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WHY OUR STORIES MATTER: A PERSPECTIVE ON THE RESTATEMENT FROM THE STATE BENCH

The Honorable Raquel Montoya-Lewis

34TH ANNUAL INDIAN LAW SYMPOSIUM
RESTATEMENT OF THE LAW OF AMERICAN INDIANS
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I'm really thrilled and honored to be able to speak to all of you today. I did kind of come and go yesterday throughout the presentations and was really sort of star-struck by the incredible speakers that you have already heard from over the last day, and was also just really impressed with the range of topics that the Restatement covers, as well as the way in which those topics are covered. It is clear from the voices you heard from yesterday that this is a Restatement that has the voice of Native people in it.

And I have to say how exciting that is for me as someone who went to law school twenty-five plus years ago. Well actually, if I'm honest, actually, I think it's thirty plus years ago. And it was a real struggle to find Native voices, Native mentors, and Native community in a law school setting. I was able to do that, but today, when I look at the list of lawyers and professors and others and students who are Indigenous and doing this kind of work, it really makes me feel like the work that started in the sixties and seventies to increase the numbers of Native lawyers, Native practitioners, Native judges, and Native professors and scholars is really paying off and becoming successful. So, I thank everyone who's participated in that, and I know many of you here have over the years, and I know how much that impacts students today, who are in law school, like Kayla, and about to become new members of our profession. And they have new views and a real inclination to push us to do our best. And certainly Kayla was one of those that pushed me in new ways, and I'm always grateful for that.

I think my presentation today is slightly different from what you've heard over the last day. All of your speakers had specific areas in which they were tasked with presenting. I'm lucky in that it was left fairly open for me. And what I hope to do over the course of my time with you is to share some of why I think the stories and our voices matter, why they should matter in the discussions we have about Indian law in all fields,

and why they should matter in a scholarly sense. So, I've titled this "Why Our Stories Matter," and I'm going to walk you through what I think is an approach that I really take when I do my work at the Washington State Supreme Court. I'm going to talk a little bit about the way I arrived to hold the seat I hold today and why that remains an incredible honor and still every day is a remarkable shock to the system that this is a position I hold.

So, when I was starting law school, there was a really active critical race theory scholarship. I couldn't keep up with the articles that were being written at this time. And frankly, as a first-year and even a second- or third-year law student, much of what was being written was so complex. It was difficult for me to follow, which I think is somewhat of a comment on the public discussions about critical race theory. If you haven't studied it, it's very difficult to know what it means. It informs a lot of the way that I think, and I was lucky enough to be in school where these conversations between professors were happening and I could see it.

At this time, I stumbled on an article about legal storytelling and the way in which the telling of a story to a court—in particular, Delgado and Stefancic argued that this was a form of talking back to an institution—the legal institution, the courthouses, the judges who weren't used to, or maybe didn't care about or didn't have time to hear the stories of the people who came in front of them. And the argument here was that the legal system impacts all of us and it impacts communities we haven't heard from who didn't build this legal system, in very specific ways. And that it is part of responding to that system and the impact of that system—by telling counter-histories and counter-stories to that system.

This was the beginning of thinking about how lawyers could introduce those stories in the courtroom and what that could look like. I began reading this in my first year of law school. And as I said, I don't know that I really followed it, but what I did know, and that my first year of law school, is that I wasn't hearing those stories. And frankly, this came as a shock to me.

When I went to law school, I went to law school because I wanted to bring those stories with me. I grew up learning that most of my tribal understanding of what our laws were, what our traditions and customs were, and what our language is were all transmitted orally. I come from the Pueblo of Isleta that at least at that time had no written language, had very minimal written law.

Everything was transmitted through oral communication. That was purposeful. It was conscious. And while we had attorneys as a tribe who put things down to writing, like contracts and other things (and this was

at a time where my tribe was at the beginning of its development and a movement into casino development and other forms of economic development where the written word really mattered), we have lawyers who functioned as somewhat of translators, listening to the governing bodies' concerns and what they believed our historical law was, and then putting that, somehow, into a contract that the tribe and those we interacted with would be willing to sign.

So as I said, my community was an oral tradition community. When I first moved back to my reservation after law school, I moved into a house that was built by my grandfather and my father. It had been lived in by my grandparents, by my dad, by several of my cousins over the years. And there is a process to welcome you into that home and make it your home. That was something that is, again, not written down anywhere. It's not something I'm going to tell you about. I'm prohibited from doing so beyond what I just said, but I know what that process is. And it is the law. I view it as and viewed it then as something that I knew I would be required to do. Even though I was in my last semester of law school and we were planning to move, I had to go down to New Mexico and participate in those traditions that made the home mine.

That was as important to my community, to my ownership of that home, as any document I've signed when I've purchased a home in the State of Washington over the last few years. The only difference was that it was communicated in our tribal language. It was communicated orally, but it had the kind of binding effect that we're all used to when we signed those thousands and thousands of pieces of paper when we are getting a mortgage and signing a deed.

So I really, in my first year at law school, experienced a great deal of frustration that the questions I was asking about who the people were behind the case law that we were reading were questions that were seen by my professors. And I was told this directly didn't matter.

Specifically, in my criminal law class, I really began to see the stories behind those cases, particularly when we got to sexual assault cases and there were significant issues in the law school around that issue at the time. I found the stories behind those cases to be of critical importance.

I asked, "What is the story? How did this case get here?" Because while the case told me procedurally how it arrived at where it was, it gave me a very, very minimal sketch of the facts leading to the case. And I wanted to know more. I wanted to know how the case ended up where it was, what the story was behind it. I was told it didn't matter. I was told it was a stupid question. I was told it was a stupid question by the professor in a way that made the rest of the class laugh at me.

By then, I'd had to again develop fairly thick skin. And I hung on

doggedly, knowing that at some point, the storytelling that I thought lawyers could do and that I knew were counternarratives to the narratives that are told by people in power would be a way to challenge the mainstream narrative. I knew that in my bones, and that was the way I started off my career in law school beginning in those early days.

So this is a photograph—and many of you on the call have been here—of the Washington State Supreme Court, where I now sit as an Associate Justice. This picture may seem out of place in the context of what we were just discussing, but I want you to experience with me for just a moment, the distance that I have traveled to take this seat. I never intended to be an attorney. I'd never met a lawyer or a judge before I went to law school, which suffice it to say means I'd never met another Native lawyer or judge before I went to law school. I was quite naive about what law school was when I was entering law school. I can't tell you how astounding it remains to me to be someone who goes into that building and works. Of course, the building is closed to the public currently due to some significant issues in making it safe, related to COVID-19 that have nothing to do with the people in the building, but are just about the fact that it's an old building.

But on the day that Governor Inslee announced that he was appointing me to this seat and the day that I was sworn in a couple of weeks later, on both of those days, I was struck as I walked up the stairs of the Washington State Supreme Court and into that extraordinary marble foyer, and then into that extraordinary courthouse that has with it the gravitas of any state supreme court. I walked in and the thought that I heard in my head as I walked past the pictures of all of the supreme court justices who had ever sat in that building or in the building prior (and some of them were territorial justices before there was even a supreme court that was conceptualized like this) was that those steps, that building, and those marble hallways were not built with someone like me in mind to take a seat behind that bench.

I think about that every time I am seated as a justice to hear cases and I think about it when I sit down to write the cases that I am assigned. In our court, we assign cases on a random basis. Given what I've been able to write on, I'm sure it doesn't look random, but I assure you, it's entirely random. It's done through a case draw that looks a little bit, particularly given the tension, like you're watching a basketball draft or something. But the clerks create a—they have a fairly complicated system with the justices and their law clerks in the back with a list of the cases that are upcoming for the next term—and we wait with bated breath to see what cases we're going to be assigned to write in the upcoming term.

At the time, newly seated in the Supreme Court, I didn't know that if I'd ever have the opportunity to work on cases that were related to the

work I had done before I arrived in that seat. And I certainly didn't have any expectation that I would be writing on cases that involved things I was an expert on as a result of the work I had done in tribal courts for fifteen years and in state superior court for the five years prior.

And it came as quite a shock to me to have the opportunity to, almost immediately be assigned an Indian law case. *In Re ZJG* is a case that—you can see the case number [No. 98003-9] and the date [Sept. 3, 2020] here—was a case that was the second case I was assigned upon my arrival at the Supreme Court. It's an Indian Child Welfare Act case, as many of you know, and I was beyond thrilled to be able to both get a case in an area I knew something about because I was being assaulted every day with things I'd never heard about <laugh> and had to make decisions on and learn as quickly as possible. I was thrilled to get a case that was in a field I knew well, and I had a real decision to make at this time. And that decision was something I took very seriously. Was I going to move through this case and write this case with the help of my team, in my own voice, telling the story in the way I know that story, or was I going to write it in the voice of the Washington State Supreme Court—formal, scholarly, judicial? I have spent my entire career up to today thinking about what that word means: judicial.

I became a tribal judge very, very young. I was right out of law school, effectively. I was a year and a half out of my judicial clerkship. My mentor, now passed, Justice Pamela Minzner encouraged me to be a judge and also said that it was too soon, that I needed longer time in practice before I became a judge. And she was right about that. My father told me that I should never be a tribal court judge for my own tribe, which was what I was being offered. And he gave me multiple reasons in a very serious father-daughter conversation about why that was something I should not do.

I trusted my father, I trusted Justice Minzner, and I chose to do it anyway and became Tribal Court Judge for the Pueblo of Isleta in my mid-to late twenties, initially thinking it would be one case. But over the course of time, that one case turned into two, that turned into four, and it just became a bigger and bigger part of my work. Both Justice Minzner and my father were right.

I needed more experience to be a good judge and being a judge in your own community for your own people is extremely difficult and like walking through a field where there are all sorts of booby traps that you can be caught up in (and certainly I got caught up in a couple of those over the course of time that I worked for my community). But over the course and beginning with being a judge, it became clear to me that both because of my age and at the time as I said, I was in my twenties, but I looked

much younger. It was not uncommon for people to think I was sixteen or seventeen.

I had to learn how to explain why I had the position I had, very often, to older men in my community and in my courtroom who began their case by lecturing me on how I was failing to follow Isleta law myself by being a young woman as a tribal court judge. I got that lecture in English. I got that lecture in Tewa. And I typically would allow those people to make that statement. In fact, one person figured out how to file a complaint against me with the New Mexico State Bar, indicating that I should not be in that position for those reasons. I figured out a way to sort of navigate that, for better or worse <laugh>.

It was quite a challenging beginning to a judicial career, but it did teach me that the only voice I really had was my own. I didn't want to adopt the voice I had been taught in law school, and I realized that I didn't have colleagues to look to, to help me answer the questions I was getting as a judge, as a new judge. I was going to have to figure it out myself.

So when I got to this case and many of you know, I have spent decades working on ICWA in various ways: primarily training social workers and other judges largely on the state side of things, how to be better at recognizing ICWA cases and following the law. This case could really have been a case that was a follow-the-law case, but I chose deliberately to take this opportunity to go back to what I began to learn kind of extracurricularly in my first year of law school and to use my voice.

My hope was to let the voices of others who had experienced being removed from their homes and communities shine through. So when you look at that first paragraph,¹ the purpose in writing this was to write it from a different viewpoint than I thought any other ICWA case had been written from and to tell the story of why ICWA matters. We've told that story in all kinds of ways, but I wanted to tell it in a case that had precedential value and in a case that came from the Washington State Supreme Court as a unanimous case.

As I did that, each day as we worked on that case in my chambers—and I can't emphasize enough the importance of my entire team who support me in getting all of my opinions out, has my name on it, but behind that name is an entire group of law students, externs, and my judicial assistant. We read everything that gets written. We revise it hundreds of

1. "In Native American communities across the country, many families tell stories of family members they have lost to the systems of child welfare, adoption, boarding schools, and other institutions that separated Native children from their families and tribes. This history is a living part of tribal communities, with scars that stretch from the earliest days of this country to its most recent ones. There are virtually no other statutes more central to rectifying these wrongs than the Indian Child Welfare Act (ICWA) or state statutes like ICWA's Washington counterpart, the Washington State Indian Child Welfare Act (WICWA)."

times. Sometimes maybe we could revise it less; some have suggested perhaps I could revise it more, but that being different arguments, this work is work that's shared, and that ultimately, I hope my voice comes through in, but I don't want to pretend that I'm the only one who touches these opinions. But as I'm writing these opinions and thinking about what that voice looks like when I'm writing as myself, a Native American woman seated in a state supreme court, I think about how I got here.

This is my great great-grandmother Tzashima. I think about her. Her photograph is right by my desk, as are many of these that I'm going to show you. She was the wife of the governor of the Pueblo of Laguna. This photograph was taken in the late 1880s. She's wearing formal traditional clothing, in particular, her squash blossom, which is her necklace, and the belt that you can kind of see underneath her, as well as the lace that's underneath the black wool covering that you can't really see in this picture. All of those things are communicating status, clan membership, and other things through her clothing to the community.

This was her husband, Jose Paisano, my great great-grandfather who was the governor of the Pueblo of Laguna. They had many children and that ran smack into the time of the boarding schools. You all know this history—"Kill the Indian; Save the Man" and that Colonel Richard Pratt was contracted with the federal government to found Carlisle Boarding School. There were multiple schools, not just those that were contracted with the government, but also Catholic and other religious-run schools that were built on his model—that if you could remove the children from their tribal communities, force them to learn Western ways in terms of education, teaching English language, removing anything that would be considered Indian.

This picture is a school picture of all of these Native kids, and you can see they're wearing a uniform. Many of them are wearing uniforms they sewed for themselves. The women were often taught how to do that, and they would sew uniforms.

This photograph is a photograph taken in about 1880. It says on it July 1880, but we're not a hundred percent sure that that notation is completely accurate, but it's about right. And you can't probably see it, what you're looking at it, but it says, "Pueblos Entered Carlisle July 1880." These kids, as far as we can tell, are all from the Pueblo of Laguna. And the young woman in the back in the middle with the white kind of bowtie is Mary Perry or Kiotse, and she is my great-grandmother. She was the one of many children that Jose and Tzashima had and who were forcibly removed from the Pueblo of Laguna and sent to boarding schools. My great-grandmother spent so many years at this boarding school.

They were very good about taking before and after pictures. If you sort

of wince at the way I'm describing it, that's a good reaction because they really are before and after posed photographs that Mr. Carlisle used around the country to show the success of his work, as well as to promote his work. And he wasn't just promoting his work—he was promoting the children; he was selling them for adoption. Often, they were being sold not as children, but as maids and other domestic help. If you want to see how that process worked, there's an extraordinary archive of Carlisle's history held at Dickinson University and the newsletters, which was called *Indian Helper*, have ads in the back of them talking about how you can purchase a Native person who is skilled in the domestic arts for \$10.

So, this photograph shows Mary Perry in the background. In front of her are two young Native kids from Laguna. All three of them came into Carlisle together. I'd say it is really lucky that they all three left together and they all returned to the Pueblo of Laguna. This is the after picture, where you see the same three children obviously grown by several years. The boys are now young men dressed in military uniforms. Mary Perry is dressed in domestic dress; likely she made that. You can see that their hair has been cut and shaped into a military haircut. In fact, into a haircut that my father wore most of his adult life when he joined the Air Force. All three of them returned to Laguna.

And I would say we are really lucky that they all returned. Many children didn't survive their time at Carlisle. There is currently a significant process going on to repatriate the bones of the children who died at Carlisle and died from flus and other viruses that they had no immunity to. And some who died, as my great friend, Judge William Thorne from Utah and the Pomo tribe, often describes, as broken hearts. There were people who ran from Carlisle and others, and who somehow made it home by walking. Those stories are not well-preserved. I've heard a couple of them that have been retold in families in the Dakotas that tell stories of these kids suddenly walking back into the village where the family and the community had no idea how they had managed to do that. Just extraordinary stories of survival. And these are stories that I grew up on.

But I also grew up on the story of my great-grandmother Mary Perry, returning to Laguna and marrying William Paisano. And William became the Governor of the Pueblo of Laguna. He was the governor for many years and Mary Perry served as his wife and she wrote letters. She wrote letters back to Colonel Pratt at Carlisle. I have some of those letters. I have letters she wrote to him and his wife and that he wrote back to her. They became very close while she was at Carlisle. And in fact, he visited her at Laguna more than once.

Her letters really express what she viewed as her failure, and her failure

was to teach the English language to the Laguna people, to teach Catholicism to the Laguna people, and to teach what she had learned at Carlisle because she became of the belief as a result of her training that the things that were happening traditionally at Laguna were things that would result in grave harm, whether that was going to help, whether that meant being eradicated by the U.S. Army. She began to believe, she learned that English was the superior language, and that the way to be, that she learned at Carlisle, was the only way to be.

When I look at the extraordinarily vibrant communities of Laguna or the Keresan language is spoken every day, as well as the other communities that I am personally familiar with, who experienced an active attempt by the U.S. government to destroy our languages and our ways of life, I am incredibly proud, and surprised isn't the right word, but heart-warmed and overwhelmed that we continue to persist, even to this day.

This is my grandfather from Isleta. And my grandfather at the same time in his family were experiencing similar things. He went to Haskell Indian School. This is his high school graduation picture, and I just want you to take note of the stylized nature of this picture. He's wearing a tie. He was taught at Haskell to be a teacher. He walked away with a teaching degree. And he met my grandmother Mae Paisano. All of these people have names by which I call them, which were names in the Tewa and Keresan languages.

My grandmother Mae Paisano married an Isleta man, my grandfather, and moved to Isleta at quite a young age. The top photo again is her graduation photo. She was also taught to be a teacher in these boarding schools, in Indian schools, some of which were in Indian Country and were day schools in New Mexico. I love that top picture because it shows her hair having, you know, these sort of waves or curls in it. And, and I took that picture to mean that someday, my hair would have waves and curls in it. And I just have no idea how she got any body in her hair because that is simply non-existent in my hair, my genetics, and that of anyone else I know who is Isleta or Laguna.

But the photograph beneath her is the way I really remember her—my grandmother on a horse on the Mesa with a smile on her face. My father grew up with them at boarding schools, and he himself was sent to boarding schools.

But as all this was happening, we were still in a position in my tribe, in my community, not to have the right to vote. And we did not get the right to vote until 1948. This is in the state of New Mexico. This is Miguel Trujillo with his young daughter Josephine. He returned from World War II, went to register to vote as he believed to be his right, particularly given

that he'd spent time defending the United States. And they said, "Indians don't have the right to vote."

And he sued in the New Mexico Supreme Court and won the right to vote. So my right to vote, I believe is fundamental. If I didn't vote, I would be disappointing my uncle who's in this picture. And my aunt, who is the young woman in this picture, who grew up to be Josephine Waconda, and who was very high up in the Indian Health Service and who served Indian Country in that way for decades. I grew up with that story knowing that the right to vote was something that happened during my father's lifetime.

This is where my father went to part of high school, and then it was boarding school. It was in Albuquerque, so it was closer to home. He was then moved from there to a private Catholic high school, a place where he was physically abused for speaking the Tewa language, and it led to significant pain for him when he tried to teach me the language. This is him as he enlisted and as he joined the Air Force after he got his four-year degree in civil engineering, which he did because he committed to joining the Air Force just after that and serving a period of time so that they would cover his tuition. He served in the Air Force for his entire career. And as I said, became a civil engineer, but brought with him significant trauma that resulted from his time in boarding schools.

He wanted desperately to teach me the Tewa language, even though we moved all over the world really, due to my father's job. And so there weren't a lot of Tewa speakers around us, but he tried to speak to me in Tewa, and there would always come a time when he was speaking that language where he would choke up. Tears would come to his eyes. He would stop talking. And that would be the end for a long time of him speaking to me in my language and his language and the language of our family, because he was so fearful that if I knew that language, that I might experience the same kind of abuse that he did.

Our language had become something that was, while my birthright, also a threat to my life. And that's how it felt to my father. And that's one reason why my Tewa is so spotty. So you can see through my story, the way the assimilation process works: family by family, drip by drip, normalizing the kind of education that I've been very successful at, normalizing the loss of language, family by family.

I'm very briefly going to talk about enrollment for just a second. As you heard in my biography, I am enrolled with the Pueblo of Isleta. But I've been disenrolled. I've been disenrolled and re-enrolled over the last fifteen years. As a tribal court judge, I got on the wrong side of the case as a tribal court judge for my tribe. I got on the wrong side of the case. There was a lawsuit against the Pueblo of Isleta government. I was not there for that suit. I came back; all the other judges who were there had

been fired, and I was the remaining judge.

The lawsuit against the government named names and named the Governor of the Pueblo of Isleta. He called me into his office and said, “I want you to be our chief judge while we sort out who else is going to come in as a judge. But before I do that, I need you to tell me what you’re going to do in this case.” And I said, “I can’t do that. You’re a party to this case.” That was a three- or four-hour conversation where we went back and forth. And I said, “I’m not going to tell you what I’m going to do in a case. I’m not going to resign because I feel strongly that this is a case that needs to be decided.”

And eventually he terminated my employment as a tribal court judge. And I knew, in that moment, that that was not the end of it. I lived on the reservation; I owned a house on the reservation. And I knew that they would use the history I have of coming from both Laguna and Isleta, which is very traditional thing—marriage between those two communities goes back millennia, and it is done through oral communication. Finding a paper trail that shows that, and that shows my grandmother’s formal adoption into the Pueblo of Laguna for membership into the Pueblo of Laguna. In fact, I did find documents that I didn’t know existed, but I didn’t think they existed. And so my work and the consequence of my education and all of these things I’ve shared with you just collided in that moment.

And as a result of my refusal to play ball with my own tribal government, at this point about twenty years ago, resulted in my being disenrolled from my tribe. As many of you are aware, I presided over a very painful and now nationally discussed disenrollment case. I was the Chief Judge at Nooksack at the very beginning of the 306 disenrollments. Having been disenrolled myself, the plaintiffs in that case, Michelle Roberts, represented at the end and still represented actually by Gabe Galanda, sought my recusal from that case. Somehow, they found out that I had been disenrolled.

It was not a popular or well-known story at the time. I’ve only recently began to tell this story and it’s a very detailed and long story I don’t have time to tell today. But really, my experience in my family of assimilation and the value of education, which was extremely important in my family, and you can see why, really collided in that moment. And you know, at the time, my disenrollment, which I viewed as being entirely political and which the tribe said, “Oh, you aren’t half Isleta—you’re a quarter Laguna and a quarter Isleta, so we can disenroll you.” My tribe, at the time, required 50% blood quantum to be a tribal member, the highest in the country, and just disenrolled me on that very flimsy basis.

It was awful—I don’t know that I have words to describe the

devastation of being told by your own community that you are not wanted. But I feel that today, as you can hear by my voice, I still feel that. My father was alive then. He died in the middle of this, and I believe that the stress of this was in no small part responsible for his premature death. But he said to me, almost in a laughing tone, “things come around, you have to be patient, but no one tells you who you are, you know, and it will come back.” And he wasn’t wrong.

I was sent a letter about five years ago saying that the constitution had changed that I could choose to be re-enrolled, and I had a decision to make about whether or not I would do so. I chose to do so because while I think, and I’ve had this experience of course, the political nature of being enrolled as a tribal member matters, whether it should or shouldn’t is a different political question that I know you’ve discussed in the course of yesterday. But I believed it mattered to other Native children and families who might need to see someone that looks like me, that is a tribal member that sits on a Washington or any other supreme court and has the opportunity.

And it’s just such an extraordinary opportunity to tell our stories in state courts in ways that were precedent and that matter, which is not to say that the other work we do doesn’t. It does, of course. These are three of the cases² that I’ve had—one I’ve had a vote in, the other two I wrote—that tell, I hope, the story of ICWA from the perspective of Indian communities. And you know these cases.

And I will just end on this photograph of our current Washington State Supreme Court, which is the most diverse court in the country I’m told. And this picture on the upper right is the photograph that is perhaps the most important photograph of me that I’ve ever seen because I’m talking to an eleven-year-old Native young woman on the east side of the state who wanted to meet me because she apparently had pictures of me on her wall. And she said, “I’m going to do that. I can do that.” And if there was anything I’d hope to accomplish in my time on the Washington State Supreme Court, it is to encourage and hope that I am followed by young people who have new ideas and who can share their voices with the rest of us. Thank you.

2. *In re ZJG & MEJG*, 196 Wash.2d 152, 471 P.3d 853 (2020); *In re ALK, IRCK-S, & DBCK-S*, 196 Wash.2d 686, 478 P.3d 686 (2020); *In re GJA, ARA, SSA, JJA, & VA*, 197 Wash.2d 868, 489 P.3d 631 (2021).