sent to the Judiciary Committee for review.

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dealings with Indian tribes. In addition to the economic and political exploitation of colonialism, there is a legacy of impoverished theory concerning the nature of tribal sovereignty, and an ongoing failure to understand the role of "difference" within the dominant legal system.

A. Economic and Political Exploitation

The ruthless pursuit of advantage can be seen as early as the fur trade that took place within the colonies. This burgeoning commercial activity often initially developed on terms quite favorable to Indian tribes. After all, they had the expertise and knew the resource. The economics of this trade were also critical for a time to the survival of many of the colonies, providing them with resources to eradicate financial deficits and establish a beneficial balance of payments.[5]

As in any lengthy period of "contact,"[6] however, substantial change occurred on both sides. The fur trade alone defined Indian-non-Indian relations for most Indians in early contact with Europeans.[7] The economic results were uneven, but in the long run they helped to establish a tribal pattern of growing dependency on foreign goods and non-indigenous, exogenous economic structures of exchange and consumption.

More pertinent, perhaps, are the equally extensive political ramifications of these trade patterns. The early political interaction was between more or less equals, but over time the political balance tilted toward the non-Indians. Increasing economic diversification in Europe and the colonies led non-Indians to depend on the fur trade less and less while Indians came to depend on it more and more.[8] "Consequently, the power of the Europeans grew while the power of the natives, like the trade itself, slowly slipped away."[9]

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5. STEPHEN CORNELL, THE RETURN OF THE NATIVE 19 (1988).

6. *See, e.g.*, FRANCIS JENNINGS, THE INVASION OF AMERICA 39-42 (1975).

7. CORNELL, *supra* note 5, at 74.

8. *Id.* Such economic activity was fostered by a federal policy of non-intercourse. This policy was premised on a perception that non-Indians could not live harmoniously with Indians. Hence, the federal government early on regulated contact between Indians and non-Indians. Non-Indians (including the states) could not purchase land from individual Indians or tribes without approval of the federal government. Hence, the federal government also regulated trade, the interdiction of liquor and criminal activity in Indian country. Frank Pommersheim, *The Reservation As Place: A South Dakota Essay* 34 S.D. L. REV. 246, 259 (1989). *See also* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834 (1962).

9. CORNELL, *supra* note 5, at 74. It is also significant to note that the ecological effects were devastating. Many fur bearing and game populations were completely depleted.

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Following the exhaustion of the fur trade, Indian-non-Indian exchanges shifted to the land itself. Yet the underlying trend of this relationship had already been established, a trend characterized by continued decline in Indian political autonomy and economic self-sufficiency and a concomitant increase in constraints imposed by growing non-Indian political and economic power.[10]

In the nineteenth century, Indian land became the fuel of American economic growth. The resulting dispossession and confinement of Indian peoples to reservations had the opposite effect on the Indian population. It further reduced Indian economic self-sufficiency and led to much underdevelopment in Indian country.[11]

The concept of an Indian reservation is best understood as the guarantee of a "measured separatism" to Indian people as the result of negotiated treaties and settlements reached between Indian tribes and the federal government. Most of the treaties between these mutual sovereigns were agreed upon during the nineteenth century through negotiations. Such proceedings represented the political and legal adjustment between the western march of an expansionary American society and the staunch resistance of established tribal societies.[12]

Treaties represented a bargained for exchange, and it is important to understand exactly what the exchange entailed. The Indians usually agreed to make peace and cede land—often vast amounts of it—to the federal government in exchange for a cessation of hostilities, the provision of some services, and, most important, the establishment and recognition of a reservation homeland free from the incursion of both the state and non-Indian outsiders.[13]

The pressure of western expansion did not abate with the signing of treaties. "Measured separatism" soon gave way to a policy of vigorous assimilation resulting in dire consequences for the concept of reservations as islands of Indianness: the homelands were cut open, the bright line separating Indians and non-Indians was obliterated, much land was lost as many non-Indian settlers came into Indian country, and cultural ways were strained while traditional tribal institutions were undermined and weakened. For many, this was the most debilitating historical blow to tribalism and Indian life.[14]

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10. *Id.* at 32.
11. *Id.* at 53-54.
12. Pommersheim, *supra* note 8, at 252.
13. *Id.* at 253.
14. *Id.* at 255. *See also* CHARLES WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW, 19-23 (1986). From 1887-1934, the national Indian land estate was reduced from 138 million acres in 1887 to 52 million acres in 1934. *See generally* FRANCIS PAUL PRUCHA, THE GREAT FATHER 890-900 (1984).

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The ravages of the allotment policy were halted only with the enactment of the Indian Reorganization Act of 1934 (IRA),[15] which permanently extended the trust status of all existing allotments and banned the issuance of any new allotments. These ravages had equally scarring collateral effects. For the first time, reservations became checkerboards of tribal, individual Indian, individual non-Indian, and corporate ownership forms. Individual Indian allotments quickly fractionated within two or three generations, often resulting in dozens or even hundreds of heirs. Even land that remained in trust was more often leased to non-Indians than used by the allottees.[16]

The direct effect of the allotment process on tribal government and tribal institutions is more difficult to assess. Some commentators[17] have argued that when the reservations were "opened" for non-Indian settlement, true traditional governments were essentially doomed in most tribes, and the authority of any form of tribal government was undermined. The great influx of non-Indian settlers coupled with the loss of communal lands and the attendant yoke of federal support for these policies eradicated much of the tribes' ability to govern. In the resulting void, the Bureau of Indian Affairs, in concert with Christian missionaries, became the true power broker and the *de facto* governing force.[18]

Federal government endorsement of these policies was reversed when the Indian Reorganization Act of 1934 (IRA) ended the allotment process and supported the development of tribal self-government. The IRA reforms sought to engender recovery from stultification through such means as explicitly authorizing and assisting in the adoption of tribal constitutions. Nevertheless the IRA's encouragement of "modern" tribal government was, and is, often perceived on the reservation as further evisceration of traditional tribal government, emphasizing as it does the "white man's" way of elections, spoken English, and the written word. For some reservation residents, the apparatus of IRA tribal governments further disturbed and unsettled the cultural balance necessary to support traditional forms of self-rule often associated with tribal governance in force during the treaty-making era. As a result, tribal governments

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15. Act of June 18, 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-478 (1983)).

16. Pommersheim, *supra* note 8, at 256. *See* WILKINSON, *supra* note 14, at 20; FRANK POMMERSHEIM, BROKEN GROUND AND FLOWING WATERS 69-71 (1977).

17. WILKINSON, *supra* note 14, at 21. WILCOMB WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN 75-76 (1971).

18. Pommersheim, *supra* note 8, at 256.

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elected under the IRA's provisions often remain controversial and continue occasionally to have a hint of illegitimacy about them.[19]

Most tribal courts that exist today have their roots in IRA constitutions which generally enumerated a recognized legislative authority of a tribal council to create a tribal court and to define its powers. Many of these tribal constitutions reflect the direct handiwork of a very intrusive Bureau of Indian Affairs.[20]

B. The Poverty of Theory

One of the legacies of the colonization process is the fact that Indian tribes, which began their interaction with the federal government as largely sovereign entities *outside* the republic, were increasingly absorbed into the republic, eventually becoming internal sovereigns of a *limited kind*. This process is most accurately characterized as one of involuntary annexation. Throughout this historical period and continuing well into the early twentieth century, Indian people were neither federal nor state citizens. Their incorporation was accomplished without any coherent legal theory to justify it and it is, arguably, directly at odds with several key legal and political premises embedded in the U.S. Constitution. These premises, drawn heavily from the work of political philosopher John Locke, include principles of limited governmental sovereignty and the consent of the governed. As suggested by Professor Clinton: "In Lockean social compact terms, Indian tribes never entered into or consented to any constitutional contract by which they agreed to be

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19. *Id.* at 258. See also, for example, the discussions at Oglala Lakota College on the Pine Ridge Reservation to abolish tribal government as it is known today and replace it with a traditional form of government. Jeltz, *Sioux Plan Traditional Government*, LAKOTA TIMES, May 29, 1991, at A1-A2.

20. *See, e.g.*, INDIAN SELF-DETERMINATION AND THE ROLE OF TRIBAL COURTS: A SURVEY OF TRIBAL COURTS CONDUCTED BY THE AMERICAN INDIAN LAWYER TRAINING PROGRAM 23-24 (1977). *See also* Curtis Berkey, *Implementation of the Indian Reorganization Act*, 2 AM. INDIAN J. 8 (1976) (In retrospect, the Interior Department played a larger role than the tribes in drafting constitutions.). *See also* Frank Pommersheim & Terry Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D. L. REV. 553 (1986) (Tribal constitutions were, in most instances, prepared in advance by the Bureau of Indian Affairs and reflected little, if any, tribal input and retained substantial review authority within the BIA.). Nor did this process end with the adoption of tribal constitutions. The process of reviewing tribal constitutions and amendments continues unabated. *See, e.g.*, U. S. DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, DEVELOPING AND REVIEWING TRIBAL CONSTITUTIONS AND AMENDMENTS: A HANDBOOK FOR BIA PERSONNEL (1987). *See also*, Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 713-14 (1989).

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governed by federal or state authority, rather than by tribal sovereignty."[21]

That is, in fact, the essential holding of the early seminal cases of *Cherokee Nation v. Georgia*[22] and *Worcester v. Georgia*.[23] Describing Indian tribes as "domestic dependent nations" and "distinct independent political communities" respectively, Chief Justice Marshall's opinions in these cases clearly placed tribes outside the state and national polities.

Like so much in federal Indian law, however, the tides of history, if not compelling legal analysis, have vastly diluted and nearly drowned these holdings. Subsequent cases, particularly *Kagama v. United States*[24] and *Lone Wolf v. Hitchcock*[25] in the late nineteenth and early twentieth centuries, fully incorporated tribes into the federal system and declared them subject to the "plenary power" of Congress. Despite its lack of constitutional roots, this power nevertheless proclaims exten-

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21. Robert Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 847 (1990).

22. 30 U.S. (5 Pet.) 1 (1831).

23. 31 U.S. (5 Pet.) 515 (1832).

24. 118 U.S. 375 (1886).

25. 187 U.S. 553, 565 (1903) (Plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.). And the sweeping scholarly criticism of the doctrine collected by Professor Clinton:

> The illegitimacy of federal assertions of such sweeping unilateral authority frequently is proclaimed in Indian country. Indeed, scholars consistently have questioned the purported doctrine of plenary federal authority over Indians because of the lack of any textual roots for the doctrine in the Constitution, the breadth of its implications, and the lack of any tribal consent to such broad federal authority. Therefore, many commentators have sought out limits on that authority. *E.g.*, Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1 (suggesting lack of textual authority for plenary powers); R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 257-69 (1980) (suggesting limitations derived from article I and the ninth amendment); Robert Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 996-1001 (1981) (suggesting inherent limits in the reach of the Indian commerce clause); Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989) (arguing for Indian consent as a limitation on federal authority); Robert T. Coulter, *The Denial of Legal Remedies to Indian Nations Under U.S. Law*, NATIONAL LAWYERS GUILD COMMITTEE ON NATIVE AMERICAN STRUGGLES, RETHINKING INDIAN LAW 103, 106 (1982) ([T]here is not textual support in the Constitution for the proposition that Congress has plenary authority over Indian nations.); Nell Jessup Newton, *Federal Power over Indians: Its Sources Scope and Limitations*, 132 U. PA. L. REV. 195, 261-67 (1984) (suggesting due process and takings limitations).

Clinton, *supra* note 21, at 856.

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sive—even limitless—power over tribes in blatant contradiction of the Lockean notion of *limited* government sovereignty. The plenary power doctrine thus appears to be extra-constitutional in its origins, and extravagant in its placement of unlimited authority in the hands of the federal government at the expense of tribal sovereignty.[26]

This vast expansion of federal authority in Indian affairs has concomitantly, and almost brutally, constrained the parameters of tribal sovereignty. For example, as Justice Stewart wrote in *United States v. Wheeler*,[27] "[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." This bald colonizing language suggests that tribal sovereignty is really no such thing at all. Within a national jurisprudence that recognizes the primacy of order, limits, and predictability within the legal system,[28] such pronouncements seem especially crabbed and de-stabilizing. This is particularly true for tribes attempting to build and to advance their vision of sovereignty. These unjustifiable constraints pose a constant and paralytic threat to the efforts of tribes and tribal courts to move forward.

This poverty of theory concerning tribal sovereignty reduces the tribal pursuit of self-determination to dependance on federal—particularly congressional—sufferance, and contrasts sharply with the constitutional and theoretical solidity that governs the interaction of the federal and state sovereigns. The Tenth Amendment to the U.S. Constitution is the cornerstone of this dynamic relationship with its declaration that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people."[29] The Tenth Amendment provides a clear constitutional marker for discussions of federal-state sovereignty,[30] while discussions of tribal sovereignty, when they are held at all, occur largely at the fringe of constitutional theory and analysis. Perhaps this is not surprising, but

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26. These developments followed closely on the heels of the General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 461-479 (1988)), which sought to "break up the tribal mass" and incorporate tribal members into both the American economy and polity. Clinton, *supra* note 21, at 853-54. *See also*, Pommersheim, *supra* note 8, at 255-58.

27. 435 U.S. 313, 323 (1978).

28. *See, e.g*, STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 107-10 (1985).

29. U.S. CONST. amend. X. *See also*, Frank Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 242-43 (1991) (suggesting that treaties might provide a rich benchmark for legal dialogue concerning the nature of tribal sovereignty).

30. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

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rather a commonplace result for indigenous peoples and cultures whiplashed by the process of colonization.[31]

And yet, if that were all there were, tribal courts might not even exist or they would be properly confined to the dustbin of both tribal and national history. Despite this vein of oppressive legal history, more encouraging Supreme Court declarations about the nature and potential of tribal sovereignty have also emerged. This is especially true in the Court's recent declarations of tribal courts' significance.

In both the *National Farmers Union* and *Iowa Mutual* cases, the Court ringingly endorsed the importance of tribal courts as the primary forums in which to resolve civil disputes arising on the reservation. As Justice Marshall wrote in *Iowa Mutual*, "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development."[32] It is the force of these most recent cases joined with the residual vitality of foundational cases such as *Cherokee Nation* and *Worcester* that provide the necessary support, if not adequate legal and constitutional theory, for tribal courts to identify and explore the proper parameters of tribal sovereignty. These cases, of course, guarantee no affirmation of the *results*—practical or theoretical—of tribal court jurisprudence.[33] Tribal courts remain threatened by the dark shadow of federal plenary authority and the general incoherence of contemporary federal Indian law,[34] but they must, nevertheless, make their way within the context of the available light in and around the corners of the shadow.

C. The Dilemma of Difference[35]

Tribal courts do not exist solely to reproduce or replicate the dominant canon appearing in state and federal courts. If they did, the process of colonization would be complete and the unique legal cultures of the tribes fully extirpated. Nevertheless, tribal legal cultures—given even the most benign view of Indian-non-Indian history—also do not

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31. *See, e.g.*, ALBERT MEMMI, THE COLONIZER AND THE COLONIZED (1965) FRANTZ FANON, THE WRETCHED OF EARTH (1963).

32. *Iowa Mutual*, 480 U.S. at 14-15.

33. In fact, there is much current debate about how much federal review of tribal court decisionmaking exists or ought to exist and, more generally, an inquiry about the exact nature of the relationship of the tribal judiciary to the federal judiciary. *See, e.g.*, Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 360-62 (1989). *See also supra* note 4 and accompanying text.

34. *See e.g.*, Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990).

35. This section draws extensively on the rich and innovative work of MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990).

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reflect pre-Columbian tribal standards and norms.[36] This is so because there has always been a unique legal reality created by tribal resistance to the process of colonization and assimilation.[37] The riprap created by these forces provides an opportunity for tribal courts to forge a unique jurisprudence along the fault line created by the ravages of colonialism and the persistence of tribal commitment to traditional cultural values.

Along this fault line one can see, and feel, the additional pressures facing tribal courts. A concern about the role "differences" might play in tribal court jurisprudence generates these forces. This fault line, in turn, rests on the shifting tectonic plate of tribal sovereignty. The concept of sovereignty consists of two main components: the recognition of a government's proper zones of authority free from intrusion by other sovereigns within the society, and the understanding that within these zones the sovereign may enact substantive rules that are potentially divergent or "different" from that of other—even dominant—sovereigns within the system. Although the notion of separate sovereigns is primarily concerned with formal constraints on power (i.e., limiting the powers of limited sovereigns), it is also related to the recognition of different legal approaches to human problems. This may be thought of, in part, as the function and utility of the "other" in the legal domain.[38]

From the federal perspective, when the "other" is the state, the differences are likely to be relatively slender because of the similarity of origin and experience. When the "other" is the tribe, the potential for difference is rather large given the difference of origin and experience. The federal record, however, evinces a tolerance of similarity, rather than dissimilarity. The history of the pressures to "civilize" and assimilate Indians provides more than ample support for this axiom of federal-tribal relations.[39] Despite these enormous pressures, tribal courts continue their struggles to maintain their identities and to resist the ongoing forces of assimilation.[40] This is particularly important given the current federal policy commitment to tribal self-government and self-determination,

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36. *See, e.g.*, Clinton, *supra* note 21, at 860: "Colonization usually results in substantial influx of the new occupants from the colonizing society, redistributes substantial property in favor of the colonizing authority, destroys or impairs some of the cultures of the colonized peoples, and restructures the production and trade relationships within the colonized area in ways that defy immediate or long-term restoration of the *status quo ante*. Even after colonization ends, its residual effects remain and create new realities that must be recognized and addressed by the legal system."

37. *See, e.g.*, Pommersheim, *supra* note 8, at 249, noting that the "historical and contemporary exercise of choice has always been undergirded by a commitment to remain indelibly Indian and for tribal people both to define themselves proudly as a people apart and to resist full incorporation into the dominant society around them."

38. Resnik, *supra* note 20, at 749 (1989).

39. *Id.*

40. *Id.* at 750.

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which seems to recognize, at least rhetorically, the possibility of difference in theory, if not in practice.

For the federalist, the immediate task lies in identifying the best legal norms with which to measure the appropriate level of tolerance. While this discussion has historically taken place under the rubric of sovereignty, it is perhaps more accurately tracked within the context of exploring difference. As suggested by Professor Resnik:

> From the perspective of the dominant society, the question is how much "subversion" and "invention" should be tolerated and encouraged. At the core of federal courts' jurisprudence is a question that has often gone under the name of "sovereignty" but may more fruitfully be explored in the context of difference. If the word "sovereign" has any meaning in contemporary federal courts' jurisprudence, its meaning comes from a state's or a tribe's ability to maintain different modes from those of the federal government. The United States has often made claims about the richness of its pluralist society—made claims that the loss of state or tribal identity would not only be a loss to states and tribes, but would also harm all citizens because of the benefit of living in a country in which not all are required to follow the same norms. Some deep-seated emotional respect for group goveruance may be at work here, some sense that these self-contained communities are "jurisgenerative" (again, to borrow from Robert Cover) and that their traditions and customs must sometimes be respected and preserved. In the tribes, cities, states, and regions of the country, one can find not only individuals, but also the individual as part of a community—a community that has had continuity over time. In these communities there are social ties, there is a shared history, there is a network of relatedness. In contrast, the federal system appears to some as individualistic and atomistic. We are attracted by these smaller institutions, these subsets, these multiple sovereignties; we like the scale, the sense of history, the intimacy.[41]

An exploration of the dilemma of difference, while very helpful in understanding the quandary of tribal courts, contains its own paradoxes. These include considerations of the definition of difference, the meaning

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41. *Id.* at 750-51. Of course, this likely richness cannot avoid the problem of potential error or wrongdoing within a community-based separate sovereign such as the tribe. In essence, there is a necessity "to try to understand what animates federal decisions to sustain the power of the 'other,' what prompts decisions to diminish that power, and what criteria should lead us to praise or criticize such decisions." *Id.* at 753.

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of difference, and the treatment of difference. Differences, for example, are not inherent, but rather, are social creations based on some kind of comparison to an often unstated norm. For example, notions about the qualities of women, minorities, and the handicapped are often based on an unstated comparison to white, able-bodied males. Societies inevitably assign people to categories in order to organize reality and to provide a framework for economics, politics and government.[42] The important question, of course, becomes how the differences are assigned and how they are treated in terms of power and opportunity. The categories themselves are human constructs subject to change and reorganization.

Differences are also a way of addressing issues related to connections and boundaries. The constant stream of social, economic, and political experience in the life of a society needs to be sorted and given meaning. Connections and boundaries help us to do this. Because connections and boundaries are interdependent terms, society need not choose between them, but must instead identify the kinds of boundaries and connections it chooses to recognize and enforce.[43] This issue is especially keen, even poignant, in the field of Indian law, where the federal government has often done much to eradicate physical boundaries in Indian country and to obliterate the Native American *landscape* which is often the *very* basis for making connections in the first instance.[44]

To construct differences, however, merely begs the question: are they positive or negative? In the context of colonialism or other oppressive forces, the majoritarian society often defines differences as negative. For example, the history of Indian-non-Indian relations is replete with labels such as primitive, uncivilized, and inferior assigned to Indians. Commentators accurately attribute to categorization of this type the creation of the stigma of difference.[45] Such a label of difference is often the product of the unilateral exercise of dominant power.

The legal treatment of the stigma of difference highlights the overall "dilemma of difference." After deciding to eradicate such a stigma, the question becomes how best to achieve this goal. The stigma of difference may be recreated both by ignoring it and by focusing on it. For example, in the context of bilingual or special education, the question may be how to deal with those defined as different, such as students who do not speak English or have mental disabilities. As Professor Minow suggests, the problem often becomes "When does treating people differently emphasize their difference and stigmatize and hinder them on that basis, and when does treating people the same become insensitive to their difference and

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42. MINOW, *supra* note 35, at 21-22.

43. *Id.* at 11.

44. JOHN G. NIEHARDT, BLACK ELK SPEAKS (1932); Pommersheim, *supra* note 8, at 250-51, 269-70.

45. MINOW, *supra* note 35, at 20.

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likely to stigmatize or hinder them on *that* basis?"[46] Solutions to the dilemma of difference cluster around choices between integration and separation, between similar treatment and special treatment and between government neutrality and government accommodation.[47]

In the context of Indian law, federal Indian policy has inexorably pressed toward assimilation and has tolerated only minor or "quaint" differences. Some might call this an admirable, but incomplete, commitment to eradicate the stigma of difference. Yoked to the notion of difference, however, is the pride rooted in pre-Columbian sources from which Indian tribes and tribal communities find cultural continuity and spiritual richness. It is this pride of difference that is at the heart of claims of tribal sovereignty. Neither the legal community nor the dominant community at large well understand this pride of difference. It is this pride of difference that tests the vitality of "old promises" in a diverse society that professes a commitment to both equality and pluralism.

Tribal courts are often confronted with the dilemma of resolving this apparent contradiction between "stigma" and "pride," not in the context of airy academic discussion about sovereignty, but in forums involving vigorously litigated and hotly contested claims. For example, how do, or should, tribal courts deal with issues such as child custody, non-performance of contracts, and trespass to property.[48] Each of these areas suggests the potential for rules or results at some odds with those of the dominant legal system. The ability to understand and to articulate the basis of difference therefore becomes critical. This is true not only within the language of sovereiguty itself, but also as a means of honoring and respecting cultural differences.

III. THEMES OF LIBERATION

Tribal courts have their work cut out. This work is essentially twofold: to transcend the ravages of colonialism, while simultaneously animating traditional values in contemporary circumstances. Some of the tools for this work include language, narrative, and the pursuit of justice.

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46. *Id.* This dilemma is dramatically played out in how faculty members treat Native American law students. In treating them just like any other students, there is a risk of exaggerating difference by pretending that there are no differences, while treating them differently (e.g., not calling on them in the class) also risks exacerbating differences. There is also the question of how any given Native American law student prefers to be treated. Needless to say, there is no consistency or confidence in any particular approach, at least at the law school at which I teach.

47. *Id.* at 20-21.

48. *See infra* notes 105-07 and accompanying text.

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A. Language

In many respects, law consists of two main components: language and power. Language is the means of expressing the power of law and therefore it is often slavish to its dictates. Language is also a force in its own right capable of expressing aspirations, even transcendence, within legal discourse. The language of tribal court jurisprudence needs to be sensitive to these disparate possibilities especially when the language of discourse is almost always English, which may itself be an inadequate vessel to express certain traditional values and concepts embedded in tribal culture. In addition, the language and law of the colonizer should always be inherently suspect.

These diverse possibilities of language have been forcefully expressed in many contexts. As noted by Vaclav Havel, the playwright leader of Czechoslovakia: "Words that electrify society with their freedom and truthfulness are matched by words that mesmerize, deceive, enflame, madden, beguile, words that are harmful—lethal, even. The word as arrow."[49] Words or phrases from the field of Indian law such as the doctrine of discovery, assimilation, abrogation of treaties, and plenary power have all triggered lethal effects such as aiding in the expropriation of Indian land and the denial of tribal culture.

Tribal courts must unpack and subvert these and other lethal, albeit legal doctrines, rather then simply defer to their power. In part, tribal courts may accomplish this task by reading these texts from a new, that is, indigenous, perspective. Because all law must be "read" to glean its meaning, this almost pristine activity may be reasonably governed by an appropriate set of protocols.

Such a set of protocols might include the following elements. Reading has two faces. One is the text or source of law anchored in some time past. The second is the current situation of the reader presently seeking to understand the text and to apply it to the situation at hand. The resulting "read," whatever it is, is the mesh of two times, two places, and two interpretations.[50] This process is essentially dialectic in nature and entertains (at least theoretically) the possibility of the emergence of a new synthesis that is less lethal, or even non-lethal, in its composition. As the legal reader must respect the text however oppressive it might be, so too the text must respect the reader's aspiration and otherness.[51] In a sense, there must be a protocol of mutual respect.

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49. Vaclav Havel, *Words on Words*, N.Y. REV. OF BOOKS, Jan. 18, 1990, at 11.

50. ROBERT SCHOLES, PROTOCOLS OF READING 7 (1989). *See also infra* notes 98-99 and accompanying text.

51. Some of this undoubtedly sounds like the controversy involving originalist and non-originalist interpretation in constitutional law. It is, of course, partly about that, but it is meant to suggest something broader and more pervasive at the same time.

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This is especially appropriate in the context of Indian law given its potential for reconciliation and meaningful self-determination. Such protocols do not guarantee anything except possibility. It is a possibility and an initiative that must, nevertheless, be understood and pursued by tribal courts. "Obviously this is not just a linguistic task. Responsibility for and towards words is a task which is intrinsically ethical."[52] It is a task which must also be encountered by an equally ethical and respectful federal legal culture in the courts and in the halls of Congress.

Language also has the potential to mislead us. Instead of honoring the sacredness of people and cultures, it can reify abstractions and deflect attention from their particularity and irrepressible reality. Vine Deloria, Jr., a leading Sioux intellectual and Indian law scholar, is most attentive to this phenomenon within Indian law and has accurately dubbed it as "the Fallacy of Misplaced Concreteness."[53] It is instructive to note that his warning is neither directed to Congress nor the federal courts (though it might well be), but rather to the arguably "friendly" community of practitioners and Indian law scholars. Tribal courts and the entire field of Indian law need to guard against this fallacy, but also need to extend their perceptual net outside the field of Indian law for relevant insights from other disciplines such as politics, history, economics, philosophy, and linguistics.[54] These insights need to be gathered not in the pursuit of further abstraction, but in the pursuit of a better understanding of the reality and dilemma of tribal cultures and Indian law. The object is not to multiply the loaves and fishes of abstraction, but to heed the prophetic observation that "what is missing in federal Indian law are the Indians."[55]

Language can further obscure the reality of power and the necessity for action. This message, for example, is central to liberation theology[56] which plays a prominent role in the political struggles in much of Central

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52. Havel, *supra* note 49, at 19.

53. Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law,* 31 ARIZ. L. REV. 203, 204 (1989).

This point is also tellingly illustrated in a reading from the Gospel of John. Mary goes to the tomb of Jesus. He addresses her, "Woman, what is it you want?" She does not know him. He says, "Mary, what do you seek?" Mary now recognizes Him, because in speaking her *name* he honors her particularity and sacred personhood. *See John* 20:15-16.

54. Vine Deloria, Jr., 15 NARF LEGAL REV. 3 (Summer 1990). It has also been observed, for example, that "when we make a classification scheme to sort the kaleidoscope variety of human culture into a related, understandable pattern, we may end up earnestly talking about the classification scheme when we think we are still talking about human cultures." JIM CORBETT, GOATWALKING 8 (1991).

55. Deloria, *supra* note 53, at 205.

56. *See, e.g.*, GUSTAVO GUTIERREZ, LIBERATION THEOLOGY (1973).

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and South America. Liberation theology focuses on the inadequacy of most of the Catholic response to the world in which we live. In a world that teems with injustice and the violent marginalization of the poor, liberation theology teaches that it is simply not enough to attend mass, to say a few prayers, and then go on one's prosperous way. That is not the message of the Gospels nor the life of Christ. Jesus spoke, suffered, and acted *in* history—not outside it—in order to redeem His promise of liberation. Liberation theory holds that any belief in redemption outside the travail of human history is a denial of the Word and essentially sinful in its repudiation of the necessity to act *in* history on behalf of ourselves and the most marginalized in our society.

This might seem a curious, if not wholly misplaced, analogy for tribal courts to consider. Yet it is peculiarly resonant in that it is a potent reminder that tribal courts (as well as their federal counterparts) do act in history and sometimes do have to take the measure of that oppressive reality. In the legal domain of Indian law, the words and actions of tribal courts do have their own unique "redemptive" potential, but only if they stay their course and keep their cultural and analytical balance.

In addition, words both assemble and disassemble. Words are often all that exist to reach out to one another across communities, traditions, and culture. But, they are also the tools with which to avoid the actions and commitments that give words meaning in the first instance. It is necessary to stand by words and to understand the sacred covenants that hold their utterances in place, unless they are to be lost in the prairie winds. These are the covenants of justice, friendship, and compassion and their application to the predicament and place of each other in the struggle to resolve the paradoxes embedded in Indian law and tribal court jurisprudence. Tribal courts must hold themselves to words of assembly and union and *not* fall prey to a language of disconnection and distance.[57]

Words are also a means of intensifying consciousness.[58] It is here on the powerful borders of words that poets speak most forcefully not only to lovers of poetry, but to anyone committed to truth and justice. For example, the poet Adrienne Rich has explored the "tension between the possibilities in language for mere containment and the possibilities for expansion, for liberation."[59] In the commitment to liberation, there is the need to be painfully sensitive to "the oppressor's language, a language that is no longer useful, and the need to find a new language, a common language, if you will. It's the question of associations with words and of

57. For example, there is the Lakota (Sioux) word "wolakota" that expresses the deep unity and harmony of all living things.

58. NORTHROP FRYE, WORDS WITH POWER 28 (1991).

59. Adrienne Rich, *An Interview by David Montenego,* AMERICAN POETRY REV. Jan-Feb. 1991, at 7.

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the history of words, and how they come down to us and how we go on with them."[60] This is particularly evident in the law—especially Indian law—where words in the form of doctrine and precedent certainly "come down to us," often in the most oppressive way in such formulations as the doctrines of discovery, plenary power, and a sovereignty subject "to complete defeasance." The enduring challenge for tribal courts is how they "go on with them" in seeking a new and common language to help discover and to define a permanent tribal sovereignty and a supportive legal reality.

There is finally the spiritual dimension of words. This concept is particularly significant within tribal cultures, but is viewed almost as anathema in the dominant legal culture. Understanding the spiritual capacity and impact of language is a crucial source of strength and wisdom within a tribal judiciary. This dilemma of spiritual language and law is artfully described by the Native American writer Linda Hogan:

> As one of our Indian elders has said, there are laws beyond our human laws, and ways that are above ours.
>
> We have no words for this in our language [i.e., English], or even for our experience of being there. Ours is a language of commerce and trade, of laws that can be bent in order that treaties might be broken, land wounded beyond healing . . . The ears of this language do not often hear the songs of the white egrets, the rain falling into stone bowls. So we make our own songs to contain these things, make ceremonies and poems, searching for a new way to speak, to say we want a new way to live in the world.[61]

Tribal courts in their pursuit of truth and justice must also look for a "new way to speak, to say we want a new way to live in the world." This is the burden, and the bounty, of forging a future that is rooted in a vital continuity with the past.

Language in the Native American tradition contains other timely insights. Although there is no shortage to the barrage of words that often permeate the dominant culture's advertising, news reporting and even its legal system, one result of this verbal inflation is a deterioration of our sensitivity to language.[62] But within the oral tradition, as suggested by the noted Native American writer N. Scott Momaday:

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60. *Id.*

61. Linda Hogan, *What Holds the Water, What Holds the Light,* PARABOLA, Winter 1990, at 16.

62. N. Scott Momaday, *The Native Voice in American Literature, in* COLUMBIA LITERARY HISTORY OF THE UNITED STATES 6 (Emory Elliott ed., 1988).

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> one stands in a different relation to language. Words are rare and therefore clear. They are zealously preserved in the ear and mind. Words are spoken with great care, and they are heard. They matter greatly, and they must not be taken for granted, they must be taken seriously, and they must be remembered.[63]

The words that are chosen to define and to express a tribal court jurisprudence must also, therefore, strive to achieve an equivalent respect for, and belief in, the efficacy and power of language.

B. Narrative and Story

In Indian law—and especially in the tribal court setting—federal statutes and case law tend to swagger with some odd combination of alleged wisdom and routine dominance. Part of this swagger is the pure (legal) arrogance of federal hegemony, but part of it is also related to the inability and perhaps even the unwillinguess of federal courts and congress to understand the cultural and narrative, much less the legal, drive propelling tribal courts and their jurisprudence in the first instance. The use of narrative and story by tribal courts, therefore, is potentially a valuable strategy to deal with this "arrogance." It may also be an important means to clarify and to elucidate the vision of tribal sovereignty to tribal courts themselves.[64]

Tribal court narrative and legal story telling are perhaps one of the most trenchant ways of confronting federal hegemony in Indian law. This hegemony having legal roots in such pernicious concepts as the plenary power doctrine[65] and a dependant tribal sovereignty,[66] contains its own "story" as well. As Professor Delgado noted: "The dominant group creates its own stories, as well. The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural."[67] Federal Indian law doctrines are grounded in "stories" of conquest, cultural superiority, and a guardian/ward mentality.[68] Tribal court narratives may seek to unravel such stories that contain a "mindset"

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63. *Id.* at 7.

64. *See, e.g.*, Frank Pommersheim, *A Path Near the Clearing: A Short Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. __ (1992, forthcoming).

65. *See, e.g., supra* notes 24-26 and accompanying text.

66. *See, e.g., supra* notes 27-28 and accompanying text.

67. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1987).

68. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) analogizing the relationship of the Indian to the federal government like that of a "ward to his guardian."

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justifying the world as it is[69] with tribal existence beholden to federal benevolence.

Stories and narrative "are powerful means for destroying mindset—the bundle of presuppositions, received wisdom, and shared understanding against a background in which legal and political discourse takes place."[70] For example, in a recent decision[71] of the Cheyenne River Sioux Tribal Court of Appeals, the Court spent a considerable part of its opinion discussing the intrusive role of the Bureau of Indian Affairs in the original drafting and preparation of the tribal constitution—particularly in regard to a provision that might be claimed to limit tribal court jurisdiction over lawsuits involving Indians and non-Indians.[72] Specifically, the Court noted:

> It is well established that these IRA constitutions were prepared in advance by the Bureau of Indian Affairs—almost in boilerplate fashion without any meaningful input or discussion at the local tribal level. Therefore, it is clear that this "oddity" in Cheyenne River Sioux Tribal law—which has no comparable analogue in the United States or any state constitution—does *not* have its roots in any considered decision of the Cheyenne River Sioux people, but rather in some gross B.I.A. oversight or self-imposed legal concern to tread cautiously when potential non-Indian interests are involved. Neither of these concerns were authorized by federal statute and ought not be given the force or respect of law.[73]

The court's language suggests a counternarrative, one that exposes colonial interference in tribal courts and its need to be properly identified and corrected. In this new light, the courts of the dominant society[74] might properly reject such colonial interference as inimical to the democratic values of pluralism and the current federal policy of meaning-

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69. Delgado, *supra* note 67, at 2413.

70. *Id.*

71. Thorstenson v. Cudmore, 18 I.L.R. 6051 (1991) (involving an action for specific performance of two contracts to convey land located wholly within the exterior boundaries of the Cheyenne River Reservation. The parties to the contracts were several non-Indians and a member of the Cheyenne River Sioux Tribe). (Note: The author sits as a member of this Court and is the primary author of the Court's opinion in this case.)

72. The specific provision conditions civil jurisdiction in a lawsuit between Indians and non-Indians by requiring a stipulation of the parties. Cheyenne River Sioux Tribe By-Laws art. V, § 1(c) (1935).

73. *Thorstenson*, 18 I.L.R. at 6053.

74. Note that this quoted portion of the *Thorstenson* opinion *supra* note 71, has recently been cited in Harris v. Harris, 473 N.W.2d 141 (S.D. 1991) for its "detailed analysis" and "scathing criticism" of the provision at issue.

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ful self-determination. Without this counter-light, federal courts are all too free to see such problems and issues as of the tribes' own making rather than grounded in a legacy of colonial dominance. This is not, however, to suggest that all the problem or responsibility lies with the federal government, but only that a need exists for renewal and mutual understanding, and dialogue on the issues facing tribal courts.

The force of narrative and story within the oral tradition of most Native American cultures is especially compelling. In the oral tradition, and especially under conditions of oppression, the tradition may end in one generation. Under such conditions, "to be careless in the presence of words or the inside of language, is to violate a fundamental morality."[75] Narrative and story are not extrinsic niceties, but are basic life forces needed to establish and to preserve communities and "to develop a common culture of shared understandings, and deeper, more vital ethics."[76]

In the Native American context, much of the narrative intensifies a particular light of intelligence and experience. Specifically:

> This light, like that of long ago, is the light of thought about the past and present, about the lives Native people live as hostages in our own land, and about the overreaching power and living presence of the land over which, finally, no one can tyrannize . . . . We Indian women who write have articulated and rendered the experience of being in a state of war for five hundred years. While non-Indians are largely unconscious of this struggle, we cannot afford that luxury.[77]

Narrative and stories in tribal court jurisprudence are valuable not only as an omega of resistance set against the dominant narrative, but also as an alpha of aspiration to meaningfully connect the past with the future. This is one hallmark of stories as the narrative and connective tissue of memory:

> That's what stories are for. Stories are for joining the past to the future. Stories are for those late hours in the night when you can't remember how you got from where you are. Stories are for eternity, when memory is erased, when there is nothing to remember except the story.[78]

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75. Momaday, *supra* note 62, at 7.
76. Delgado, *supra* note 67, at 2414.
77. PAULA GUNN ALLEN, SPIDER WOMAN'S GRANDDAUGHTERS 2 (1989).
78. TIM O'BRIEN, THE THINGS THEY CARRIED 40 (1990).

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Indeed, without stories the collective memory of culture will be severely impoverished, if not eradicated. In turn, the culture becomes increasingly susceptible to being swallowed whole by the great American maw of assimilation and uniformity. Similar pressures of assimilation and cultural forgetfulness are powerfully illustrated by the quandary of the Palestinians living in Israel. The Israelis hoped that the Palestinians, in their pursuit of economic survival, "would prosper as individuals but remain impoverished as a community."[79] The dominant society, even when providing some modest economic access, prefers to do so on individual terms that do not encourage a land based cultural pluralism.

These individual and cultural pressures to survive are thus sometimes pitted against each other as alternative rather than mutually reinforcing commitments. These pressures are painful and potentially divisive. Again the Palestinians' situation is instructive: "Although as individuals we talked about Palestinian independence and uniqueness, as a community we believed just the opposite."[80] This is a valuable insight in the tribal court context. Individuals may say anything, but it is ultimately the words and actions of the tribe and its institutions that will determine survival and continuity with a cultural past. When communities fail to maintain such historical links, a great deal may be lost:

> [T]he Israeli world enveloping them only left them feeling like strangers in their own land. . . . For the Israeli shadow that followed Palestinians wherever they went was a shadow with a voice, and the voice kept whispering in every Palestinian's ear, "It's not yours. Palestine is not yours. It's ours."[81]

In such struggles, stories sometimes provide nurture and sustenance more important than food itself. For example, as the character Badger notes in the instructive fable *Crow and Weasel*:

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79. THOMAS L. FRIEDMAN, FROM BEIRUT TO JERUSALEM 325 (1989).

80. *Id.* at 326. See also the observation that "If as Arabs we say correctly that we are different from the West, as well as different from its image of Arabs, we have to be persuasive on this point. That takes a lot of work, and cannot be accomplished by a resort to cliches or myths . . . The competitive, coercive guidelines that have prevailed are simply no good anymore. To argue and persuade rather than boast, preach, and destroy, *that* is the change to be made." Edward W. Said, *Ignorant Armies Clash By Night,* THE NATION, Feb. 11, 1991, at 163.

81. FRIEDMAN, *supra* note 79, at 340. This process also occurred to a lesser extent with the parts of 1948 Palestine that became part of Egypt and Jordan. *Id.* at 333. In addition, the Palestinian cultural institutions that became the vessel and rudimentary framework for their national aspirations developed in Israel's western-styled democracy with a level of free expression not available to Palestinians in Egypt or Jordan. *Id.* at 334-35.

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> "I would want you to remember only this one thing," said Badger. "The stories people tell have a way of taking care of them. If stories come to you, care for them. And learn to give them any where they are needed. Sometimes a person needs a story more than food to stay alive. That is why we put these stories in each other's memories. This is how people care for themselves."[82]

And with such "care," stories "help us all remember to remember":

> As long as we refuse to remember to know that our whole life is a ceremony and that the only temptation is really a temptation to forget God, then we will continue to hate and continue to be lost. Medicine and food and religion are one thing. In the old days, when a man got up he prayed toward the rising sun, and then remembered God all day.[83]

The challenge of this spirit and wisdom is not at the edge, but rather at the heart of tribal court jurisprudence. This has been most eloquently articulated as a general jurisprudential rule by the late Robert Cover:

> I have argued not only that the nature of law is a bridge to the future, but also that each community builds its bridges [with] the materials of sacred narrative. . . . The commitments that are the materials of our bridge to the future are recorded and expressed through sacred stories.[84]

There is, of course, no telling what a federal reviewing court might make of such stories embedded in tribal court jurisprudence. And perhaps in these conservative times, expectations should accordingly be minimized. Yet behind the courts there is "the people." As trenchantly noted by a leading commentator in the context of recent liberal U.S. Supreme Court dissents:

> Surely "the People" will be far more likely to pick up the slack if they can somehow come to have a stake in—to feel responsible for—these threatened causes, views, creeds, and lives. Thus, if the practices of the Native American Church are

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82. BARRY LOPEZ, CROW AND WEASEL 48 (1990).

83. Ronald Goodman, Wild Plants and Remembering to Remember 2 (1990) (Unpublished manuscript on file with the author). The quotation is from Stanley Red Bird (1917-1987) of the Rosebud Sioux Tribe.

84. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 182 (1985).

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> rendered familiar—if we can somehow come to sympathize with the religious impulse they represent, whether or not we agree with its content of the creed—we will be far more likely to "have a stake" in their maintenance.[85]

In addition, tribal court opinions more generally can serve as educational tools to reach out to the dominant society at large, insisting upon the responsibilities of a liberal society to nurture and protect alternative cultures.[86] Yet such stories and opinions must be properly anchored in the analytic processes of the law in order to be both compelling and persuasive.

Lastly, tribal court jurisprudence needs to clarify and to integrate all the interdependent narrative and analytical strands. Again the quandary of the Palestinians is highly revealing: "The Palestinians, however, didn't just want to tell the Israelis, 'We are not you.' They also wanted to tell the Israelis and themselves who *they* were."[87] That is the challenge and promise of a tribal court body of law grounded in story, narrative, reason, and justice. Such an undertaking, though fraught with the obvious perils of federal hegemony[88] and limited resources,[89] remains a work of local autonomy and culture. As suggested by the poet-essayist Wendell Berry in a similar setting: it must "be done not from the outside by the instruction of visiting experts, but from the inside by the ancient rule of neighborliness, by the love of precious things, and by the wish to be at home."[90]

C. Justice

In law, language, narrative, and analytical rigor need to serve the ends of justice. Without this convergence, the processes of law—including tribal law—serve only top-down order, hierarchy, and special interests. The meaning and definition of justice are not always perfectly clear; nonetheless, the pursuit of justice within tribal court jurisprudence must be a central concern if the claim of sovereignty is to have meaning beyond the mere arrogation of power.

In order to think more precisely about what justice means, or might mean, in the tribal court context, it is first necessary to consider broader

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85. Robin West, *The Supreme Court 1989 Term Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 104 (1990).

86. *Id.* at 105.

87. FRIEDMAN, *supra* note 79, at 380.

88. *See supra* notes 24-27 and accompanying text.

89. *See infra* notes 166-69 and accompanying text.

90. WENDELL BERRY, WHAT ARE PEOPLE FOR? 169 (1990) (addressing the issue of reviving rural communities).

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questions about the nature and function of law generally. Two visions of law presently predominate most legal thinking and scholarship. "Formalists" see the law as a set of rules issuing from a political sovereign—passed by the legislature or articulated in judicial opinions. The goal of such a set of rules or principles is to act as a means of social control affecting human behavior in desired ways.[91]

Legal realists claim to pierce this formalism in order to examine what "really happens" as the result of law. What this view reveals is not high minded concerns for neutral rules, but rather the manipulation of law with the "aim of inducing those most injured by the political process to acquiesce in it."[92]

Law may be thought about in yet a third way—a way that is particularly resonant with issues and concerns in Native American communities where law has played and continues to play a dominant, if not dominating, role in tribal life. This third view sees law as a "culture which constitutes a world of meaning and action. It is a culture that establishes and maintains community through its practice of language. In this sense the law is an ethical and political activity and should be understood and judged as such."[93]

In this vision of legal culture, the law constitutes not only an obvious set of rules governing current reality, but more significantly, may also inspire the attainment of a more enlightened reality. If our legal texts reflect the political and economic context of our lives, the law (particularly foundational texts such as constitutions and treaties) may also be imbued with a commitment to change *context* in line with a more idealized version of ourselves and our communities.[94]

This legal potential is especially significant within the context of tribal court jurisprudence. First, it prescribes a method for approaching federal law and precedent, not so much in their unavoidable literal proscriptions, but with the overarching federal commitment to respect tribal sovereignty and meaningful self-determination. Second, it offers tribes a way of thinking about their own law and judicial decision making as a means of transforming their colonized context.[95]

This legal vision can sound rather "soft" in the hardball reality of actually making law and deciding contested cases, but that is no reason to disregard it. In fact, it is all the more reason to embrace it. If law and the pursuit of justice are subsumed completely under the rubric of applying the appropriate legal rules to a single fact pattern, the law

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91. JAMES BOYD WHITE, JUSTICE AS TRANSLATION, XIII (1990).

92. *Id.* This view is often associated with a school of thought known as Critical Legal Studies. *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

93. WHITE, *supra* note 91, at XIV.

94. *Id.* at 137.

95. *See, e.g.*, Pommersheim, *supra* note 64.

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readily collapses into a mechanical and ideological means for maintaining the status quo. All of this does *not* negate the important idea that precedent and law play in helping to realize other significant values, such as order and predictability within the legal system. Rather it helps to achieve a better balance between stasis and movement, between the real and the ideal and between "injustice" and justice. In a developing tribal court jurisprudence, attention to such issues is especially critical, lest tribal courts inadvertently reproduce the distortions that permeate majoritarian courts and their jurisprudence.

It remains necessary to suggest what the meaning or pursuit of justice consists of in this legal conception. Professor James Boyd White's exegesis is particularly informative in this regard. He suggests that justice is not any fixed quantity or even consequence, but rather who we are to each other:

> This is the radical question of justice, too: not, "How much do I get?" but "Who are we to each other?" What place is there for me in your universe, or for you in mine? Upon what understandings, giving rise to what expectations, do we talk? What world, what relations do we make together? These are the questions we ask our law to answer.[96]

The notion of justice as essentially relational in nature resonates well within Native American communities. For example, throughout the Lakota tribal world, all prayers and many public addresses conclude with the speaker uttering of the phrase "mitaku oyasin" which literally means "all my relations." This utterance seeks to recognize and to create a connection between the speaker and her listeners. For in the Lakota world view, without relationships there is no way to connect or have meaningful exchange with each other.[97]

The pursuit of justice described by Professor White is captured by the word and process of "translation." Again, the very word translation occupies a central place in many Native American traditions because of its obvious connection with bilingualism, as well as with the spiritual domain of traditional healers who "translate" the messages from the spirit world. Translation in the legal realm involves taking the law or text of the past and removing it from the associations of its origin and relocating it in a new set of associations and circumstances. "The text remains the same, but its translation—its being carried over—to our own time locates it in a new context of particularities which will, and should, give it a

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96. WHITE, *supra* note 91, at 233.

97. *See, e.g.*, JOSEPH E. BROWN, THE SPIRITUAL LEGACY OF THE AMERICAN INDIAN (1989).

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transformed meaning."[98] Such an approach to law and justice may ultimately hold sway within tribal courts because it holds the promise of transformation and reconsideration of a legal past largely dominated by the forces of colonization and assimilation.

Finally, this notion of translation is also an ethical and political dictate; a protocol of reciprocity as it were:

> In this sense translation forces us to respect the other—the other language, the other person, the other text—yet it nonetheless requires us to assert ourselves, and our own languages, in relation to it. It requires us to create a frame that includes both self and other, both familiar and strange; in this I believe it serves as a model for all ethical and political thought.[99]

Considerations of "justice as translation" provide an innovative perspective for thinking about the thrust of law and the attainment of justice. Yet it remains unclear how this perspective works in the domain of solving concrete legal problems. In this arena, the work of Professor Martha Minow[100] is illuminating, refreshing, and cautionary. An important aspect of her work is its focus on relationships rather than rights. It is also true that her work "discovers" much of what already inheres in Native American legal and cultural thought, but which the distortions of colonialism obscure from view.

Preliminarily, however, some discussion of the more traditional solution of "rights" is needed. This solution holds that the universal recognition and enforcement of rights especially for marginalized women, minorities, the poor, and disabled, would go far to achieve justice. However, this stated solution is only partly valid. One problem lies in identifying what rights (and values) initially exist or ought to exist in the first place.[101] A second problem, which is especially acute in the Native American community, is its notion of a right held by an abstract individual "independent of social context, relationship with others, or historical setting."[102]

No one doubts that rights are significant in one's relationship to government, be it federal, state or tribal. Rights are, for example, the whole premise of the Federal Bill of Rights[103] and the Indian Civil

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98. WHITE, *supra* note 91, at 152.

99. *Id.* at XVII. See also earlier discussions of the "other," *supra* notes 38-41 and accompanying text.

100. *See supra* notes 35-47 and accompanying text.

101. MINOW, *supra* note 35, at 149-52. *See also* MARY ANN GLENDON, RIGHTS TALK (1991).

102. *Id.* at 152.

103. U.S. CONST. amends. I-X.

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Rights Act of 1968,[104] as well as Bill of Rights provisions in tribal constitutions.[105] However, in addition to having a "rights standing" with their government, individuals also have significant interaction with others outside the governmental sphere. These situations have traditionally been defined more as ones of "relationship" rather than rights, and have been mediated (rather than litigated) by institutions outside the court such as the family, church, and community. Yet with the weakening of much of the strength and vitality of these institutions in the dominant society, "relationship" is threatened to be subsumed by the growing assertion of rights to be litigated by atomized individuals in the private sphere. Many Native American societies find this threatening, because it is potentially invasive of that fundamental web of relationships defined by family, community, and culture that holds individuals and the tribe together.

Tribal court jurisprudence needs to heed this distinction. Perhaps it is possible, or even necessary, for tribes to see its citizens as located on one side of a triangle with a rights mediated standing to their government on another side of the triangle and a relationship model of interaction with other individuals and people on the third side of the triangle. The model of dominant jurisprudence seems at times more like thousands of particles defined only by the laws of physics. This entropy is clearly at odds with the view of most indigenous communities that define their existence in terms of *relatedness* among individuals and groups, not the rights of isolated, contingent individuals.

Because law both reflects and constructs reality, such views are not without effect on the social and cultural fabric of tribal life. For example, the legal decision whether to grant "standing" in a custody dispute to a member of the extended family or "tiyospaye,"[106] who is neither the mother nor the father of the child has readily identifiable implications for the family and the tribe's cultural values. Similarly, in a contract dispute the potential tribal court decision to render a judgment

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104. 25 U.S.C. §§ 1301-1303 (1984). Note however that the youth, fragility, and cultural differences of many tribal governments may require more modest substantive remedies. *See, e.g.*, Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976) (holding that due process and equal protection under the ICRA are not necessarily defined the same as under the fourteenth amendment); Smith v. Confederated Tribes of the Warm Springs Reservation, 783 F.2d 1404 (9th Cir. 1986) (holding that the procedures tribal courts choose to adopt are not necessarily the same procedures that federal courts follow).

In addition, there is, of course, the ongoing discussion of whether the federal government ought to have infringed on tribal sovereignty by implementing this statute without tribal consent. *See, e.g.*, Robert T. Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. HUM. RTS. L. REV. 49 (1971).

105. *See, e.g.*, ROSEBUD SIOUX TRIBAL CONST. Art. X (1966).

106. "Tiyospaye" is the Lakota (Sioux) word for extended family.

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involving not only money damages or specific performance, but a remedial performance of some kind—such as caring for a neighbor's cattle or garden—in order to heal the relationship between the parties and to maintain the well being of the community has deep cultural implications. As Professor Minow observes: "Beyond our talk of rights we have each other and the steady burden of learning to live together and apart."[107]

Another limitation of the "rights" approach to certain legal issues is its tendency to locate the problem in the person with the "difference" (even when the system potentially stands to ameliorate the "difference" based on the asserted "right"), rather than in the community itself.[108] For example, what is the appropriate approach to deal with a hearing impaired child in a public school? What are her "rights" to "special" treatment? What must the school do to meet her "special" needs? These formulations of the problem lead to answers focusing on this "different" child. Yet there is another way of defining the problem as one involving not only the hearing impaired student, but one implicating the whole class and the relationships among *all* the students and the teacher.

This approach relocates the problem of difference in the community as a whole rather than in the individual. In the example given, a solution that presents itself suggests class-wide instruction in sign language in which all students (and the teacher) will be better able to communicate with each other. As a result, "all students could learn to struggle with problems of translation and learn to empathize by experiencing first hand discomfort with an unfamiliar mode of expression.[109] Of course, there will be the expected objections of impracticality, cost, and relativizing the problem. All of this may be relevant, but it does not take away from the insight of how distributing the problem *within the community* can potentially help to alleviate both the hierarchy and stigma associated with locating the problem *within the person.*

This example is particularly resonant within the bilingual, bicultural context present on many reservations. In this view, the importance of bilingual, bicultural education is not only to academically "help" the "different" Native American students or even to preserve and to advance Native American language and culture, but to expose non-Indian students to a linguistic and cultural (and legal) reality that will in turn narrow the "differences" between Indians and non-Indians that prevent or obstruct the communication that is absolutely essential to mutual respect and understanding. The object here is not to eradicate difference through assimilative education, but to preserve differences through increased awareness

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107. MINOW, *supra* note 35, at 311. A relational model of justice is just that. It is an ideal relative to reality in which (Indian) people and groups may not get along.

108. *Id.* at 85.

109. *Id.* at 84. The example of the hearing impaired child also comes from MINOW, *supra* note 35, at 82-84.

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of their necessity and importance to the well being of *all*. This understanding can be advanced effectively through such creative use of a relational model.

All of this is not meant to disparage the importance of rights within tribal court jurisprudence, but rather to suggest that rights are only *part* of the solution. That "rights" are paramount to the well being of tribal citizens vis-a-vis their government (and even more so vis-a-vis the state and federal governments) is almost axiomatic. These rights need not, however, simply replicate the content of rights in the federal and state setting. Instead, rights in the tribal court setting may require their own unique parameters.[110]

In the sphere of private and communal relationships often grounded in a cultural context that has as a central value the concept of relatedness, a complementary jurisprudence must assert itself.[111] A jurisprudence that conceives of justice as essentially relational in nature must also take root in tribal juridical soil. If, for example, the observations of the Native American writer Ella Deloria that the ultimate goal of Dakota (Sioux) life is to "be a good relative"[112] and that "every other consideration [is] secondary—property, personal ambition, glory, good times, life itself"[113] remain vital today, tribal court jurisprudence needs to fashion and reflect the contemporary contours of this traditional value. This is no easy matter given the weight of the dominant jurisprudence to the contrary and the ongoing historic pressures of assimilation. Nevertheless, this is the essence of the struggle to achieve a cultural fidelity to the past and a communal integrity in the present.

Tribal court jurisprudence also finds unique challenges in its legal strategies for dealing with nature and the environment. Simply put, the

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110. *See supra* note 104 and accompanying text.

111. Note for example this helpful observation:

> It is only contradictory to defend both rights and relational strategies in a conceptual framework that poses either/or solutions and reads any focus on interconnection as a retreat from liberalism to feudalism. We are more inventive than that. It is a mistake to infer that relational strategies are inconsistent with rights. An emphasis on connections between people, as well as between theory and practice, can synthesize what is important in rights with what rights miss. Especially when located as a historical response to patterns of assigned status, rights represent an important cultural tool to challenge persistent relationships of unequal power.

MINOW, *supra* note 35, at 382-83.

112. As quoted in ALLEN, *supra* note 77, at 9.

113. *Id.* In other words:

> try telling yourself
> you are not accountable
> to the life of your tribe
> the breath of your planet.

ADRIENNE RICH, *North American Time, in* YOUR NATIVE LAND, YOUR LIFE 34 (1986).

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poverty on many reservations places intense pressure on tribes to pursue economic development in an attempt to alleviate material deprivation.[114] This in turn creates a growing burden on the tribes to develop and to use their natural resources.[115] The model of the dominant society is this: the value of natural resources lies in developing and exploiting them for the "benefit" of the human community. This simplism necessarily elides the distortions and ravages of much of modern capitalism and industrial socialism.

Most of the decision-making in this area actually seems more political and economic, than legal and cultural, in nature. But upon closer inspection this is not really so. Eventually, tribal courts will have to confront the legal facet of natural resources: whether rivers, trees, and salmon have legal rights of their own independent of the human community or whether they are simply commodities awaiting development.[116] For the Native American reverence for the life and spiritual nature of all of creation to be truly meaningful, it must receive legal recognition within tribal court jurisprudence. If it does not, the observation embodies nothing more than a romantic cliche.

The cultural expressions of such principles are often quite evocative and demanding:

> According to Koyukon teachers, the tree I lean against *feels* me, hears what I say about it, and engages me in moral reciprocity based on responsible use. In their tradition, the forest is both a provider and a community of spiritually empowered beings. There is no emptiness in the forest, no unwatched solitude, no wilderness where a person moves outside moral judgments and law.[117]

The legal demand of such teachings presses toward the development of a true tribal jurisprudence of place. A jurisprudence that is committed not only to justice for the members of the human community, but to justice and honor for the community of nature that helps to sustain the human community. The contours of such a jurisprudence of place remain to be fashioned, but the necessity of engaging its challenge does not.

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114. *See, e.g.*, Frank Pommersheim, *Economic Development in Indian Country: What Are the Questions?*, 12 AM. INDIAN L. REV. 195 (1984).

115. Note however that the concept of "natural resources" is actually a misnomer. A natural "resource" cannot exist without some intervening *human* agency to define it. WILLIAM CRONON, CHANGES IN THE LAND, 165 (1983).

116. This theme has been developed under the rubric of Moral Monism and Moral Pluralism in the work of CHRISTOPHER D. STONE, EARTH AND OTHER ETHICS (1987).

117. RICHARD NELSON, THE ISLAND WITHIN 13 (1989).

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IV. HORIZONS

Tribal court jurisprudence must also consider federal constitutional law and international law in order to connect itself to the national and world context. Because tribal sovereignty is so precariously situated within much of federal constitutional law,[118] tribal court adjudication presents an opportunity to present views of federal constitutional law and theory seeking to restore the constitutional integrity to the relationship between the federal government and Indian tribes. As noted earlier,[119] concepts of plenary authority and a sovereignty subject to complete defeasance are insufficient for ensuring any kind of a meaningful constitutional relationship. Reference to international law provides an opportunity to draw on the emerging law of the rights of indigenous people as a progressive global doctrine, which may in turn effect the actions and theory of western settler states such as the United States in dealing with their own indigenous populations.

A. Constitutional Law

In the arena of federal constitutional law, several tribal court approaches are apparent. These include describing the essential constitutional incoherence that currently manifests itself in federal Indian law, identifying the appropriate federal constitutional benchmarks for engaging in dialogue about tribal sovereignty, and re-emphasizing the moral and ethical commitments that ought to animate federal-tribal interaction.

In a constitutional republic premised on the authority of limited sovereigns and the consent of the governed,[120] federal doctrines of plenary power and unilateral abrogation of tribal authority are clearly extra-constitutional and ought to be considered beyond the scope of national authority. Unfortunately they are not and tribal courts need to fashion their own constitutional arguments to confront this disturbing reality. One such argument includes delineating the constitutionally insupportable rationale for these doctrines, namely that no adequate constitutional justification exists for doctrines that by definition eschew the constitutional *permanence* of tribal sovereiguty, as well as place

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118. *See, e.g., supra* note 27 and accompanying text. *See also,* Escondido Mut. Water Co. v. LaJolla Band of Mission Indians, 466 U.S. 765, 788 n.30 (1984) ("All aspects of Indian sovereignty are subject to defeasance by Congress") as well as the scholarly discussion of Milner S. Ball, *Constitution, Court, Indian Tribes,* 1987 AM. B. FOUND RES. J. 3, 49; Robert A. Williams, *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress Over the Indian Nations,* 30 ARIZ. L. REV. 439, 446 n.31 (1988).

119. *See supra* notes 21-34 and accompanying text.

120. *See supra* note 21 and accompanying text.

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unlimited authority in the hands of the federal sovereign when dealing with tribes.

Another argument involves the Indian commerce clause[121] in the U.S. Constitution that recognizes the right of Congress to regulate trade with Indian tribes. The Indian commerce clause by its own terms acknowledges Indian tribes as sovereigns, sovereigns other than states and for which the federal government needs delegated authority to regulate. Broad as the authority conferred in the Indian commerce clause might be, it cannot include the right to annul or otherwise unfairly limit the right of tribes to exist[122] and to exercise reasonable authority within their borders. Tribal courts are ideally situated as the judicial arms of these enumerated sovereigns to make these arguments in their most compelling manner.

Tribal courts are also well positioned to delineate the appropriate constitutional benchmark for tribal-federal dialogue concerning the parameters of tribal sovereignty. This would likely include the dynamic recognition of tribal sovereignty in treaties as well as the sovereignty acknowledged in the Indian commerce clause. From a tribal perspective, treaties are critical because they represent the true interaction of mutual sovereigns. Treaties in many instances embody a standing of equals, and a parity of authority and recognition. Treaties are paramount in discussions of tribal sovereignty not only because they recognize tribes as sovereigns, but because they also reveal the contours of the pivotal exchanges that form the undergirding of the federal-tribal relationship.[123]

The quality of these exchanges varied significantly. Many tribes were forced to agree to small reservations in regions removed from their traditional territories, because the federal government had the strong military upper hand. Yet in other cases—particularly involving the

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121. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8.

122. For example, over 109 tribes and bands were terminated during the notorious termination era of the 1950's and early 1960's. The effects of termination were extensive and wide-ranging. For example, "termination ended the special federal-tribal relationship almost completely and transferred almost all responsibilities for, and powers over, affected Indians from the federal government to the states. The historic special Indian status came to an abrupt end for terminated individual Indians and tribes." Biggs & Charles F. Wilkinson, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151-54 (1977).

123. *See, e.g., supra* note 13 and accompanying text. *See also* additional discussion on the importance of treaties in Pommersheim, *supra* note 29, at 242-43 (discussing treaties as the cornerstone of tribal-federal and tribal-state relations); Pommersheim, *supra* note 64 (discussing treaties as an important source of tribal sovereignty in the context of tribal constitutional adjudication). *See generally* VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES (1974).

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Lakota of the Great Sioux Nation in South Dakota—there was a virtual military standoff and the reservations were established in the heart of the traditional Sioux homeland in the Dakota territory.[124]

Standing alone, the recognition of tribal sovereignty does not solve complex contemporary problems of jurisdiction, but it does provide the necessary common ground from which problems of the allocation of tribal-federal and tribal-state authority can be better understood. Furthermore, it relieves tribes from the constant destabilizing threat to their very existence and right to self-determination that the full potential of the plenary power represents.[125]

President Bush himself recently hailed and reaffirmed this historic government to government relationship. The President's words need to find their way into tribal court jurisprudence:

> This government to government relationship is the result of sovereign and independent tribal governments being incorporated into the fabric of our Nation, of Indian tribes becoming what our courts have come to refer to as quasi-sovereign domestic dependent nations. Over the years the relationship has flourished, grew, and evolved into a vibrant partnership in which

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124. Pommersheim, *supra* note 8, at 253. Note also that Lakota people, for example, did not see the treaty as mere expedience and the power politics of the day, subject to future accommodation of other emerging national interests. Every treaty was settled with the smoking of the pipo. As insightfully noted by Father Peter John Powell, the well known historian and anthropologist:

> [W]hites rarely, if ever, have understood the sacredness of the context in which treaties were concluded by Lakota people . . . "The pipe never fails," my people, the Cheyenne, say. For the pipe is the great sacramental, the great sacred means that provides unity between the Creator and the people. Any treaty that was signed was a sacred agreement because it was sealed by the smoking of the pipo. It was not signed by the Chiefs and headmen before the pipe had been passed. Then the smoking of the pipe sealed the treaty, making the agreement holy and binding.
>
> Thus, for the Lakotas, the obligations sealed with the smoking of the pipe were sacred obligations.

P. S. Powell, *The Sacred Treaty*, quoted in ROXANNE D. ORTIZ, THE GREAT SIOUX NATION, 106 (1977). *See also* Pommersheim, *supra* note 8, at 252 n.29.

125. *See, e.g.*, Robert A. Williams, Jr., *The Discourses of Sovereignty in Indian Country*, XI INDIAN L. SUPPORT CENTER REP. 1 (Sept. 1988). I believe most people in the field of Indian law, but particularly at the state and federal level, have little understanding or "feel" for the real threat—used often enough historically in such things as termination and P. L. 280 era legislation—that plenary power holds for Indian people and tribes.

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> over 500 tribal governments stand shoulder to sboulder with other governmental units that form our Republic.[126]

Treaties remain the "supreme law" of the land under the U.S. Constitution.[127] Tribal courts need to call on federal courts to heed this solemn dictate with a fidelity often and unexcusably missing from our national jurisprudeuce.

Lastly, tribal courts need to remind federal courts of the ethical imperative that "Great nations like great nien, should keep their word."[128] It is an imperative that is not in the service of abstraction and rhetoric, but in the service of real people and communities seeking to realize a future that is both eontinuous with a cultural past and responsive to the demands of the historical present. It is an obligation that is also in keeping with our national commitment to justice, pluralisin, and a guarantee of a "measured separatisin"[129] to Indian tribes.

B. International Law

International law provides another valuable source with which to enrich tribal eourt jurisprudence. Many new legal insights leading to increased recognition of eollective group rights occur on the frontier of international law developnient. Tribal court adjudication is a crucible for the local application of these emerging international norms and covenants. Such applications serve potentially to give unique meaning to the current adage "to think globally and act locally," and help to complete the jurisprudential loop from the reservation to the worldwide horizon.

International law not only provides legal insight into the struggle of indigenous people for voice and recognition, but it also helps to illuminate the constraints on that developiment which find their roots in certain *foundational* Indian law principles. Until quite recently, for example, international law norms, as applied to indigenous peoples' situations, have focused on individual rights derived from principles associated with the

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126. Pres. Bush as quoted in B.I.A. INDIAN NEWS WEEK-IN-REVIEW, June 17, 1991, at 2.

127. U.S. CONST. art. VI.

128. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

129. WILKINSON, *supra* note 14, at 4. In order te fulfill this commitment, there may even be the need to adopt a constitutional amendment to formally assemble and contemporize tribal sovereignty and bring it from the margin to the center of our constitution text and faith. *See also* Paul Savoy, *Time for a Second Bill of Rights*, 252 NATION 799 (1991) (calling for constitutional reform to achieve economic democracy and security).

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European doctrine of discovery.[130] This doctrine finds its central elaboration in the seminal case of *Johnson v. McIntosh*,[131] in which the U.S. Supreme Court held that European explorers' "discovery" of land occupied by Indian tribes gave the discovering European nation "an exclusive right to extinguish the Indian titles of occupancy, either by purchase or conquest."[132]

The doctrine of discovery was extended in early international law scholarship to mean that the only territorial titles recognized by international law were those held by the "civilized" members of the family of western nations.[133] The pervasive termination and assimilation policies in domestic Indian law complemented this doctrine. For example, "'Civilized' states pursued a sacred duty of trust by dismantling 'tribal organization' and treating indigenous peoples 'as individuals under guardianship.'"[134] The yoke of these mutually reinforcing objectives was to effectively dismiss indigenous people as proper subjects of international law and scholarship.[135]

These colonial dominated doctrines have come under renewed criticism from the stories and narratives of indigenous people themselves, as well as renewed scholarly interest in the rights of indigenous people. Consequently, a movement begun in the 1970s led ultimately to the formation of the United Nations Working Group on Indigenous Populations in 1981.[136]

The United Nations Working Group is charged with the task of developing international legal standards for the protection of indigenous peoples' human rights. The Working Group's standard setting activities are intended to culminate in a final Draft Universal Declaration on Rights of Indigenous People to be forwarded to the U.N. General Assembly for

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130. Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 4 DUKE L. J. 660, 672 (1990). Much of this section of the article draws on Professor Williams' fine work. *See also* S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 HARV. INDIAN L. SYMP. 191 (1990).

131. 21 U.S. (8 Wheat.) 543 (1823).

132. *Id.* at 587.

133. Williams, *supra* note 130, at 673-74.

134. *Id.* at 675. Note also the echo of the language from Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) which described Indians as being "in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."

135. Williams, *supra* note 130, at 675.

136. *Id.* at 676. This process is described in more detail at 676-82.

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ratification.[137] Upon ratification, the Universal Declaration on Rights of Indigenous Peoples will become an authoritative international human rights document in the modern world legal order. It will declare the international community's minimum legal standards for the protection of indigenous peoples' human rights to survival.[138]

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137. *Id.* at 683. *See Report of the Working Group on Indigenous Populations on its Fifth Session,* at 3-5, U.N. Doc. E/CN. 4/Sub. 2/1987, Annex II. The Working Group's original draft principles respecting indigenous peoples' rights recognize:

1. The right to the full and effective enjoyment of the fundamental rights and freedoms universally recognized in existing international instruments, particularly in the Charter of the United Nations and the International Bill of Human Rights.
2. The right to be free and equal to all other human beings in dignity and rights, and to be free from discrimination of any kind.
3. The collective right to exist and to be protected against genocide, as well as the individual right to life, physical integrity, liberty, and security of person.
4. The collective right to maintain and develop their ethnic characteristics and identity.
5. The collective right to protection against any act which has the aim or effect of depriving them of their ethnic characteristics or identity. This protection shall include prevention of any form of forced assimilation, any propaganda directed against them, etc.
6. The collective right to participate fully in the economic, political and social life and to have their specific character reflected in the legal system and in the political institutions of their country.
7. The duty of the territorial State to grant—within the resources available—the necessary assistance for the maintenance of their identity and their development.
8. The right to special State measures for the immediate, effective and continuing improvement of their social and economic conditions, with their consent, that reflect their own priorities.
9. The right to be secure in the enjoyment of their own traditional means of subsistence, and to engage freely in their traditional and other economic activities, without adverse discrimination.
10. The right to determine, plan and implement all health, housing and other social and economic programs affecting them.
11. The right to manifest, teach, practice and observe their own religious traditions and ceremonies, and to maintain, protect, and have access to sites for these purposes.
12. The right to all forms of education, including the right to have access to education in their own languages, and to establish their own educational institutions.
13. The right to preserve their cultural identity and traditions, and to pursue their own cultural development.
14. The right to promote intercultural information and education, recognizing the dignity and diversity of their cultures.

Williams, *supra* note 130, at 682-83 n.72.

138. Williams, *supra* note 130, at 683.

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Professor Williams separates this bundle of emerging rights into four categories most prominent in the international witness and testimony of indigenous people. They are: (1) the distinctive nature of indigenous peoples' collective rights, (2) the centrality of territorial rights to indigenous survival, (3) the recognition of indigenous peoples' right to self-determining autonomy, and (4) international legal protection of indigenous rights.[139] All of these principles speak directly to the current struggles predominating Indian law; they need application and elucidation in the tribal court context.

These themes are significant for tribal courts in a number of important ways. So much of tribal history and culture—including its thought and philosophy—is collective and communal in nature that it has often been difficult to frame such an indigenous legal discourse within and at the margin of a dominant jurisprudence of *individuals*. Western legal thought is premised on individuals who precede the state, while much of Native American thought is premised on the centrality and primacy of groups such as families, communities, and tribes themselves.[140] This dichotomy is well captured by the respective Western and indigenous aphorisms of "I think therefore I am" and "I belong therefore I am."

This concept of collective rights is also a central tenet with which to resist ongoing cultural and legal pressures to assimilate and fall prey to "ethnocide."[141] Because Indian people are federal and state citizens, assimilation often seems to have a benevolent cast as a means to escape poverty and discrimination. Yet these pressures are ultimately lethal for people whose primary identity is with a group and culture that the forces of assimilation seek to dismantle. As a good friend, Elizabeth Little Elk, once said to me: "I cannot live without the reservation. It is like oxygen to me."[142]

The emerging international right of territorial integrity has long been a staple of domestic Native American struggles within the United States. The historical ravages of the allotment,[143] termination,[144] and dimin-

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139. *Id.* at 684-85.

140. *See, e.g.*, Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739 (1990).

141. Ethnocide may be defined as including "any act which has the aim or effect of depriving them [indigenous people] of their ethnic characteristics or cultural identity [or] any form of forced assimilation or integration, [such as the] imposition of foreign life-styles." Williams, *supra* note 130, at 688, quoting from *Discrimination Against Indigenous Peoples: First Revised Text of the Draft Universal Declaration on Rights of Indigenous People*, at 6, ¶ 5, U.N. Doc. E/CN.4/Sub. 2/1989/33 (1989) [hereinafter *W.G. Draft*].

142. Frank Pommersheim, *When it Comes to Indians, the West is Ignorant*, HIGH COUNTRY NEWS, May 21, 1990, at 15 (note that the speaker of the quote in the article Elizabeth Garriott now goes by her maiden name Elizabeth Little Elk).

143. *See, e.g., supra* note 14 and accompanying text.

144. *See, e.g., supra* note 122 and accompanying text.

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ishment[145] processes have been extensive. All have contributed substantially to the erosion of the tribal land estate within the United States. For people intimately connected with the land as a source of identity and spiritual strength, the loss has been much more than economic and political; it has been culturally devastating. International human rights law is beginning to recognize and to address this reality. For example, the current Working Group's Draft Declaration of Indigenous Peoples' Rights specifically recognizes the right of indigenous peoples to "ownership, possession and uses of lands which they have traditionally occupied or used."[146] This growing international legal recognition of the centrality of land to the survival and well being of indigenous people validates the ongoing commitment of tribes to maintain and to enhance their reservation-based way of life—a way of life that draws on the land's economic potential and numinous bounty.

The global human rights theme of self-determination employs almost identical language, comparing very favorably to that used in the context of much contemporary Indian law discourse. The label "meaningful self-determination" purports to describe current federal Indian policy.[147] An international thrust in the same direction ought to help re-enforce this sometimes wavering federal commitment. "Self-determination" is sometimes difficult to pin down at its outer-edges. However, from the tribal perspective, it is clear that the doctrine includes the authority to govern all individuals and property found within the reservation's borders. This important international development recognizes the tribe's right to govern its own affairs, as well as the right of its citizens to fully participate in the society at large.[148]

Finally, there is the broad development of the growing recognition of legitimate international legal status of indigenous people. Consistent with the doctrine of discovery and most colonial policy, indigenous people have generally not been recognized as having "standing" in international

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145. Diminishment refers to the Congressional practice of unilaterally reducing the size of reservations. *See, e.g.*, Solem v. Bartlett, 465 U.S. 463 (1984); Pommersheim, *supra* note 8, at 258-62.

146. Williams, *supra* note 130, at 689-90 quoting *W.G. Draft*, *supra* note 141, at 6, ¶¶ 12 & 13. According to the wording of the Draft, indigenous peoples possess:

> 12. The right of *collective and individual* ownership, possession and use of the lands or resources where they have traditionally been occupied or used. The lands may only be taken away from them with their free and informed consent or released by a treaty or agreement.
>
> 13. The right to recognition of their land-tenure systems for the protection and promotion of the use, enjoyment, and occupancy of the land.

147. *See, e.g.*, CHARLES WILKINSON & DAVID GETCHES, FEDERAL INDIAN LAW, 151-60 (2nd ed. 1986).

148. Williams, *supra* note 130, at 694-95.

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law.[149] For example, indigenous people have almost always been foreclosed from access to international tribunals, where standing is reserved to states.

Indigenous people have consistently argued that because they have negotiated treaties with Western settler states since initial contact more than four hundred years ago, such treaties by their very nature recognize tribal sovereignty and statehood as a matter of domestic and international law. The Working Group's Draft Universal Declaration incorporates much of this with its recognition of indigenous peoples' right "to claim that states honor treaties and other agreements concluded with indigenous people,"[150] as well as the right to seek domestic and international redress for treaty violations.[151] This increased international visibility and standing ought, in turn, to increase the credence and durability of a tribal court jurisprudence that explores and elucidates these same themes in the local context. In fact, given the absence of clarity about the relationship of tribal courts to federal courts,[152] there may even be the innovative possibility of building a relationship between tribal courts and international forums including such things as concurrent jurisdiction or a trial-appellate court system.

These powerful international law developments provide much new doctrinal footing and support with which to enhance the depth and breadth of tribal court jurisprudence. They cannot help but boost tribal courts' morale about the importance and significance of what they are doing, as well as providing valuable legal support for much of their work in the area of treaties, self-determination, and territorial integrity.[153]

V. DREAMS AND HARD WORK

Inevitably, the theory and reality of law and legal development place substantial burdens on judges and practitioners committed to undoing a legacy of discrimination and oppression, as well as forging a jurisprudence of justice and hope. These burdens include issues of resources,

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149. *Id.* at 695.

150. *Id.* at 698, quoting *W.G. Draft, supra* note 141, at 8, ¶ 28.

151. Williams, *supra* note 130, at 699.

152. *See, e.g.*, Pommersheim & Pechota, *supra* note 20, at 590-92; Pommersheim, *supra* note 33 at 360-62.

153. All of this requires a caveat. These developments have yet to achieve the status of fully recognized international law. They supplement, but do not supplant, the other sources of tribal court jurisprudence discussed in this essay. And for those so inclined, there is the raw skepticism of Professor Laurence's declaration that he has "little faith in the ability of public international law to protect any valuable rights. I have no faith in the ability of public international law to put bread on American Indian tables." Robert Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ. L. REV. 413, 428 (1988).

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competence, and the continuing encroachment of the majoritarian legal system and its tradition.

The effort required to establish a new tribal jurisprudence is both personal and institutional in nature, and involves attorneys and judges who work and practice in tribal courts, as well as the support staff of secretaries, clerks, and lay counselors. The overwhelming number of people who work in tribal courts, at least those in South Dakota, are tribal members who take great pride in their work.[154] In part, this pride is engendered by the recognition that tribal courts are rapidly developing into significant tribal institutions embodying the struggle to realize sovereignty and to achieve justice.

Hallmarks of this development include the growing number of law trained Indian attorneys and judges who constitute the tribal court bar, the increasing importance and volume of civil legislation in tribal courts, and the development of active and flourishing tribal appellate courts. For example, in 1973, there was not a single law trained Indian tribal judge in South Dakota. Now over half of the chief tribal judges are law trained Indians. In addition, fully functioning appellate courts exist on all the reservations. The opinions of these courts are regularly reported in the national *Indian Law Reporter* and rival the complexity and sophistication of those of many state and federal courts. Also of note is the fact that *eight* out of eighteen tribal trial judges in South Dakota are Native-American *women* (both law and non-law trained), while only *one* out of thirty-five circuit (i.e. trial) judges in South Dakota is a woman.[155]

Many courts and tribes are also actively contemplating constitutional and other legal reforms to further enhance their institutional strength and competence. This most often includes considerations of the separation of powers, judicial improvements such as increased training, and expanding the body of law available for tribal court application and review.[156] For example, a recent amendment to the Rosebud Sioux Tribal Constitution

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154. As a member of both the Rosebud Sioux Tribal Court of Appeals and the Cheyenne River Sioux Tribal Court of Appeals and as a person with wide tribal court contacts throughout the state, I can personally attest to the high level of commitment and pride evident in the Indian people who work in tribal courts. *See also* the comments of South Dakota Circuit Judge Merton Tice, *infra* note 159 and accompanying text.

155. Attendance survey distributed at the South Dakota Tribal-Stato Judicial Conference (May 1991). Note also that the number of Native-American law school graduates has risen from 44 in 1960 to 999 in 1980. Michael Taylor, *Modern Practice in Indian Courts*, 10 U. PUGET SOUND L. REV. 231, 236 n.21 (1987).

156. *See, e.g.*, the plans of the Northern Cheyenne Constitutional Revision Project for wide ranging change including the separation of powers in Woody Kipp, *Northern Cheyenne Work on Constitutional Changes*, LAKOTA TIMES, Aug. 7, 1991, at A-10; as well as the plans of eight Indian reservations in Wyoming and Montana to form an Indian Supreme Court in order to "strengthen sovereignty." *Eight Tribes Form Indian Supreme Court*, LAKOTA TIMES, July 10, 1991, at A1.

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creates a mechanism to convene a tribal constitutional convention.[157] Other tribal initiatives range from legislative consideration of commercial codes governing commercial activities on the reservation to setting up culturally appropriate methods of civil dispute resolution, such as mediation by respected elders.[158] Although the success of these efforts is still unknown, they nonetheless demonstrate that tribal courts and their jurisprudence are in a period of exciting and innovative change—a change commensurate with their growing local and national status and responsibility. Attendant challenges, however, are present and may thwart this growth and development.[159]

Much of the hard work necessary to overcome these pressures falls on judges and practitioners in tribal courts. Few tribal courts have the

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157. The amendment specifically provides that:

> Upon receipt of a petition that contains the signatures of at least thirty (30) percent of the voters in the last tribal election, the Tribal Secretary shall refer this petition to the next Tribal Council meeting which shall call a Tribal Constitution convention to commence within thirty (30) days and to appoint a seven-member Tribal Constitutional Task Force, consisting of tribal members outside the Tribal Council, to conduct this Convention for the purpose of hearing proposed amendments and to approve those of which shall be referred to the Secretary of the Interior, and upon receipt of them, it shall be the duty of the Secretary of the Interior to set an election as described in Section 1 above.

ROSEBUD SIOUX TRIBE CONST. amend. XIX (1985).

158. *See, e.g.*, James W. Zion, *The Navaho Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983).

159. *See, e.g.*, the recent testimony (June 12, 1991) of the Chief Deputy Attorney General of the State of South Dakota before the United States Senato Select Committee on Indian Affairs that claimed, in part, that "Abuses in tribal government and court [sic] argue against extension of tribal jurisdiction." This testimony was offered in opposition to S. 962 and S. 963 which would make permanent the interim congressional suspension of the result of Duro v. Reina, 110 S. Ct. 2053 (1990) (holding that tribes did not have criminal jurisdiction over non-member Indians). This testimony was provided even in the face of a South Dakota legislative resolution explicitly endorsing S. 962 and S. 963.

Despite this executive antagonism, there appears to be much more cooperation and mutual respect at the judicial level, evinced by such things as the successful national *Civil Jurisdiction of Tribal and State Courts: From Conflict to Common Ground* Conference (June 30—July 2, 1991, Seattle, WA), as well as the equally successful Tribal-State Judicial Conference called by Chief Justice Robert Miller of the South Dakota Supreme Court (May 1, 1991). Note also the comments of South Dakota Circuit Judge Merton Tice after conducting a state civil trial in a tribal courtroom on the Pine Ridge Reservation:

> The Oglala Sioux Tribe should be proud of the high standards and quality displayed during the course of this trial by their Tribal Police. . . .
>
> The cooperation, professionalism, and the warmth I felt from literally everyone with whom I came into contact during the trial leave me with a very special appreciation of Pine Ridge and the Oglala Sioux Tribe.

Tice Compliments OST Court System, LAKOTA TIMES, May 29, 1991, at A5.

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advantage of law clerks and sumptuous law libraries to supplement the research practitioners develop in their written briefs.[160] Therefore, the burden on practitioners and tribal judges is extensive. Practitioners and judges need to cast their jurisprudential nets widely in order to better encompass the possibilities for rich and diverse legal thought. The practitioners' focus is often much narrower. They desire to win cases. Nevertheless, winning cases and enriching legal thought are not mutually exclusive acts, particularly in the tribal court context.

For example, many practitioners—particularly non-Indian attorneys—who appear before tribal trial and appellate courts in South Dakota regularly cite South Dakota cases as dispositive precedent. This approach is unduly narrow, if not actually counterproductive. Because the questions before tribal courts are often ones of first impression,[161] there may not be any dispositive local tribal precedent on point. Tribal precedents from other reservations, however, may also be relevant. Such precedent will be most often found in the national *Indian Law Reporter* that reports all tribal court opinions that it receives.[162] Nevertheless, this reporter service is a research tool to which few South Dakota practitioners subscribe. In a close case the court might well follow tribal rather than

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160. This lack of research capability is a serious problem and needs to be addressed. *See, e.g.*, the discussion of the proposed *Tribal Judicial Enhancement Act*, S. 667, 102d Cong., 1st Sess. (1991) *infra* notes 166-69 and accompanying text as a potential solution.

161. Drawing on my experiences as an Associate Justice on both the Rosebud Sioux Tribal Court of Appeals and the Cheyenne River Sioux Tribal Court of Appeals, I have observed that practitioners often exhibit a lack of familiarity with the precedent of the very court they are practicing before. This problem is often exacerbated by irregular publication of opinions in the *Indian Law Reporter*. It is also to be noted that the absence of tribal legislation (including treaties and the tribal constitution) or a tribal court precedent on point does *not* exhaust the possible sources of dispositive law. Another vital source is that body of law known as tradition and custom and which is part of the oral tradition. A given tribal code may or may not direct one to this source. *See, e.g.*, Sisseton-Wahpeton Tribal Code ch. 3, § 1 (1982), which specifically provides:

> Civil matters shall be governed by the laws, customs and usages of the Tribe not prohibited by the laws of the United States, applicable Federal law and applicable regulations and decisions of the Department of the Interior. The laws of the State of South Dakota may be employed as a guide. Where doubt arises as to the customs and usages of the tribe, the Court shall request the address of Tribal Councilors familiar with Tribal Customs and usages. Where appropriate, the laws of the State of South Dakota may be employed to determine civil matters. The laws of the State of South Dakota shall not be used as a substitute for existing tribal laws.

Note also the directory role given to stato law in this tribal code. *See, e.g.*, Pommersheim, *supra* note 33, at 337-38.

162. This subscription service is published and updated monthly by the American Indian Lawyer Training Program, which is located in Oakland, Cal.

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state precedent because of its greater similarity of history and circumstance.

Standing alone, state law precedent is merely persuasive, not binding. Just because the state and reservation are physically contiguous is not enough to justify the routine application of state court precedent, especially in light of the history of animosity and colonialism.[163] In these situations, precedent from another tribal court might be more pertinent. At a minimum, practitioners need to articulate why the principle of law, rather than the simple fact that it is embedded in South Dakota precedent (or other tribal precedent for that matter), is a good and just one and should be followed on its *merits*.

In light of many tribal courts' relative youth,[164] much tribal court litigation involves cases in which there is no controlling authority. This alone suggests the possibility for innovative and creative lawyering, which, as a necessary byproduct, can help to forge a meaningful and enduring tribal jurisprudence. Conversely, treating tribal court litigation as so much "business as usual" risks courting a colonial jurisprudence of imitation, a jurisprudence guided by the expedience and propinquity of available state court decisional law rather than a jurisprudence grounded in authenticity and cultural integrity with global horizons. The depth and quality of tribal court jurisprudence is largely the product of the engagement and critical intelligence of the practicing and judging bar—a bar which must now rise to the challenges of both culture and history *and* individual client representation.

It is also true, as previously noted, that tribal courts often lack up to date and efficient legal resources and record management systems. Tribal law libraries tend to be bare-bones. They often contain no more than the tribal code, a smattering of United States Code and Code of Federal Regulations volumes, and state, federal and Indian law reporters. Law clerks and computerized research component facilities are virtually unknown luxuries. The research resources of many tribal courts are therefore seriously limited. This basic deficiency, however, is one that can be readily overcome, primarily through an infusion of money. If the federal government desires to make any wise financial commitments to advance meaningful tribal self-determination, funds for tribal court development would seem a most felicitous investment.

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163. *See e.g.*, Pommersheim, *supra* note 29, at 239.

164. Most contemporary tribal courts were not established until the 1930s after the adoption of written tribal constitutions pursuant to the authorization contained in the Indian Reorganization Act, 25 U.S.C. § 476 (1990). Most tribal courts have dealt with serious, voluminous, and complex litigation for approximately 30 years. *See generally* Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community*, 18 N. M. L. REV. 49 (1988).

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A bill that goes far in attempting to meet this need is currently before Congress. The proposed Tribal Judicial Enhancement Act[165] specifically addresses needs related to improved access to law libraries, improved court records management systems, continuing legal education, and technical assistance.[166] The Act calls for $30 million to be spent over five years. Funds would be provided through agreements or contracts awarding financial assistance to any Indian tribe developing, enhancing, or continuing a tribal judicial system pursuant to the Indian Self-Determination Act.[167] In addition to important policy objectives and reasonable levels of funding, the proposed statute explicitly recognizes that "tribal courts are an essential element of tribal self-government and integral to fulfillment of the Federal Government's policy of self-determination."[168]

Regardless of its ultimate fate, the bill clearly addresses important tribal court needs and endorses their premier role in achieving self-determination and rendering justice in Indian country. Such a federal commitment, if enacted into law, can go a long way to complement the hard work of tribal court personnel and to aid in the realization of their dreams of justice, sovereignty, and durability. In fact, the proposed Tribal Judicial Enhancement Act helps to avoid hegemonic paternalism, creating instead a model of federal-tribal partnership.

VI. CONCLUSION

This essay speaks ultimately of love[169] and its ability to define an

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165. S. 667, 102d Cong., 1st Sess. (1991). A similar bill, H.R. 4004, entitled the Indian Tribal Justice Act, has been introduced in the House of Representatives.

166. 137 CONG. REC. S3400-01 (daily ed. Mar. 14, 1991) (statement of Sen. McCain).

167. S. 667, *supra* note 165, at § 7(a).

168. *Id.* at § 2(4).

169. Love undoubtedly seems like a strange, if not inappropriate, word to use in legal scholarship. But maybe not. Love after all is the foundation from which to speak truth to power. *See, e.g.*, Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990).

It also is the life force that weds one to the life and landscape of others. "Every place, like every porson, is elevated by the love and respect shown toward it, and by the way its bounty is received." NELSON, *supra* note 117, at XII. It is also an "expression of an intense spiritual affinity with the mystery that is 'to be sharing life with another life.'" Barry Lopez, quoted in NELSON, *supra* note 117, at frontispiece (no page number).

And as wisely observed by a leading neurologist:

> This sense of affection is neither sentimental nor extraneous. In studying these patients one comes to love them; and in loving them, one comes to understand them: the study, the love, the understanding are all one . . . Neurologists scarcely dare *admit* to emotion—and yet emotion, warmth of feeling, shines through all genuine work.

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indigenous jurisprudence that is committed to "a new and sweeping utopia of life, where no one will be able to decide for others how they die, where love will prove true and happiness be possible, and where the races condemned to one hundred years of solitude will have, at last and forever, a second opportunity on earth."[170] Such an understanding endeavors to transcend the ravages of history and to avoid the canon of despair. As noted by the poet Adrienne Rich, "the search for justice and compassion is the great wellspring for poetry in our time." She "draw[s] strength from the traditions of all those who, with every reason to despair, have refused to do so."[171] These claims for the potential of tribal jurisprudence are not meant to be extreme, but rather elemental in their call to the roots of tradition to guide contemporary struggle and to shape modern tribal competence with wisdom and grace.

In light of this evolving pattern, the encroachment of the dominant legal tradition must abate. However, it too has something to offer this progression, namely the foundational insight of a constitutional faith that sees law not only as a field of force, but as a ground of aspiration for individual and group self-realization. With this understanding, the separate strands in the braid of a pluralistic legal tradition may converge ever closer. For example, as recently noted by the Supreme Court of the Oglala Sioux Tribe:

> It should not have to be for the Congress of the United States or the Federal Court of Appeals to tell us when to give due process. Due process is a concept that has always been with us. Although it is a legal phrase and has legal meaning, due process means nothing more than being fair and honest in our dealings with each other. We are allowed to disagree . . . What must be remembered is that we must allow the other side the opportunity to be heard.[172]

Inevitably, there will also be differences between the dominant and indigenous jurisprudential views that cannot be resolved so easily, but these differences too must be reconciled without force, and with due deference and respect—a deference and respect that seeks to honor the fundamental guarantee of treaties of a "measured separatism" for Indian tribes. This achievement, if realized, contains the potential to complete

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OLIVER SACKS, AWAKENINGS 254 (1983).

170. Gabriel Garcia Marquez, *The Solitude of Latin America*, N.Y. TIMES, Feb. 6, 1983, at EY 19.

171. RICH, *supra* note 113, at back cover (paper back edition).

172. Bloomberg v. Dreamer, Oglala Sioux Civ. Ap. 90-348 at 5-6 (1991) (holding that due process requires a hearing before attempting to remove anyone from the Pine Ridge Reservation).

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the circle and to confirm and to give renewed meaning to the struggle for justice and liberation animating the *ideals* of both the majoritarian and tribal legal traditions. For it is true, *finally*, that without the torment of the ideal,[173] there is little hope for significant and enduring change.

173. The phrase comes from South African writer Nadine Gordimer.

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