CONTEXTUALIZING THE LOSSES OF ALLOTMENT THROUGH LITERATURE

"The Lone Wolf *opinion, like other Supreme Court opinions, is completely divorced from the immense human injury that follows from bad law."*[1]

"Tracks *is essentially a story about land—and the lives of the people connected to it."*[2]

KRISTEN A. CARPENTER*

Some years ago, scholars issued a "call to context," arguing that legal rules should be studied and applied with attention to the historical, personal, cultural, geographic, and other circumstances that give rise to legal problems.[3] These scholars critiqued a strict "rule-of-law" model wherein abstract legal principles dominated legal thinking.[4] By contrast, they argued the examination of legal rules in context can enhance lawyers' understanding of what's really going on in cases and improve their ability to apply the rules to the various situations of their clients.[5]

The need to contextualize legal rules is particularly acute in federal Indian law. Because the field originated in Anglo-American rather than tribal legal traditions, federal Indian law is often alien and oppressive to its Indian constituents.[6] Moreover, many students and even practitioners of Indian law are not deeply informed about Indian people, cultures, and

---

*Assistant Professor, University of Denver Sturm College of Law. J.D., Harvard Law School (1998); A.B., Dartmouth College (1994). With thanks to Patti Alleva, Jerilyn Decoteau, Matthew Fletcher, and Angela Riley.

1. Anthony G. Gulig & Sidney L. Harring, *"An Indian Cannot Get a Morsel of Pork . . ." A Retrospective on* Crow Dog, Lone Wolf, Blackbird, *Tribal Sovereignty, Indian Land, and Writing Indian Legal History*, 38 TULSA L. REV. 87, 96 (2002).

2. LORENA L. STOOKEY, LOUISE ERDRICH: A CRITICAL COMPANION 71 (1999).

3. *See* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2099 (1989) ("American legal scholarship of the past several decades has revealed deep dissatisfaction with the abstract and collective focus of law and legal discourse.").

4. *Id.* While Massaro's article concisely synthesizes the rule-of-law and contextual approaches, it is important to note that she did not reject the rule-of-law model in her discussion of "empathy" in legal analysis.

5. Robert M. Jarvis, Phyllis G. Coleman, & Gail Levin Richmond, *Contextual Thinking: Why Law Students (And Lawyers) Need to Know History*, 42 WAYNE L. REV. 1603, 1612 (1996).

6. *See generally* Philip P. Frickey, *Context and Legitimacy in Federal Indian Law*, 94 MICH. L. REV. 1973, 1977 (1996).

places.[7] As a result, lawyers sometimes fail to appreciate how Indian law cases affect Indian communities or how to represent Indian clients effectively. At the very least, there is room for improvement in understanding Indian law and its impact on Indian people.[8]

Contextualizing Indian law needs to occur in many ways. This article suggests only one: that the study of literature has the potential to contextualize certain Indian law cases.[9] Adherents of "law and literature" argue that the study of literature is "invaluable to the legal academy" in that it "contextualizes and personalizes the effects and impacts of the law."[10] More specifically, literature can offer "a voice, an indomitable rock or stone—a landmark of identity and a source for empathy and understanding."[11] While the law and literature movement has its critics,[12] a number of scholars argue that reading literary works, including fiction, alongside relevant legal texts can deepen our understanding of the law.[13]

This essay considers a law and literature approach to one Indian law problem: understanding the losses of "allotment." Allotment was a late

---

7. *See* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM xiii-xxxvi (2005) (arguing that many people's "knowledge" of American Indians amounts to racial stereotype rather than real information).

8. *See generally* RENNARD STRICKLAND, TONTO'S REVENGE 99-120 (1997) (discussing Indian law and lawyers).

9. Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 411 (2005). There are at least two approaches to "law and literature." The first might be called "law in literature" and involves the reading of "[w]orks of the literary imagination as texts to be mined for the insights they might provide into the nature of law and justice." *See* Jeffrey G. Sherman, *A Tax Teacher Tries Law and (Dramatic) Literature*, 37 SUFFOLK U. L. REV. 225, 258 (2004). A second approach looks at "law as literature" and "deploy[s] the techniques of literary analysis in the interpretation of legal texts." *Id*. at 256. For just a few of the classic works on law and literature see ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW 29-30 (1993); Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1 (1988); JAMES BOYD WHITE, THE LEGAL IMAGINATION (1987); Benjamin Cardozo, *Law and Literature*, *in* LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES (1931).

10. Michele Cammers Goodwin, *The Black Woman In The Attic: Law, Metaphor And Madness in* Jane Eyre, 30 RUTGERS L.J. 597, 611 (1999).

11. *Id*.

12. For a small sampling of the vast body of scholarship criticizing the law and literature movement, see, e.g., Jane B. Baron, *The Rhetoric of Law and Literature: A Skeptical View,* 26 CARDOZO L. REV. 2273 (2005); Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059 (1999); RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).

13. *See, e.g*., Elizabeth Tobin, *Imagining the Mother's Text: Toni Morrison's* Beloved *and Contemporary Law*, 16 HARV. WOMEN'S L.J. 233, 272 (1993) ("The literary work is only valuable in its relation to law if it is read alongside the 'real' as a way to respond to the various narratives that both the legal and the literary voices provide."); Carolyn Heilbrun & Judith Resnick, *Convergences, Law, Literature, and Feminism*, *in* LAW AND LITERATURE: TEXT AND THEORY 91-126 (Lenora Ledwon ed., 1996); Peter Margulies, *The Identity Question, Madeleine Albright's Past, and Me: Insights from Jewish and African American Law and Literature*, 17 LOY. L.A. ENT. L. REV. 595 (1997).

nineteenth and early twentieth century federal legislative program to take large tracts of land owned by Indian tribes, allocate smaller parcels to individual Indians, and sell off the rest to white settlers.[14] The idea was that Indians would abandon traditional patterns of subsistence to become American-style farmers, and great tracts of land would be freed up for the advancement of white settlement.[15] Codified in 1887, allotment was a key component of the federal government's larger project of assimilating Indians into mainstream society,[16] and remained federal policy until Congress finally rejected allotment in 1934.[17]

Allotment was devastating for Indian tribes and people who suffered incredible losses of land, economic livelihood, culture, and everything else that mattered.[18] But the Supreme Court's caselaw on allotment might make you think otherwise. Indeed, *Lone Wolf v. Hitchcock*[19] characterizes allotment as a policy that simply changed the manner in which tribes owned their real property and did not cause any losses at all.[20]

There are, of course, many ways to develop a fuller legal picture of the losses tribal people suffered during allotment, including historical and empirical research.[21] But this article argues that fiction also has something to offer. Accordingly, this piece[22] argues that two novels by the Turtle Mountain Chippewa author Louise Erdrich can serve to contextualize the

---

14. *See* CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 43-55 (2005).

15. *Id*.

16. *See* General Allotment (Dawes) Act, ch. 119, § 1, 24 Stat. 388 (1887) [hereinafter General Allotment (Dawes) Act].

17. *See* Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934).

18. *See id*. (offering allotment on the Nez Perce reservation as an example).

19. 187 U.S. 553 (1903).

20. *See Lone Wolf*, 187 U.S. at 553.

21. For works on the historical context of allotment see BLUE CLARK, LONE WOLF V. HITCHCOCK: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY (John R. Wunder ed., Univ. of Neb. Press 1994) (1946); WILLIAM T. HAGAN, TAKING INDIAN LANDS: THE CHEROKEE (JEROME) COMMISSION, 1889-1893 (Univ. of Okla. Press 2003). For other narrative approaches to allotment, see Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth Of Common Ownership*, 54 VAND. L. REV. 1559 (2001); Stacy L. Leeds, *The Burning Of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10-SPG KAN. J.L. & PUB. POL'Y 491 (2001).

22. This symposium essay is a precursor to a full-length article considering the topic of Indian law and literature. For other articles considering Indian law issues through the lens of literature, see 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, 3-4 (2006); Christine Metteer Lorillard, *Stories That Make the Law Free: Literature as a Bridge Between the Law And the Culture In Which It Must Exist*, 12 TEX. WESLEYAN L. REV. 251 (2005); N. Bruce Duthu, *Incorporative Discourse in Federal Indian Law: Negotiating Tribal Sovereignty Through the Lens of Native American Literature,* 13 HARV. HUM. RTS. J. 141 (2000); N. Bruce Duthu**,** Crow Dog *and* Oliphant *Fistfight at the Tribal Casino: Political Power, Storytelling, and Games of Chance,* 29 ARIZ. ST. L.J. 171 (1997).

losses suffered by Indian people during the allotment period.[23] While tribal people clearly lost a lot of land, Erdrich helps us understand how allotment brought about losses in socio-economic, familial, spiritual, and other realms of tribal life. And even though she is writing about fictional Ojibwe people and not the real Kiowa and Comanches involved in *Lone Wolf*, Erdrich raises important, relevant questions about allotment. Inspiring lawyers to contemplate these questions—completely ignored by *Lone Wolf*—can enhance understanding of the case and contemporary advocacy today.

Part I describes how *Lone Wolf* decontextualizes allotment, setting forth a legal rule without any discussion of the Indian people or places affected by it. Part II discusses allotment as it appears in the novels of Louise Erdrich. Part III analyzes the lessons learned from reading the law of allotment alongside the literature of allotment.

I. ALLOTMENT DECONTEXTUALIZED: THE *LONE WOLF* OPINION

In the late nineteenth century, Congress passed legislation to "allot" lands held in common by American Indian nations to individual tribal members, and sell off the "surplus" to white settlers.[24] The policy was an "unmitigated disaster" for Indian tribes.[25] One scholar argues, "Allotment and the subsequent sale or lease of Indian lands accomplished what the genocide of epidemics, war and bootlegged alcohol had not been able to do: a systematic 'ethnocide' brought about by a loss of Indian identity with the loss of land."[26] Former Principal Chief of the Cherokee Nation, Wilma Mankiller, has explained:

> What happened to us at the turn of the century with the loss of land, when our land was divided out in individual allotments, had a profound irreversible effect on our people. . . . When we stopped viewing land ownership in common and viewing ourselves in relation to owning the land in common, it profoundly altered our

23. *See* General Allotment (Dawes) Act, ch. 119, § 1, 24 Stat. 388 (1887).

24. The federal "allotment," program, instituted through the General Allotment Act of 1887, divvied up what land tribes had collectively retained during the treaty period, and distributed it among individual owners. Allotment provided a twenty-five year "trust period" during which Native allotments could not be sold or taxed. *See* General Allotment (Dawes) Act, ch. 119, § 1, 24 Stat. 388 (1887).

25. *See* Joseph William Singer, Lone Wolf*, or How to Take Property by Calling it a "Mere Change in the Form of Investment*," 38 TULSA L. REV. 37, 45 (2002).

26. County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 276 (1992) (Blackmun, J., dissenting) (quoting HELEN H. SCHUSTER, THE YAKIMAS: A CRITICAL BIBLIOGRAPHY 70 (1982)).

> sense of community and our social structure. And that had a tremendous impact on our people and we can never go back.[27]

These statements, and many others, begin to express the great and terrible losses that the federal policy of allotment brought to Indian nations. Yet, the United States Supreme Court famously held that losses suffered by Indians during allotment were no losses at all.[28] In fact, in 1903, when Kiowa Indians challenged the allotment of their treaty-guaranteed lands on grounds that it violated the Fifth Amendment's prohibitions against taking property without just compensation, the Supreme Court held that Congress's action was unreviewable.[29] Congress was exercising its plenary power over Indian property and this power included the right to break treaties.[30] And, in any event, allotment was "a mere change in the form of investment of Indian tribal property."[31] The implication was that Congress merely divvied up tribally held lands to individual Indians, with no net loss of property.

Of course, the implication is simply false. Indians lost property in several ways during allotment. First, the forced redistribution of land from Indian tribes to Indian individuals constituted a major loss for the tribes as landowners. As Joseph Singer has pointed out, if the government statutorily forced a corporation (or any other non-Indian entity) to distribute all of its property to shareholders or members, that entity would have a claim for an uncompensated taking under the Fifth Amendment.[32] This is not so when the entity is an Indian nation.

Second, tribes lost property when the government sold off "surplus lands." The idea was that after individual tribal members received their allotments, the extra lands previously owned by the tribes would be available for white settlement. Usually the federal government did compensate tribes for their surplus lands. But often the compensation package did not reflect market value or what the tribes thought they had bargained for. In some instances, the allotment "agreement" was negotiated under duress, or ratified without tribal consent.[33] In *Lone Wolf* itself, the Kiowa and Comanche plaintiffs alleged that the allotment agreement never received the

---

27. Wilma Mankiller, *in* The Native Americans, Turner Broadcasting System (1992) (on file with the author).

28. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

29. *See id.* at 567.

30. *See id.*

31. *Id.* at 568.

32. Singer, *supra* note 25, at 44 ("[A] transfer of property from a corporate entity to someone else—even to its members—would *a fortiori* constitute a taking of property without just compensation as required by the Fifth Amendment.").

33. *See id.* at 46-47.

signatures of three-fourths of the adult male tribal members as required by treaty and those who did sign did so under threats, fraud, and duress. This violation of a contractual (treaty) right not to have land taken absent consent constitutes yet a separate property violation in Professor Singer's view.[34]

Finally, many individual Indians lost their allotments once the federal government lifted restrictions on alienation—usually about twenty-five years after allotting the property. At that point, individual Indians were then "free" to do what they wanted with their property, which was then subject to state taxation. But allotment had brought about such incredible changes in the socio-economic pattern that some Indians were not really free, in any meaningful sense, to keep their individual allotments. Tribes that had followed a hunter-gatherer subsistence lifestyle for thousands of years were expected to take up farming. Even for tribes with an agricultural tradition, allotment was devastating when they received land ill-suited to grow crops or too small to sustain a successful farm.[35] Thus, when they came to own their land outright, many Indians were barely staving off, or succumbing to, poverty. When they could not meet state tax payments, they lost their allotments in foreclosures. Others sold their property outright to generate cash for food and necessary goods. Still others were unfamiliar with real estate transactions, pressured by federal agents and corporations, or eager to sell their only item of value and enter the market economy.[36]

---

34. *See id.* at 43.

35. Stacy L. Leeds, *Borrowing From Blackacre: Expanding Tribal Land Bases Through the Creation of Future Interests and Joint Tenancies*, 80 N.D. L. REV. 827, 831 (2004) (providing a quote from a Cherokee farmer, D. W. C. Duncan, in 1906).

> Before this allotment scheme was put in effect in the Cherokee Nation we were a prosperous people. We had farms . . . . Orchards and gardens—everything that promoted the comforts of private life. . . . Under our old Cherokee regime I spent the early days of my life on the farm up here of 300 acres, and arranged to be comfortable in my old age. . . . When I was assigned to that 60 acres . . . and I could take no more under the inexorable law of allotment enforced upon us Cherokees, I had to relinquish every inch of my premises outside of that little 60 acres. What am I going to do with it? For the last few years. . . I have gone out there on that farm day after day. . . . I have exerted all my ability, all industry, all my intelligence. . . to make my living out of that 60 acres, and, God be my judge, I have not been able to do it. . . . I am here today [sic], a poor man upon the verge of starvation—my muscular energy gone, hope gone. I have nothing to charge my calamity to but the unwise legislation of Congress in reference to my Cherokee people.

Id. at 831-32.

36. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 78-79 (2005) (delivering a generalized description of how individual Indians lost allotments); ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES (1940) (giving a description of allotment's effects on the Cherokees, Choctaws, Creeks, Chickasaws, and Seminoles in

As a result, the Indian land base decreased by about ninety million acres during the fifty-year allotment policy.[37] So *Lone Wolf*'s dicta about Indian property is both factually disingenuous and racially discriminatory, as numerous scholars have already pointed out.[38] But *Lone Wolf* suffers other limitations. It tells us nothing about the people who brought the suit or the lands they were suing about.[39] It provides little information about the history or policy[40] underlying allotment.[41]

In short, *Lone Wolf* provides virtually no information about the context of the case.[42] The opinion, thus, gives readers little information with which to evaluate whether allotment was "mere change in the form of investment of Indian tribal property" or what it meant to entrust tribal property to Congress's "plenary power" and "perfect good faith." Two novels of Louise Erdrich do, however, illuminate these questions.

II. CONTEXTUALIZING *LONE WOLF*: TWO NOVELS OF LOUISE ERDRICH

In *Tracks*[43] and *Four Souls*,[44] Erdrich tells an intergenerational story of fictionalized Ojibwe people in North Dakota.[45] The narrative starts in 1912, just as the effects of allotment were starting to manifest on their reservation.[46] Over the next eighty or so years, Erdrich's characters live out the

---

Oklahoma); WILKINSON, BLOOD STRUGGLE, *supra* note 14, at 43-55 (providing short description of allotment's effects on the Nez Perce reservation).

37. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 13 & n. 59 (1995).

38. *See generally Symposium:* Lone Wolf v. Hitchcock*: One Hundred Years Later,* 38 TULSA L. REV. 1 (2002) (featuring articles that universally condemn *Lone Wolf* by scholars including Judith V. Royster, Philip P. Frickey, Joseph William Singer, Frank Pommersheim, T. Aleinikoff, Stacy L. Leeds, Anthony G. Gulig, Sidney L. Harring, Bryan H. Wildenthal, and Steve Russell).

39. *But see generally* CLARK, *supra* note 21.

40. *But see* DAVID GETCHES ET AL., FEDERAL INDIAN LAW 140-88 (situating the *Lone Wolf* case in over eighty pages of discussion about the history and federal policy giving rise to the case).

41. And, of course, *Lone Wolf* could not forecast how allotment would affect Indians in the future—as in the above discussion of what happened when restraints on alienating allotments were lifted—though these developments were not entirely unforeseeable.

42. *See generally* Massaro, *supra* note 3; Frickey, *supra* note 6.

43. LOUISE ERDRICH, TRACKS (Harper & Row 1989) (1988) [hereinafter TRACKS].

44. LOUISE ERDRICH, FOUR SOULS (Harper Collins 2004) [hereinafter FOUR SOULS].

45. This Article cites to the following editions: ERDRICH, TRACKS, *supra* note 43; ERDRICH, FOUR SOULS, *supra* note 44.

46. While Erdrich's works are fiction, scholars have suggested that her works depict her own Turtle Mountain Reservation. *See, e.g.*, Julie Maristuen-Rosakowski, *The Turtle Mountain Reservation in North Dakota: Its History as Depicted in Louise Erdrich's* Love Medicine *and* Beet Queen, 12 AM. INDIAN CULTURE & RES. J. 33, 35 (1988). Additionally, there is the suggestion that her fictional works depict actual historical events taking place on other reservations. *See, e.g.,* James D. Stripes, *The Problems of (Anishinaabe) History in the Fiction of Louise Erdrich*, 7 WICAZO SA REV. 26, 26-33 (1991) (discussing the resemblance between events in

"legacy of allotment."[47] They lose much of their land, but that is not all. With the land, they lose their trees and homes, food and subsistence lifestyles, sacred lakes and ceremonies, physical and emotional health, family patterns and family members.

The losses suffered by Erdrich's characters are not complete, but they are devastating and transformational. In the end, Erdrich brings the story full-circle to the contemporary period of land recovery and cultural revitalization—but not without first chronicling, albeit in a fictionalized sense, the losses of allotment. Her works, therefore, offer a window of understanding into the historical and contemporary ramifications of allotment.

Tracks is narrated by a traditional elder, Nanapush, and a younger mixed blood woman, Pauline Puyat. The story begins in 1912, during a cold winter when the people are hungry and suffering from smallpox. In the first scene, Nanapush and tribal policeman Edgar Pukwan are sent out to the Pillager cabin—there a grandmother and grandfather, little brother and two sisters, lie "stone cold and wrapped in grey horse blankets, their faces turned to the west."[48] They have succumbed. Overwhelmed by the deaths and lingering spirits, Nanapush and Pukwan are even more discomforted when something moves and they realize that the eldest daughter Fleur is still alive. Nanapush takes Fleur from the home, and nurses her back to health somehow during this winter of 1912 when only some people manage to fend off death.

Not coincidentally, 1912 is the also the year when allotment's twenty-five year "trust" period is ending. With legal protections against alienating Indian allotments lifted, white speculators and settlers could acquire them on the cheap through timber leases, tax forfeitures, and bank foreclosures—or sales by tribal members who were ill-informed, short-sighted, or starving. As Nanapush laments, "Starvation makes fools of anyone. In the past, some had sold their allotment lands for one hundred poundweight of flour."[49] Moreover, many people do not understand the new mechanisms of the white man's laws, politics, or business transactions: "There were so few

---

Tracks and "the historic White Earth timber scandal"). Erdrich describes her work as invoking common Indian experiences rather than specific ones. *See id.* at 28 (citing LAURA COTELLI, WINGED WORDS: AMERICAN INDIAN WRITERS SPEAK 47 (1990) ("[*Love Medicine*] does touch some universals, which is what we're talking about, Pan-Indianism. We wanted the reservation in *Love Medicine* to kind of ring true to people from lots of different tribes.")). For criticism of Erdrich's representations of Ojibwe culture and language, see DAVID TREUER, NATIVE AMERICAN FICTION: A USER'S MANUAL 29-68 (2006).

47. *See generally* Royster, *supra* note 37.

48. TRACKS, *supra* note 43, at 3.

49. *Id*. at 8.

of us who even understood the writing on the papers. Some signed their land away with thumbs and crosses."[50]

But despite the overwhelming conditions of cold, disease, hunger, and intruding white society, some of the novel's characters try to resist. As Nanapush says the people "who were desperate to hold on [] now urged that we get together, and buy back our land, or at least pay a tax and refuse the lumbering money that would sweep the marks of our boundaries off the map like a pattern of straws."[51] Nanapush and Fleur are two of these "hold-outs" against the forces of assimilation and allotment. Along with Fleur's daughter Lulu, companion Eli Kashpaw, and Eli's mother Margaret, they band together at Fleur's cabin, hunting meager game and saving to collect the tax money due on their lands. To some extent, Fleur's power and medicine, and the depth of their relationships to each other sustain them.

But ultimately, the land is the most important thing. "Land," Nanapush says, "is the only thing that lasts life to life."[52] For Fleur, this land is the source of her subsistence lifestyle, the connection with her culture and medicine, the ground where her parents are buried, and the place where she relates to the supernatural being that resides in the lake. And the value of the place transcends Fleur, as Nanapush explains: "Pillager land was not ordinary land to buy and sell. When that family came here, Misshepeshu had appeared because of the Old Man's connection. But the water thing was not a dog to follow at our heels."[53] For the entire tribe, the home of Pillagers seems to embody power and tradition.

In the end, the little family loses the land and, at the same time, loses Fleur's premature baby girl—the land lost to fraud, late fees, and a non-Indian buyer, and the child to malnourishment, the cold, and a mixed-blood nun's inability to remember the old medicines. The loss of the baby and land seem tragically, intimately related. Nanapush tries to reassure Fleur: "You not be to blame if the land is lost . . . or if the oaks and the pines fall, the lake dries, and the lake man does not return. You could not have saved the child that came so early."[54] But blame seems irrelevant and hollow as life on the lake has clearly begun to unravel.

Resistant to the end, Fleur is still living in her cabin at Lake Machimoto when the lumber crews arrive to chop the trees around her. She sends her only surviving daughter, Lulu, to a government boarding school,

50. *Id*. at 99.
51. *Id*. at 8.
52. *Id*. at 33.
53. *Id*. at 175.
54. *Id*. at 178.

ostensibly to protect her from everything happening on the reservation, but, of course, Lulu only feels abandoned. Fleur then tries to return to the lake and just barely survives drowning. Still alive, Fleur stands her ground as the timber work closes in; "woodchips litter[ing] the ground" around her and the air smelling of "the spilled sap of pine," Fleur prepares to leave the reservation.[55] She stays long enough to witness, or maybe even facilitate, "each tree. . . sawed through at the base."[56] Everything seems to teeter for a moment and then with an awesome, silencing "thunderstroke," the forest crashes, wiping out Fleur's cabin and leveling the landscape. Nanapush and the others can only watch her leave, with "no telling when and if she would ever return."[57]

For the sixteen years since *Tracks* was published, Erdrich left readers wondering what happened to Fleur. We learn, in the opening scene of *Four Souls*, that Fleur is "follow[ing] her trees. . . determined to cut down the man who took them."[58] She walks east in a torrent of sadness and grief, on a reverse trail of tears, taking her from the reservation to the city. Fleur proceeds on deer paths and small roads through woods and underbrush, all the way to "the first whitened streets" of the city where "buildings upon buildings piled together" and "the strange lack of plant growth confused her."[59] Though disoriented, Fleur keeps on the trail and we learn that it leads to the house of the man who acquired her land. Erected on a site where generations of Ojibwe had camped, given birth, loved, and lived, the house of John James Mauser is built out of Fleur Pillager's trees.

Most of *Four Souls* takes place in Mauser's house, a "house of German silver sinks and a botanical nursery, of palm leaf moldings and foyers that led into foyers of pale stained glass, this house of bathrooms floored with quiet marble, gray and finely veined."[60] This house that is still oozing with the sap of Fleur's trees, "as though recalling growth and life on the land belonging to Fleur Pillager and the shores of Matchimanito and beyond."[61] And it is here, in this house, that Fleur unpacks her plan to recover and reinvigorate that growth, land, and life. Her old powers still working sufficiently in the city to seduce the entire household, she first convinces Mauser's sister-in-law, the upright and uptight white spinster Polly Elizabeth Gheen, to hire her as the laundress and then starts to minister to

55. TRACKS, *supra* note 43, at 218.
56. *Id*. at 223.
57. *Id*. at 225.
58. FOUR SOULS, *supra* note 44, at 4.
59. *Id*. at 3.
60. *Id*. at 9.
61. *Id*.

the sickly Mauser. She wants to heal him so that she can destroy him—and there is the plot laid bare: "She had come to kill and humiliate and take back her land."[62]

While seemingly single-minded in her intention, however, Fleur's story could never be so simple. First, Fleur develops some sympathy for Mauser, and he falls in the long line of men who "adored and feared" her.[63] At the same time, Fleur finds out that Mauser has stolen not only *her* land, but that of hundreds of Ojibwe people. He had "wronged and stolen and gained his fabulous position in the first place by obtaining false holdings in northern Minnesota . . . . [H]e'd cut the last of the great pine forests there, thousands of acres. . . left behind a world of stumps and then sold the land off cheap."[64] Borrowing the tactic that Mauser had used to swindle land from Ojibwe girls, Fleur agrees to marry him. Because her primary motivation is still to regain her land, Fleur "withheld herself physically from Mauser until he came up with the papers and then went through with the wedding. By *zhaaginaash* law, she understood that his legal wife would inherit all he owned."[65] However Fleur's emotional state is shifting, too. Unable or unwilling to "love" exactly, but no longer plotting Mauser's death, Fleur becomes pregnant with his son and seems, for a time, destined to live in the big house, surrounded by her dead trees.

The plot evolves to make the reader question Fleur's mission. Suffering a difficult pregnancy, Fleur becomes addicted to whiskey and her son is born with disabilities.[66] Erdrich leaves us wondering if this is punishment for Mauser or Fleur or just the fates at work. In several reversal-of-fortune twists, Polly Elizabeth becomes Fleur's caretaker, Fleur ascends to the pinnacle of Minneapolis high society, and Mauser begins to lose his wealth. Fleur seems to have positioned herself to exact revenge, only to have the rug pulled out from under her—what a pyrrhic victory it will be if Fleur inherits Mauser's property only after he has lost it all in the market.

Back on the reservation, Nanapush and Margaret adapt to post-allotment life, sharing a home, negotiating traditional spirituality, and Christianity, tormenting each other as couples do, and trying to secure Lulu's return from the federal boarding school. The juxtaposition between

---

62. *Id*. at 73.
63. *Id*. at 72.
64. *Id*. at 126.
65. *Id*. at 74 (emphasis added).
66. *Id*. at 75. Scholars have criticized Erdrich and her late husband, Michael Dorris, for their views on the problem of Fetal Alcohol Syndrome. *See, e.g.*, Elizabeth Cook-Lynn, *Anti-Indianism, in* MODERN AMERICAN: A VOICE FROM TATEKEYA'S EARTH 81 (2001) (criticizing MICHAEL DORRIS, THE BROKEN CORD: A FAMILY'S ONGOING STRUGGLE WITH FETAL ALCOHOL SYNDROME (1989)).

Fleur's situation and that of her relatives is poignant. Fleur has fled the reservation because her losses were too great to stay—but despite everything, the reservation is still the place where her family and culture survive together,[67] leaving us to wonder why Fleur remains adrift and alone in the big city,[68] plotting what starts to feel like an empty revenge scheme.

Yet, this story is about more than revenge gone awry—and the moral of the story is not that revenge is always hollow. The story is about the particular depth of pain caused by Indians' land loss and the ensuing paths that contemporary Indians take to resist, return, and heal. One of those ways is to hold accountable those responsible for the loss. In *Tracks*, the Indian Agent insisted that it was "not his fault the trees were sold and cut down. . . . Nor was the tribe to blame. There was no adversary, no betrayer, no one to fight."[69] But in *Four Souls*, at least, Mauser hears and accepts his role in the taking of Ojibwe lands: "I've got the misfortune, perhaps, to have understood at last what I've done. She has let me know full well the misery I left behind."[70] Unlike most whites, Mauser comes to know that he had a personal role in Indians' losses and that no monetary payment will ever fully make up for what he has taken. Fleur, even after all of these years living as a wealthy woman in Minneapolis still "expects that [Mauser] will restore her land."[71]

In the same scene, Mauser illustrates another layer of Fleur's recovery story, her resistance to the dominant narrative of conquest. Although Mauser has owned up to his taking of tribal lands, his recognition is imperfect. He asserts he could "hardly make restitution to people who've become so depraved. . . . The reservations are ruined spots and may as well be sold off and all trace of their former owners obliterated. . . . Thinking their tribes will ever be restored is sheer foolishness."[72] But Fleur never believes this story. All gussied up in a white suit, she returns to the reservation.

Fleur's return is not easy. People gossip that she must have stolen the strange-looking boy who seems to be her son, she lives in her car, and wears the white suit like an eggshell over her fragile, bruised, and battered

---

67. *But see* Frank Pommersheim, *The Reservation as Place*, *in* BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 11-12 (1995).

68. *But see* DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960 134-57 (1986). Fixico describes that following allotment, many Indians were induced to move to cities through federally–supported "urbanization" programs that promised to provide better economic and education opportunities to Indians. But, "[u]nfortunately, the hard realities of urban life [along with the federal government's failure to provide the promised support] soon destroyed Indian hopes for a successful livelihood and dashed their many dreams." *Id.* at 139.

69. TRACKS, *supra* note 43, at 207.

70. FOUR SOULS, *supra* note 44, at 126-27.

71. *Id.* at 127.

72. *Id.*

self. And she still needs to recover her land. Though Fleur returned with the deed, secured from Mauser, she quickly learns that Mauser, too, had lost the property for failure to pay taxes. After the property went to the state, Tatro, the Indian agent and reservation bar owner, purchased it through a "legal loophole."[73] Fleur has to win her land back—in a poker game.[74] When she plays drunk and turns her hand over to her "strange in the head"[75] son, Tatro figures he's got it made and puts up Fleur's own lost land as his bet. At that point, the boy shows the Pillager in him, wins every hand, and recovers his mother's acres by the lake and the island too.

Despite this victory and the tribal celebrations that ensue, Fleur still needs to recover from her exile and return to the reservation, her deep losses of family and land, and the after-shocks of how she chose to cope with such trauma. She finally breaks down in shame, exhaustion, and sorrow. Margaret instructs her in a course of traditional healing. After much suffering and cleansing, Fleur Pillager "like the spirits . . . lives quietly in the woods."[76] Fleur is changed, but she is home, and along with the people of the reservation, she has "come out of it with something, at least. This scrap of earth . . . . [A]nd as long as we can hold on to it we will be some sort of people."[77]

III. LEGAL LESSONS FROM LITERATURE

So we have two novels of allotment. How do they help us when we come back to the law? There are numerous legal potential lessons from *Tracks* and *Four Souls*, of which I discuss just two.

First, I am inspired by Fleur's insistence on restitution from Mauser. Erdrich tells us that Fleur wanted: "Revenge, she wanted that. And also restoration. Don't forget. She wanted her land back and if she couldn't have the trees she wanted some equivalent justice for their loss."[78] Even when Mauser, the white oppressor who has become her husband, says that such restoration is completely impossible foolishness, Fleur maintains her purpose. Despite years of apparent assimilation in the city, she still wants her land back, and ultimately she gets it.

---

73. *Id*. at 187.

74. *Id*. at 192. This passage may remind readers that some Indian nations have used proceeds from gaming activities to finance land acquisitions, or more correctly reacquisitions of lost lands. *See* Kristen A. Carpenter & Ray Halbritter, *Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming*, 5 GAMING L. REV. 311 (2001).

75. FOUR SOULS, *supra* note 44, at 200.

76. *Id*. at 209.

77. *Id*. at 210.

78. *Id*. at 72.

"Don't forget," Fleur seems to tell us contemporary lawyers, the story should be about "restoration, getting the land back, and justice."[79] This is where my analysis comes back to *Lone Wolf*. Citing its nonjusticiability doctrine, the Supreme Court held that it could not even "consider" Indian claims that allotment of Kiowa and Comanche lands occurred through federal fraud, concealment, and without Indian consent.[80] Thus, the Court, like Mauser, does not even want to hear the Indians' claims and these claims are supposed to fade quietly into history.[81]

Accordingly, many lawyers accept the impossibility of having these claims heard today.[82] We are not as tenacious as Fleur. We do not challenge *Lone Wolf*. We seem to accept that the losses of allotment are, for the most part, non-redressable in the courts.[83] If we sue over allotment, at all, it is for a tiny sliver of what was lost. In the now famous and ongoing *Cobell* case, beneficiaries of individual Indian money (IIM) accounts, created by the General Allotment Act, have filed a class action alleging that the Secretaries of the Interior and the Treasury and the Assistant Secretary of the Interior for Indian Affairs grossly mismanaged accounts. *Cobell* has raised widespread awareness about the injustice of federal mismanagement of allotment and made progress toward a settlement of Indian claims.[84] Its lead plaintiff and lawyers *are* nearly as tenacious as Fleur.

---

79. For a fascinating article on language and democratic-institution building, see Robert L. Tsai, *Democracy's Handmaid,* 86 B.U. L. REV. 1, 26 (2006) ("A well-made composition pries open the historical memory, putting significant events, folk narratives, and other foundational tropes at the disposal of the virtuous citizen. The mapping of abstract ideas onto everyday phenomena allows individuals to appreciate and internalize democratic principles.").

80. Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903).

81. Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994) (describing how the courts allow the passage of time to erode Indian property rights even when Indians clearly retain legal rights to their lands).

82. An interesting scholarly debate was once held on whether contemporary lawyers should "learn to live with" Congressional plenary power over Indian affairs—or not. *See* Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; Robert Laurence, *Learning to Live With the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams'* Algebra, 30 ARIZ. L. REV. 413 (1988); Robert A. Williams, Jr., *Learning Not to Live With Eurocentric Myopia: A Reply to Professor Laurence's* Learning to Live With the Plenary Power of Congress Over the Indian Nations, 30 ARIZ. L. REV. 439 (1988); Robert Laurence, *On Eurocentric Myopia, The Designated Hitter Rule and "The Actual State of Things*," 30 ARIZ. L. REV. 459 (1988).

83. This is particularly curious given that *Lone Wolf*'s nonjusticiability doctrine was overruled, at least as a general matter, in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977). "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *Id*. (internal quotations omitted).

84. *See* Jamin B. Raskin, *Professor Richard J. Pierce's Reign of Error in the Administrative Law Review*, 57 ADMIN. L. REV. 229, 231-32 (2005).

> The *Cobell* plaintiffs are hundreds of thousands of American Indians who brought suit against the Secretary of Interior and the Secretary of Treasury on June 10, 1996. Their

Yet, for all of its accomplishments, *Cobell* is a lawsuit about an accounting for revenues (for example revenues on oil, gas, and agriculture leases made by federal agents on behalf of Indian allottees). Though the *Cobell* claims are in the tens of billions of dollars,[85] they represent only a portion of property that Indian individuals lost during allotment. *Cobell* does not directly address the ninety million acres of land lost collectively by tribes, nor the indirect losses to culture, family, society, livelihood, or well-being. And the federal government still resists settling *Cobell*.[86] If we cannot reach closure on even one category of the losses of allotment, it becomes difficult to imagine how larger claims will be successful.

Consider, too, litigation over Congress's two attempts to deal with the problem of fractionalized allotments. Land allotted in 160-acre tracts in 1900 has descended over the generations to ever expanding numbers of heirs, such that some parcels are now living-room sized. To the extent that the federal government put itself in the business of managing these thousands of living rooms, without creating any workable plan of investment or accounting, the scheme has proven rather unwieldy and undesirable. In the 1980s and 1990s Congress recognized the problem of fractionalized

---

> suit demanded an accounting for egregious mismanagement of millions of acres of Indian lands held for more than a century by the government under the Individual Indian Money (IIM) trust. The alleged liability in this case is in the tens of billions of dollars, making it one of the largest class action suits in American history. Contrary to all expectations that there can be no justice for Indians in the judicial institutions of the United States, the plaintiffs have been prevailing on the main questions in Judge Lamberth's courtroom, as well as on appeal in the United States Circuit Court of Appeals for the District of Columbia. It has been undisputedly established that the Departments of Interior and Treasury have breached their fiduciary obligations by mismanaging the Indian trust funds. Both the District Court and the D.C. Circuit have found the government to be in severe and long-standing violation of its statutory and common law trust duties. The task at hand is to get the government to "fix the system" of trust management (Phase I of the litigation) and to render a "historical accounting" of the lost, mismanaged and plundered Individual Indian trusts (Phase II) over the decades.

Id.

85. *Id*.

86. One federal representative who often sounds like Mauser is, unfortunately, Ross Swimmer, former Principle Chief of the Cherokee Nation who was appointed as the Special Trustee to handle Indian trust assets, including IIM accounts. *See, e.g.*, Ross O. Swimmer, *Separating Fact from Fiction: The Department of the Interior and the Cobell Litigation,* 33-SPG HUM. RTS. 7, 7 (2006)

> So much about the long-running and highly emotional Cobell v. Norton Indian trust litigation. . . and the U.S. Department of the Interior's responsibility to Indian trust beneficiaries is misunderstood. The plaintiffs say that the federal government has failed, and continues to fail, to properly distribute massive amounts of Indian trust funds and that the vast majority of Indian trust records have been illegally destroyed. These statements have been repeated so often, they are simply taken as truth. But these claims are false.

Id.

allotments in its passage of the Indian Land Consolidation Act (ILCA).[87] ILCA required any fractional interest in Indian lands to escheat back to the tribe on death of the owner, if that interest represented two or less percent of the tract's total acreage or earned its owner less than $100 per year.[88] The plan was that tribes would "reconsolidate" these splinters of allotment. But, in *Hodel v. Irving*,[89] the Supreme Court held ILCA to be an unconstitutional taking of individuals' property,[90] and in *Babbit v. Youpee*,[91] the Court held the same about the amended version of ILCA.[92]

Of course it is ironic that when an Indian individual loses his right to devise property worth less than $100 it is a taking, but when an Indian tribe loses possession of millions of acres of land, it is not a taking. But just as troubling, perhaps, is the idea underlying ILCA—that somehow forcing Indian families to relinquish (more) property could be a meaningful remedy for allotment. The proposition is that Congress could somehow remedy the loss of ninety million acres of land by patching back together tenth-of-an-acre portions still owned by Indians, with virtually no cost to the federal government or the non-Indian citizens who now own great amounts of allotted Indian lands.[93]

If the above cases represent some of the major litigation on allotment,[94] it seems that the *Lone Wolf* legacy must be limiting our advocacy in some respects. We seem to accept as true the proposition that Congress's decision to allot tribal lands is unreviewable. We do not seek to overturn *Lone Wolf*, which, unlike some of its more famous and equally discriminatory

---

87. *See* Babbit v. Youpee, 519 U.S. 234, 236-45 (1997); Hodel v. Irving, 481 U.S. 704, 713-18 (1987).

88. 25 U.S.C. § 2201, Pub. L. 97-459, tit. II, 96 Stat. 2519 (1983).

89. 481 U.S. 704 (1987).

90. *Hodel*, 481 U.S. at 713-18.

91. 519 U.S. 234 (1997).

92. *Youpee*, 519 U.S. at 236-45.

93. On the moral appropriateness of suing non-Indian land owners in contemporary land claims cases, see Arlinda Locklear, *Morality and Justice 200 Years After the Fact*, 37 NEW ENG. L. REV. 593, 598 (2003).

> [W]e are not at all embarrassed to include those who now occupy the land as defendants as well. First of all, they are not innocent in any sense of the word. They are trespassers. They have been sued because they are sitting on, taking advantage of, and enjoying the benefit of land that belongs to the Iroquois people. Second, even had they not been aware of that fact 100 years ago, if I had to venture a guess, I would say that a good 75% of them had personal knowledge of that fact when they acquired the land.

Id.

94. *See* Royster, *supra* note 37, at 13-14 (examining cases considering the ramifications of allotment on tribal jurisdiction and territorial sovereignty).

contemporaries, has never been reversed.[95] We do not ask Congress, which has repudiated the allotment policy, to compensate tribes for their lost acres or return them.[96] As Anthony Gulig and Sidney Harring have written: "The unresolved question after *Lone Wolf* is the restoration of the land base of the Indian nations. Indeed, this is a question that almost cannot be posed because, in conventional wisdom, it is impossible to return Indian lands."[97]

Why do we contemporary lawyers let the *Lone Wolf* holding stand unchallenged? Could we be inspired by Fleur to insist on restoration, getting the land back, or anything resembling justice for the losses of allotment? I do not yet know what the legal forum might be—more lawsuits, legislation, or a special reparations initiative all come to mind. And the accounting for losses should not stop with damages or even the return of Indian lands.[98] A crucial part of the process should be requiring the federal government and non-Indian citizens to listen to tribal people's allotment stories, to understand that the losses were grave, and that every acre of land took with it a little bit of tribal family life, sustenance, religion, and well-being.[99] Erdrich's novels are, after all, fiction. Indian people should have an opportunity to tell their real stories of allotment, have their stories become as much a part of the legal record as *Lone Wolf*, and then receive appropriate remedies.[100]

In any such legal proceeding for the losses of allotment, we would need to state the claims carefully. And this is my second lesson from Erdrich—it's about framing the losses of allotment. Indian law scholars recognize

---

95. *See* Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's* Brown v. Board of Education, 38 TULSA L. REV. 73, 74 (2002) [hereinafter Leeds, *The More Things Stay the Same*] (unlike other notorious cases resting on blatant, and now abhorrent, racial discrimination, *Lone Wolf* has never been overturned). *Lone Wolf* has arguably been "softened" by subsequent cases recognizing a right to compensation in takings of treaty-guaranteed lands where the government fails to act in good faith. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 389-90 (1980).

96. William Bradford, *Beyond Reparations: An American Indian Theory of Justice,* 66 OHIO ST. L.J. 1, 25-27 (2005) (on allotment as a basis for Indian reparations).

97. Gulig & Harring, *supra* note 1, at 107.

98. *See* Bradford, *supra* note 96, at 1 (arguing that Indian claims merit "more" than reparations and calling for "acknowledgment, apology, peacemaking, commemoration, compensation, land restoration, legal reformation, and reconciliation").

99. *But see* Duthu, *supra* note 22, at 143.("It is critically important that legal discourse, and particularly the legal discourse that concerns relations between Indigenous and non-Indigenous societies, incorporates the emerging and evolving narrative traditions of Indigenous Peoples.").

100. *But see* S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 TEMP. L. REV. 89, 139 (2006) (on struggles and successes in using indigenous oral histories in legal cases); *see also* LESLIE HALL PINDER, THE CARRIERS OF NO: AFTER THE LAND CLAIMS TRIAL (Lazara Press 1991) (a personal narrative on the challenges of Native storytelling in legal forums).

that allotment occurred during the larger policy period of "assimilation,"[101] and acknowledge the federal government's multiple goals of reducing the Indian land base, opening reservations for white settlement, expanding federal power, and civilizing Indians.[102] Accordingly, scholars have written about allotment's ramifications for issues including territorial sovereignty,[103] tribal law,[104] tribal membership,[105] culture,[106] gender,[107] race,[108] constitutional law,[109] legal history and poverty,[110] subsistence practices,[111] and of course, property.[112] Yet, we scholars have not managed to suggest a legal claim or set of claims that would address the losses of allotment in comprehensive fashion.

When *Tracks* and *Four Souls* tell the multi-faceted and intergenerational stories of an allotted community, they suggest that narrow claims, such the claim for a taking of property in *Lone Wolf*, fail to capture the losses of allotment.[113] Erdrich suggests how allotment's taking of real

---

101. *See* DAVID H. GETCHES, CHARLES F. WILKINSON, & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 141-86 (1998) (on the federal policy period of "allotments and assimilation" stretching from 1871 to 1928).

102. *Id.* at 141.

103. *See generally* Royster, *supra* note 37.

104. Bobroff, *supra* note 21, at 1559 (on allotment's replacement of tribal property systems with a federal property system); Leeds, *supra* note 21, at 491 (advancing a tribal law response to the problems of fractional allotments).

105. The relationship between allotment and enrollment has been the subject of much discussion by Ward Churchill and John LaVelle. WARD CHURCHILL, A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS 1492 TO THE PRESENT (1997); *see also*, John LaVelle, *The General Allotment Act "Eligibility" Hoax: Distortions of Law, Policy, and History in Derogation of Indian Tribes*, 14 WICAZO SA REV. 251 (1999), *available at* http://lawschool.unm.edu/faculty/lavelle/allotment-act.pdf; John LaVelle, *Review Essay: "Indians are Us?": Culture and Genocide in Native North America*, 20 AM. INDIAN Q. 109 (1996), *available at* http://lawschool.unm.edu/faculty/lavelle/american-indian-quarterly.pdf; Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 33 (2006).

106. *See* Steve Russell, *Honor,* Lone Wolf, *and Talking to the Wind*, 38 TULSA L. REV. 147 (2002).

107. *See, e.g.*, Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 688 (1999) (on allotment's impact on women).

108. *See generally* Leeds, *The More Things Stay The Same*, *supra* note 95.

109. T. Alexander Aleinikoff, *Securing Tribal Sovereignty: A Theory for Overturning* Lone Wolf, 38 TULSA L. REV. 57 (2002); Frank Pommersheim, Lone Wolf v. Hitchcock*: A Little Haiku Essay on a Missed Constitutional Moment*, 38 TULSA L. REV. 49 (2002).

110. *See generally* Gulig & Harring, *supra* note 1.

111. *Id.* at 37.

112. *See generally* Singer, *supra* note 25.

113. *But see* Rebecca Anita Tsosie, *Challenges to Sacred Site Protection,* 83 DENV. U. L. REV. 963 (2006) (arguing that indigenous advocates need a new theory of advocacy because claims based on the trust responsibility, public lands statutes, and property have all failed in the context of sacred sites litigation).

property brings about other losses in tribal communities.[114] In her novels, people become less able to sustain themselves by hunting when their land base dwindles. Weakened with hunger and malnourishment, and unable to access their traditional medicines, people starve, succumb to disease, and miscarry unborn children. Without a secure place to live, some question their ability to raise and nurture the children that survive; others watch their relatives move to allotments located hundreds of miles away. Bonds of kinship sometimes stretch thin and the ability to rely on neighbors and relatives dwindles. As a community, the people's connection to sacred places and the spiritual world weakens, and they lose trust in each other. With increasing duties to manage on-reservation property, the Bureau of Indian Affairs' role expands alongside tribal institutions and sovereignty. Pressured to raise money to pay taxes on their land, some members leave the reservation for places where they can get a job, but lack the protection of relatives, and suffer brutal crimes as a result.

Thus, we see in Erdrich's characters' experiences that allotment affected socio-economic patterns, land tenure, religious life, family strength, personal integrity, safety, and survival—and that's just what it did immediately. Erdrich's story allows us to follow the losses of allotment across several generations. When Fleur Pillager, the last of the most traditional of the families on the reservation, loses her land and sends her daughter away to boarding school, that daughter does not learn to check traplines or collect plants for medicine. She becomes emblematic of generations sent away to be educated who do not learn their own traditional tribal cultures. Pauline Puyat converts to Catholicism and becomes a nun, Pauline becomes so obsessively faithful that in Erdrich's later novel *Love Medicine*,[115] she treats her daughter borne out of wedlock as devil's spawn. In the following generation, some of the grandchildren grow up to experience identity crises, physical and psychological illness, alcoholism, and suicide. Others become lost to the tribal community altogether.

---

114. *See, e.g.*, Angela R. Riley, *Indigenous Peoples and Emerging Protections for Traditional Knowledge*, *in* INTELLECTUAL PROPERTY AND INFORMATION WEALTH (forthcoming 2006) (on file with author).

> For indigenous peoples, claims to tangible and intangible property cannot be neatly bifurcated. Devastation of the physical, natural world means destruction of the intangible products of the group's cultural life, including songs, rituals, ceremonies, dance, traditional medicines, art, customs, and spiritual beliefs. This is because, in land-based societies, the culture is so inexorably intertwined with the physical world that to destroy one necessarily means destruction of the other. Indigenous peoples cannot continue to create and control their indigenous medicines, for example, if the natural environment from which these medicines are derived is spoiled.

Id.

115. LOUSIE ERDRICH, LOVE MEDICINE (Harper Perennial Modern Classics 2005) (1984).

Erdrich's story is not only one of loss and she does not paint Indian life with a broad brush of dysfunction. Many of the characters handle their post-allotment lives with grace or at least humor. Nanapush and Margaret Kashpaw, for example, have a healthy relationship filled with the verbal spars of old couples. They negotiate Catholicism and traditional religion, hunting for their food and enjoying the new products of white traders. They manage to survive Nanapush's jealous fears about other men's affections for his companion and Margaret's overwhelming desire to cover the cabin floor with linoleum. The federal government's plan to take Indian lands and assimilate Indian people effects change in this Ojibwe community, but it does not manage to wipe Indian Country or Indian peoples off the map.

In the end, Fleur Pillager comes home. Many of the reservation residents are still there, carrying on with the daily business of living. They have not abandoned the tribe or the remaining land. The "mighty pulverizing machine"[116] of allotment mowed down many of the trees, but the people and places have survived to a large extent. There is hope for the restoration of Fleur's home and some sense that she will revive the Pillager strength and spirituality in ways that will benefit the entire community. In this way, Erdrich's novel reflects real life, too, in all of its complexities. Indian people are recovering their land, returning home, and reinvigorating their cultures, languages, and governments. Tribal initiatives to deal with allotment include Winona LaDuke's White Earth Land Recovery Project, which seeks to purchase allotted lands within the reservation and, at the same time, revitalize traditional rice cultivation and harvesting, language, and other cultural practices.[117]

Indian people are not just waiting around for *Lone Wolf* to be reversed or hoping that Congress's repeated amendments of ILCA will solve the problems of allotment.[118] But they have suffered, and it is appropriate to insist on acknowledgement of their losses as they have suffered them and not just in existing legal categories like property. As scholars and lawyers for tribes, we could help by studying allotment more holistically. We could consider both the linkages between various types of legal problems (e.g., property, sovereignty, governance, economic development, regulatory authority, and child welfare) and the interdisciplinary nature of

116. President Theodore Roosevelt, First Annual Message to Congress: The Struggle for Self-Determination (Dec. 3, 1901), http://www.digitalhistory.uh.edu/nativevoices/voices_display.cfm?id=92 ("The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual.") (last visited Dec. 22, 2006).

117. *See* White Earth Land Recovery Project Home Page, http://www.nativeharvest.com/ (last visited Dec. 22, 2006).

118. The ILCA was amended again in 2000 and 2004. *See* Pub. L. No 106-462 (Nov. 7, 2000); Pub. L. No. 108-374 (2004).

these legal problems. We could perhaps ask historians, environmental scientists, social psychologists, and spiritual leaders to consult on legal matters and help us understand how allotment might indirectly contribute to the challenges families face today.

As we look at allotment more holistically, we might also examine critically the types of legal claims available. For example, the classic Fifth Amendment takings claim has not gotten Indians too far in allotment cases.[119] Even if such litigation were successful, it would likely result in monetary damages only, failing to recognize or redress the many losses of allotment that money can not compensate. By contrast, various instruments of international human rights law offer claims not only for losses of property, but also for losses of culture and lifeways that would seem to be more appropriately broad.[120] When we look at contemporary measures for legislative reform or go so far as to talk about reparations, we should insist on the multi-faceted, intergenerational, and devastating losses of allotment. We should ensure that Indian people have a chance to tell, if they want to, the real, tribal-specific stories of allotment, and we should insist that any remedies address losses in ways that tribes determine to be meaningful.

At the very least, allotment initiatives must include programs to address problems of property loss and jurisdiction. Perhaps land restoration could go hand in hand with initiatives to foster economic development, strengthen extended families, teach tribal languages, support ceremonial practices, conserve tribal landscapes, fund after-school programs, and enhance governing institutions. Many tribes have such programs internally, and the federal government also supports them, but making a clearer connection with the "legacy of allotment" might strengthen internal understanding and external commitments to fund such programs.

IV. CONCLUSION

When read alongside *Lone Wolf*, the novels of Louise Erdrich can help to advance a fuller story of allotment. Of course, Erdrich writes about fictionalized Ojibwes and not the actual Kiowa and Comanche plaintiffs of *Lone Wolf*. Thus, *Tracks* and *Four Souls* do not in any way represent Kiowa or Comanche experiences during allotment, but they nonetheless suggest that the Supreme Court probably omitted some important context in

119. *See* Gulig & Harring, *supra* note 1, at 103 ("While no one (to our knowledge) has ever counted up the results of the thousands of allotment-era Indian land cases that coursed through the various courts, it is likely that Indians lost most, if not all of them.").

120. *See generally* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2004) (discussing numerous human rights instruments with applicability to indigenous claims for loss of culture, religion, and natural resources).

its decision. The novels might inspire Kiowas and Comanches and their lawyers to share their own counter-story to *Lone Wolf*. In addition to their land and money, what kind of losses to culture, religion, livelihood, health, jurisdiction, family, sovereignty, and well-being did the Kiowas and Comanches suffer? Were there other kinds of losses? What have these losses meant to the people and lands? What kind of restoration would be appropriate?

More generally, these novels can motivate lawyers to work with their Indian clients to articulate the real losses caused by allotment and seek justice for them. As Wilma Mankiller said, "The losses were permanent and we can never go back."[121] Erdrich echoes this thought, telling us that her Ojibwe characters "sometimes die, or change, or change and become."[122] Yet, Indian people continue to recover from allotment on their own terms and in ways that acknowledge the full complexity of the losses of the past. Toward that end, Erdrich's novels inspire more thoughtful analysis of, and redress for, the losses of allotment.

121. *See generally* Mankiller, *supra* note 27.
122. *See* FOUR SOULS, *supra* note 44, at 210.