

**LOOKING TO THE EAST: THE STORIES OF MODERN INDIAN
PEOPLE AND THE DEVELOPMENT OF TRIBAL LAW**

Matthew L.M. Fletcher

ABSTRACT

Tribal sovereignty is a story told by tribal leaders and advocates for decades to federal and state governments and courts. This story has led to significant political and economic gains for Indian people, but the story is getting old. While the pre-contact Indian communities relied upon storytelling to communicate important social norms, the conquest of Indian nations eviscerated that capacity. Indian people, in order to preserve the right to legal self-determination, must restore their own unique customs and traditions and incorporate those elements into modern tribal law. This paper analyzes four short stories by the renowned Spokane-Coeur d'Alene author Sherman Alexie, stories about modern Indian people living in a world dominated by non-Indian culture and government. The paper highlights areas where new stories may inform tribal government choices as to tribal law and policy, including tribal membership and cultural property. Tribal law and sovereignty cannot exist in the long-term without reference to and a direct connection to the new stories of Indian people living today.

LOOKING TO THE EAST: THE STORIES OF MODERN INDIAN PEOPLE AND THE DEVELOPMENT OF TRIBAL LAW

Matthew L.M. Fletcher*

For my Gram and old stories, and the Peach and new stories

Introduction

For many Indian people, the east represents a new beginning. Each day the sun rises and Indian people begin new lives, with new stories and new experiences. East is the direction of young people, of newborns, and creativity. East is a direction of starting over with new and powerful energy. East is the direction of change.

Indian people – scratching and clawing, fighting and dying, sometimes silent, sometimes loud – have survived meticulous and incredible ruin at the hands of outsiders. The larger story is ongoing, with many tribes running huge money-generating casinos, sophisticated and accountable environmental protection programs, and comprehensive social safety nets, while other tribes struggle to meet basic daily needs. The stories of American Indian law and policy, told by tribal attorneys and leaders, academics, and judges, form a great portion of the underlying basis for the rise of tribal self-determination and tribal sovereignty.

The smaller stories, the stories of individual Indians living on or off the reservation, working or unemployed, educated or illiterate, make up the infrastructure of the remains of tribal cultures. These stories, realistic or fictitious, have a great deal to add to the ongoing conversation about where Indian people will go with their newfound self-determination and tribal sovereignty. These new stories are a necessary and integral part of the future of tribal law and governance.

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Part I of this Article describes the state of tribal sovereignty in the early part of the new century. Tribal sovereignty is a story told by tribal leaders and advocates for decades to federal and state governments and courts. This story has led to significant political and economic gains for Indian people, but the story is getting old. Part II draws a link between the old stories of Indian communities and the new stories of modern Indian people. While the pre-contact Indian communities relied upon storytelling to communicate important social norms, the conquest of Indian nations eviscerated that capacity. Indian people, in order to preserve the right to legal self-determination, must restore their own unique customs and traditions and incorporate those elements into modern tribal law. Part III attempts to take four short stories by the renowned Spokane-Coeur d'Alene author Sherman Alexie,¹ stories about modern Indian people living in a world dominated by non-Indian culture and government. Part III highlights areas where new stories may inform tribal government choices as to tribal law and policy, including tribal membership and cultural property. Part IV concludes by arguing that tribal law and sovereignty cannot exist in the long-term without

¹ Other legal scholars have analyzed some of Sherman Alexie's stories or borrowed images from his films. *E.g.*, Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 605 n. 73 (2002) ("Sherman Alexie's John Smith is a man struggling to regain a lost identity after his Native heritage disappeared when a white couple adopted him.") (citing SHERMAN ALEXIE, *INDIAN KILLER* (1996)); N. Bruce Duthu, *Incorporative Discourse in Federal Indian Law: Negotiating Tribal Sovereignty Through the Lens of Native American Literature*, 13 HARV. HUM. RTS. J. 141 (2000) (analyzing several stories from Alexie's first collection of short stories) (citing SHERMAN ALEXIE, *THE LONE RANGER AND TONTO FISTFIGHT IN HEAVEN* (1993); Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847, 865 (2005) (noting the element of silence in one of Alexie's stories) (citing SHERMAN ALEXIE, *Dear John Wayne*, in *THE TOUGHEST INDIAN IN THE WORLD* 189 (2000); Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 479 (1999) (quoting Alexie's famous formula – "Survival = Anger x Imagination. Imagination is the only weapon on the reservation.") (quoting SHERMAN ALEXIE, *THE LONE RANGER AND TONTO FISTFIGHT IN HEAVEN* 150 (1993)); Sumayyah Waheed, *Limiting Ourselves: A Response to Elbert Lin's "Identifying Asian America"*, 12 ASIAN L.J. 187, 194 n. 39 (2005) (describing the main character in Alexie's novel *Indian Killer* as an example of a person of color who cannot come to terms with his identity and the consequences thereof) (citing SHERMAN ALEXIE, *INDIAN KILLER* (1996)); Kevin K. Washburn, *Crime, American Indians, and the Law*, 104 MICH. L. REV. 709, 712 n. 9 (2006) (describing the Indian car in *Smoke Signals* that only drives in reverse) (citing *SMOKE SIGNALS* (Miramax 1998)).

reference to and a direct connection to the new stories of Indian people living today.

I. Sovereignty: The Empty(ing) Vessel

Tribal sovereignty as a tool of Indian advocacy and leadership must be reexamined. Tribal sovereignty is the calling card of tribal leaders – it has been for decades – and the invocation of tribal sovereignty has led to many successes in the courts and before the politicians.² It used to be that a tribal attorney could stand before a federal judge with a copy of a treaty and *Williams v. Lee*³ or page 122 of Felix Cohen’s *Handbook of Federal Indian Law*⁴ and win, but any observer of modern federal Indian law can see that mere invocation of tribal sovereignty no longer suffices to persuade. Audre Lourde’s warning that the master’s house will not be torn down with the master’s tools has special relevance to American Indian law.⁵ “Sovereignty” is an Anglo-American legal construct and that construct is limited.⁶

That is not to say “tribal sovereignty” is dead. Far from it. The Supreme Court recognizes tribal sovereignty and has with relative consistency since 1959’s *Williams v. Lee*, where the Court held that Indian tribes have the right to “make their own laws and be ruled by them.”⁷ The Court’s definition of tribal sovereignty, however, ends at the boundary sticks of tribal lands and with the birth certificates of tribal members.⁸ But Indians are not the only

² See CHARLES F. WILKINSON, BLOOD STRUGGLE 127 (2005).

³ 358 U.S. 217, 220 (1959) (“[T]he question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”).

⁴ FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1941) (University of New Mexico Press 1971) (noting that tribal government authority is inherent and may not be divested except through express acts of Congress).

⁵ See Audre Lourde, *The Master’s Tools Will Never Dismantle the Master’s House*, in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 98, 98-101 (Cherríe Moraga & Gloria Anzaldúa eds. 1981).

⁶ See Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595 (2004); Robert Odawi Porter, *Tribal Disobedience*, Syracuse Univ. Public Law Research Paper No. 05-01, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=811585 (last visited April 11, 2006).

⁷ 358 U.S. 217, 220 (1959).

⁸ Compare *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that Indian tribes have exclusive and plenary authority to define tribal membership criteria), with *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (holding that

people living inside the bubble of tribal sovereignty. If tribes are to recapture the true authority to self-govern, they must move beyond “sovereignty.”⁹

Though, in general, Indian tribes are in a better position now than they have been in hundreds of years,¹⁰ they have not taken sufficient advantage of the space within which the Court recognizes belongs to them. Indians and Indian tribes must recognize that the space to “make their own laws” is equivalent to the right of preserving and making their own culture. Indian leaders fill some of that space from the top down with Anglo-American legal constructs, constructs that are necessary to existing in the modern era. But the law of Indian tribes, “tribal law,” cannot sustain itself without becoming part of the local culture. Or, stated another way, tribal culture must permeate tribal law over time in order for that law to survive. Tribal law and culture are inextricably intertwined.

Law and culture are collections of stories. The same stories that scholars study as snapshots of tribal culture also are stories about a tribe’s law.¹¹ Before contact with Euro-Americans, Indian stories and law changed and developed in an organic manner. After contact and until the modern era (1959, for lack of a better year),¹² these Euro-Americans destroyed the stories at worst or prevented

Indian tribes may not extend sovereign authority over newly-acquired lands except in limited circumstances).

⁹ This piece relies the definitions of “sovereignty” and “indigenous law” as stated by Professor Rob Williams in 1995:

[I]ndigenous claims to ‘sovereignty’ more accurately can be said to comprehend a jurisgenerative demand on the part of indigenous peoples to live by a law of their own choosing and creation. An indigenous law, of course, holds the potential of being a law which is separate and distinct from the majority society’s law....

Robert A. Williams, Jr., *Sovereignty, Racism, and Human Rights: Indian Self-Determination and the Postmodern World Legal System*, 2 REV. OF CONSTITUTIONAL STUD. 146, 154 (1995).

¹⁰ See generally WILKINSON, BLOOD STRUGGLE, *supra* note __; Kristen A. Carpenter, *Recovering Homelands, Governance, and Lifeways: A Book Review of Blood Struggle: The Rise of Modern Indian Nations*, 41 TULSA L. REV. 79 (2005) (reviewing WILKINSON, BLOOD STRUGGLE, *supra* note __).

¹¹ E.g., KARL N. LEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY 228 (1941); PAUL RADIN, THE TRICKSTER: A STUDY IN AMERICAN INDIAN MYTHOLOGY (1956); RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975).

¹² See CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 1 (1987).

their development at best.¹³ In the modern era, Indians and Indian tribes must take advantage of the space created by invocation of the notion of tribal sovereignty.

Native American literature critics recognize on a visceral level that more Indian writing must emphasize “empowerment,”¹⁴ a tangent or offshoot of “sovereignty.”¹⁵ Indians must take control of their own development, learn the old stories and tell new stories.¹⁶ Indian people and, in last resort, academics can tell us the old stories. But it is new writers and leaders that must tell us the new stories, the stories that interpret the old stories for the modern era.

II. Tribal Common Law and the New Stories

Modern federal Indian law keeps open a small window for Indian tribes to make their own laws and be governed by them. But the focus of federal Indian policy throughout American history has been one of quashing tribal law and culture. The small window of opportunity to declare one’s own laws, to determine one’s own future and governance, is the question of the next century for tribal advocates. It is in this place where tribal governments must seek to govern in a manner that preserves tribal cultures to the maximum extent possible.

Before contact with Europeans conquerors, many, if not most, Indian communities governed themselves through complex kinship relationships. Government structures that resemble modern governments today, such as hunting or war parties, formed only as necessary. As Indian communities began to meet and negotiate with Europeans, the Indian people would select the person or persons from the community they believed most suited to negotiation and oration. These persons might or might not be considered the wisest or most influential, but the European adversary assumed that they were speaking with the leader of the community. Often their

¹³ See FRANK POMMERSHEIM, *BRAID OF FEATHERS* 21 (1995) (“[T]he core of the culture was driven underground into a shadow existence.”).

¹⁴ E.g., Devon A. Mihesuah, *Finding Empowerment through Writing and Reading, or Why Am I Doing This?*, 28 *AM. INDIAN Q.* 97, 98-99 (2004); Joyce Ann Kievit, *A Discussion of Scholarly Responsibilities to Indigenous Communities*, 27 *AM. INDIAN Q.* 3, 7 (2003) (quoting Email from Devon A. Mihesuah (April 16, 2003)).

¹⁵ E.g., Kievit, *supra* note __, at 28 (quoting Email from Clara Sue Kidwell (April 19, 2003)).

¹⁶ See Kievit, *supra* note __, at 12 (quoting Email from Daniel M. Cobb (April 16, 2003)).

assumption was incorrect, but from these encounters the Europeans believed they had engaged the leader or leaders of a uniform political entity – an Indian tribe. The notion of an Indian tribe assumes a governmental structure, however limited or simplistic, that did not often exist in reality. But over centuries of treaty-making and federal Indian legislation and policy culminating in the Indian New Deal, 1934's Indian Reorganization Act¹⁷ – the dominant and exclusive Indian governance structure became the Indian tribe.

Advocacy in favor of a tribal law that is sensitive to tribal cultures and traditions does not mean a return to pre-contact Indian community governance structures, whatever they may be. Too much time has passed since Indian people have adopted and adapted their tribal government structures. But unique tribal custom and tradition must play a part in the continued advancement of tribal governments. Indian tribes are at a critical juncture – the opening for Indian people to make their own laws and be governed by them is here.

Pre-contact, Indian communities provided for social control through a complex arrangement of interconnected relationships, dependent on storytelling and mythmaking. Elders passed down mores and other community behavioral norms to younger community members through the telling of stories. Often these stories were tied to the community's traditional territory, such as certain landmarks. The reservation system, the boarding schools and missionaries, and the dispossession of Indian lands guaranteed the loss of most of these stories.

Indian communities today are seeking to restore as many of the old stories as possible, but they need to think about new stories. New stories depict Indian people doing good and evil in recent times, with a realist bent about how Indian communities are now surrounded by a series of often hostile, alien, and dominant cultures. The old stories translated into a form of Indian community law – the new stories should be, in turn, examined for their relevance to modern tribal law.

III. Translating the New Stories into Tribal Law

Sherman Alexie's two most recent collections of short stories, *The Toughest Indian in the World* and *Ten Little Indians*, tell stories

¹⁷ 25 U.S.C. § 461 et seq.

of old and modern Indians; Indians living both on and off the reservation; unemployed poor Indians and over-educated Indian professionals; and Indians who are lovers and Indians who are fighters.¹⁸ Many of these Indians go through experiences that Alexie refers to as “ceremonies.” The ceremonies could be as simple as picking up Indians hitching on the side of the road¹⁹ or making coffee.²⁰ Or it could be old friends who haven’t seen each other for years who still remember their “secret language” when they meet again.²¹ Another ceremony is the mild banter of an Indian couple living on a reservation.²² An act of love may be a ceremony: “In his wallet, [my father] kept photographs of all his children, and pulled them out three or four times a day to examine them. He thought this small ceremony was a secret.”²³

The act of writing, of creating, is a ceremony: “It’s all about ceremony. As an Indian, you learn about these sacred spaces. Sometimes, when you’re lucky and prepared, you find yourself in a sacred space, and these poems come to you.”²⁴ Alexie’s urban Indian poet Harlan Atwater wrote poems as a ceremony of discovering how to be an Indian.²⁵

Like Alexie, the Indians in his stories tend to be urban Indians, living in Seattle for the most part. They also tend to be educated – college graduates or dropouts or current attendees. They are poets, they are lawyers and politicians, and students. These characters are Indian reservation expatriates, for the most part, and their experiences informed by their respective stories of leaving the rez, longing for the rez, and despising the rez. These Indians are expatriates from their own communities, in the same way that time

¹⁸ See SHERMAN ALEXIE, *TEN LITTLE INDIANS* (2003); ALEXIE, *THE TOUGHEST INDIAN IN THE WORLD*, *supra* note ____.

¹⁹ See ALEXIE, *The Toughest Indian in the World*, in *THE TOUGHEST INDIAN IN THE WORLD*, *supra* note ___, at 21, 21.

²⁰ See ALEXIE, *One Good Man*, in *THE TOUGHEST INDIAN IN THE WORLD*, *supra* note ___, at 209, 235 (describing making coffee as “a simple ceremony that white people perform just as well and as often as Indians.”).

²¹ ALEXIE, *Indian Country*, in *THE TOUGHEST INDIAN IN THE WORLD*, *supra* note ___, at 121, 134.

²² See ALEXIE, *Saint Junior*, in *THE TOUGHEST INDIAN IN THE WORLD*, *supra* note ___, at 150, 188.

²³ ALEXIE, *One Good Man*, in *THE TOUGHEST INDIAN IN THE WORLD*, *supra* note ___, at 209, 219.

²⁴ ALEXIE, *The Search Engine*, in *TEN LITTLE INDIANS*, *supra* note ___, at 1, 22.

²⁵ See *id.* at 40-42.

and distance has exiled all modern Indians from their traditions and customs. From these stories, we can learn from analogy, or at least learn a way to learn.

A. Class

Carey Vicenti, a Jicarilla Apache member, professor, and tribal judge, wrote that the return of the first wave of educated Indians back to their tribal communities was a mixed blessing.²⁶ Young Indians left their communities at a young age and returned with four, seven, ten years of education. Those that were successful in college and graduate or professional schools brought the ideas of the outside world into their communities unleavened by the cultural requirements of the community. In short, their work did much to assimilate tribal legal and political structures. Indian leaders and the following waves of educated Indians returning to Indian Country, according to Professor Vicente, learned from these early mistakes,²⁷ but it is no small feat to take the Anglo-American legal and political structures and to adapt them to the needs of tribal communities.

The learning curve for both those leaving and returning and those that never left is steep. Alexie's story, *Class*,²⁸ is an allegory of this process, focusing more on the difficult and ugly portions. Alexie's main character, Edgar Joseph, is a lawyer who describes himself as "growing ... braids since I'd graduated from law school. My hair impressed jurors but irritated judges. Perfect."²⁹ He married a non-Indian woman and after a combination of disaster and betrayal their relationship is on the rocks.³⁰ During this period, Edgar visits an Indian bar in Seattle. The bartender and the customers, rough and poor relative to Edgar, make it clear to him that he does not belong there. Edgar is an alien in that place, but agrees to fight the biggest, meanest Indian there, Junior.³¹ Junior beats him badly and cuts off one of his braids.³²

Class exemplifies a ceremony of the rejection of the educated Indian from Indian communities. The urban Indian bar parallels the

²⁶ See Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE, Nov.-Dec. 1995, at 134, ___.

²⁷ See *id.* at ___.

²⁸ See ALEXIE, *Class*, in *THE TOUGHEST INDIAN IN THE WORLD*, *supra* note ___, at 35.

²⁹ *Id.* at 38.

³⁰ See *id.* at 42-46.

³¹ See *id.* at 49-52.

³² See *id.* at 53-55

reservation community, often broken and disjointed. Edgar's knowledge, his experience, and even his person has become alien to that community. In a crude manner, the story is about Edgar's rejection of his Indian community. He cut his ties by moving away, marrying outside the community, and working in a field without utility to his community. As a result, he cannot bring back what he has learned. His exile is complete. Junior's desecration of Edgar's façade of Indianness, his braids, parallels the tribal community's rejection of outsider law. Edgar's law has nothing to say, has no meaning, for the tribal community. It is the same with outside law transplanted onto reservation communities. Without context, without solid footing, the law fails.

B. *The Search Engine*

Fundamental to any Indian community is a question of belonging. The new regime of laws imposed by the national government requires Indian tribes to codify its community membership requirements, so much so as to change the community into a political body (a tribe) that may be foreign to community. So Indian communities that once determined membership through informal community rules and norms now follow formal, rigid membership or citizenship requirements. Blood quantum, lineage, and documentation control the process. People with no sense of the community, from outside the community, are full participants, while people living within the heart of the community, living its language and ceremonies, are excluded. Modern American Indian law is replete with anecdotes about full-blood Indians with grandparents of four different tribes who do not meet the membership requirements of any of the four tribes; Indians of communities terminated or eviscerated by American history, part of an absent or homeless tribal community; or Indians adopted out of reservation communities into far-away non-Indian families forever lost to their original community.

The Search Engine in part is the story of the latter, a "lost bird," according to the main character Corliss Joseph.³³ Harlan Atwater, the poet hero, wrote poetry in the 1970s as a means of recovering his Indianness, of discovering what it means to be an Indian – "I started writing poems to feel like I belonged," he said. To feel more Indian. And I started imagining what it felt like to grow

³³ ALEXIE, *The Search Engine*, in *TEN LITTLE INDIANS*, *supra* note __, at 1, 40.

up on the reservation, to grow up like an Indian is supposed to grow up....”³⁴ But as an Indian adopted out of his tribe and placed with a white family in an urban area, he would never know. For Harlan, “the two best, the two most honorable and loyal people in my life are my white mother and my white father.”³⁵ Harlan stopped writing poetry because, he says, “No matter what I write, a bunch of other Indians will hate it because it isn’t Indian enough, and a bunch of white people will like it because it’s Indian.”³⁶ In the concluding scene, he asks, “[W]hat kind of Indian does that make me?”³⁷

In contrast, the main character, the young Spokane Indian college student, Corliss, did grow up on the reservation as part of her Indian community. She often speaks with her mother on the reservation and returns for frequent visits.³⁸ “She knew the name of her tribe, and the name of her archaic clan, and her public Indian name, and her secret Indian name....”³⁹ She knows who she is and where she comes from – she fits Vine Deloria’s definition: “[A tribe] means a group of people living pretty much in the same place who know who their relatives are.”⁴⁰ And yet she feels out of place as a writer, student, and poet, attending an outsider school, reading outsider literature, learning the ways of outsiders. Her uncles criticize her for reading books by Catholic priests because they abused her relatives.⁴¹

Consider a story out of the history of the Michigan Anishinaabe, Leopold Pokagon. Leopold grew up in a northern lower Michigan Ottawa community, moving to another Michigan Anishinaabe community, as was the norm of that time, to be with his spouse.⁴² While as a matter of politics and blood, Leopold was an Ottawa Indian, the Potawatomi community of southwestern Michigan and northern Indian accepted him, even adopted him.

³⁴ *Id.* at 41.

³⁵ *Id.* at 52.

³⁶ *Id.* at 41.

³⁷ *Id.* at 52.

³⁸ *See id.* at 17-20.

³⁹ *Id.* at 52.

⁴⁰ Trial Transcript at 17:127-28, *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977) (No. 76-3190) (quoted in JACK CAMPISI, *THE MASHPEE INDIANS: TRIBE ON TRIAL* 32 (1991)).

⁴¹ *See* ALEXIE, *The Search Engine*, in *TEN LITTLE INDIANS*, *supra* note __, at 1, 13, 14.

⁴² *See* VIRGIL J. VOGEL, *INDIAN NAMES IN MICHIGAN* 54 (1986).

Leopold grew to be a formidable ogema (leader) and acted as the lead negotiator during the 1833 Treaty of Chicago negotiations for what would become known as the Pokagon Band of Potawatomi Indians.⁴³ Indian community membership practices allowed for outsiders to become members, assuming they knew who their relatives were and met social criteria. These “outsiders,” often blood relatives, could be adopted.

Compare earlier political relationships such as Leopold’s to modern tribal membership practices and law. The federal government, as a general matter, imposed codified, formalized membership criteria such as blood quantum or lineage along somewhat arbitrary lines.⁴⁴ Leopold, an Ottawa (or Chippewa) with 100 percent non-Potawatomi blood, might never become a member of the Pokagon Band according to its current constitutionalized membership criteria.⁴⁵ The traditional ways of defining membership and belonging gave way to the newer, arbitrary, and formalized laws.

Harlan Atwater’s story as a lost bird, as well as the student Corliss Joseph’s story as a student learning from non-Indians, treats questions of tribal community membership in the modern era as a more complex question that tribal membership laws allow. It seems clear that Harlan would be able to restore his political affiliation with the modern Spokane Tribe, but that is a limited view of the whole story. Harlan’s exile from his reservation community is complete because he can never grow up there and he can never learn what it means to be a Spokane Indian at home. He wrote poetry as a flawed way to find that meaning, but he quit when he realized it was impossible. Even if he had moved back to his community and stayed there the rest of his life, it wouldn’t have been the same as a childhood there. Corliss did spend her childhood there and will always retain that base of inner knowledge and experience, no matter

⁴³ See JAMES A. CLIFTON, *THE POKAGONS, 1683-1983: CATHOLIC POTAWATOMI INDIANS OF THE ST. JOSEPH RIVER VALLEY* 43-51 (1984); R. DAVID EDMUNDS, *THE POTAWATOMIS: KEEPERS OF THE FIRE* 266 (1978).

⁴⁴ *E.g.*, *Snowden v. Saginaw Chippewa Indian Tribe of Michigan*, 32 Indian L. Rep. 6047, 6048 (Saginaw Chippewa Indian Tribe of Mich. App. Ct. 2005) (describing the federal government’s interference with tribal membership criteria).

⁴⁵ This example is probably not a good one, as the new Pokagon Band constitution, ratified in 2005, contains very broad adoption allowances. See *POKAGON BAND OF POTAWATOMI INDIANS OF MICHIGAN AND INDIANA CONST.* art. V, § 2 (2005).

how many years she spends apart from the community. She might spend decades away, but she would be hard-wired into her community forever.

And there is where Alexie's story identifies a fundamental disconnect between the tribal law of political membership and the tribal custom and tradition of family/political/community membership. Belonging is a notion that American Indian law identifies as being part of the fundamental inherent authority of tribal communities to define,⁴⁶ but given the long history of American Indian policy, tribes still haven't responded to the realities of community. Tribal law is available to make these changes.

C. *What You Pawn I Will Redeem*

Professor Joe Singer's recent article, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*,⁴⁷ tells the story of the Supreme Court's most recent decision relating to the Oneida Indian Nation's land claims in New York state.⁴⁸ Despite the fact that a 1793 statute, the Nonintercourse Act, provided that no purchase of Indian lands without the consent of Congress was valid "at law or equity,"⁴⁹ the Court held that the Oneida Indian Nation's claims may be subject to the equitable remedy of laches.⁵⁰ In large part, the story of the rejection of the tribal land claims in New York is based on the notion of "settled expectations"⁵¹ – that enough time has passed so that the beneficiaries of the illegal land transaction are no longer culpable for the actions of their predecessors.

Alexie's story, *What You Pawn I Will Redeem*,⁵² is a story of redeeming property in a manner in which Anglo-American common law could not conceive. In the story, the property at issue is the main character's grandmother's dance regalia, lost over several decades to

⁴⁶ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (citing *Roff v. Burney*, 168 U.S. 218 (1897)).

⁴⁷ __ CONN. L. REV. __ (forthcoming 2006).

⁴⁸ See *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 125 S. Ct. 1478 (2005); see also *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985); *Oneida Indian Nation of N.Y. v. County of Oneida, N.Y.*, 414 U.S. 661 (1974).

⁴⁹ 1 Stat. 329 (1793), codified as amended at 25 U.S.C. § 177.

⁵⁰ *City of Sherrill*, 125 S. Ct. at 1489-90; see also *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius*, 2006 WL 346424 (N.D. N.Y., Feb. 14, 2006).

⁵¹ *City of Sherrill*, 125 S. Ct. at 1492.

⁵² See ALEXIE, *What You Pawn I Will Redeem*, in *TEN LITTLE INDIANS*, *supra* note __, at 169.

theft and found in a pawnshop in Seattle.⁵³ Though Jackson Jackson (he calls himself “Jackson Squared”) has never seen the regalia in person, he knows that his grandmother would sew a yellow bead into the armpit for identification purposes – and the bead is there.⁵⁴ Jackson asks the pawnbroker for the regalia, but he refuses on the ground that he paid \$1000 for the regalia and that no police officer would believe Jackson, who is homeless.⁵⁵ The pawnbroker makes a deal with Jackson, which is no deal at all, that he will sell the regalia to Jackson for only \$999 if he can come up with the money in one day.⁵⁶ The story involves Jackson’s quest to raise the money in a single day. He fails, returning to the pawnbroker the next day with the same amount of money with which he started – five dollars.⁵⁷ The pawnbroker, after asking if Jackson worked hard for the money, gives him the regalia.⁵⁸

Postmodern legal scholars have begun the long process of identifying the legal interests underlying Anglo-American common law doctrines.⁵⁹ It is time that tribes, tribal advocates, and tribal courts do the same before they adopt these common law doctrines.⁶⁰ In *What You Pawn*, the law of theft and contract that would apply to Jackson’s grandmother’s regalia benefits the good faith purchaser, the party investing the most capital or resources into the purchase and maintenance of the regalia. Like the landowners of the land subject to the New York Indian land claims, the pawnbroker knows he has the benefit of the law. He knows the black letter and the application of the law means he will win in any court of law. But

⁵³ See *id.* at 171-72.

⁵⁴ See *id.* at 172.

⁵⁵ See *id.* at 173-74.

⁵⁶ See *id.*

⁵⁷ See *id.* at 193.

⁵⁸ See *id.* at 194.

⁵⁹ E.g., Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029 (1992).

⁶⁰ E.g., *Turtle Mountain Judicial Board v. Turtle Mountain Band of Chippewa Indians*, No. 04-007, at 17-18 (Turtle Mountain Band Appellate Court 2005) (questioning whether the tribal court should adopt the “clean hands doctrine”) (citing Russel Lawrence Barsh, *Putting the Tribe in Tribal Court: Possible? Desirable?*, 8 KAN. J. L. & PUB. POL’Y, Winter 1999, at 74, 81, citing in turn *Simplot v. Ho-Chunk Nation Dept. of Health*, 23 Indian L. Rptr. 6235, 6243 (Ho-Chunk Nation Tribal Ct., Aug. 29, 1996)).

Jackson, perhaps, teaches a lesson about the value of what academics might call “cultural property.”⁶¹

Jackson’s quest to raise the money with which to repurchase his grandmother’s regalia is a study of his ambivalence about Anglo-American notions of property and capital. He starts with the five dollars he and his friends had on them when they saw the regalia in the pawnshop, plus twenty dollars the pawnshop owner gives him, and buys liquor with the money.⁶² He talks the Real Change office into letting him have 50 papers for free with the intent of selling them for a dollar each, but sells only five papers.⁶³ He spends four of the five dollars on cheeseburgers.⁶⁴ He steals \$2.50 from his friend Junior and uses that money to buy a cigar and two lottery tickets.⁶⁵ He wins \$100 from his lottery ticket escapade, gifts \$20 of that prize to the woman that sold him the tickets, and uses the rest to buy shots at an Indian bar.⁶⁶ Jackson passes out and is rescued by a police officer that looks after him. The officer offers to help prosecute the pawnshop owner, but Jackson declines. The cop gives him thirty dollars.⁶⁷ Jackson spends \$25 on breakfast for himself and four homeless Aleut Indians.⁶⁸ It is with that five dollars Jackson returns to the pawnshop. The most Jackson could have collected that day was \$130.50 (at least according to my rough calculations), but Jackson wouldn’t have eaten or shared his breakfast and his bounty with his friends and compatriots.

Two property systems (and possibly more) come into contact with each other in *What You Pawn*. Jackson, a Spokane Indian, comes from a culture and a community used to sharing, even to one’s detriment. Hoarding property and capital, even for a worthy and noble purpose, is difficult. But this property system also values the cultural and personal significance of the dance regalia in a way

⁶¹ E.g., Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1133 (2005); Angela R. Riley, “Straight Stealing”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005).

⁶² See ALEXIE, *What You Pawn I Will Redeem*, in TEN LITTLE INDIANS, *supra* note ___, at 169, 174.

⁶³ See *id.* at 177-78.

⁶⁴ See *id.* at 179.

⁶⁵ See *id.* at 179-80.

⁶⁶ See *id.* at 180-82.

⁶⁷ See *id.* at 185-90.

⁶⁸ See *id.* at 191-92.

that doesn't square with a bank account balance. Comparing that property system (if it could even be called a "property" system) with the Anglo-American system that incorporates the concepts of a pawnbroker and pawnshop is what the Supreme Court could not do in its New York Indian land claim cases. Tribal policymakers in filling in the bubble of tribal law and tribal governance should be aware of these differences.

One wonders what the pawnbroker would have done had he known Jackson's full story of the 24 hours.

D. *The Sin Eaters*

In 2005, the popular online fake news source, *The Onion*, published an article called "Area Cherokee in Violation of Indian Removal Act of 1830,"⁶⁹ a story about how the United States military had issued an arrest warrant for a Cherokee family living in present-day Georgia, who seemed to have forgotten that they were living in Georgia in violation of federal law. The military planned to forcibly remove the family to the Cherokee reservation in Oklahoma. The story is an obvious satire of American Indian policy, but, inside of many Indians, there is a part of them that believed this story.

Alexie's *The Sin Eaters* is another fictional story of the United States military acting to remove Indian people from their homes and it is, without doubt, the horror story to end all horror stories for modern Indian people.⁷⁰ In *The Sin Eaters*, Indians from around the country awaken one morning to the sound of military aircraft and jackboots as military personnel invade Indian Country. They divide the individual Indians by blood quantum and tribe, load them into military transport at gunpoint, and beat or kill those who resist or run.⁷¹ The reason for this declaration of war and forced march to yet another concentration camp is never explained, except with reference to a "contamination."⁷²

The divide and conquer with governmental force reads as an allegory for the bureaucratic nightmare of Indian affairs when the

⁶⁹ *Area Cherokee in Violation of Indian Removal Act of 1830*, 41 THE ONION, No. 49, Dec. 7, 2005, available at <http://www.theonion.com/content/node/43197> (last visited February 19, 2006).

⁷⁰ See ALEXIE, *The Sin Eaters*, in THE TOUGHEST INDIAN IN THE WORLD, *supra* note ___, at 76.

⁷¹ See *id.* at 82-101.

⁷² *Id.* at 93.

Bureau of Indian Affairs controlled Indian Country like a authoritarian dictatorship. The Bureau's local agents often forced Indian tribes to enact laws creating a link between political and property rights and blood quantum. In some circumstances, the Bureau considered Indians with a white parent or grandparent to be "competent," meaning that they were legally capable of disposing of their property – to the advantage of the government agent or to a white land speculator. In other instances, the Bureau considered Indians with an Indian parent or grandparent to be "incompetent," meaning that the Bureau was legally authorized to dispose of their property – again, to the advantage of the government agent or to a white land speculator.

The contamination theme of the story reads as a retelling of the history of Euro-American contagions that eviscerated the Indigenous populations from the moment of First Contact even to the beginning of the last century. The twist that Alexie gives this story is that, in *The Sin Eaters*, the American government appears to be trying to prevent Indians from being contaminated. That twist doesn't change the outcome, however, as Alexie makes clear that the government is studying and exploiting Indian people for the benefit of the non-Indian people of America.

The government's placement of Indian people in military compounds reads like an allegory of the boarding school and missionary system of the 19th and 20th centuries, where the government and the church took away Indian children to boarding schools with the intent to destroy the Indian within, a sinister and vicious form of assimilation. The analogy to boarding schools continues with the sexualization of the torture that goes in on the place where the military holds Indian people.

In some ways, *The Sin Eaters* is a baseline for American Indian law and policy. Alexie reminds us that, at any moment, perhaps without notice, the American government can take away Indian lives and property. The story is the ultimate horror story because, as the tagline for the remake of the film, *The Hills Have Eyes*, suggests, the lucky ones die first. The survivors, the subjects of this governmental and military action, lose their homes, lose their families, lose their souls – all at gunpoint. The new reservation, the military compound with its torture rooms and isolating sleeping quarters, forces the Indian characters into a worse existence than

death. One underlying current to the story is the notion that perhaps what is being done to these Indian people is for the benefit of mankind, or at least to Americans.

And there is the fourth analog to American Indian law and policy. This new policy of genocide and imprisonment of Indian people is an allegory for the undercurrent of all American Indian law and policy – Indian people must be sacrificed for the greater good of non-Indians and, perhaps later, the Indian survivors. As the doctors take bone marrow from Jonah’s hips, they attempt to comfort him with the assertion that Jonah’s sacrifice “is saving the world.”⁷³ Manifest Destiny, resulting in the practical enslavement of Indian people, the destruction of Indian cultures, and the dispossession and exploitation of Indian lands, was for the benefit of the Americans. Alexie’s story instructs us that the next time the American government comes for Indian people, it will be for much bigger and more desperate reasons. The small Indian man, the preacher, reminds the other captives, “[Y]ou’re a worm. You’re less than a worm to them. You’re an exile, you’re a leper, you’re a pariah, you’re a peon, you’re nothing to them. Nothing.”⁷⁴

The fifth and final analog of *The Sin Eaters* to American Indian law and policy is the notion of “measured separatism,” a term used by Charles Wilkinson to explain the public policy of Indian treaties and the reservation system.⁷⁵ Unlike most other racial, ethnic, and legal minorities, Indians and Indian tribes tended to avoid integration into the greater American polity. The “melting pot” taught in public schools (and since discredited by progressive scholars and politicians beginning in the 1960s) makes no sense whatsoever to reservation Indians and is a sad, twisted joke to urban Indians. “Measured separatism” lost its cutting edge during the ravages of Manifest Destiny, gold rushes, and the Allotment Era, but it still retains cutting legal validity, for example, in the notions of tribal sovereignty, the trust relationship, and the “political status” classification of Indians and Indian tribes. *The Sin Eaters* reminds the reader that the intimate relationship between Indians, Indian tribes, and the federal government is a knife that cuts both ways. The small man, the preacher, says, “[T]hose soldiers, those people are

⁷³ *Id.* at 115.

⁷⁴ *Id.* at 106.

⁷⁵ WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW, *supra* note ___, at 14.

getting things ready. They've got their own ceremonies, you know?"⁷⁶

And here is *The Sin Eaters*' greatest value to American Indian leaders and policymakers. It is a reminder that the trust relationship isn't about trust and that tribal sovereignty is a hollow vessel without something powerful to fit it. *The Sin Eaters* is a guidepost, a reminder that tribal law and culture is always about survival and that everything that has come before must instruct and inform tribal leaders about how to proceed.

IV. Tribal Sovereignty, Tribal Law, and Stories

In the story *The Search Engine*, Alexie states, "Ancient questions [are to be] answered with ancient ceremonies."⁷⁷ The "ancient" questions are about political membership, leadership, government, religion, punishment – all of which federal Indian law refers to as internal or intramural affairs. The old stories, assuming Indian people and tribal governments listen, should offer a great deal to the answering of these questions. Professor John Borrows, an Anishinaabe Indian from Canada, writes about how the old stories, such as trickster tales, could form the basis for many tribal common law doctrines.⁷⁸ For example, Professor Borrows finds the underlying reasons for requiring consultation with all affected communities before making decisions affecting the environment in the Anishinaabe trickster story, "The Duck Dinner."⁷⁹

The converse to "ancient" questions and stories is modern questions and stories. Alexie seems to be suggesting that the new questions must be answered with new stories. Corliss Joseph doesn't take to vision questions, but instead "negotiate[es] her way through a colonial maze ... [with] good credit and ... a Visa card."⁸⁰ Harlan and Corliss cry together in the back of a used book store, creating an "original ceremony" because "[e]very ceremony has to be created

⁷⁶ ALEXIE, *The Sin Eaters*, in *THE TOUGHEST INDIAN IN THE WORLD*, *supra* note __, at 76, 105-06.

⁷⁷ ALEXIE, *The Search Engine*, in *TEN LITTLE INDIANS*, *supra* note __, at 1, 27.

⁷⁸ See JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* 13-23, 46-54 (2002).

⁷⁹ See *id.* at 46-54 (citing RICHARD M. DORSON, *BLOODSTOPPERS & BEARWALKERS* 49-50 (1952)).

⁸⁰ ALEXIE, *The Search Engine*, in *TEN LITTLE INDIANS*, *supra* note __, at 1, 27.

somewhere....”⁸¹ Alexie’s characters perform ceremonies with every little action they take that reminds them they are American Indians. Some are significant and others, most others, are not. But it is the insignificant events in history that can become important precedents in law.

These modern stories can be catalysts for change and development of an Indigenous tribal law. Maybe stories about people like Corliss Joseph’s lost bird will encourage or persuade tribal governments to amend their membership criteria or rethink the notion of tribal membership altogether. Maybe stories like Jackson Jackson’s grandmother’s dance regalia will influence tribal cultural property law. Indians are living stories every moment of every day and these stories can be influential and useful to the development of tribal law.

In 2003, Sherman Alexie released his film, *The Business of Fancydancing* in New York City and other major cultural markets. Alexie never found a major distributor for the film, which is about a gay Indian poet, and released it on his own. The critics didn’t dislike it, but didn’t like it as much as they liked Alexie’s previous film, *Smoke Signals*, released in 1998, which did receive wide distribution, excessive promotion, and critical acclaim. Months prior to the official release date of *The Business of Fancydancing*, the Bay Theater in Suttons Bay, Michigan, four miles from Peshawbestown, acting in accordance with local demand, asked for and received a print of the film. They showed it to standing room only crowds packed with Michigan Anishinaabeg for a week, during which Alexie made an appearance at a local school. Like *Smoke Signals*, as critics noted, *The Business of Fancydancing* is full of in-jokes, references that Indian people from all over North America understand. They say you can tell the Indians from the non-Indians from who is laughing at some of the stories.

But these stories are more than in-jokes. These stories are commentary and literature about Indian people today – Indian people who grew up driving beat-up Indian cars but own Hondas now; Indian people who once lived on natural gas and oil royalties but now live off of food stamps; Indian people who lived in tar paper shacks as children but work in the tribal forestry and natural resources department now; and Indian people who grew up under a

⁸¹ *Id.* at 49.

business council created by a model IRA constitution and who still live under the auspices of that government and that constitution. If you watch Indian people watching Alexie's (and others') films, the parts where they aren't laughing are as important as the parts where they are laughing. The stories help Indian people survive. These stories help Indian people learn from each other. And Indian people *are* paying close attention to these stories. They're written for us, by us.

Conclusion

From the East, Indian people look to the South next. The South represents a time of growth and passion – and maturity. The creative labors of the earlier times begin to bear fruit. Many Indian people believe that the South represents fire, with both destroying and cleansing properties. South is the direction of fuller understanding.

Tribal governments – and the Indian people that operate them and hold them accountable – must develop a law and tradition of governance that learns from the experiences of individual Indian people and communities, making the new tribal law harmonize with the new (and old) stories of Indian people. Fundamental questions, such as who Indian people are in a legal sense under tribal law, must be answered in light of the modern experiences of Indian people, not the laws and traditions imposed by outsiders.

Literature informs and influences law and culture in subtle but significant ways. Indian people and tribal governments should learn from their own literature as well.

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