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"[This] I Know from My Grandfather": The Battle for Admissibility of Indigenous Oral History as Proof of Tribal Land Claims

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"[THIS] I KNOW FROM MY GRANDFATHER:"[1] THE BATTLE FOR ADMISSIBILITY OF INDIGENOUS ORAL HISTORY AS PROOF OF TRIBAL LAND CLAIMS

*Hope M. Babcock**

Abstract

A major obstacle indigenous land claimants must face is the application of federal evidentiary rules, like the hearsay doctrine, which block the use of oral history to establish legal claims. It is often oral history and stories that tribes rely upon as evidence to support their claims, reducing substantially the likelihood of a tribe prevailing. Indigenous oral history presents unique challenges to judges when faced with its admissibility. Canadian courts have largely overcome these challenges by interpreting evidentiary rules liberally, in favor of the aborigines. As such, Canadian aborigines have enjoyed greater land claim success than indigenous claimants in the United States, raising the question why United States courts do not follow the Canadian example. After examining the evidentiary strengths and weaknesses of indigenous oral history and the barriers posed to its admissibility in court, this article finds the answer is the willingness of Canada to both recognize the harm done to aboriginal peoples during the country's colonial history and to make amends by opening the courts to these claims.

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1. Andrew H. Fisher, *This I Know from the Old People: Yakima Indian Treaty Rights as Oral Tradition*, MONT.: MAG. W. HIST., Spring 1999, at 2, 17.

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Introduction

> *If our federal courts are to respond to this nation's commitment to cultural diversity, they must be prepared to hear and really listen to Native American voices, quite different from their own, speaking in terms shaped by their non-literate cultural heritage. By doing so, the federal courts would be honoring the Western, liberal tradition that they inherit based on the idea that everyone benefits by adding voices to the marketplace of ideas.*[2]

Both the United States and Canada have faced similar judicial hurdles in determining land title claims between Indian and non-Indian claimants. The results have varied greatly between the two court systems, largely because of different evidentiary rules and different attitudes toward indigenous claimants.

U.S. courts have typically closed their doors to indigenous oral history as proof of Indian land claims based on the hearsay and best evidence rules, because the original story teller cannot be produced and there is no written

2. Glen Stohr, Comment, *The Repercussions of Orality in Federal Indian Law*, 31 ARIZ. ST. L.J. 679, 704 (1999).

record to confirm the recounted events.[3] Yet these stories often *are* the "best" evidence of such claims; in fact, they may be the only evidence. Because tribal land claims can dispossess current non-Indian landowners or require the payment of large sums of money to settle such claims,[4] they disrupt the existing economic, social, and political order.[5] Evidentiary rules that block their realization, therefore, frequently have popular and judicial support — even in Canada, where oral history has been more accepted.[6] The fluctuating and ever-shifting federal policies toward Indians, a pendulum between assimilation and self-determination,[7] makes it is easy to see why the United States would be hesitant to grant Indian claimants a right to use oral history in court — allowing such evidence could make Indians successful in their land claims.

Despite the commonality between the United States and Canada's early experience with its indigenous peoples and shared attitudes toward them,[8] Canada's recent history with its indigenous peoples is quite different from the United States. This departure is due principally to a 1982 constitutional amendment recognizing the rights of First Nation peoples.[9] This constitutional reconciliation has had a positive impact on aboriginal

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3. *See infra* at 39-41 (discussing examples of U.S. courts rejecting oral history as proof of an Indian land claim).

4. *See, e.g.*, GARETH DUNCAN & GILLIAN PIGGOTT, ABORIGINAL TITLE IN BRITISH COLUMBIA: TSILHQOT'IN NATION V. BRITISH COLUMBIA 1 (2008) (discussing the recent Canadian Supreme Court decision that recognized the group's title to approximately 200,000 hectares, roughly half of the claim area, and granted the tribe hunting and trapping rights in the entire claimed area).

5. Gerald Torres & Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 657 ("To grant sub-groups a special status or alternative basis for defining themselves calls into question the 'substantiality of the ethical order' that defines 'rights' in terms of individuals.").

6. *See* David Milward, *Doubting What the Elders Have to Say: A Critical Examination of Canadian Judicial Treatment of Aboriginal Oral History Evidence*, 14 INT'L J. EVIDENCE & PROOF 287, 302 (2010) ("A legal realist appraisal may well conclude that the real objective is to keep Aboriginal interests subordinated to Canadian state sovereignty and policies.").

7. Torres & Milun, *supra* note 5, at 659.

8. Elizabeth Furniss, *Indians, Odysseys and Vast, Empty Lands: The Myth of the Frontier in the Canadian Justice System*, 41 ANTHROPOLOGICA 195, 197 (1999).

9. Constitution Act, 1982, s. 35(1), *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (entitled "Rights of the Aboriginal Peoples of Canada," and provides as follows: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.").

claimants, leading Canadian courts to make admissible indigenous oral history when proffered in support of an aboriginal land claim.[10]

A close examination of what constitutes tribal oral history, how it is developed, and how it is passed between generations shows it is more reliable and enduring than one might believe.[11] Tribal stories are not equivalent to the utterances barred under the hearsay rule, and are frequently better evidence than what the written historical record contains.[12] While questions remain about the trustworthiness of oral history and the fitness of courts to deal with evidence from indigenous cultures, the Canadian experience shows that there is sufficient flexibility in the rules of evidence to enable courts to accept oral history and weigh its probative value, as with any other evidence. Sufficient safeguards can also be put in place to establish authenticity and improve reliability.

But, unlike Canada, the United States does not have a constitutional directive to "reconcile" indigenous and non-indigenous interests. Without this type of constitutional amendment in the United States, U.S. courts have little motivation to lend evidentiary credence to tribal oral history in support of Indian land claims.

This article discusses the challenges a common law court faces when dealing with indigenous oral history in a tribal land claim proceeding and how those challenges can be overcome. The primary goal of this article is to showcase the injustice of the current evidentiary barriers to tribal oral history in the United States and to expose the lack of a rational basis for maintaining those barriers, especially in light of the Canadian judicial experience.

The first part of this article explains the importance of land to indigenous peoples, and exposes some fundamental differences in the judicial approach of Canada and the United States toward the legal basis of indigenous claims. This part also lays out how Canadian aboriginal claimants establish a land claim. The second part, after briefly introducing the tribal practice of legal storytelling, discusses indigenous oral history, its various purposes, the forms that it may take, the ways in which it may be transmitted over time, and the important role land plays in those stories. Part three looks at

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10. DUNCAN & PIGGOTT, *supra* note 4, at 25 (citing Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (Can.)).

11. Milward, *supra* note 6, at 288 ("Aboriginal societies often had strict protocols to preserve the integrity of their oral histories, and their transmission from generation to generation.").

12. *See infra* Part II.B (discussing the features of tribal stories and oral history that can make it more reliable evidence than a written record).

the uneasy fit between oral history evidence and the type of evidence usually presented in court. Part three also discusses the additional complexities that tribal language and cultural differences bring to a land claim adjudication.[13] Part four examines the barriers to the introduction of oral history presented by the best evidence and hearsay rules, and the adoption by Canadian courts of a "principled exception" to the most serious of these barriers, the hearsay rule. Included in this discussion is the creative use by Canadian courts of judicial notice and other evidentiary procedures to authenticate oral history in aboriginal land claim proceedings when a written record or first-hand observer is unavailable. This part also identifies the measures Canadian courts have enacted to authenticate aboriginal oral history sufficiently to allow its use in court without disrupting the integrity of the judicial process. The fifth part of this article discusses the differences between the experience of Canadian courts with aboriginal oral history and that of courts in the United States.

There is no objective reason why U.S. courts could not take the same path as Canadian courts. This article concludes that the U.S. has not adopted the Canadian evidentiary rule due to the federal government's fluctuating and fickle approach to the "Indian problem."[14] Unlike Canada, which has made efforts to address evidentiary barriers with its First Nations peoples, the United States has only recently entered an era of indigenous Self-Determination,[15] and the jury is still out on the benefits of this era.

I. Indigenous Peoples and Their Special Relationship to the Land

> *"Our culture enables us to make sense of our lives and determines, to a large extent, what life choices we make, and those choices must make sense according to the stories our culture tells about us."*[16]

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13. Geoff Sherrott, *The Court's Treatment of Evidence in Delgamuukw v. B.C.*, 56 SASK. L. REV. 441, 441 (1992)(citing ERIC COLVIN, LEGAL PROCESS AND THE RESOLUTION OF INDIAN CLAIMS 28 (1981)) (stating that non-tribal judges may be ill-suited to have a cultural understanding of aboriginal oral history). This might be why U.S. courts resist the admissibility of oral history. *See also* Brian J. Gover & Mary Locke Macaulay, *"Snow Houses Leave No Ruins:" Unique Evidence Issues in Aboriginal and Treaty Rights Cases*, 60 SASK. L. REV. 47, 48 (1996); *id.* at 89 (reporting that the trial in the *Delgamuukw* case took 374 days and lasted three years, while the *Bear Island* litigation took 120 days).

14. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 41 (6th ed. 2011).

15. *Id.* at 217.

16. *Id.* at 657.

To understand indigenous oral history, one needs to understand the culture, cosmology, mythology, and land relations of that indigenous group.[17] These factors make indigenous oral history unique to each separate indigenous group because cultures and mythologies differ among various indigenous groups. For these reasons, the uniqueness of indigenous oral history adds doubt to its reliability and utility as evidence in a court proceeding. It is equally important to know what an indigenous claimant must prove in order to establish her land claim because the burden of proof will be affected by the role, or lack thereof, that oral history plays in putting forth evidence.

A. Aboriginal Peoples and Land

The terms "indigenous peoples" or "aboriginal peoples" generally refers to "the living descendants or pre-invasion inhabitants of lands now dominated by others."[18] Connection to land is of paramount importance to indigenous peoples and is coupled with their determination "to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."[19] Land is a "constituent element" of many tribes.[20] The centrality of land to indigenous peoples is based on more than the potential land uses — land also provides tribes the cultural identity and security that they need to survive.[21] The importance of land to many indigenous cultures distinguishes them from non-indigenous ones.[22]

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17. *Id.* at 649 n.77.

18. Eric Dannenmaier, *Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine*, 86 WASH. U. L. REV. 53, 58 (2008). This article uses the terms aboriginal, indigenous, and tribe interchangeably, understanding that each can have a unique meaning especially in different countries.

19. *Id.* at 59 (quoting JOSÉ R. MARTÍNEZ COBO, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, FINAL REPORT (1981-86), published as U.N. Doc E/CN.4/Sub.2/476/Add.1-4; U.N. Doc E/CN.4/Sub.2/476/2/Add.5; U.N. Doc E/CN.4/Sub.2/1982/2/ Add.1-6; U.N. Doc E/CN.4/Sub.2/1982/2/Add.6; U.N. Doc E/CN.4/Sub.2/1983/21/Add.1-8; and U.N. Doc E/CN.4/Sub.2/1986/7, *available at* http://social.un.org/index/IndigenousPeoples/Library/Mart%C3%ADnezCoboStudy.aspx (last visited Sept. 10, 2012)).

20. Torres & Milun, *supra* note 5, at 655; *see also id.* at 655-66 ("[T]he indexical value of land in establishing identity is completely different than the legal value of land inscribed in deeds. . . . In this way, the law can undermine the foundational significance of land for a particular culture.").

21. DUNCAN & PIGGOTT, *supra* note 4, app. E., at 76 ("A tract of land is not just a hunting blind or a favourite fishing hole. Individual sites such as hunting blinds and fishing

Indigenous peoples' relationship to their ancestral land is also imbued with beliefs about the spirit world.[23] For many native peoples, the landscape "is the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning."[24] The metaphysical dominates an indigenous peoples' relationship to their land.[25] This spiritual relationship dictates accepted practices on the lands and translates into a strong duty to protect that land.[26] These practices also create a special bond between the land and the indigenous group.[27] This "relationship to land is part of the Indian worldview — indigenous people 'often see themselves as 'belonging' to the land or being part of the land.'"[28]

While the concept of land ownership and the accompanying documentation is of critical importance to non-indigenous peoples, it is of little importance to indigenous peoples.[29] Europeans mistakenly thought that because indigenous peoples did not fence in their land or mimic European notions of property ownership, land was unimportant to them, as

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holes are but a part of the land that has provided 'cultural security and continuity' to Tsilhqot'in people for better than two centuries. A tract of land is intended to describe land over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people." (quoting Tsilhqot'in Nation v. British Columbia, 2007 B.C.S.C. 1700 (Can.))).

22. Stohr, *supra* note 2, at 688 ("The second major difference between Native American and Western religions, and one that has perhaps the largest impact on litigation, is the importance of land and sacred places").

23. Andie Diane Palmer, *Evidence 'Not in a Form Familiar to Common Law Courts': Assessing Oral Histories in Land Claims Testimony after Delgamuukw v. B.C.*, 38 ALTA. L. REV. 1040, 1049 n.36 (2000).

24. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989).

25. Caskey Russell, *Cultures in Collision: Cosmology, Jurisprudence, and Religion in Tlingit Territory*, 33 AM. INDIAN Q. 230, 240 (2009) ("Tlingit property and jurisprudence . . . are inextricably intertwined with the metaphysical") (quoting Rosita Worl, Tlingit At.oow: Tangible and Intangible Property (1998) (unpublished Ph.D. dissertation, Harvard University) (on file with Harvard University Library system)).

26. VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 10 (1984) ("With respect to the lands they lived on, many Indians felt a strong religious duty to protect their territory.").

27. DUNCAN & PIGGOTT, *supra* note 4, at 64.

28. John C. Hoelle, *Re-Evaluating Tribal Customs of Land Use Rights*, 82 U. COLO. L. REV. 551, 585 (2011) (quoting Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economies, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 284-85 (1996).

29. Torres & Milun, *supra* note 5, at 656.

there was no visible system of land ownership.[30] Indeed, indigenous peoples "live within a place designated for them in the dominant society's imaginary of them,"[31] which devalues their connection to the land, even though land and specific places in the landscape have always been and remain of paramount importance to them.[32] Because Europeans saw no customary indications of land ownership, they eventually expelled indigenous peoples from their land[33] and destroyed not only specific places of indigenous importance, but also the very fabric of their relationship to the land.[34] Despite this tortured history, indigenous peoples survived.[35]

B. General Background Information on Indigenous Land Claims and How They Are Established in Canadian Courts

Indigenous land claims are based on the legal notion of a "right" or title to the land.[36] Understanding what is entailed in establishing an indigenous land claim or right to land is important because of oral history's potential role in those claims.

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30. BRUCE CHATWIN, THE SONGLINES 56 (1987) ("White men . . . made the common mistake of assuming that, because Aboriginals were wanderers, they could have no system of land tenure.").

31. Larry Nesper, *Law and Ojibwe Indian "Traditional Cultural Property" in the Organized Resistance to the Crandon Mine in Wisconsin*, 36 LAW & SOC. INQUIRY 151, 162 (2011).

32. DUNCAN & PIGGOTT, *supra* note 4, app. D., at 65 ("[A]boriginal title is ultimately premised upon the notion that the specific land or territory at issue was of central significance to the aboriginal group's culture. Occupation should therefore be proved by evidence not of regular and intensive use of the land but of the traditions and culture of the group that connect it with the land. Thus, intensity of use is related not only to common law notions of possession but also to the aboriginal perspective.").

33. DUNCAN & PIGGOTT, *supra* note 4, app. E., at 76 ("As a consequence of colonization and government policy, Tsilhqot'in people can no longer live on the land as their forefathers did.").

34. Alexander Reilly, *The Ghost of Truganini: Use of Historical Evidence as Proof of Native Land*, 28 FED. L. REV. 453, 459 (2000) [hereinafter Reilly, *Ghost of Truganini*] ("On the historical evidence alone, it seemed that the impact of European settlement on the Aboriginal people of the region was so devastating that it would be very difficult to establish a continuing traditional connection with the land in its wake.").

35. *Id.* at 474.

36. Cheryl Suzack, *The Transposition of Law and Literature in* Delgamuukw *and* Monkey Beach, 110 S. ATLANTIC Q. 447, 454 (2011).

In former Commonwealth countries, the concept of an indigenous land right or Indian title has its origins in indigenous occupation of land[37] before any declaration of sovereignty by the British Crown.[38] These rights survived colonial conquest and the colonization of indigenous lands,[39] "unless such interest has been formally extinguished by legislation."[40] Contrary to U.S. law,[41] Canadian courts never viewed North America as *terra nullius,* with no pre-existing legal systems prior to European arrival.[42] In Canadian courts, indigenous law is "actually law," and imposes an obligation on the courts to bring "laws that arise from the standards of the indigenous peoples before the court" into their decision-making process.[43] Unlike U.S. courts, a variety of former Commonwealth courts have ruled that indigenous land rights are "grounded in their pre-existing customary laws which have survived colonialism."[44] Indigenous customs, including native systems of land tenure,[45] are a principle source of indigenous title.[46]

"[I]ndigenous title 'protects what remains of the unique relationship to land of the indigenous peoples.'"[47] For example, for a land claim to prevail in a Canadian court, indigenous plaintiffs must establish that since the time of Canadian sovereignty, they have: maintained a substantial connection to the land,[48] that the connection is of 'central significance' to their distinctive

37. Under Canadian law, "occupation" includes more than the villages where native peoples lived; it includes the surrounding, even the remote lands on which they depended for survival. *See* DUNCAN & PIGGOTT, *supra* note 4, app. D., at 64.

38. Jérémie Gilbert, *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine of Indigenous Title*, 56 INT'L & COMP L.Q. 383, 390 (2007).

39. *Id.* at 385.

40. *Id.* at 391, 403 ("[The] concept of aboriginal title is by itself discriminatory as 'it provides only defective, vulnerable and inferior legal status for indigenous land and resource ownership'.").

41. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 567-68 (1823).

42. DUNCAN & PIGGOTT, *supra* note 4, app. D., at 63.

43. *Id.* at 62.

44. Gilbert, *supra* note 38, at 589-90; *see also* Hoelle, *supra* note 28, at 558 ("The customary law of Indian tribes is not immediately accessible, as it is seldom written down by Indians themselves.").

45. Gilbert, *supra* note 38, at 592. It is not always easy to discover this customary law.

46. *Id.* at 591 ("[T]he existence of indigenous peoples' rights to their land is to be found in indigenous peoples' own customary laws.").

47. *Id.* at 597 (quoting Alexander Reilly, *The Australian Experience of Aboriginal Title: Lessons for South Africa*, 16 S. AFR. J. ON HUM. RTS. 512, 515 (2000)).

48. Gilbert, *supra* note 38, at 597.

culture,"[49] and that they have engaged in traditional uses of that land.[50] A substantial connection to the land does not require complete continuity of occupation.[51] "Occasional entry and use," however, is not sufficient.[52]

Under the Canadian common law doctrine of indigenous title, the requirement of "continuity" means that native peoples must still occupy some portion of their traditional land.[53] Physical occupation sufficient to establish title to the land may be shown by regular use of the land in question, including hunting and fishing or other types of exploitation of the land's resources.[54] However, seasonal use of these lands for hunting and fishing is insufficient to establish hunting or fishing rights.[55]

The continuity requirement can create inequities. For example, this criterion can be difficult for nomadic indigenous peoples to meet[56] because ties to a particular geographic area are difficult to establish due to historic roaming.[57] Additionally, the judicial requirement that indigenous groups

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49. DUNCAN & PIGGOTT, *supra* note 4, app. D. at 57-58 ("If the group has 'maintained a substantial connection' with the land since sovereignty, this establishes the required 'central significance.'" (quoting Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 151 (Can.))).

50. John Borrows, *Frozen Rights in Canada, Constitutional Interpretation and the Trickster*, 22 AM. INDIAN L. REV. 37, 43 (1997) ("Aboriginal rights protect only those customs which have continuity with practices existing before the arrival of Europeans. Aboriginal rights do not sustain central and significant Aboriginal practices which developed solely as a result of their contact with European cultures.").

51. *See* John McNeil, *The Onus of Proof of Aboriginal Title*, 37 OSGOODE HALL L. J. 775, 777 (1999) ("Needless to say there is no need to establish an unbroken chain of continuity between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title." (citations omitted) (quoting *Delagamuukw*, 3 S.C.R. at 1103) (internal quotation marks omitted)).

52. *See* DUNCAN & PIGGOTT, *supra* note 21, at 24 ("To say that title flows from occasional entry and use is inconsistent with . . . the approach to aboriginal title which this Court has consistently maintained" (quoting R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220, para. 59 (Can.))).

53. Gilbert, *supra* note 38, at 596 ("Under the doctrine on indigenous title, indigenous peoples' right to their land would be recognized by national jurisdictions to the extent that indigenous communities have survived dispossession and still live on parts of their lands.").

54. DUNCAN & PIGGOTT, *supra* note 4, app. D., at 57.

55. *Id.* at 56.

56. R.D. Lumb, *Native Title to Land in Australia: Recent High Court Decisions*, 42 INT'L & COMP. L.Q. 84, 100 (1993).

57. DUNCAN & PIGGOTT, *supra* note 4, app. D., at 57, 62, & 74 (suggesting the need to modify common law understandings of physical occupation being proof of possess to reflect nomadic or semi-nomadic types of occupation).

continue to engage in traditional practices on their land, if carried to the extreme, can freeze indigenous customs and practices,[58] requiring tribes to conform to non-indigenous land practices. Rigidly adhering to the continuity requirement can create a "false notion of history," [59] and can diminish tribal authenticity and sovereignty, as tribes are perceived by the non-indigenous culture as having not "evolved" enough to meet the continuity standard.[60]

Modern Canadian courts have tempered the continuity requirement to be more favorable to indigenous land use practices[61] because "imposing the requirement of continuity too strictly would risk 'perpetuating the historical injustices suffered by aboriginal peoples at the hands of colonisers who failed to respect aboriginal rights to land.'"[62] Once evidence of occupation is established, Canadian courts accept it as "historical fact,"[63] thereby lending more weight to the role of oral history.

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58. *See* Nicholas Buchanan & Eve Darian-Smith, *Introduction: Law and the Problematics of Indigenous Authenticities*, 36 LAW & SOC. INQUIRY 115, 121 (2011) ("The process of setting legal criteria, whereby Aboriginal people must prove that their long-standing hunting, fishing, and spiritual practices create ties to the land, essentializes these acts as being necessarily traditional and timeless.").

59. Gilbert, *supra* note 38, at 601-02 (quoting Alexander Reilly & Ann Genovese, *Claiming the Past: Historical Understanding in Australian Native Title Jurisprudence*, 3 INDIGENOUS L.J. 19, 38 (2004)).

60. Stephen W. Silliman, *Change and Continuity, Practice and Memory: Native American Persistence in Colonial New England*, 74 AM. ANTIQUITY 211, 213 (2009) ("Native American communities continue to be judged by private citizens, government officials, anthropologists, and the media based on how much they have changed or not changed, and these judgments directly impact issues of authenticity, sovereignty, land, and other aspects of their everyday lives."). One concern is that essentializing the relationship of indigenous cultures to land can "'freez[e] and reify[] an identity in a way that hides the historical processes and politics within which it develops.'" Dannenmaier, *supra* note 18, at 101 n.283 (alterations in original) (quoting Jean E. Jackson & Kay B. Warren, *Indigenous Movements in Latin America, 1992-2004: Controversies, Ironies, New Directions*, 34 ANN. REV. ANTHROPOLOGY 549, 559 (2005)). Essentializing can negate or mask important and nuanced characteristics of a tribe's relationship to land, and may also support a stereotyped view that justify overpowering the "essentialized" people. *Id.*

61. Gilbert, *supra* note 38, at 599 ("[T]he Canadian legal system has usually adopted . . . '*some* degree of change in the content of an indigenous practice over the period of time since colonisation does not render that practice ineligible for legal recognition and protection.'" (quoting Anthony Connolly, *Judicial Conceptions of Traditional Canadian Aboriginal Rights Law*, 7 ASIA PAC. J. ANTHROPOLOGY 27 (2006))).

62. Gilbert, *supra* note 38, at 600 (quoting Delgamuukw v. British Columbia [1997] 3 S.C.R. 50 (Can.)).

63. DUNCAN & PIGGOTT, *supra* note 4, app. E., at 76.

With a better understanding of indigenous peoples and the importance of land to them, as well as the requirements of establishing an indigenous land claim, this article now turns to a discussion of indigenous oral history preceded by a short exposition of legal storytelling in general.

II. Indigenous Story Telling and Its Importance

> *Even in captivity, Pintupi mothers, like good mothers everywhere, tell stories to their children about the origin of animals . . . and as Kipling illustrated the Just So stories with his own line drawings, so the Aboriginal mother makes drawings in the sand to illustrate the wanderings of the Dreamtime heroes . . . . It is through the 'sketches' that the young learn to orient themselves top their land, its mythology and resources.*[64]

As discussed previously, land plays a dual role for tribes, both as a source of identification and security. Unless oral history can be used by tribes to establish a tribal claim to their traditional lands, there may be no way of assuring that the land will remain in the tribe's domain. In addition, tribal stories have importance beyond the particular court dispute because they are critical for tribal identity and governance, so their recognition might help indigenous peoples in their quest for equality.[65]

A. Stories in the Law

Stories occupy an important place in the law. Stories offer a space for litigants to explain "the concrete particulars of their experience in a way normally excluded by legal reasoning and rule."[66] However, "the making, transmission, and reception of stories is never innocent or unproblematic . . . ; [the process] activates unacknowledged ideologies and doxa . . . [and the] formal design of narratives reflects their intention, their tendency, their construal and their outcome."[67] This is because stories "do not simply recount happenings; they give them shape, give them a point, argue their import, [and] proclaim their results."[68] Embedded in the nature

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64. CHATWIN, *supra* note 30, at 21-22.

65. Alphine W. Jefferson, *Christian W. McMillen's Making Indian Law: The Haulapai Land Case and the Birth of Ethnohistory*, 37 ORAL HISTORY REV. 114, 115 (2010) (book review) ("[R]espect for and value of nontraditional ways of documenting and reading history can be valuable judicial tools in the Native American struggle for equality.").

66. Peter Brooks, *The Narrativity of Law*, 14 LAW & LITERATURE 1, 1 (2002).

67. *Id.* at 6.

68. *Id.* at 4.

of stories is an evidentiary problem — the need to separate truth from hyperbole.[69]

Stories require "the law to be accountable to a critique from outside its hermetic closure; one that insists that legal language and legal business as usual *implicate* master narratives, ideologies, and concepts that have a place in other domains of culture as well, and cannot be insulated and protected purely as legal terms of art."[70] As a result, stories, particularly the stories of minorities, struggle for a place in court.[71] On the other hand, judges use stereotypes about minorities from stories to influence their judgments.[72]

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69. Debora L. Threedy, *Claiming the Shields: Law, Anthropology, and the Role of Storytelling in a NAGPRA Repatriation Case Study*, 29 J. LAND RESOURCES & ENVTL. L. 91, 113 (2009) ("[J]ust because a story is persuasive does not mean that it is true and, conversely, a poorly constructed story is not necessarily a false story." (citing W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTION REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 89 (1981))).

70. Brooks, *supra* note 66, at 9.

71. *Id.* at 1 ("[L]iterary narratologists . . . have long argued that narrative is one of the large categories in which we order and construct reality. But I think that they remain heretical within the world of the law, which does not overtly recognize 'narrative' as a category in the process of legal adjudication."). On the topic of judicial response to stories told by individuals without power, *see* Peter Brooks, *The Narrativity of Law*, 14 LAW & LITERATURE 1, 10 (2002) ("At its most potent, the 'law and literature movement' summons the law to be accountable to a critique from outside its hermetic closure, one that insists that legal language and legal business as usual implicate master narratives, ideologies, and concepts that have a place in other domains of culture as well, and cannot be insulated and protected purely as legal terms of art."); Jamie G. Longazel, Laurin S. Parker, & Ivan Y. Sun, *Experiencing Courts, Experiencing Race: Perceived Procedural Injustices Among Court Users*, 1 RACE & JUST. 219 (2011) ("African Americans in particular often walk away from their court experience with far more negative attitudes than their White and Latina/Latino counterparts but also to understand such differences as being the result of the lived experience of race in the courtroom. Second, our study suggests the importance of privileging experiential knowledge. People of color have valuable stories to tell about their distinct experiences (i.e., Williams, 1991). Granted, we were unable to grasp the full value of such stories given the methodology we employed, but we were able to uncover what we feel is an important evidence of how minority groups differently experience an otherwise neutral institution by taking respondents at their word for what they perceived as unfair treatment.").

72. *Supra* note 66, at 4. ("Often, one detects, what's at issue is a judge's sense of how a woman is supposed to behave in certain circumstances: a set of unexamined cultural doxa (as Roland Barthes would have said) that undergird our everyday construal of narratives."); *See also* Anthony V. Alfieri, Race Prosecutors, Race Defenders, 89 GEO. L.J. 2227, 2229-30 (2000-2001) (remarking that racialized narratives or treatment "might be unrecognizable to a lawyer not trained to look for them"); and *id.* at 2274 (arguing that the analysis of white racialized narratives and their embedded notions of privilege and superiority illuminates the meaning of color blindness and merit in law and lawyering).

B. Tribal Stories and Oral History

Oral history is composed of individual, family, or group stories that orient the storyteller and her audience in a place and a time, often before the storyteller is born.[73] In the case of indigenous peoples, oral history includes songs,[74] rituals, and ceremonies as well as artifacts like totems,[75] weavings,[76] pottery,[77] or even houses[78] that recount that history.[79] These tangible and intangible properties are teaching tools for tribal members[80] and comprise a clan's laws, especially its rules about property ownership.[81]

Like land, tribal stories are essential for self-identification and governing.[82] They are a source of norms, cultural values, and moral

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73. Val Napoleon, *Delgamuukw: A Legal Straight-Jacket for Oral Histories?*, 20 CAN. J.L. & SOC'Y 123, 152 (2005).

74. Palmer, *supra* note 23, at 1043 ("This [social] group [referring to the head of an aboriginal house group] is corporate and extends through an oral history that is marked by song, stories, and witness, and is acknowledged through the remembrance and mindful pronouncement of that same name by others.").

75. Carolyn Smyly, *Anthony Island Totems: The Last Big Stand*, 101 CANADIAN GEOGRAPHIC 26, 27 (1981) ("Such is the tenacity of folk myth that it is necessary still to point out that totem poles were never 'heathen idols' worshipped by the Indians. They were large genealogical representations, that is, huge family crests, and were erected with great ceremony to honour the dead and sometimes the living members of a family.").

76. Russell, *supra* note 25, at 236 ("[T]he history of how each clan came to possess their land was also written in each text[and] the fabric of the ceremonial blankets and clothes.").

77. John W. Ragsdale, Jr., *Anasazi Jurisprudence*, 22 AM. INDIAN L. REV. 393, 410-11 (1997).

78. Palmer, *supra* note 23, at 1044 ("The most significant evidence of spiritual connection between the Houses and their territory was a feast hall where the Gitksan and Wet'suwet'en people tell and re-tell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands." (quoting Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010, paras. 13-14)).

79. Suzack, *supra* note 36, at 453 ("To establish their historical use and ownership, the appellants entered evidence in the form of totem poles with the Houses distinctive crests, regalia, sacred oral traditions about their ancestors, histories, and territories, and spiritual songs, dances, and performances as proof of ties to their land." (internal quotations omitted) (citing Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 13)).

80. James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 22 BOSTON COLL. INT'L & COMP. L. REV. 55, 76 (1977) ("Songs are also used as teaching tools.").

81. Russell, *supra* note 25, at 238 ("The highly elaborate art of the Tlingits is not merely aesthetic; it is an elaborate semiotic system that legitimizes claims of clan hereditary and both tangible and intangible property ownership.").

82. Matthew L. M. Fletcher, *Looking to the East: The Stories of Modern Indian People and the Development of Tribal Law*, 5 SEATTLE J. FOR SOC. JUST. 1, 3 (2006) [hereinafter

principles, where ties to a particular part of the landscape are crucial for their legitimacy.[83] "Pre-contact Indian community governance provided social control through a complex arrangement of interconnected relationships dependent on storytelling and mythmaking."[84] Elders passed down mores and other community behavioral norms to younger community members through the telling of stories.[85] The authority of their ancestors gives these stories credibility.[86] Because tribal stories assist in self-definition, they are critical to a tribe's survival as a separate people from their colonizers.[87] Deprived of their stories, Indian cultures — and Indians as separate peoples — may disappear.[88]

The narrator of a tribal story is someone who occupies a special place in the family or group due to age or some form of investiture.[89] The narrator's function is to pass the story along to the next generation and to the next storyteller.[90] The repetition of stories is critical to the maintenance and credibility of their content and is an efficient way of transmitting critical information.[91] Since written language was rare,[92] the only way to preserve tribal laws was to orally transmit them to the next generation.[93] "In a world without books or electronic media, oral tradition represented the most

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Fletcher, *Looking to the East*] ("Tribal law and culture are collections of stories. The same stories that scholars study as snapshots of tribal culture are also stories about a tribe's law.").

83. Matthew L. M. Fletcher, *A Perfect Copy: Indian Culture and Tribal Law*, 2 YELLOW MED. REV. 95, 100 (2007) [hereinafter Fletcher, *A Perfect Copy*] ("Many indigenous laws and norms were incorporated into the languages and stories of Indian communities. Stories and rules had meaning and relevance to Indian people as long as they were tied to a particular territory.").

84. Fletcher, *Looking to the East*, *supra* note 82, at 5.

85. Fisher, *supra* note 1, at 13 ("Elderly women in particular played an important role in educating the young people. Grandmothers told their children and grandchildren the stories that instilled proper behavior and preserved family and tribal history.").

86. *Id.* at 14-15.

87. Russell, *supra* note 25, at 244.

88. Torres & Milun, *supra* note 5, at 657.

89. Fisher, *supra* note 1, at 13 ("The patrilineal descent of Plateau chieftainships enabled the signers' male kin to inherit this special status and its attendant responsibilities.").

90. *See* Ragsdale, *supra* note 77, at 403.

91. Furniss, *supra* note 8, at 198.

92. Fisher, *supra* note 1, at 12 (citing WALTER J. ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD 2 (Routledge 2002) (1982)).

93. *Id.* at 13 ("The only way [my grandfather] could carry out the laws was by repeating them to his children and it was handed down from time. These people had a memory that was developed to the extent they had to remember these things.").

important way of communicating knowledge from generation to generation."[94]

Land has an important place in indigenous stories.[95] Often these stories are tied to a community's traditional territory, such as certain landmarks,[96] revealing such a strong connection to the land that one could say they are in fact "imprinted on the land."[97] An example of land imprinting is totems. In the northwest, totems demarcated clan boundaries.[98] Intangible properties, like songs and names, further delineated clan ownership claims to certain properties.[99] Thus, the oral histories and the stories they contain can play an important role in establishing the essential fact of occupation[100] in an indigenous land claim. The participants in the oral histories recognize these stories as "providing an authoritative record of past events."[101]

Indigenous stories also provide origin, including the tribe's cosmology, and explain why a particular tribe would be tied to a particular place in the universe — a specific geographic spot.[102] The stories are generally nonlinear, not separating past from present, but rather flowing through the present, unlike non-indigenous history.[103] Gods, mythic contacts with them, and symbols occupy important places in the cosmology of indigenous peoples and hence in their stories.[104]

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94. *Id.* at 12-13.

95. Fletcher, *Looking to the East*, *supra* note 82, at 5 n.26 ("[O]ral narratives have the power to establish enduring bonds between individuals and features of the natural landscape and that as a direct consequence of such bonds, persons who have acted improperly will be moved to reflect critically on their misconduct and resolve to improve it." (quoting KEITH H. BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE 40 (1996))).

96. *Id.* at 5.

97. Reilly, *Ghost of Truganini*, *supra* note 34, at 468 ("Oral histories are imprinted on the landscape. They require 'travelling through country' to read them. Stories maintain their life through their connection to the land.").

98. Russell, *supra* note 25, at 236 ("This is not to say that the carvings represented some sort of atlas in the Western sense, but that they served as an extension of the oral tradition, which, as such, demarcated clan boundaries.").

99. *Id.* at 239.

100. Napoleon, *supra* note 73, at 152.

101. Palmer, *supra* note 23, at 1045 ("One of the fundamental features of orals histories . . . is that it is acknowledged by the participants as providing an authoritative record of past events.").

102. Nesper, *supra* note 31, at 163.

103. *See* Reilly, *Ghost of Truganini*, *supra* note 34, at 468 ("[W]ritten histories separate the past and the present, oral histories assume and maintain a conjunction between the past and the present.").

104. Ragsdale, *supra* note 77, at 422.

The "truth" of the facts recounted in these stories are less important than the purpose behind the story itself and the basic moral and/or cultural lessons they convey.[105] Those basic lessons remain unadulterated even though the particular facts of the story may fluctuate to accommodate a particular storyteller's proclivities and environment.[106] Attempts to corroborate the factual basis of these stories with written, environmental, or geological records would therefore have "mixed results."[107]

For the reasons above, oral histories are the antithesis of written histories, and are often demeaned as coming from primitive, uncivilized societies.[108] But oral histories are not the precursors of written histories, or even a means of filling a gap when written history is incomplete.[109] They occupy their own important place in reconstructing and reinvigorating the past,[110] and may "evoke recollections and understandings that were previously silenced or ignored."[111] They may also be the only proof that indigenous groups have to establish their claim to a particular plot of land that holds significance to them.[112] Further, because their claims arose before there was any written history to document them, any written history on record would unilaterally reflect the biases of the particular historian

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105. Reilly, *Ghost of Truganini*, *supra* note 34, at 468.

106. *Id.* ("Events in the past are shifting and amenable to intervention and so can be used as a way of reaffirming or even changing the present. The past is open to regular interrogation." (quoting BAIN ATWOOD, THE MAKING OF THE ABORIGINES (1989) (internal quotation marks omitted))).

107. Stohr, *supra* note 2, at 687.

108. *Id.* at 683. The practice of tribal oral history is seen as primitive, and was reflected in the U.S. Supreme Court's adoption of the Indian canons of treaty construction. *Id.* at 689.

109. *Id.* at 687 ("Oral traditions have a part to play in the reconstruction of the past. . . . But the relationship is not . . . [that] when writing fails, tradition comes on stage. This is wrong. Wherever oral traditions are extant, they remain an indispensable source for reconstruction." (quoting JAN VINSINA, ORAL TRADITION AS HISTORY 199 (1985))).

110. *See* Alistair Thomson, *Fifty Years On: An International Perspective on Oral History*, 85 J. AM. HIST. 586 (1998) ("If memory were treated as an object of historical analysis, oral history could be 'a powerful tool for discovering, exploring, and evaluating the nature of the process of historical memory- how people make sense of their past, how they connect individual experience and its social context, how the past becomes part of the present, and how people use it to interpret their lives and the world around them.'" (quoting MICHAEL FRISCH, A SHARED AUTHORITY: ESSAYS ON THE CRAFT AND MEANING OF ORAL AND PUBLIC HISTORY 10, 188 (1990))).

111. *Id.* at 584.

112. O. W. MacLaren, M. Barry & K. Sangster, *Tsilhquot'in Nation v. British Columbia*, 43 SURVEY REV. 123, 126 (2011).

recording it and could contain translation errors.[113] Indeed, when law ignores indigenous oral history, it is the history of native peoples that is excluded,[114] which is a potential violation of international norms.[115]

III. The Intersection of Indigenous Oral History and Courts

> *How can one accept or prove this when the formulators and adherents of the jurisprudence left no written guide?*[116]

The fit between indigenous oral history and judicial procedures is uncomfortable in part because court procedures, judicial rules, and the legal idiom do not create room for story telling in general, and are particularly unreceptive to the fictive elements of native stories. When faced with court rules and legal terminology, the indigenous story changes into something quite different, potentially unrecognizable to the storyteller and less useful as evidence. Additionally, there are differences between the purpose of tribal stories and judicial evidence, cultural differences between the indigenous storyteller and the judge, uncertainties about the evidentiary value of these stories, and finally the contrarian nature of the stories. These difficulties are discussed in this part of the article.

A. Why Native Peoples Do Not Fit the Judicial Paradigm Easily

There are several ways in which the legal system as a whole disadvantages Native peoples. First, law is not a neutral force; it both shapes and reflects social norms and constructs.[117] Law is "the tool used to define and interpret the meaning of specific events," even though it has

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113. Gover & Macaulay, *supra* note 13, at 67-68 (noting that recordings of oral history were done in a very "cursory fashion and from poorly identified sources," and some of them were "heavily influenced by White historical narratives, missionary propaganda, and even anthropological publications.").

114. *See* Suzack, *supra* note 36, at 452 ("[A]boriginal communities bear the costs of judicial invention in its elision of the past.").

115. Gilbert, *supra* note 38, at 395 ("HRC [Human Rights Commission] has shown that past wrongs could constitute a continuous violation of the contemporary rights enjoyed by indigenous peoples under the ICCPR [International Covenant on Civil and Political Rights]." (citing Simunek, Hasting, Tuzilova, and Prochazka v. Czech Republic, Communication No. 516/1992, UN Doc CCPR/C/54/D/516/1992 (1995))).

116. Ragsdale, *supra* note 77, at 403.

117. Suzack, *supra* note 36, at 451 ("[T]heorization of law as 'an authoritative form through which social values are articulated and regularized and thus become part of the 'common sense' of the age and culture,' and as a social force constraining of culture through its capacity for transpositioning social objects and actors." (quoting Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J.L. & SOC. 316 (1990))).

great difficulty accommodating "irreconcilable cultural perspectives."[118] Law is part of the state's hegemony.[119] As such, it is an "artifact" of both culture and power and can limit a peoples' cultural vision to that of the dominant culture.[120] The legal idiom can favor the version of a story told by the people in power over that of the less powerful.[121] Judicial norms and procedures can erase historical complexities in order to fit the procedural structure of a case and, in the process, reinvent social meanings and understandings.[122]

These inherent judgments also involve misconstruing Native peoples, as "law creates and involves flattened images of what Native people do and do not do. Often this legal essentialization takes the form of Native peoples being marked as opposite to the dominant culture — spatially, temporally, and perceptually removed from the majority of the population living in cities and urban centers."[123]

Second, legal rules, particularly the rules of evidence, control "the substantive demonstration of the issues in dispute and by the authoritative use of previously decided cases."[124] These rules favor stories that can be scientifically and objectively proven over ones that cannot be,[125] and often create a strong bias in favor of the written record.[126]

> Oral accounts are often considered to be subjective in comparison to written records' assumed objectivity and the

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118. Torres & Milun, *supra* note 5, at 631.

119. Suzack, *supra* note 36, at 451.

120. Torres & Milun, *supra* note 5, at 631-32.

121. *Id.* at 630.

122. Suzack, *supra* note 36, at 452-53 ("[L]egal discourse has a profound capacity for the incorporation and reinvention of social meanings and for the erasure of the discursive complexity of the historical past.").

123. Buchanan & Darian-Smith, *supra* note 58, at 121.

124. Torres & Milun, *supra* note 5, at 642 (noting how Torres is particularly critical of how claims are proved in an indigenous land claim dispute).

125. *See* Stohr, *supra* note 2, at 681 ("Literacy permeates Western culture. With few exceptions, government, science, religion and entertainment all are centered around the written word. . . . The jurisprudence [likewise] reflects a certain entrenched cultural predisposition to trust only that which is documented or documentable ('scientific') and to distrust that which is not ('intuitive,' 'irrational')." (alterations in original) (quoting Verna C. Sanchez, *All Roads Are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence*, 8 HASTINGS WOMEN'S L.J. 31, 59-60 (1997))).

126. *See* Torres & Milun, *supra* note 5, at 632 ("By distinguishing a pre-literate from a post-literate phase in the life of the Mashpee . . . the court devalued the oral history of the Mashpee where it conflicted with written documents, even though those documents did not reflect the understandings of the Mashpee at the time the documents were created.").

> spoken word is understood as being susceptible to modification over time as it is retold from one person to another... In comparison, the written word tends to become immutable once recorded, less vulnerable to change and strengthened each time it is relied upon as authority.[127]

Just as legal norms can disadvantage Native peoples, so too can judicial rules. Professor Torres' description of the Mashpee trial shows how the court systematically favored the written record over the Mashpee's oral history and in the process silenced them.[128] "[B]ecause the Mashpee Indian culture is rooted in large measure on the passing of an oral record, their history could only signify silence."[129] Yet there can be problems with the written record. The written record can contain factual errors and "mistaken depictions of the past,"[130] can be "culturally limited, and informed by a narrow knowledge base."[131] "Ethnocentric biases, imprecision" about geographic locations, changes in "nomenclature" over time, and a lack of records from older periods can seriously undermine the accuracy of written records as well.[132]

Third, judges have great discretion in applying the law. They are the gatekeepers for how an indigenous land claim is presented to the court, and whether it is presented at all. Judges determine how the back-story of an indigenous claim will be portrayed through admissions of evidence, which witnesses get to tell that story, and which stories carry the greatest probative weight.[133] Thus, a judge's determination of the facts relevant to establishing the legal claims controls the story that the plaintiffs can tell.[134]

In indigenous land claim cases, "there are no generally applicable facts," which makes the court's job more difficult.[135] For a fact to be relevant to a judge, it must sound in precedent, which comprises of "the stories deemed

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127. Reilly, *Ghost of Truganini*, *supra* note 34, at 468-69 (quoting Merkel, J., in *Commonwealth v Yarmirr)*.

128. Torres & Milun, *supra* note 5, at 649 n.78.

129. *Id.* at 649.

130. Milward, *supra* note 6, at 288.

131. *Id.* at 304.

132. *Id.* at 305; *see also* Lori Ann Roness & Kent McNeil, *Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts*, 39 J. WEST 66, 67 (2000) ("However, where written records do exist, they often do not contain adequate information on Aboriginal use and occupation of land and tend to be tainted by the European perspective of the persons who produced them.").

133. Reilly, *Ghost of Truganini*, *supra* note 34, at 465.

134. Torres & Milun, *supra* note 5, at 630-31 (describing this process as a "game").

135. Gover & Macaulay, *supra* note 13, at 48.

acceptable by previous courts."[136] Precedent is important as it both establishes "the outer limits of a particular legal pronouncement" and the "foundation for subsequent interpretations of those limits."[137] The examples that are in precedent and cited authority, however, are not neutral and do not arise "naturally,"[138] and the story that emerges is far from a "classic narrative."[139]

When indigenous land claims reach court they are "translated by means of examples that the law can follow — precedent, and examples that law can hear — evidence."[140] This "legal coding," through which translation occurs, "highlights . . . the confrontation between irreconcilable systems of meaning produced by two contending cultures . . . [which strips away] nuances of meaning . . . [and] elevates a particular version of events to a non-contingent status."[141] When the normative bias of the law, (including the vernacular of the law), judicial procedures, and the judge's discretion transform the tribe's story into a story a court can hear, this often fundamentally changes the story to a point where it may be unrecognizable to the storyteller.[142] For example, Professor Torres describes the Mashpee trial as allowing "no room for divergent cultural understandings, even the Mashpee's self-understanding."[143] Thus, in order to bring a land claim, a tribe may be required to sacrifice their storytelling perspective to fit the required legal mold.

B. What Makes Indigenous Oral History Particularly Problematic for a Judge

As previously shown, indigenous oral history presents unique challenges for judges when it is proffered as proof of some historical fact.[144] Its provenance is frequently hazy; its origins and the chain of storytellers are

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136. Torres & Milun, *supra* note 5, at 647.

137. *Id.* at 642.

138. *Id.*

139. *Id.* at 646 ("The process of legal storytelling and relevance determination is more like a gathering of material for an index than the telling of a classic narrative. Facts are assembled to tell a story whose conclusion is determined by others.").

140. *Id.* at 628.

141. *Id.* at 628-30; *see also* DUNCAN & PIGGOTT, *supra* note 4, at 25.

142. Torres & Milun, *supra* note 5, at 628.

143. *Id.* at 631, 658 (explaining that the concept of a land claim is completely foreign to most Indian cultures; it is a legal construct tribes must adopt to protect their traditional interests in their land).

144. *See* Stohr, *supra* note 2, at 680 (listing the challenges Native Americans face).

often unknown and shrouded in mystery.[145] Because of mythological references and unverifiable facts, oral histories cannot be easily confirmed.[146] As with written history, the stories and artifacts that compose oral history are self-serving.[147] As opposed to oral histories, however, written histories welcome challenge from critics whose scholarship is based on questioning the validity of the record and introducing a new historical vision.[148] With oral history, there is no audience who will challenge the content[149] because time has destroyed many of the artifacts that might confirm the oral history,[150] and the loss of native language skills has reduced the number of living story tellers who can repeat the stories and provide the remnants of their origin.[151] Memory is a frail thing, and critical elements of a story may be lost along the way or may be unverifiable because the storyteller has forgotten where the story came from.[152] Another problem may be that the story is incomplete because the responsibility for telling the story is divided among groups within the same tribe.[153]

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145. *See* Napoleon, *supra* note 73, at 149 (reporting on the Court's struggles with oral history).

146. Milward, *supra* note 6, at 289-90 (suggesting that courts use an "independent expert witness" who can work "in an environment that stresses open and cooperative dialogue with the Aboriginal oral historians as a way "to present a reasonably ascertainable truth to the court.").

147. Stohr, *supra* note 2, at 687.

148. Gover & Macaulay, *supra* note 13, at 54 ("[H]istorical facts are always open to dispute and revision and history is frequently being rewritten. Testimony in litigation, on the other hand, once admitted into evidence and interpreted by a court, becomes fixed inter-parties even though the same evidence out of the context of the litigation could, as an intellectual exercise, be given a different interpretation by subsequent scholars or upon other facts emerging to change the context . . . .").

149. *Id.*

150. *See generally* Smyly, *supra* note 75 (discussing the destruction of Anthony Island totems).

151. *See* Fisher, *supra* note 1, at 16 ("English literacy, language loss and the passing of older generations has caused many traditions to atrophy in the twentieth century . . . Despite a decline in the number of proficient performers. Native oral traditions endure within traditional circles. Yakama treaty rights have partially merged with a literate legal tradition, but the promised made in 1855 have neither faded from memory nor lost their significance to the Yakama Nation.").

152. *See* Torres & Milun, *supra* note 5, at 654 ("Recorded memory relies less on the memory of the teller.").

153. Justin B. Richland, *Hopi Tradition as Jurisdiction: On the Potentializing Limits of Hopi Sovereignty*, 36 LAW & SOC. INQUIRY 201, 230 (2011).

At a macro level, there is a fundamental difference between the function of a tribe's stories and of court procedures.[154] There are also significant cultural differences between the Indian storyteller and her non-Indian audience, in this case a judge.[155] Then there are uncertainties over the reliability of tribal stories because they are passed forward through generations and frequently altered to reflect changes in circumstances and changes with the perspective of the storyteller.[156] Last, these stories challenge the status quo,[157] and force the dominant culture to question its justifications for legal and socio-economic power.[158] These problems are extremely evident in land claim disputes. This makes oral history evidence particularly difficult for judges to admit and determine how much weight to give it.[159] Each of these problems is developed in more detail below.

1. Different Roles of Courts and Indigenous Story Tellers

Indigenous oral history is problematic for a judge because it is imbued with mythology, unlike admissible evidence. Indians tell stories to self-identify, explain their origin, and to locate themselves in a particular cosmology, often in a specific geographic location.[160] An Indian's view of their cosmology is quite different from that of a non-Indian — specifically

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154. *See* Dwight G. Newman, *Tsilhqot'in Nation v. British Columbia and Civil Justice: Analyzing the Procedural Interaction of Evidentiary Principles and aboriginal Oral History*, 43 ALTA. L. REV. 433, 434 (2005) ("How is the use of oral history as part of the aspirations toward justice for Aboriginal peoples reconciled with the practical needs of a civil justice system? How do judges operationalize this law through the common law development of appropriate civil procedure in relation to the admission of such evidence?").

155. Palmer, *supra* note 23, at 1049.

156. Gover & Macaulay, *supra* note 13, at 66-67 ("*Oral tradition . . . can be adapted to changed conditions without anyone being aware that a departure from precedent has been made.* Unwritten custom 'quietly passes over obsolete laws, which sink into oblivion, and die peacefully, but the law itself remains young, always in the belief that it is old.'" (emphasis added)).

157. DUNCAN & PIGGOTT, *supra* note 4, at 12.

158. Napoleon, *supra* note 73, at 151 ("[T]he S.C.C. wrote that accommodation of unique aboriginal evidence must not strain the Canadian legal and constitutional structure. Borrows suggests that aboriginal oral histories will very likely strain the Canadian legal and constitutional structure because (1) owing to the illegality and/or unconstitutionality of past actions, oral histories can potentially undermine the law's claim to legitimacy, and (2) oral histories effectively assert an alternative structure of legitimate normative order.").

159. Reilly, *Ghost of Truganini*, *supra* note 34, at 453-54.

160. *See* Ragsdale, *supra* note 77, at 406 ("The origin myths of the historic and contemporary Pueblos, emanating out of their Anasazi past, described the emergence of the people from a life in the underworld out to an existence on the surface.").

given the important role spirits and myth play.[161] Objective or factual proof in indigenous stories is unimportant, as the story is intended to teach moral and cultural lessons through allegory and symbols.[162] It is unimportant to a tribal storyteller if the contents surrounding the story stay the same as long as its purpose — to reassert some moral, spiritual, or cultural truth — remains the same. [163] Regardless of the passage of time, a change in storyteller, or surrounding circumstances, these truths remain inviolate.[164]

A judge's role with respect to the admissibility of evidence is inapposite to the role of a storyteller. The judge must find "objective truth" based on the unimpeachable nature of the supporting facts, even though that very process may be distorted by cultural and socioeconomic differences.[165] The judge is not a mediator between contrasting cultures and claims,[166] yet this is the role the judge must often assume in indigenous land claims cases.[167] The peculiar nature of indigenous oral history additionally requires a court to "sift" through myths and spiritual matters in search of these demonstrable facts.[168] "Evidence in which legend, mythology, politics and morality are interwoven are ill-suited for the positivist of scientific analysis characteristically employed by the court in which the aim of determining objective truth is pursued."[169] Legal evidence and indigenous storytelling are therefore at odds with one another.

2. Cultural Differences

Cultural differences are also problematic for a judge faced with the admission of oral history into evidence. The significant cultural differences

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161. Russell, *supra* note 25, at 230 ("Beyond the physical collision of two different peoples there is also a metaphysical collision between differing cultural modes for apprehending reality, for determining truth, and for understanding one's relationship within physical and spiritual environments.").

162. *See* Zion & Yazzie, *supra* note 80, at 76 ("Navajo norms, values and moral principles are stated in the Navajo language and preserved in Navajo creation scripture, origin stories, ceremonies, songs, stories and maxims.").

163. Newman, *supra* note 154, at 448.

164. *See* SALLY MCBETH, NATIVE AMERICAN ORAL HISTORY AND CULTURAL INTERPRETATION IN ROCKY MOUNTAIN NATIONAL PARK 32 (2007), *available at* http://www.cr.nps.gov/history/online_books/romo/mcbeth/oral_history.pdf.

165. Reilly, *Ghost of Truganini*, *supra* note 34, at 472.

166. Torres & Milun, *supra* note 5, at 631.

167. DUNCAN & PIGGOTT, *supra* note 4, app. E., at 76.

168. Gover & Macaulay, *supra* note 13, at 68.

169. MacLaren, Barry & Sangster, *supra* note 112, at 127 (discussing *Tsilhquot'in* decision).

between indigenous and non-indigenous peoples[170] make translation of indigenous oral history into legal vernacular difficult.[171] "The law[,] as presently structured[,] allows no clear way to achieve" symbiosis between these polar opposites.[172] This difficulty in translation between two vastly different approaches to evidence "renders unreadable the entire code of which [tribes] are a part, while simultaneously legitimizing the resulting ignorance."[173]

Indigenous stories invoke a world and a cosmology filled with spirits and mythical creatures that are completely foreign to the western secular thought, which emphasizes scientifically proven fact.[174] Even with respect to the spiritual realm, the Western cosmologies could not be more different from indigenous ones.[175] Stories occupy a space that is completely foreign to most non-Indians.[176] These stories are largely unintelligible to the western ear, including the ears of a judge faced with authenticating their use in a land claim dispute.[177] Judges are ill equipped to hear the story from the perspective and worldview of the indigenous storyteller,[178] and the legal system is poorly constructed to receive it.[179] Judges cannot comprehend

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170. *See* Fisher, *supra* note 1, at 5 ("Native Americans merely understood their treaties differently, in ways that made sense to them. As the Yakima case suggests, Indian interpretations arose from a combination of specific cultural characteristics and the general traits of primary orality.").

171. Torres & Milun, *supra* note 5, at 658 ("In fact, the reality of Indian life is, in a real sense, untranslatable.").

172. *Id.*

173. *Id.* at 629.

174. *See* Ragsdale, *supra* note 77, at 397.

175. *See* Stohr, *supra* note 2, at 695 ("One feature of oral religions that troubles and confuses non-Natives is that these religions are tribal, as opposed to universal or world, religions. There is no drive to missionize or convert those outside the group. In fact, among many Native American groups-and other oral cultures divulging sacred knowledge to a non-tribal member may present grave spiritual dangers.").

176. *See* Torres & Milun, *supra* note 5, at 649 ("The commonplace view, replicated in the process of legal proof, is that 'facts' only have meaning to the extent that they represent something 'real.' The stories that members of the Mashpee Tribe told were stories that legal ears could not hear. Thus the legal requirements of relevance rendered the Indian storytellers mute and the culture they were portraying invisible.").

177. *See* Palmer, *supra* note 23, at 1050 ("Perhaps, in the study of law in Canada, we should become increasingly mindful of accounts situated within legal frameworks which have origins independent of the common law tradition developed under the influence of a lineage of British sovereigns that has extended into Canadian courts.").

178. *Id.* at 1047 (suggesting that efforts be made to educate the public at large and judges in particular in the ways of orally based traditions).

179. Stohr, *supra* note 2, at 693-94, 700.

these images and stories when court procedures and rules are inhospitable to them; therefore, their significance and any possible utility they might have to a judge is lost.[180]

3. Uncertainties About the Reliability of Indigenous Stories

A court's primary concern with indigenous oral history is its reliability.[181] Many features of indigenous oral history undermine its reliability and hence its usefulness in a court proceeding.[182] For example, storytellers change as time passes, as well as the audience for the story, so courts cannot rely on a listener's affirmation of the truth of the facts asserted in the story.[183] Indeed, the tribe itself may be changing and evolving in response to external and internal cultural pressures.[184] Places mentioned in a story may gain greater cultural significance as threats to them increase.[185] Stories can be "reworked" by different storytellers.[186] "It is well known that, simply by repetition, stories and information are distorted to some degree [and] oral history . . . may have been distorted or indeed lost because of changes and events . . . ."[187] Memory can "deteriorate,"[188] be self-selecting,[189] and self-serving.[190] Additionally, the description of places and events may change or be too vague for any audience — Indian or non-Indian — to affirm objectively.[191]

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180. *See* Torres & Milun, *supra* note 5, at 629 ("When particular versions of events are rendered unintelligible, the corresponding counter-examples that those versions represent lose their legitimacy. Those examples come unglued from both the cultural structure that grounds them and the legal structure that validate them.").

181. Stohr, *supra* note 2, at 686-87.

182. Milward, *supra* note 6, at 296.

183. *Id.*; *cf.* Jane McMillan, *Colonial Traditions, Co-optations, and Mi'kmaq Legal Consciousness,* 36 LAW & SOC. INQUIRY 171, 194 (2011).

184. *See* Russell, *supra* note 25, at 250 ("[A] living culture must go to the grindstone again and again and be resharpened rather than remain bright and shiny, dull and well-oiled, but sitting unused in a closet or . . . in a museum. An unused culture is a dead culture.")

185. Nesper, *supra* note 31, at 162 ("Not unlike the Black Hills for the Lakota . . . the local geography has been growing more sacred over the decades as it is threatened by external forces.").

186. Gover & Macaulay, *supra* note 13, at 67 (quoting Mathias v. Canada, 2000 CANLII 16282, para. 37 (Fed. Ct.)).

187. Milward, *supra* note 6, at 297.

188. Thomson, *supra* note 111, at 584.

189. Napoleon, *supra* note 73, at 135.

190. *Id.* at 153 (statement of Mr. Goldie).

191. *See* Nesper, *supra* note 31, at 165 (statement of interviewee) ("You don't keep track of a way of life."); Ragsdale, *supra* note 77, at 396 ("Preliminary problems with a reconstruction of an ancient jurisprudence include those of definition and probative

However, none of this necessarily makes the story any less reliable, it just means that the indigenous group's view of history and historical accuracy is different than that of a non-indigenous group.[192] History is considered by the indigenous to be "the reconstruction of (or a perspective on) an imagined past."[193]

Therefore, historical events, whether recounted in writing or orally, typically contain contested truths[194] and rarely conform to the neat patterns that the presentation of legal claims requires.[195] Far from being tidy, both written and oral history are messy and discordant. Both are informed by the predilections of the historian,[196] reliant on memory, and "textual" in nature, although oral history may be "'encoded in places' that are not as obvious as the printed word."[197] Unfortunately, while historians may understand that their job is to be skeptical about various recollections of historical truths,[198] judges sitting on land claim disputes involving indigenous peoples are not skeptical and receive written historical text as though it was incapable of being biased.[199]

The presence of secret information in some indigenous stories can also lead to questions about its reliability. For tribes, the telling of this secret information will lessen the story's power and perhaps the power of the tribe to which it belongs.[200] Tribes with these stories are reluctant to repeat

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evidence. Such problems are compounded by a preliterate silence and by the Anasazi withdrawal nearly 700 years ago.").

192. Reilly, *Ghost of Truganini*, *supra* note 34, at 468 ("As such, it is not surprising to find . . . contradictions in oral accounts of the past. These do not necessarily indicate a lack of reliability in the account, but that it is a product of a different understanding of history.").

193. *Id.* at 457.

194. *Id.* at 465 ("The courts occasionally take notice of historical events as if they were uncontestable truths.").

195. *Id.* at 467 ("The law is attracted to historical evidence because of its appearance of objectivity, its neatness and its simplicity. It appears to provide a concrete connection to the past, in contrast to oral testimony, which relies on memory.").

196. *Id.* at 471 ("[H]istorians understand all history to be a construction informed by the author of an historical document, and therefore there is no clear distinction between real history and social history. Following from this proposition, there is an important process of uncovering or acknowledging the contingent and contextual nature of historical facts, however they are categorised.").

197. *Id.* at 468.

198. *See* Gover & Macaulay, *supra* note 13, at 52-53.

199. Reilly, *Ghost of Truganini*, *supra* note 34, at 472.

200. Threedy, *supra* note 69, at 116; *see also* Buchanan & Darian-Smith, *supra* note 58, at 121 ("[Australian] aboriginal peoples have at times been forced into a position whereby they must reveal sacred knowledge in order to show long-standing affiliation with land or objects. Such knowledge is typically held very secretly, passed down orally by women to

them, let alone introduce them in court as proof of their place-based claim for fear of sacrificing the place's sacredness.[201] Forcing tribes to reveal sacred information to conform to judicial requirements may "compromise elements of their cultural identity and religious beliefs."[202] A tribe's need for secrecy can clash with the economic interests of an affected landowner and the cultural norms of the dominant society, revealing a deep divide in cultural mores.[203] The existence of secret information is "a great stumbling block for Native American litigants, aggravating courts and raising their suspicions of fraud or ignorance."[204]

4. Stories of the Dispossessed

A final factor that makes indigenous oral history problematic is that its admission forces the majority culture to recognize the stories of its dispossessed peoples.[205] Empowering culturally repressed peoples like Indians to tell their stories in court to regain land that has been taken from them threatens the established political, social, and economic order. These stories could destabilize vested interests[206] and put in place a new order that

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women and men to men, and is integral to complex intergeneration social relations. . . . [O]nce oral knowledge is given as evidence, it becomes written text, available to be read by Native peoples and non-Native peoples alike.").

201. Threedy, *supra* note 69, at 117 ("The idea that to obtain the protection promised by the government for sacred sites the claimants had to violate the sacredness of the site can be criticized as creating a Hobson's choice: maintain the secrecy of the sacred knowledge associated with the site and lose the protection of the site itself, or protect the site by disclosing the secret knowledge that makes the site sacred, thereby profaning the sacred. At best, what this conundrum reveals is incommensurability between Western law and indigenous law. The legal system is unable to accept indigenous truth claims on their own terms, without restructuring them according to legal narrative conventions."). Threedy reports that the Australian courts have found a way around this dilemma by adopting specific protocols to deal with it.

202. Buchanan & Darian-Smith, *supra* note 58, at 121.

203. Robert van Krieken, *Kumarangk (Hindmarsh Island) and the Politics of Natural Justice Under Settler-Colonialism*, 36 LAW & SOC. INQUIRY 125, 129-30 (2011).

204. Stohr, *supra* note 2, at 689.

205. *See* Furniss, *supra* note 8, at 199 ("Narrative . . . 'is not merely a neutral discursive form . . . but rather entails ontological and epistemic choices with distinct ideological and even specifically political implications.'").

206. *Id.* at 12 ("Pursuant to the decision in *Delgamuukw*, provincial fee simple grants cannot extinguish Aboriginal title. Therefore, where a court finds existing Aboriginal title to privately held lands, that Aboriginal title should continue to exist as a burden on the fee simple and potential underlying Crown title (keeping in mind that the Crown can expropriate fee simple land).").

might be completely alien to the majority's culture and accepted truths.[207] Recognizing indigenous land title, which is a communal title,[208] also threatens the surrounding sovereign state.[209] Indigenous land claims are seen by some as purely "a political enterprise."[210] Courts try to avoid political issues[211] and are reluctant to acknowledge rights that may be disruptive of the rights of others.[212]

Counter-stories, like those told by indigenous peoples,[213] are not welcome in court.[214] Judicially recognizing tribal oral history might require acknowledgement of a country's colonial past and ill-treatment of its indigenous peoples.[215] Unfortunately for Indians, colonization weakened indigenous oral history,[216] making it more suspicious from an evidentiary

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207. *See, e.g.*, H. Elizabeth Dallam, *The Growing Voice of Indigenous Peoples: Their Use of Storytelling and Rights Discourse to Transform Multilateral Development Bank Policies*, 8 ARIZ. J. INT'L & COMP. L. 117, 119 (1991).

208. Russell, *supra* note 25, at 239 ("Regarding landownership, a member of a Tlingit house traditionally inherited rights to the land that his or her clan owned. Clan ownership of land was communal, and no single person had the right to sell or cede that property without unanimous agreement of the clan.").

209. Dannenmaier, *supra* note 18, at 71 ("Having once denied sovereignty, title, and often personhood to indigenous peoples, it is a difficult project to recognize collective indigenous title (which has implications for tenurial relations and development decisions) while allowing a surrounding state to retain ultimate sovereignty. It is a conflict at the heart of decisions such as M'Intosh and Mabo, and one that remains difficult to reconcile.").

210. Napoleon, *supra* note 73, at 153 (statement of Mr. Macaulay) (quoting Transcript of the Direct Examination of Chief Gyoluugyat [Mary McKenzie] at 455, Delgamuukw v. The Queen).

211. *See, e.g.*, Hope M. Babcock, *How Judicial Hostility Toward Environmental Claims and Intimidation Tactics by Lawyers Have Formed the Perfect Storm Against Environmental Clinics: What's the Big Deal About Students and Chickens Anyway?*, 25 J. ENVTL. L. & LITIG. 249, 281 n.136 (2010).

212. *See* City of Sherrill, N.Y. v. Oneida Indian Nation, 544 U.S. 197, 202-03 (2005), *reh'g denied*, 544 U.S. 1057 (2005).

213. *See* Torres & Milun, *supra* note 5, at 655 ("In order for the Mashpee's legal claim to make 'sense,' it must be phrased within a strictly legal context, and that context must include the justification for displacing two centuries of 'the way things are.'").

214. Dallam, *supra* note 207, at 123 ("[T]he legal forum is unreceptive to counterstories.").

215. *See* Milward, *supra* note 6, at 302 (statement of John Borrows) ("As such, oral tradition is controversial because it potentially undermines the law's claim to legitimacy throughout the country due to the illegality and/or unconstitutionality of past actions.") (quoting Borrows, *supra* note 50, at 26-27).

216. *See* Reilly, *Ghost of Truganini*, *supra* note 34, at 460 ("When the tide of history has washed away any real acknowledgment of traditional law and any real observance of

standpoint and vulnerable to judicial challenge, even when oral testimonies corroborate that history.[217] But where there is no evidence to contradict oral history, judges should admit it into evidence.[218]

IV. Evidentiary Barriers to the Acceptance of Indigenous Oral History in Court

> *"Law's flexibility helps to ensure that law and culture remain consistent to the extent that law remains legitimate to the members of the community. To the extent that law and culture are not four square with each other (broadly speaking, of course), law is illegitimate."*[219]

There are "three simple ideas" underlying the various rules governing the admission of evidence — evidence must be useful, reliable, and probative.[220] The reliability requirement underpins two evidentiary rules that courts use to bar the introduction of indigenous oral history: the hearsay rule and the best evidence rule.

The hearsay rule excludes from evidence out-of-court statements "offered for the truth of the statement[s]" being made.[221] Hearsay statements are considered "second hand" information,[222] and courts

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traditional customs, the foundation of native title has disappeared.") (quoting Mabo v. Queensland (No. 2) 1992 (Brennan, J.)).

217. *See id.* at 456 ("Oral testimony reveals how the claimants understand their spiritual traditions and their past and present relationships to their land and to each other. It might be corroborated by the historical evidence, or conflict with it. Where there is an apparent conflict, courts determine what impact this has on the weight to be attributed to oral testimony.").

218. *See* Milward, *supra* note 6, at 311 ("Where there is no evidence to corroborate otherwise reliable oral history evidence, but also no evidence to contradict it, nothing should stop the judge from accepting the oral history evidence as reliable proof of the rights claim.").

219. Fletcher, *A Perfect Copy*, *supra* note 83, at 98.

220. Newman, *supra* note 154, at 443 (statement of McLachlin, J.) ("Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonable reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.") (quoting Mitchell v. M.N.R., [2001] S.C.R. 911, para. 30 (Can.)).

221. Napoleon, *supra* note 73, at 130.

222. Reilly, *Ghost of Truganini*, *supra* note 34, at 468 ("In traditional jurisprudence, the general rule on the admissibility of oral testimony is that 'a witness can only give evidence of a fact of which the witness has personal knowledge.' Any other source of knowledge,

generally deem them "untrustworthy" because the "person who made the out-of-court statement is not under oath, cannot be observed by the court, and is not subject to cross-examination."[223] Oral history is archetypical hearsay evidence.

The best evidence rule mandates that a court always be given the "best evidence," which means that written evidence is preferred over oral evidence in most circumstances. [224] This rule can significantly decrease the evidentiary weight given to oral history when there is a written alternative. Written history may 'contradict' oral history, yet oral history may not be used to 'contradict' the written history.[225]

Rigid application of the best evidence and hearsay rules penalizes indigenous societies for not keeping written records at a point in their histories when European writing was unknown to them.[226] Without more flexibility in the rules of evidence, many indigenous land claims cannot succeed in court.[227] Canadian courts have demonstrated that evidentiary rules can be modified in the interests of achieving "substantive justice"[228] and "a *fair justice system*."[229] But this must be done in a way that does not compromise the fairness of the trial.

This part of the article discusses the interaction of the best evidence and hearsay rules with oral history evidence and Canada's flexible approach to

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whether it be what someone else has told the witness or something the witness has read, is hearsay and generally inadmissible.") (quoting J.D. HEYDON, CROSS ON EVIDENCE 44 (6th ed. 2000)).

223. Napoleon, *supra* note 73, at 130.

224. *See* Torres & Milun, *supra* note 5, at 654 ("[Those rules] give preference to documentary evidence over 'mere' recollection of the Tribe's members.").

225. *See* Clay McLeod, *The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past*, 30 ALTA. L. REV. 1276, 1282 (1992) (noting occasions in which judges have allowed their "ethnocentric biases" favoring literate cultures to relegate oral history by "implicitly den[ying] that it is useful as a primary source of historical knowledge").

226. DUNCAN & PIGGOTT, *supra* note 4, at 25-26 n.153.

227. *See* Milward, *supra* note 6, at 301-02 (statement of Dwight Newman) ("[T]he law of evidence and substantive law are in constant dialogue with each other. In this context, this means that the rules of evidence must be developed dynamically and flexibly in order to realise [sic] fair and substantive justice for Aboriginal rights claims.") (quoting Newman, *supra* note 154).

228. Newman, *supra* note 154, at 439.

229. *Id.* at 440; *see also id.* at 443 n.66 (listing fairly recent cases where oral history was admitted even though no historical confirmation).

those rules. Canada's liberal use of judicial notice to facilitate admission of oral history is also discussed.

A. The Hearsay Rule and Canada's Response to It

One of the principal evidentiary rules barring the admissibility of indigenous oral history is "the hearsay rule."[230] "Hearsay can be unreliable . . . [and is not] the best obtainable evidence."[231] A court cannot gainsay the truthfulness of a hearsay statement because it was not made "under oath . . . [and was] not subject to cross-examination."[232] Indigenous oral history is quintessentially hearsay evidence, as neither the originator of the story nor the original witnesses to it can be brought before the court.[233]

Canadian courts have two main avenues to admit oral history as evidence. The first is a judicially created "principled approach" to the hearsay rule,[234] which reflects the constitutional directive that indigenous rights and interests be recognized and affirmed.[235] This exception admits aboriginal oral history under "certain circumstances,"[236] which are similar to those under the exception to the best evidence rule. Interestingly, Canada's approach mirrors what is happening in other former commonwealth courts.[237] For testimony to be admissible in Canada under the hearsay rule, it must be both necessary and reliable.[238] U.S. courts also admit hearsay evidence based on necessity and reliability.[239] "Both necessity and trustworthiness are determined by the application of common sense and experience by the trial judge,"[240] but the events referred to must have "occurred before living memory."[241] Necessity may be satisfied if the

230. Roness & McNeil, *supra* note 132, at 68.

231. *Id.*

232. *Id.*

233. *E.g.*, *id.*

234. Milward, *supra* note 6, at 293 ("Aboriginal oral history evidence must instead be admitted on a case-by-case basis under the principled approach.").

235. *See* BRUCE GRANVILLE MILLER, ORAL HISTORY ON TRIAL: RECOGNIZING ABORIGINAL NARRATIVES IN THE COURTS 8-9, 157 (2011).

236. Roness & McNeil, *supra* note 132, at 68; *see also* Reilly, *Ghost of Truganini*, *supra* note 34, at 468 ("There is no question that the admission of much of the oral testimony of traditional laws and customs in native title trials is as an exception to the hearsay rule.")

237. *See* MacLaren, Barry & Sangster, *supra* note 112, at 125-26.

238. Milward, *supra* note 6, at 292.

239. *See* Gover & Macaulay, *supra* note 13, at 61.

240. Roness & McNeil, *supra* note 132, at 68.

241. Napoleon, *supra* note 73, at 131.

originator of the oral history or a witness to its recounting are dead and cannot be produced before the court.[242]

Canadian courts, however, engage in a more detailed inquiry into the reliability of the hearsay testimony[243] and require that the specific facts surrounding the statement provide "reliability".[244] For example, a judge will examine whether the person testifying was in a position to know her tribe's oral history and thus qualifies as a reliable source of that history.[245] The reputation of the declarant is key.[246] Canadian courts look at whether the statement might have been motivated by litigation and whether the deceased person had any "interest in the matter" in dispute, which might make her testimony "untruthful."[247]

The general "trustworthiness" of the oral history hearsay statements is improved if the group accepted those statements "as their true history" and were uttered and then repeated in public settings.[248] Canadian courts inquire into reliability before the witness actually takes the stand, which allows for an early "testing" of the testimony, increasing the fairness of the process.[249] This preliminary declarant investigation allows "witnesses [to] contradict or confirm the accuracy of the recitation," giving the histories greater reliability.[250] This declarant-focused investigation is not, however, in the form of a more rigorous *voir dire*,[251] and courts, which have discretion over how rigorous the inquiry should be, may even decide to not do it at all.[252]

The second option for bypassing the hearsay roadblock for oral history testimony is to use the standard hearsay exception for statements made by individuals who are now deceased, if the statements relate to reputation or pedigree.[253] Canadian courts consider that oral history relating to public

242. Roness & McNeil, *supra* note 132, at 68.

243. *See, e.g.*, Newman, *supra* note 154, at 436-37.

244. Milward, *supra* note 6, at 293 ("[E]ven reasonably reliable oral history evidence may be excluded if its probative value is exceeded by its prejudicial effect.").

245. *Id.* at 294.

246. *Id.* at 308.

247. Roness & McNeil, *supra* note 132, at 68.

248. Gover & Macaulay, *supra* note 13, at 61 (quoting R.V. Dick, [1989] C.N.L.R. 132, 134 (Can. B.C. Prov. Ct.)).

249. Newman, *supra* note 154, at 446.

250. Milward, *supra* note 6, at 297.

251. *Id.* at 435.

252. Mitchell v. M.N.R., 2001 S.C.C. 33, para. 33 (Can.) (dictum).

253. Sherrott, *supra* note 13, at 444-45.

reputation[254] and family lineage[255] as qualifying under this exception to the hearsay rule.[256] U.S. courts also admit hearsay evidence under the lineage exception to the hearsay rule.[257] Reputation can include community knowledge, pedigree, family history, and genealogy, the latter two of which are generally implicated in indigenous stories.[258] Canadian courts admit oral history about the location of boundaries under this reputation exception to the hearsay rule, but recognize that this exception did not include statements about the specific ways the tribes use the land.[259] Because a deceased person uttered these statements, they can also be admitted under the unavailability hearsay exception if the twin criteria of necessity and reliability are met.[260]

B. Getting Around the Best Evidence Rule

The best evidence rule requires that "if there is more than one way to demonstrate a fact," the stronger method must be employed.[261] In Canadian courts, this rule has not prevented the introduction of oral testimony, if it is both necessary and reliable.

Necessity requires that there be no other evidence available.[262] Necessity is easily established when dealing with an oral culture. Reliability,

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254. Roness & McNeil, *supra* note 132, at 68 ("Reputation can involve . . . community acknowledgement of the existence of public or general rights, i.e., rights held by the entire population or a particular segment of it.").

255. *Id.* ("Pedigree relates to declarations about family genealogy and history, such as relationships and dates of births, marriages, and deaths.").

256. Napoleon, *supra* note 73, at 130.

257. *See* Gover & Macaulay, *supra* note 13, at 72 (citing MCCORMICK ON EVIDENCE 535 (J.W. Strony ed., 4th ed. 1992)).

258. Roness & McNeil, *supra* note 132, at 68-69 ("As Aboriginal rights to land are communal in nature, they generally come within the categories of public or general rights that can be proven by declarations of reputation. Moreover, as kinship is integral to the social structures and distribution of entitlements within many Aboriginal communities, the pedigree exception can be relied upon as well in appropriate circumstances.").

259. Gover & Macaulay, *supra* note 13, at 63.

260. Roness & McNeil, *supra* note 132, at 68.

261. Fed. R. Evid. 1002 (1972) ("An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.").

262. *See* Napoleon, *supra* note 73, at 130 ("The hearsay rule admits exceptions involving oral histories: (1) necessity, such as when the person who witnessed the event is dead and no one else is able to provide information of the same evidential quality, and (2) reliability- the probability of trustworthiness, given the context of the reported statement or event (e.g., interest in the matter, when was the out-of- court statement was alleged to have been made? etc.)").

however, must be established on a case-by-case basis.[263] Canadian courts generally find oral history evidence reliable where there are "special circumstances, such as when the information is transmitted at a public gathering where there are witnesses as well as public affirmation of the transmission."[264]

The *Tsihiqut'in v. British Columbia* case set out additional criteria for the admission of oral evidence under the best evidence rule. Those criteria address the methods of preserving, transmitting, and protecting oral history's truth, selecting who qualifies to learn and tell the group's history, as well as information on the expertise, reliability, reputation, and personal knowledge of witnesses.[265] This type of inquiry can help the judge determine the evidence's admissibility and weight.[266]

Other evidentiary principles might also be helpful to those seeking the admission of indigenous oral history. For example, "the principle of inference that allows a finding of one fact if it flows logically from another proven fact" might allow judges to draw conclusions from oral history as a logical inference from a proven fact.[267] However, courts have great discretion with respect to how they apply this principle of inference, especially if the logical or rational nexus between the proven fact and the fact to be inferred may be tenuous at best.[268]

C. The Use of Judicial Notice to Bypass Evidentiary Barriers

In addition to liberal use of the exceptions to the best evidence and hearsay rules, courts could use judicial notice to admit oral history. Judicial notice gives a court some flexibility in its approach toward indigenous oral history by allowing a "judge to make a finding of fact without evidentiary

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263. *See* BRUCE G. MILLER, ORAL HISTORY ON TRIAL, RECOGNIZING ABORIGINAL NARRATIVES IN THE COURTS, 112 (2011) (noting that the admissibility and weight of such evidence must be determined on a case-by-case basis).

264. *See id.* at 145-62.

265. *Id.*

266. Mitchell v. M.N.R, 2001 S.C.C. 33, para. 33 (Can.) (dictum) ("The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history *may be appropriate* both on the question of admis4ibility and the weight to be assigned the evidence if admitted." (emphasis added)).

267. Milward, *supra* note 6, at 288.

268. *Cf.* Reilly, *Ghost of Truganini*, *supra* note 34, at 467 ("Although the requirements of proof make the *strict* application of rules of evidence unworkable, there are principles in the rules of evidence that should be considered in the context of native title litigation. First, there is a rule developed in the common law that recognises the dangers associated with absolute findings of fact.").

proof provided by the parties."[269] Under this principle, courts can take notice of matters that are common knowledge in the particular area in which the court is located.[270]

"Canadian jurisprudence recognises [*sic*] that judicial notice can operate to find facts that are distinctive to specific communities," including notice of "local geography and historical facts."[271] The problem with applying judicial notice to indigenous land claims is that knowledge about indigenous peoples and their customs may not be common knowledge in the community where the court is sitting,[272] and historical and geographic facts are "often vigorously disputed" in indigenous land claim cases.[273]

However, in an effort to reconcile the interests of their indigenous peoples with non-indigenous peoples, Canadian courts gloss over the rule that limits the scope of these disputes to members of the local indigenous community and not to the wider society.[274] This thereby allows for more accurate fact-finding about distinct indigenous groups.

Another issue to consider when applying judicial notice to gain admissibility of oral history evidence is the application itself. The application of judicial notice may reflect cultural biases of the indigenous applicant.[275] Courts have wide discretion in how they apply judicial notice.[276] Nonetheless, Canadian courts have utilized what one judge called a "contextualized application of judicial notice to fill in the blanks in the written historical record."[277] Courts can determine the usefulness of oral testimony by looking at three factors: corroboration, repeatability, and consistency.[278] For example, a court can verify oral history evidence "with other oral history testimony" or "see if other witnesses repeat the same story."[279]

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269. Milward, *supra* note 6, at 289.

270. *Id.* at 317 ("[F]acts notorious and generally accepted within a local community can properly fall within the scope of judicial notice.").

271. *Id.* at 289, 318-19.

272. *See* Palmer, *supra* note 23, at 1047 (suggesting overcoming this problem by holding court on Indian reservations).

273. Milward, *supra* note 6, at 316 (discussing judicial notice).

274. *Id.* at 289.

275. Gover & Macaulay, *supra* note 13, at 78 ("What one person may consider a stereotypical myth may be a fact beyond dispute to another person.").

276. *Id.* at 79.

277. Milward, *supra* note 6, at 318.

278. *See* Stohr, *supra* note 2, at 695.

279. *Id.*

Even when oral history is admissible, a court must still evaluate its authenticity[280] and determine what weight to give it.[281] The claimants bear the burden of proving each element of their claim.[282] Canadian and Australian courts have lowered the burden of proof in cases involving indigenous treaty and rights claims[283] in an effort to respect indigenous claims within their modern judicial systems.

V. The Striking Difference Between How Canadian and U.S. Courts Treat Indigenous Oral History

> *Underlying all these issues is the need for a sensitive and generous approach to the evidence tendered to establish aboriginal rights, be they the right to title or lesser rights to fish, hunt or gather. Aboriginal peoples did not write down events in their pre-sovereignty histories. Therefore, orally transmitted history must be accepted, provided the conditions of usefulness and reasonable reliability set out in Mitchell v. M.N.R., are respected.*[284]

As the prior sections of this article show, Canadian courts have a much more lenient attitude toward indigenous oral history. This is evidenced by their liberal interpretation of the exceptions to the best evidence and hearsay rules, by the judicious use of judicial notice, by lightening the burden of proof, and by not requiring the presentation of corroborating evidence.[285] Even Justice Vickers, in his landmark *Tsihlqot'in* decision, said he would use anthropological, archaeological and historical records to corroborate oral history evidence.[286] Another possible way to affirm the reliability of oral history is to examine its consistency with other known truths.[287] While Canadian courts have yet to hand down a pro-indigenous

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280. Validation can be done through oral testimony or through multiple witnesses corroborating the same story. *See id.* at 695.

281. Gover & Macaulay, *supra* note 13, at 86 (noting that the courts should be cautious in assigning weight to oral history even when admissible under the rules of evidence).

282. Roness & McNeil, *supra* note 132, at 66.

283. Gover & Macaulay, *supra* note 13, at 56. *But see id.* at 89 (explaining that even when aboriginal oral history is admitted, it is given little weight).

284. R. v. Marshall; R. v. Bernard, 2005 S.C.C. 43 (Can.), [2005] 2 S.C.R. 220.

285. Milward, *supra* note 6, at 288; *see supra* Part IV.

286. *See* MacLaren, Barry & Sangster, *supra* note 112, at 128-29 (discussing *Tsilhquot'in* decision).

287. Threedy, *supra* note 69, at 113 ("[I]n addition to assessing the internal consistency and completeness of a story, listeners will consider whether the story is consistent with what

decision, the favorable policies, discussed above, make such outcomes possible, even likely.[288]

This has led some critics to complain that although Canadian courts are announcing favorable judicial policies toward oral history evidence, the practical application of such policies is disappointing.[289] Perhaps Canadian courts have done less than their critics would like because they are reluctant to set in place hard rules that could not possibly cover all factual permutations in these types of cases.[290] Despite the potential disparities between theory and actual practice, and regardless of the critiques, it is nevertheless striking to consider the attitudinal differences of Canada's judicial approach to oral history.

The animating approach of Canadian courts toward the evidentiary issues of indigenous oral history is to be conscious of "the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in."[291] Canadian courts are specifically enjoined "not [to] undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case."[292]

The reason for Canada's generous attitude toward indigenous land claims, and the use of oral history to support them, most likely is its adoption of Section 35 as an amendment to its Constitution in 1982. This amendment requires that the rights of indigenous peoples be "recognized and affirmed" through a process of reconciling indigenous and non-

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is known about how the world works. In the case of the shields, the question thus becomes whether the Navajo account of the hiding of the shields is consistent with what is known about the Navajos from the anthropological and historical perspectives.").

288. *See* MacLaren, Barry & Sangster, *supra* note 112, at 136 (discussing *Tsilhquot'in* decision) ("While Aboriginal claimants still await the first judicially secured award of Aboriginal title, the pragmatic application of the *Tsilhquot'in Nation* Order at trial sets the framework for making this aspiration a practical reality."). *But see* Sherrott, *supra* note 13, at 449.

289. Milward, *supra* note 6, at 288 ("Since the enunciation of these principles, however, Canadian courts have consistently demonstrated hostile treatment of oral history evidence with the consequence of dismissing Aboriginal rights claims . . . [by]draw[ing] on a principle that Aboriginal oral history should not be given more weight than it can reasonably support . . . [and]habitually characteris[ing] written historical and documentary evidence as more reliable and persuasive than oral history evidence.").

290. *See* Newman, *supra* note 154, at 444.

291. R v. Van der Peet, [1996] 2 SCR 507, para. 68 (Can.).

292. Newman, *supra* note 154, at 441 (citing *Van Der Peet*, 2 S.C.R. at para. 68).

indigenous interests.[293] This constitutional amendment acknowledges the "historical injustices" done to indigenous peoples.[294]

Negotiation between indigenous and non-indigenous Canadians is part of the concept of reconciliation, which requires the recognition by non-indigenous Canadians that first Nation Peoples approach the bargaining table "in the same state they were in 500 years ago, as organized societies existing prior to the assertion of Crown sovereignty . . . [with a] distinct [conception] of how to lead good lives."[295] The concept of reconciliation, however, does not mean that the rights of the non-indigenous or competing public interests should be ignored in the process of achieving it.[296]

Since the passage of Section 35, Canadian courts, particularly Canada's Supreme Court, have accepted indigenous oral history on an equal footing with written evidence.[297] This means that oral history evidence "is to be given a real and fair chance to prove an [a]boriginal rights claim . . . [and that] if the oral history evidence is to be subjected to a critical inquiry as to its ultimate reliability, then the documentary and historical evidence should be subjected to that kind of inquiry as well."[298] To do otherwise would create a constitutional inconsistency.[299]

Reconciliation also means that evidence presented by First Nations must be viewed from the perspective of the indigenous claimants,[300] with all the forgiveness that such a directive implies. In other words, the Canadian constitution enjoins courts to make every effort to understand and accept

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293. *See* DUNCAN & PIGGOTT, *supra* note 4, app. E., at 22, 73.

294. *Id.* at 71.

295. DUNCAN & PIGGOTT, *supra* note 4, app. E., at 72 (quoting Gordon Christie, *Judicial Justification of Recent Developments in Aboriginal Law?*, 17 CAN. J.L. SOC'Y 41, 69-70 (2002)).

296. Brian Slattery, *The Metamorphosis of Aboriginal Title*, 65 CAN. BAR. REV. 255, 282 (2006) ("However, by the same token, the recognition of historical title, while a necessary precondition for modern reconciliation, is not in itself a sufficient basis for reconciliation, which must take into account a range of other factors. So, for example, to suggest that historical aboriginal title gives rise to modern rights that automatically trump third party and public interests constitutes an attempt to remedy one grave injustice by committing another.").

297. Kirsten Matoy Carlson, *Does Constitutional Change Matter? Canada's Recognition of Aboriginal Title*, 22 ARIZ. J. INT'L. & COMP. L. 449, 485 (2005).

298. Milward, *supra* note 6, at 312.

299. Carlson, *supra* note 297, at 467 (explaining how the *Delgamuukw* court "concluded that the inadmissibility of Aboriginal oral traditions could prevent Aboriginal peoples from every being able to establish their historical claims and that this would be unacceptable under the [Canadian] Constitution.").

300. *Id.* at 466-67.

indigenous oral history as evidence. Applying these principles to the best evidence and hearsay rules allows indigenous oral history to have a greater chance of admissibility as proof in a land claim.

Despite that the U.S. Supreme Court has allowed the admission of hearsay evidence based on necessity and reliability like Canada,[301] with rare exception, this principle has not been applied to indigenous oral history.[302] One such exception is a 1987 decision by the Court of Claims, where "the Court found that the ancient ties of the Zuni to the land in question were 'manifest in the tribal oral tradition about Zuni origin and migration and in the physical artifacts representing the archaeological history of Zuni culture."[303] The court specifically found evidentiary value in the tribe's oral tradition "because of the importance attached in the community to accurate transmission of oral history," and the presentation of oral history in a deposition form made it "more persuasive to [the] court."[304] The validity of the testimony was established "through corroboration between different pieces of the oral history testimony;[305] 'reliability,' or repeatability, tested through the ability of deponents to tell the same story on various occasions; and 'consistency,' meaning the conformity of testimony with other testimony."[306]

However, by requiring corroboration, unlike Canadian courts, the Court of Claims gave the impression that oral history was less valuable than documentary evidence.[307] Also by limiting oral history evidence to "to cases where the chain of oral transmission can be traced to Indians who had actual knowledge of the time of pre-contact occupancy[,] a circumstance that even in the recently settled Western states is increasingly impossible[,]"[308] the court all but assured that such oral history evidence would not be admitted in this or any future cases before that court.

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301. Newman, *supra* note 154, at 441 ("The United States Supreme Court adopted an approach permitting the admission of hearsay based on necessity and reliability as early as 1960, and the judgment accomplishing the change seems to contain these values.").

302. *But see* Jefferson, *supra* note 65, at 114 (explaining that the Supreme Court based its 1941 decision "recogni[zing] the legitimacy of Hualapai land claims against the Santa Fe Railroad . . . on the presence of artifacts, customary usage of other objects of material culture, as well as traditional oral history narratives.").

303. Newman, *supra* note 154, at 448 (noting that this decision does not provide a "ringing endorsement of oral history.").

304. *Id.*

305. Stohr, *supra* note 2, at 692.

306. Newman, *supra* note 154, at 448.

307. Stohr, *supra* note 2, at 693.

308. *Id.*

More common in U.S. courts are decisions like *Coos Bay,* where the court saw no evidentiary value in oral history and dismissed the oral history evidence given by twenty-one tribal members because a majority of those members may have been bias to the case's outcome.[309] An American legal treatise even warns lawyers representing Indians in land claim cases from using oral history because the declarants may be "far removed from the issue in question, in point of time, and may have an interest in the outcome of the case."[310] Showing a preference for documentary evidence, the text went on to say that while oral history evidence may be "entitled to some weight and may not be ignored or discarded by the Indian Claims Commission as 'literally worthless,' such evidence may be given less weight than contradictory evidence which the court deems to be 'more reliable,' particularly when such other evidence is supplemented by reliable historical accounts."[311]

Interestingly, the Native American Graves Protection and Repatriation Act ("NAGPRA") accomplishes statutorily what U.S. courts have been largely unwilling to do; namely putting oral history on equal footing with documentary evidence.[312] The statute makes storytelling part of the adjudicative process.[313] It also explicitly treats hearsay evidence as competent evidence by requiring that "the decision-maker must consider oral tradition" in determining "the strength of a claim of cultural affiliation."[314]

Although arguably the courts in both countries are still outfitted with the trappings of colonialism reflecting a non-Indian bias,[315] Canada has fortunately taken steps to acknowledge and rectify this problem, and has

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309. *Id.* at 691 ("In *Coos Bay Indian Tribe v. United States*, the court dismissed the testimony of twenty-one Indian witnesses who gave the oral history of their Tribe because their testimony was in conflict with contemporary documentary evidence. The court alluded that the testimony may have been biased because seventeen of the witnesses had 'a direct interest in the outcome of [the] case.'").

310. M.J. Kaplan, Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. 425, 436 (1979).

311. *Id.*

312. Threedy, *supra* note 69, at 108.

313. *Id.* at 109 ("One of the most interesting aspects of thinking about the role of stories under NAGPRA is that the statute explicitly incorporates storytelling into the adjudicative process.").

314. *Id.*

315. Furniss, *supra* note 8, at 196 (discussing British Columbia Supreme Court Justice McEachern's dismissal of anthropological testimony in *Delgamuukw* as "unscientific and biased").

used courts as part of this process. U.S. courts have not taken such steps of reconciliation and still appear dedicated to assimilating Indians into the dominant culture and eliminating their separateness, including their separate land base.[316] Acknowledging tribal oral history as proof of the legitimacy of a tribal land claim would undermine a long judicial history of non-recognition. But without the compulsion of a constitutional directive or even a spontaneous utterance by the Supreme Court, which seems highly unlikely,[317] there is little reason to expect that U.S. courts will follow the Canadian example. They have barely entered the fray.

Conclusion

"The battle between orality and literacy is a battle over what constitutes truth[,]" and the "triumph of literacy is a triumph of certainty over reason."[318] It is also a battle over memory and what "constitutes history,"[319] and the stories nations preserve to ensure their survival.[320] The battlefield has been the courthouse, and the weapons employed by courts to block the admission of indigenous oral history have been the rules of evidence.

Despite invasion and obstruction brought by contact with Europeans, indigenous peoples have preserved their history through stories, artifacts, and rituals.[321] But everything about oral history evidence presents a challenge to a court accustomed to written and recorded evidence. Canada has encouraged its courts to surmount these problems by amending its Constitution to require the reconciliation of the interests of its indigenous peoples with non-indigenous Canadians. In response to this mandate,

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316. Matthew L.M. Fletcher, *2010 Dillon Lecture: Rebooting Indian Law in the Supreme Court*, 55 S.D. L. REV. 510, 512-16, 517 (2010) (recounting the many losses tribal interests have suffered in federal courts).

317. *Id.* at 511 (arguing that without "a viable long-term strategy . . . tribal interests are and will continue to be punching bags in Supreme Court litigation").

318. Stohr, *supra* note 2, at 680 ("[C]ourts generally celebrate this victory.").

319. *Id.* ("[T]he oral basis for Native American religions is the most important factor explaining the lack of success experienced by Indian Tribes and individuals attempting to use federal courts to protect sacred sites and to recognize the Indians' Free Exercise claims").

320. Reilly, *Ghost of Truganini*, *supra* note 34, at 462 ("The centrality of the pioneer in Australian history is perpetuated by the authority granted pioneer histories in native title litigation. The pioneer becomes not only the maker of the nation, but of its history as well.")

321. Stohr, *supra* note 2, at 684 ("In reality, Native American cultures are not static; they changed and evolved radically both before and after European contact, and as living cultures continue to do so today. Through their oral literature, Native Americans have preserved this history, although the differences in emphasis, style and organization [of that history] often have led non-Natives to view this history skeptically or to deny its existence altogether.").

Canada's courts have adopted a liberal vision of the exceptions to the best evidence and hearsay rules and used judicial notice to put indigenous oral history on equal footing with written evidence.

Canada's 1982 amendment of its constitution set the country's courts on a mission to make amends for what it did to its indigenous peoples throughout much of that country's colonial and post-colonial history. The country recognized that indigenous peoples had been wrongly displaced from their lands and restitution required opening the courts to claims for the return of those lands. Oral history became a critical component of establishing those claims, and the constitutional mandate could not be fulfilled if that evidence was not allowed to be heard. The story in the United States is quite different. There has been no formal recognition of wrongs done to Indians by removing them from their ancestral lands.

There is no procedural reason that U.S. courts cannot follow Canada's lead. No evidentiary rule stands in our way, and there is no evidentiary exception that cannot be liberally interpreted to favor indigenous rights. What Canadian courts have done since 1982 is not revolutionary from an evidentiary rule perspective; it is only revolutionary from the standpoint of its substantive impact. The U.S. must also reconcile and allow procedural and evidentiary rules to achieve fair outcomes for its indigenous peoples.