

# JUSTICE FOR NATIVE NATIONS: INSIGHTS FROM LEGAL PLURALISM

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*This Article makes the case that, despite being underused by U.S. scholars in the field of Indian and Indigenous peoples law, a legally pluralist approach can and does provide vital conceptual insights. Not only does legal pluralism supply an important framework through which to conceptualize and address existing power imbalances between Indian tribes and the federal government, but it also makes instances of interaction between these different and yet connected normative orders—or legal cultures—readily more apparent. Scholarly arguments within this research field in the United States tend to take the form of either wholehearted reliance on constitutional and human rights advocacy to address injustices or the wholesale rejection of the Anglo-American legal system as simply incompatible with indigenous norms and traditions. By contrast, and in proposing an alternative to this academic deadlock, this Article submits that these distinct legal cultures must necessarily interact, and that these interactions are always fertile ones. Drawing on Robert Cover’s concept of “jurisgenerativity” to inform an interactive conception of legal culture, it is argued that this has the capacity to lay a foundation for discursive approaches capable of giving rise to new, mutual traditions.*

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As the indigenous of our great nation, we have learned the languages and cultures of others. One can accept and utilize values from another nation by not lessening one's own language and culture. If one adapts or assimilates into another's way, one may lessen his/her language and culture. We can learn the western form of laws and governance to enrich and enhance our traditional way of life and our sovereign nation. We do not have to lose our traditional values and universal principles but only to strengthen it.

—Preface, Navajo Common Law Project<sup>1</sup>

### INTRODUCTION

Over the last two decades, the academic literature focusing on Indian and Indigenous peoples' law has reflected increasing frustration with the decisions of the U.S. Supreme Court.<sup>2</sup> That frustration is a product of the growing consensus that tribal issues do not receive fair and even-handed treatment in the federal courts. Many reasons have been offered for this apparent asymmetry, ranging from accusations of continued colonialism<sup>3</sup> and racism,<sup>4</sup> to elevation of states' rights<sup>5</sup> and

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1. *Navajo Common Law Project*, NAVAJO COURTS (2002), <http://www.navajocourts.org/indexnclp.htm>.

2. See, e.g., David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267 (2001) ("The Supreme Court has made radical departures from the established principles of Indian law. The Court ignores precedent, construing statutes, treaties, and the Constitution liberally to reach results that comport with a majority of the Justices' attitudes about federalism, minority rights, and protection of mainstream values."); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 422 (1993) ("[T]he current Supreme Court has recently moved away from Chief Justice Marshall's model in dramatic fashion. It has not justified this shift by reference to any longstanding historical, doctrinal, or contextual development.").

3. See, e.g., Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1 (1999).

4. *Id.* at 26–27 ("[R]egardless of whether the Court's instincts merit the epithet 'prejudice,' it seems clear with which of their fellow citizens the Justices feel more empathy."); see also Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 73 (2015) ("Federal promises to the tribes are no less sacred than federal promises made to non-Indian purchasers of property in Indian country."); Melissa L. Koehn, *The New American Caste System: The Supreme Court and Discrimination Against Civil Rights Plaintiffs*, 32 U. MICH J.L. REFORM 49, 66 (1998).

5. See, e.g., Getches, *supra* note 2; Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391 (2008).

a poor understanding of the relevant history.<sup>6</sup> In an effort to correct these perceived failings, academics have offered a variety of suggestions including a return to the foundational principles of Indian law,<sup>7</sup> outreach efforts at judicial education,<sup>8</sup> and the incorporation of international human-rights principles.<sup>9</sup> However, what is rarely suggested is a look at legal theory; in particular, the legal sociological approaches that developed around legal pluralism.

Legal pluralism has much to offer the field of Indian and Indigenous peoples' law. By *legal pluralism*, this Article refers to the situation where competences and responsibilities are divided across federal, state, and tribal courts, with the ultimate goal of giving effect to local and culturally specific normative practices within what is still a fundamentally centralized legal system. This definition describes Federal Indian law almost perfectly, as Federal Indian law is focused on situating tribal governments and tribal courts within the larger U.S. legal system by defining the relative allocation of power among and the relationship between the federal, state, and tribal governments. Indeed, this situation is paradigmatic of John Griffiths's definition of classic legal pluralism as "the messy compromise [that] the ideology of legal centralism feels itself obliged to make with recalcitrant social reality . . . ."<sup>10</sup> But while the legal literature often calls for respect to be given to tribal custom and tradition,<sup>11</sup> that literature rarely does so in the context of the existing body of work regarding legal pluralism.<sup>12</sup> Indeed, these discussions usually refuse to recognize that the legal orders of the United States and its Native nations exist in circumstances of legal plurality.<sup>13</sup>

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6. See, e.g., Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002).

7. See, e.g., Getches, *supra* note 2, at 360 ("Returning the Court to thoughtful consideration of the foundational principles of Indian law would end the current trend that grossly disservices tribes by lumping Indian law cases with cases involving racial preferences, attacks on state rights, and aberrations from the mainstream.").

8. *Tribal Courts and the Administration of Justice in Indian Country: Hearing Before the Comm. on Indian Affairs*, 100th Cong. 9 (2008) (prepared statement of Hon. Roman J. Duran, First Vice President, National American Indian Court Judges Association).

9. Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 295-97 (1986).

10. John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 7 (1986).

11. See, e.g., Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998).

12. These comments concern the U.S. legal academy and the field of Indian and Indigenous peoples law only; engagement with legally pluralist approaches has been more widespread in other academic jurisdictions concerning indigenous issues and in relation to other fields of research.

13. An exception here is Bruce Duthu, who notes that "[t]he challenge for Indian tribes, and indigenous peoples generally, is to confront and overcome this ideology of *legal centralism*, and the overriding institutional supremacy of the nation-state." N. BRUCE DUTHU, *SHADOW NATIONS: TRIBAL SOVEREIGNTY AND THE LIMITS OF LEGAL PLURALISM* 3 (Oxford Univ. Press 2013). He also notes that through "the lens of classical legal pluralism, we can

Several difficulties arise from the combination of legal plurality and the failure to recognize it as such. First, the U.S. Supreme Court demonstrated respect for tribal courts when it declared in both *National Farmers Union Ins. Cos. v. Crow Tribe* and *Iowa Mutual* that tribal remedies must be exhausted before a dispute is brought to federal court.<sup>14</sup> But the Supreme Court also declared that the existence and extent of tribal jurisdiction is itself a federal question,<sup>15</sup> thus reserving a spot for the Supreme Court at the apex of the U.S. legal order. The Court has used this spot to exert a strong centralizing influence on the work of both tribal and federal courts. Importantly, this force is also a homogenizing one, often serving to eliminate vital contextual differences in tribal legal features and practices.<sup>16</sup> This decontextualization lies at the heart of the dissatisfaction in both tribal communities and the legal academy about the quality of justice that tribes receive in federal court.<sup>17</sup> In addition, taking recourse to not only the federal legal order but also its specifically adversarial procedures forces the dispute to be viewed in terms of binary oppositions and as competing claims to the truth.<sup>18</sup> However, such polarized debates have the effect of “distort[ing] the truth, leav[ing] out important information, simplif[y]ing complexity, and obfuscat[ing] rather than clarif[y]ing.”<sup>19</sup> Thus, complex cultural issues are distilled into tropes that are often unrepresentative of lived experiences. Second, while historical experience has done little to reassure Indigenous peoples that justice can and will be delivered by the courts of the conqueror,<sup>20</sup> contemporary critical analysis often proceeds from a premise of deep-seated antipathy to the federal court system in general. Importantly, these critiques are skeptical of the system’s operation, with the whole system understood here as

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see that the contemporary relationship between Indian tribes and the federal government reflects a palpable structural imbalance of power, the product of the colonial experience and the United States’ own imperialism into Indian country . . .” *Id.* at 18–19.

14. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

15. *Nat’l Farmers Union Ins. Cos.*, 471 U.S. at 857 (holding that the existence and extent of tribal jurisdiction is a federal question). *Indian country* is a legal term of art referring to the geographic boundaries under the jurisdiction of a given tribal government. Congress has defined *Indian country* at 25 U.S.C. § 1151. Although this definition was originally established for purposes of the Major Crimes Act, the Supreme Court has applied it to the boundaries of tribal jurisdiction more generally.

16. Melissa L. Tatum, *Tribal Courts: Tensions Between Efforts to Develop Tribal Common Law and Pressures to Harmonize with State and Federal Courts*, in *HARMONIZING LAW IN AN ERA OF GLOBALIZATION: CONVERGENCE, DIVERGENCE AND RESISTANCE* (Larry Backer ed., Carolina Acad. Press 2007).

17. Jennifer Hendry & Melissa L. Tatum, *Human Rights, Indigenous Peoples, and the Pursuit of Justice*, 34 *YALE L. & POL’Y REV.* 351, 385 (2016).

18. Robert Yazzie, “*Life Comes From It*”: *Navajo Justice Concepts*, 24 *N.M. L. REV.* 175, 176–81 (1994).

19. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 *WM. & MARY L. REV.* 5, 6 (1996).

20. “[A] generally accepted maxim is that the way to win an Indian law case is to keep it out of the Supreme Court.” Hendry & Tatum, *supra* note 17, at 364–65; see also Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 *NEW ENG. L. REV.* 695 (2003).

innately *Other*. Legal pluralism offers a new perspective and critical framework for Indigenous justice in the United States and beyond.

This Article begins in Part I with a brief overview of the history of Federal Indian law as an academic discipline, with the purpose of offering a hypothesis as to why legal pluralism has received such little attention. Part II then examines the academy's responses to the decisions of the U.S. Supreme Court. Part III discusses the innate potential in legal form and illustrates this potential with several case studies in which Indigenous communities have translated specific culturally normative practices into readily identifiable (to the U.S. legal order) legal forms. The aim in providing these examples is twofold: first, to highlight the real benefits of casting existing tribal normative practices into recognizable, legal-procedural forms—benefits that have often gone unnoticed by legal pluralists fixated on the normative over the structural or stylistic; and second, to draw attention to the fact that a lack of reciprocity on the part of the dominant U.S. legal culture means that these benefits have been necessarily limited. As expressed in Part IV, this Article's conclusion is an optimistic one. Interactive legal culture within this context has radical conceptual potential—not just to give rise to new communicative practices, but also to lay a foundation for discursive approaches capable of underpinning new, mutual traditions.

### I. A BRIEF LOOK AT THE HISTORY OF INDIAN LAW AS AN ACADEMIC DISCIPLINE

Although *Columbia Law Review* first published an Indian law article in 1922,<sup>21</sup> Indian law as a separate academic discipline took root in the 1970s. From 1922–1970, 185 Indian law articles were published.<sup>22</sup> The 1970s witnessed 580 published academic papers<sup>23</sup> as well as the first published Indian law textbook.<sup>24</sup> The authors of that first textbook, as well as almost all of the first wave of academics specializing in Indian law,<sup>25</sup> were public-interest lawyers who had left practice to take up academic positions at universities and who brought their passion with them.<sup>26</sup> The academic discipline's public-interest roots have always maintained strong connections with the Indigenous communities it serves, but an almost unavoidable corollary is that the discipline has been and remains somewhat atheoretical. What little theory that was developed by legal academics in the United States centered almost exclusively on theories of constitutional power and the constitutional structure of the federal government. The nature of legal education in the United States reinforced this tightly bounded view of legal theory. Until recently,

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21. Cuthbert W. Pound, *Nationals Without a Nation: The New York State Tribal Indians*, 22 COLUM. L. REV. 97 (1922).

22. Rory SnowArrow Fausett & Judith V. Royster, *Courts and Indians: Sixty-Five Years of Legal Analysis: Bibliography of Periodical Articles Relating to Native American Law, 1922–1986*, 7 LEGAL REFERENCE SERVS. Q. 107 (1987).

23. *Id.*

24. See DAVID GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS*, at v (6th ed. 2011).

25. *See id.*

26. *See id.*

law schools in the United States were primarily professional schools educating lawyers. Law professors were generally experts in the law, but possessed only a juris doctor degree. It was highly unusual for law professors to possess interdisciplinary training or advanced degrees in other fields.

Over the past two decades, as the walls between the legal academy and the rest of the university have become thinner and more porous, more interdisciplinary theory has been folded into legal education, including the work of Indian law scholars. The most influential theory has been critical legal studies, and more specifically, critical-race theory.<sup>27</sup> While critical-race theory has provided important tools for those working in Indian law, this Article argues that a stronger engagement with legal philosophical and sociological theories has the potential to introduce fresh insights into well-rehearsed debates.

In particular, legal pluralism provides numerous tools for articulating arguments regarding the place of tribal governments and tribal courts in the U.S. federal system. The field's current primary approaches to Indigenous justice propose either to engage the U.S. legal order, notably in terms of rights discourse, or to reject it. Remarkably, neither employs legal pluralism to argue that tribal legal orders are legal-culturally distinct, which this Article believes is a crucial oversight. A legally pluralist approach is "inherently connected to the concept of legal culture as a result of the potential for multiplicity included in the designation of 'legal' as something both conceptually and characteristically variable."<sup>28</sup> As illustrated by Parts III and IV, employing the concepts of interactive legal culture<sup>29</sup> and "jurisgenerativity"<sup>30</sup> draws attention to those processes of social learning that result from the necessary interactions of legal cultures under circumstances of legal plurality. Borrowing and applying these concepts from legal pluralism also reveals that it is only under circumstances of genuine reciprocity between and among legal cultures, both dominant and non-dominant, that effective communication can be achieved in such situations of plurality.

## II. CONTEMPORARY APPROACHES IN INDIAN AND INDIGENOUS PEOPLES' LAW

Current approaches in the field of Indian and Indigenous peoples' law can, we argue, be separated into two camps: rights-based responses and critical responses. It should be noted that at their core these are united by the question of whether justice for Indigenous peoples can be achieved through the American courts. Both approaches recognize the asymmetry inherent in the existing legal order, where the justice process is controlled by a dominant legal culture within which tribal systems and Indigenous individuals must necessarily interact. Yet, it is here that the two camps begin to diverge, with each presenting different arguments concerning what is perceived as a lack of fairness within the U.S. legal order. In this regard, the first camp prioritizes human rights and rights-based approaches, placing

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27. *Cf. id.* at vi.

28. Jennifer Hendry, *Existing in the Hyphen: On Relational Legal Culture*, in *CULTURE IN THE DOMAINS OF LAW* 188 (René Provost ed., 2017).

29. See discussion *infra* Part IV.

30. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983).

emphasis on the innate potential of international and domestic rights to achieve justice through currently existing structures. By contrast, the second camp takes the critical position that the legal system is built upon an irretrievably flawed premise, which is to say that justice cannot be achieved within a patriarchal, post-colonial order. The second camp also advocates either full withdrawal in favor of separate tribal legal orders or a fundamental restructuring of the existing system. This Article's analysis covers each of these in turn with a view to outlining their shortcomings. This Article will first provide a brief overview of the U.S. Supreme Court's jurisprudence that caused this lack of faith in the system.

#### *A. Vacillations in the U.S. Supreme Court's Indian Law Jurisprudence*

Until 1978, the U.S. Supreme Court was generally protective of tribal sovereignty. Although the Court held that tribal governments had been absorbed into the U.S. political structure, it found that tribes retained some degree of sovereignty and governmental authority,<sup>31</sup> that only the federal or tribal government could waive a tribe's sovereign immunity,<sup>32</sup> and that non-Indian businesses who come on to a reservation to do business must take grievances to tribal court.<sup>33</sup>

In 1978, the U.S. Supreme Court issued two decisions—*Oliphant v. Suquamish Indian Tribe*<sup>34</sup> and *United States v. Wheeler*<sup>35</sup>—that signaled the start of a two-decade-long roller coaster ride for those who worked in Indian law. In *Oliphant*, the Supreme Court declared that tribal governments lack the ability to prosecute non-Indians who committed crimes in a tribe's territory.<sup>36</sup> *Oliphant* represented a stunning departure from accepted legal principles. The Court concluded that a non-Indian man who lived on the reservation could not be expected to know that assaulting a tribal police officer and resisting arrest violated tribal law.<sup>37</sup> In reaching its conclusion, the Court quoted its 1883 decision in *Ex Parte Crow Dog*,<sup>38</sup> which held that federal courts lack criminal jurisdiction over Indians in Indian country, because this would effectively

[judge] them by a standard made by others and not for them . . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception.<sup>39</sup>

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31. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 80 (1831).

32. *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 513–14 (1940).

33. *Williams v. Lee*, 358 U.S. 217 (1959). These are intended to be illustrative examples rather than an exhaustive list. In addition, as this Article argues elsewhere, not all decisions that favored tribes were the victories they might appear to be at first glance. Hendry & Tatum, *supra* note 17, at 364–65.

34. 435 U.S. 191 (1978).

35. 435 U.S. 313 (1978).

36. *Oliphant*, 435 U.S. 191.

37. *Id.* at 194, 212.

38. *Ex parte Crow Dog*, 109 U.S. 556 (1883).

39. *Oliphant*, 435 U.S. at 210–11 (quoting *Ex parte Crow Dog*, 109 U.S. at 571).

*Wheeler* was a federal criminal case under the Major Crimes Act,<sup>40</sup> in which the defendant argued that the Fifth Amendment's Double Jeopardy Clause barred federal prosecution because he had already been sentenced for the same conduct in tribal court.<sup>41</sup> The Supreme Court rejected this argument by extending the so-called Dual Sovereignty Doctrine to encompass tribal governments.<sup>42</sup> The Double Jeopardy Clause prohibits multiple prosecutions by one government for the same acts, but the Dual Sovereignty Doctrine holds that since the federal and state governments derive their sovereignty from separate and independent sources, they are not the *same* government for purposes of Double Jeopardy.<sup>43</sup> *Wheeler* found that tribal governments also derive their sovereignty from a different source than the federal and state governments, and thus tribal governments are also separate governments for purposes of Double Jeopardy.<sup>44</sup>

Over the next 20 years, the Supreme Court followed *Wheeler* with cases such as *Oklahoma Tax Commission v. Sac & Fox Nation*<sup>45</sup> and *National Farmers Union Ins. Cos. v. Crow Tribe*.<sup>46</sup> The Supreme Court followed *Oliphant* with cases such as *Montana v. United States*<sup>47</sup> and *Strate v. A-1 Contractors*.<sup>48</sup> By the late 1990s, a new pattern had emerged—one that revealed a new conception of tribal sovereignty. The Supreme Court's jurisprudence recognized tribal sovereign authority over tribal members and those who otherwise voluntarily associated with tribal governments, but did not recognize tribal sovereignty over those who were not members of the tribe. This new conception of tribal sovereignty, one that views sovereignty as membership-based rather than geographically-based,<sup>49</sup> is a very strange and limited view of governmental authority.

The Court's 2001 decision in *Atkinson Trading Co. v. Shirley*<sup>50</sup> sharply illustrates how the Court's new approach to tribal sovereignty diverges from its approach to the authority of states and the federal government. One of the core powers of a government is the ability to levy taxes, and one common tax found throughout the United States is a tax on hotel rooms.<sup>51</sup> However, when the Navajo Nation imposed such a tax, it was challenged by the non-Indian owners of a hotel that was located on land within the boundaries of the Navajo Nation.<sup>52</sup> According to

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40. 25 U.S.C. § 1153 (2015).

41. *United States v. Wheeler*, 435 U.S. 313, 330 (1978).

42. *Id.* at 332.

43. *Moore v. Illinois*, 55 U.S. (14 How.) 13, 17 (1852).

44. 435 U.S. at 330.

45. 508 U.S. 114 (1993) (upholding tribal taxation authority).

46. 471 U.S. 845 (1985) (requiring exhaustion of tribal-court remedies).

47. 450 U.S. 544 (1981) (restricting the ability of tribal governments to regulate non-Indian hunting and fishing).

48. 520 U.S. 438 (1997) (restricting tribal-court jurisdiction over non-Indians).

49. See Allison Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 17 (1993).

50. 532 U.S. 645 (2001).

51. *Id.* at 652.

52. *Id.* at 645.



precedent, non-Indians who come onto the reservation to do business are subject to tribal law.<sup>53</sup> But the Supreme Court narrowed “doing business” to require a contractual relationship between the non-Indians and the tribe or its citizens, rejecting as insufficient the fact that Navajo Nation fire, police, and paramedics were first responders to incidents at the hotel.<sup>54</sup> This requirement is shown in sharper relief when cases involving the equivalent state taxing powers are scrutinized. In those cases, there is no inquiry into whether the state or a private party owns the parcel of land in question, nor do courts require the existence of a contract before allowing the state to regulate the conduct of non-citizens. This, coupled with rejecting the evidence that the tribal government funded emergency services, clearly demonstrates how this view of tribal sovereignty differs from state governmental authority.

The Court’s decisions also clearly signal that the interests of state governments will supersede those of tribal governments. The Court illustrated this pattern in its 2001 decision *Nevada v. Hicks*, a case involving state game wardens investigating allegations that a tribal member had shot and killed a protected species off the reservation.<sup>55</sup> The state game wardens twice obtained state search warrants for the suspected tribal member’s house located on trust land within the reservation.<sup>56</sup> Each time, the wardens took the state search warrant to tribal court, obtained a tribal search warrant, and jointly executed the warrants with tribal law enforcement.<sup>57</sup> No evidence of wrongdoing was found during either search, although officers did damage some property in the process of conducting the search.<sup>58</sup> The tribal member filed a civil suit in tribal court, and one of the primary issues was whether the tribal court had jurisdiction to hear the suit against the state game wardens.<sup>59</sup> Under well-established precedent, tribal governments and tribal courts possess civil jurisdiction over all persons present on trust land within the tribe’s reservation.<sup>60</sup> Instead of following that precedent, the Court forged a new test, holding that when the non-Indians in question were state law enforcement investigating off-reservation crime, the Court must balance the state and tribal interests.<sup>61</sup> Interestingly, the Court never identified a single tribal interest, but rather proclaimed that the state interest in law enforcement outweighed any possible tribal interest.<sup>62</sup>

Thus, by 2001, the U.S. Supreme Court completely shifted from protecting tribal governmental authority to viewing it less as the authority of a sovereign government and more like the authority a private club possesses over its members.

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53. See, e.g., *Williams v. Lee*, 358 U.S. 217 (1959).

54. *Atkinson Trading Co.*, 532 U.S. at 645–46.

55. *Nevada v. Hicks*, 533 U.S. 353 (2001).

56. *Id.*

57. *Id.* at 356.

58. *Id.* The only way to determine whether certain mounted trophy heads were from a protected species was to conduct a DNA test, so the law enforcement seized the trophy heads, and the lab cut an ear off each one for the DNA testing.

59. *Id.* at 353.

60. See, e.g., *Montana v. United States*, 450 U.S. 544, 546 (1981).

61. See *Hicks*, 533 U.S. at 385.

62. *Id.* at 364.

This limited conception of tribal sovereignty presently dominates the Court's Indian law jurisprudence.

*B. Responses to the U.S. Supreme Court's Jurisprudence*

As the Supreme Court's erratic and vacillating path through tribal governmental authority coalesced into a steady course of ever-decreasing recognition of tribal sovereignty, many academics and Indian law practitioners began losing faith in the willingness of the Court to deliver justice for Indigenous people. By 1991, noted scholar Rennard Strickland declared that "[i]n the field of Indian law, we are witnessing the collapse of twentieth century law as the weapon of preservation and a return to the nineteenth century use of law as the weapon of genocidal homogenization."<sup>63</sup> The preface to the sixth edition of the major textbook, published in 2011, traced the changes:

More than eighty percent of the cases in this volume did not exist when the first edition came out in 1978 . . . . The third edition saw several major changes . . . . Most striking . . . was the inclusion of new cases that were apparently out of step with the most venerable and reliable principles in the field . . . . The fourth edition confirmed a continuing trend of Supreme Court decisions that departed from the foundation cases . . . . The fifth edition demonstrated that in many ways, Indian law has reached a crossroads . . . . The sixth edition . . . will be the first edition of the casebook unable to report on a significant advance or defense of tribal interests in the federal courts.<sup>64</sup>

In response to this shift in Supreme Court jurisprudence, some—such as the newly created Tribal Supreme Court Project—sought to be more strategic in selecting cases to prosecute in the federal courts.<sup>65</sup> Others turned to international human rights to put pressure on domestic courts,<sup>66</sup> while still others abandoned recourse in the courts altogether in favor of seeking administrative or legislative solutions.<sup>67</sup> This Article explores these responses in more detail below.

*1. Rights-Based Responses*

The first camp views the issue as one of rights. Those in this camp argue under the aegis of either the guarantees found in the U.S. Constitution or those enshrined in international human-rights documents that more rights—better rights—will serve to bring about justice. Those who prefer to bring the fight using the language and practice of human rights operated—and continue to operate even in

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63. Rennard Strickland, *Indian Law and the Miner's Canary: The Signs of Poison Gas*, 39 CLEV. ST. L. REV. 483, 484 (1991).

64. GETCHES ET AL., *supra* note 24, at v–vii.

65. See, e.g., Labin, *supra* note 20.

66. See, e.g., Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Refining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660 (1990).

67. See, e.g., MELISSA L. TATUM & JILL KAPPUS SHAW, *LAW, CULTURE & ENVIRONMENT* (Carolina Acad. Press 2014).

the face of limited success—overwhelmingly within that paradigm. More than any other, this approach has characterized the discipline, although there was a clear loss of faith in the U.S. Supreme Court after its 2001 decisions in *Nevada v. Hicks*<sup>68</sup> and *Atkinson Trading Co. v. Shirley*.<sup>69</sup>

Those focusing on U.S. constitutional guarantees argue that tribes have been de facto incorporated into the U.S. federal structure and the rights guaranteed in the Constitution should guide the development of a new foundation for Federal Indian law.<sup>70</sup> Others look to specific areas such as criminal justice, with its robust rights scheme, to help guide the next wave of tribal self-determination.<sup>71</sup>

Other scholars look beyond the domestic options and take the view that international human-rights documents provide a more suitable vehicle for articulating and resolving the grievances of Indigenous communities.<sup>72</sup> Importantly, this vehicle provides a viable alternative even for those disillusioned with arguments put in terms of domestic U.S. law which was promulgated by a reactionary Supreme Court. Williams draws attention to this issue noting that

[t]he principle of exclusive domestic jurisdiction central to European legal discourse on the Indian, has conveniently operated to force tribal nations to litigate their disputes with the conqueror's subjects, or the conqueror itself, under the eurocentric vision of justice dispensed by the conqueror's courts . . . . An unfettered access to international domestic legal forms could provide tribes with the political leverage needed to force their colonizers to defend their abusive, anachronistic and racist vision of Indian status and rights before the world community.<sup>73</sup>

While a rights-based approach does have inherent appeal, especially for those steeped in the individualistic, Anglo-American legal system, that approach has limited utility and is effective only under particular circumstances. As this Article has previously argued, such approaches are simply not suited to achieve justice relative to many of the issues facing Indigenous individuals and communities because these types of approaches suffer from three key problems: “[they privilege] (the worldview) of the dominant legal culture; . . . artificially restrict . . . the conversation about causes of and solutions to problems of Indigenous justice; and . . . mask . . . the inherent tension between human rights and legal pluralism.”<sup>74</sup> Moreover, common to these issues is the concern that procedure can oftentimes end up serving as a proxy for justice. That is to say, that the formal appearance that there has been a “day in court” or even a decision ostensibly in favor of the Indian cause

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68. 533 U.S. 353 (2001).

69. 532 U.S. 645 (2001).

70. See, e.g., Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77 (2014); Frickey, *supra* note 3.

71. See, e.g., Kevin Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777 (2006).

72. Williams, Jr., *supra* note 66.

73. Williams, Jr., *supra* note 9, at 293–97.

74. See Hendry & Tatum, *supra* note 17, at 354.

according to the rules of the dominant legal culture can hide the fact that the justice they were seeking has not been acknowledged, let alone delivered.

Many of this Article's criticisms of rights-based discourse—specifically that it operates within a legal paradigm that is neither neutral nor impartial but patriarchal and hegemonic, and which nakedly perpetuates the existing power asymmetries—are drawn from critical legal studies, critical-race theory, and radical feminism. However, as this Article explores in the next Section, while these critical responses are excellent at identifying problems, they oftentimes stop short at identifying viable solutions. After briefly exploring the arguments of the critical camp, this Article considers how engaging theoretical work on legal pluralism and legal culture can provide insights useful for achieving workable solutions.

## 2. Critical Responses

This Article uses *critical* here as a term of art; the camp we label *critical responses* is grounded in the critical legal studies and critical-race-theory movements. These movements trace their roots to the 1970s and began as an attempt to develop new tools to analyze and understand “the complex interplay among race, racism, and American law.”<sup>75</sup> One of the core doctrines of critical legal studies is that no distinction exists between law and politics. It follows, then, for the critical legal scholar that “what we regard as ‘legal doctrine’ is actually a collection of dominant and dominating conceptions.”<sup>76</sup> Within the field of Indigenous peoples’ law, this doctrine manifests itself in declarations that

Federal Indian law is the continuation of colonialism. On the basis of a non-sovereign “tribal sovereignty,” the United States has built an entire apparatus for dispossessing indigenous peoples of their lands, their social organizations, and their original powers of self-determination. The concept of “American Indian sovereignty” is useful to the United States because it denies indigenous power in the name of indigenous sovereignty.<sup>77</sup>

Some scholars, such as Robert Odawi Porter, question the legitimacy of applying American law to tribal governments,<sup>78</sup> while others, such as Martha Minow, argue that applications of U.S. law must be analyzed against the backdrop of history. For example, regarding the case *Santa Clara Pueblo v. Martinez*,<sup>79</sup> which involved an Equal Protection claim under the Indian Civil Rights Act (“ICRA”)<sup>80</sup> that challenged a tribal ordinance where children of male tribal members were eligible for tribal citizenship but children of female members were not, Minow submits that

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75. Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

76. Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. 103, 117 (1987).

77. Peter d’Errico, *American Indian Sovereignty: Now You See It, Now You Don’t*, in DECOLONISING INDIGENOUS RIGHTS 110–11 (Adolfo de Oliveira ed., 2009).

78. Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1455 (2004).

79. 436 U.S. 49 (1978).

80. 25 U.S.C. §§ 1301–03 (1998).

[t]he case could be viewed as simply the sacrifice of individual rights in the face of strong pluralism. But the larger pattern of domination and control of tribes throughout United States history must also be part of the analysis. The case reflects a history in which Native American tribal sovereignty has been more often suppressed than respected. Native American tribal sovereignty endures entirely subject to approval by the United States government and the points of autonomy granted by tribes reflects the dominant society's ordering of priorities. Perhaps, then, it reflects the larger society's overall values that the tribe is allowed discretion over how much to protect its women from discriminatory treatment; or perhaps the larger society's values are served by allowing the tribe to exclude some candidates from tribal membership. The tribe itself has no genuine autonomy to sort out its own values and preferences in a system in which control over their own affairs has so often been undermined.<sup>81</sup>

As this quote makes clear, the general position of unifying Indian and Indigenous peoples' law scholars within this critical camp is that the innate biases and lack of understanding within the U.S. legal order serve to compromise any justice it could ever deliver. The result is that justice remains irrevocably *Other* in its articulation and effect. While some scholars in this camp urge a return to tribal legal systems,<sup>82</sup> others allege that tribal systems are also tainted:

[T]ribal rules and laws are subservient to [f]ederal rules and laws. Tribal leadership is obedient to [f]ederal law—it does not dare challenge it . . . there is no point to trying to decolonize the Navajo government—it was not right for us from the start. Its structure and process is a replica of the American system . . . .<sup>83</sup>

However, the frustration the authors experience with these approaches is their tendency to prioritize the critique, to take a hammer to the edifice, but then to leave us all sitting in the rubble. These approaches are so busy being critical of the U.S. legal order and its shortcomings—albeit, validly so—that they fail to recognize the potential that exists. And nowhere is this deconstructionist tendency more apparent than in critical arguments that privilege culturally determines understandings, essentializes Indigenous legal cultures, and precludes the possibility of genuine communication between and among communities and groups bringing justice claims.

At this juncture, this Article submits two major arguments. First, while those in the critical camp wring their hands about the unfairness of the system, Indigenous communities take an altogether different and more pragmatic approach. This difference in approach between the academy and the tribes is very likely because the latter do not have the luxury of disengaging from the U.S. legal order.

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81. Martha Minow, *Rights and Cultural Difference*, in IDENTITIES, POLITICS, AND RIGHTS 347, 359 (Austin Sarat & Thomas R. Kearns eds., 1995).

82. See Porter, *supra* note 78, at 1455.

83. Larry W. Emerson, *Diné Sovereign Action: Rejecting Colonial Sovereignty and Invoking Diné Peacemaking*, in NAVAJO SOVEREIGNTY: UNDERSTANDINGS AND VISIONS OF THE DINÉ PEOPLE 168–69 (Lloyd L. Lee ed., 2017).

Although these pragmatic strategies have been hugely variable, both in terms of their effectuation and their relative successes, they are united by their underlying goal—to retain the substantive normative content of their own legal cultural features through a deliberate strategy of adapting their legal and procedural forms to be recognizable to the dominant legal culture. Second, an interactive view of legal culture offers the critical camp a way out of its bind, facilitating the bypass of this discourse’s pervasive binary of Indigenous/non-Indigenous. Moreover, it allows for context to be maintained while at the same time undermining the type of essentialization characteristic of those approaches insistent upon asserting “epistemic closure.”<sup>84</sup> This argument forms the basis of Part IV; Part III provides the foundation for this argument by employing three selected case studies to illustrate this pragmatic adaptation of legal form.

### III. THE BENEFITS OF LEGAL FORM

The legal anthropologist Fernanda Pirie has argued in favor of an approach to comparison that includes consideration of the legal form exhibited by the “explicit rules and legal categories [used] to organize and describe the social world.”<sup>85</sup> Pirie makes the case that studying the forms of law—its legalism<sup>86</sup>—can provide fresh insights into the role and function of law within different societies.<sup>87</sup>

This Article contends that while the focus of legal pluralists—and legal comparatists more generally—has tended to rest upon the substance of legal norms, this comes at the arguable expense of the structural and stylistic, resulting in important issues being overlooked. This is perhaps not surprising, considering both the anthropological and functionalist influences legal comparison has been subjected to, but this omission seems to be a glaring one. While changes in normative content can be problematic, some legal and procedural forms are more malleable. As this Article’s case studies exemplify, this can be explained by how changes in form need not necessitate variations in the content, meaning that there can be little cost in terms of actual practice but oftentimes substantial benefit. Such benefits will depend on context, of course, but this Article argues that paramount among these benefits is the increased de facto legitimacy that can be afforded to a legal culture that opts to alter a legal feature or practice in a way that makes that feature or practice more readily understandable to a dominant legal culture. This speaks to increased efficiency in communication, which is arguably a significant

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84. See, e.g., Simone Glanert & Pierre Legrand, *Law, Comparatism, Epistemic Governance: There Is Critique and Critique*, 18 GERMAN L.J. 701 (2017); Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L & COMP. L.Q. 52, 65–66 (1996).

85. Fernanda Pirie, *Comparison in the Anthropology and History of Law*, 9 J. COMP. L. 72, 94 (2014).

86. Pirie is clear that her use of the term is to denote legal form, and is not intended to contribute to the discussion of ‘legalism’ initiated by Judith Shklar. See JUDITH SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (Harvard Univ. Press 1964).

87. See generally LON L. FULLER, *THE MORALITY OF LAW* 37–94 (Yale Univ. Press 1969).

benefit for the small price of changing something which can be of limited cultural significance.<sup>88</sup>

However, before continuing, this innate interactivity requires some more attention. Here, this Part foregrounds this Article's core argument—namely that interactivity, while important, is only so useful in and of itself. Without a requirement of *mutuality*, the accommodations in terms of altering legal forms rests entirely with the minority legal culture, which is to say, with the tribes. These three case studies—all drawn from tribes in the United States—collectively illustrate the point that the current burden of adaptation rests with Native peoples and with tribal governments, including tribal courts.

#### *A. Developing and Reporting Tribal Common Law*

Tribal governments, like all other governments, have always possessed methods for settling disputes and dealing with those who violate community norms.<sup>89</sup> However, as part of their assimilation into the United States, most tribes were required to create Anglo-style adversarial court systems.<sup>90</sup>

Although these courts are tribal courts, they operate under the watchful eye of the federal court system and the threat that any perceived unfairness, injustice, or overreaching will be cause for reducing the jurisdiction of all tribal courts.<sup>91</sup> In the words of Justice Tom Tso of the Navajo Supreme Court, “the Anglo world has essentially said to tribes, ‘Be like us. Have the same laws and institutions we have. When you have these things maybe we will leave you alone.’”<sup>92</sup> However, to be effective, tribal courts must be viewed as legitimate by the community they serve.<sup>93</sup> This is a difficult balance to strike, and the solution has rested within the concept of common law. In explaining the process of decision-making in Navajo courts, Justice Tso stated:

The law the Navajo courts must use consists of any applicable federal laws and tribal laws and customs. The structure of our courts is based upon the Anglo court system, but generally the law we apply is our own. . . . In 1985 the Tribal Code sections regarding applicable law were amended. Now the courts are required to apply the law of the United States which is applicable and laws or customs of the Navajo Nation which are not prohibited by federal law. . . . It is easy to understand that the Navajo Tribal Code contains the written law of the Navajo Nation and that this law is available to anyone. When we speak of Navajo customary law, however—many people become

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88. This is, of course, not to say that all legal and procedural forms are easy to change and lack cultural specificity or embeddedness. However, this is the case for each of the case studies selected for inclusion and discussion here.

89. See Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705, 708–09 (1997).

90. *Id.* at 709–19.

91. Tatum, *supra* note 16.

92. Tom Tso, *The Process of Decision-Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 232 (1989).

93. See Newton, *supra* note 11, at 293; Tatum, *supra* note 16, at 91.

uneasy and think it must be something strange. Customary law will sound less strange if I tell you it is also called “common law.”<sup>94</sup>

The Navajo Supreme Court thus embarked on a systematic effort to identify, explain, and use Navajo common law as the basis of its decisions whenever possible; this has been dubbed the Navajo Common Law Project. To date, Navajo common law has been used in a wide variety of cases, ranging from calculating tort damages to resolving disputes over grazing leases. Navajo Supreme Court justices also made a point of speaking at conferences, writing papers, and generally taking every opportunity to explain their process, methods, and goals.<sup>95</sup> Many tribes and tribal courts have followed the pattern that the Navajo Supreme Court established.<sup>96</sup> The pattern has been very successful in allowing courts to use tribal substantive standards but—and for our purposes, all importantly—comes wrapped in a form that is recognizable and acceptable to federal courts. In the words of Professor Pat Sekaquaptewa, “In tribal communities, development of the common law is the key to ensuring tribal ownership over once imposed justice systems and often imported foreign legal standards.”<sup>97</sup>

This process of developing and using tribal common law is something most tribes can undertake,<sup>98</sup> and indeed several tribes have pursued this same path, including the Hopi,<sup>99</sup> the Muscogee (Creek),<sup>100</sup> and the Seneca.<sup>101</sup> However, it is not enough to use tribal common law; tribal courts must explain how the process works and make those decisions available to those who practice in tribal courts. The Navajo Supreme Court has done this by printing, binding, and publishing its opinions in book format, like court reporters published by state and federal courts.

94. Tso, *supra* note 92, at 230.

95. *See id.*; RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW* (Univ. of Minn. Press 2009); Yazzie, *supra* note 18.

96. Given that more than 550 federally recognized tribes exist in the United States, it is impossible to provide an exhaustive list. Examples of tribes in addition to the Navajo Nation that use tribal common law in judicial decisions include the Muscogee (Creek) Nation, the Hopi Tribe, and the Winnebago Tribe. *See* Mvs. L. Rep. (Muscogee (Creek) Nation); Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL’Y 761 (2000) (Hopi Tribe); Rave v. Reynolds, 23 Indian L. Rep. 6150, 6157 (Winn. Sup. Ct. 1996) (Winnebago Tribe); *see also* JUSTIN RICHLAND & SARAH DEER, *INTRODUCTION TO TRIBAL LEGAL STUDIES* 36–58 (2d ed. 2010).

97. Sekaquaptewa, *supra* note 96, at 762.

98. This Article says *most* because these endeavors are dependent on the continued existence and knowledge of a given tribe’s culture, and some tribes, particularly very small ones, have lost that knowledge.

99. *See, e.g.*, JUSTIN B. RICHLAND, *ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT* (Univ. of Chi. Press 2008); Sekaquaptewa, *supra* note 96.

100. *See, e.g.*, Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100 (\$1,463.14); Methamphetamine; and a 2004 General Motors Hummer H2, VIN NO. 5GRGN23U64H116688, 4 Mvs. L. Rep. 253 (2005).

101. *See, e.g.*, Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal System Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997).



State and federal courts publish their decisions in multi-volume series called reporters. Each case is summarized and indexed so that it is easy to locate cases containing specific principles. While the Navajo Reporter lacks a comprehensive, cumulative index, some of the later volumes contain explicit sections discussing Navajo common-law terms and principles.<sup>102</sup>

The Muscogee (Creek) Nation tribal courts took the idea of a court reporter one step further and not only published opinions from its modern-day Supreme Court but also published its tribal trial-court opinions and every written opinion it could find that was issued by one of its courts.<sup>103</sup> The project was conceived and coordinated by Judge Patrick Moore, a judge who sat on the district-court bench and who had concerns that attorneys with little to no Indian law experience were being called on to practice in tribal courts. Many of these attorneys lacked a proper understanding of tribal courts, and the dearth of any published court decisions and related rulings exacerbated this situation, as this made it difficult for attorneys to locate relevant cases.

One obstacle to creating a comprehensive tribal court reporter was the need to create a customized indexing and digesting system. State and federal courts' indexing and digesting systems were not built with tribal courts in mind, so the topics they used were both under- and over-inclusive for tribal courts. What was needed was a separate, *tribally appropriate* method of indexing and digesting court opinions that used similar methods and functionality as the state and federal court reporters, but whose content was tailored for tribal courts in general and the Muscogee (Creek) Nation in particular. With the help of some consultants,<sup>104</sup> that was accomplished in 2006 when the eight-volume Mvskoke Law Reporter (Reporter) was published. The Reporter, which contained all the tribe's court decisions from 1832–2005, used a newly created indexing and digesting system that was tailored for the tribal court. The Reporter also used a sufficiently familiar format to convey to attorneys that this was the work of a legitimate court. Once again, this Article observes that it is the *form* that is important, not the content.

#### ***B. Pascua Yaqui: Speaking on Behalf of the Accused***

The tribal common-law example is a project that most tribal courts can undertake. However, this Article's second example is more limited and is not suited for every tribe. The difference is that, while all tribes have a set of customs and traditions to regulate behavior, this second example concerns a much more specialized practice—the right of an accused to have someone speak on his or her behalf. The Pascua Yaqui tribe has a similar practice, as do other tribes, such as the Muscogee (Creek) Nation, which has had a tribally recognized constitutional right to the assistance of counsel for those accused of crimes since at least 1867. It is

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102. See, e.g., 8 Navajo Rptr. xi.

103. The Mvskoke Law Reporter consists of eight volumes. The first three contain opinions and orders of the modern era district court. Volume four contains the decisions of the modern era tribal supreme court. Volumes five through seven contain historic opinions, and volume 8 contains the index. 1 Mvs. L. Rep. IX.

104. Including Melissa Tatum, one of the authors of this Article.

noteworthy that the Pascua Yaqui extend this right to all accused of violating the group's norms, not just those who cannot afford their own attorneys.

For the Pascua Yaqui, this cultural practice became important when the Tribe decided to opt in to the Special Domestic Violence Criminal Jurisdiction provisions of the 2013 Violence Against Women Act ("VAWA"). This decision required that the Tribe meet the procedural prerequisites outlined in the statute. Once the Tribe was deemed in compliance, the Tribe could begin prosecuting non-Indians who committed domestic violence, dating violence, or who violated a protection order while within the Tribe's territory.

The VAWA's procedural requirements largely center on procedural protections guaranteed by the U.S. Constitution to those accused of crimes. These constitutional guarantees apply to defendants in federal and state courts; they do not apply to those tried in tribal courts. That is not to say that no procedural protections are in place for tribal criminal proceedings; most of the provisions of the Constitution relating to criminal trials are contained in the Indian Civil Rights Act ("ICRA"), which does apply to tribes.

However, for a variety of historical and practical reasons, ICRA does not guarantee indigent defendants a right to counsel. While this has been a key reason behind many U.S. Supreme Court decisions restricting tribal jurisdiction over non-Indians, it is much less significant than it appears. The Supreme Court's discussions of indigent defense counsel occur against the backdrop of the Sixth Amendment<sup>105</sup> and how that Amendment is applied to states.<sup>106</sup> States are not required to supply every defendant in every criminal case with an attorney. Rather, a state criminal defendant's right to indigent defense counsel depends on what charges the defendant is facing. States are required to provide indigent defense counsel only when the potential sentence is greater than one year and, in cases involving lesser sentences, when a convicted defendant is sentenced to actual jail time.<sup>107</sup> ICRA limits the sentences that tribal courts can impose so that the first condition never applies.<sup>108</sup> In addition, many tribes use alternative sentencing and do not sentence convicted defendants to jail time. Thus, even if the Sixth Amendment did apply to tribes, it would require tribes to provide indigent defense counsel only in a small set of cases

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105. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

106. The individual-rights provisions of the U.S. Constitution are not automatically applicable to the states. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). The Supreme Court has instead adopted an approach in which it examines each clause individually and determines whether the clause should be incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states.

107. See *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

108. At least not until the enactment of the 2010 Tribal Law and Order Act ("TLOA"), which restores to tribes the ability to sentence a convicted defendant to a maximum of three years for each offense. TLOA requires that any tribe choosing to exercise this enhanced sentencing authority must provide defendants with indigent defense counsel. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

in which state courts must provide an attorney. In many of these cases, tribal procedures regarding pro se defendants make the role of an attorney much less critical in tribal court.

Nevertheless, great concern has been exhibited about the lack of a right to indigent defense counsel in tribal court.<sup>109</sup> As a result, Congress required that tribes who wish to exercise the Special Domestic Violence Criminal Jurisdiction, restored to tribes under VAWA, must provide indigent defense counsel. For some tribes, this is an expensive imposition of Anglo-American judicial standards. Others, such as the Pascua Yaqui, could recast a long tribal tradition of providing someone to speak on the accused's behalf in terms recognizable to the Anglo-American system. In creating its modern criminal justice system, the Pascua Yaqui incorporated this traditional provision, but also paid lip service to a requirement with which they already complied by calling this new office the public defenders' office. Existing tribal practice is thus repackaged and reframed for the specific purpose of being acknowledged by the dominant legal culture.

### *C. Child Welfare, Permanency Planning, and Title IV-E Foster Care Funds*

While the legislature devoted a great deal of time and attention to the Indian Child Welfare Act ("ICWA"),<sup>110</sup> it paid comparatively little attention to other aspects of tribal child abuse and neglect systems. ICWA allocates jurisdiction over child-welfare matters between state and tribal courts.<sup>111</sup> However, ICWA does not control when a child-welfare matter is purely internal within the tribal system or when an ICWA matter is transferred to tribal court. In these two situations, tribes are free to develop tribally appropriate standards for handling child abuse and neglect cases, including setting standards for removing children, placing them in foster care, developing reunification plans, or providing a guardian for the child in question.

State child-welfare systems invariably provide a mechanism for terminating the parental rights of those parents who are unable or unwilling to take the steps necessary to be reunified with their children. As part of the funding provided to assist states with foster care and other expenses related to the child-welfare system, the federal government provided incentives to states to engage in

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109. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 383–84 (2001) (Souter, Kennedy & Thomas, JJ., concurring) ("The ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequence given the special nature of Indian tribunals, which differ from traditional American courts in [several] significant respects. To start with the most obvious one, . . . the Bill of Rights and the Fourteenth Amendment do not on their own force apply to Indian tribes. Although [ICRA] makes a handful of analogous safeguards enforceable in tribal courts, the guarantees are not identical . . ."); *Duro v. Reina*, 495 U.S. 676, 693 (1990) ("While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages and usages of the tribes they serve. . . . It is significant that the Bill of Rights does not apply to Indian tribal governments. [ICRA] provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts. There is, for example, no right under the Act to appointed counsel . . .").

110. Pub. L. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963 (1978)); see, e.g., BARBARA A. ATWOOD, *CHILDREN, TRIBES, AND STATES* (Carolina Acad. Press 2010).

111. 25 U.S.C. § 1911 (1978).

permanency planning and to place limits on the amount of time parents are given to comply with reunification planning requirements. The goal is to keep children out of continuous legal limbo and move them into stable, long-term home situations.

Even when tribes became eligible to receive these funds (known as Title IV-E funds), many tribes did not qualify because their child-welfare codes did not provide for termination of parental rights. This was often a result of a tribal custom and tradition, and did not mean that tribal children were kept in endless rounds of legal limbo. Rather, these tribes provided for the appointment of permanent guardians for the children, but left the door open for parents who were eventually able to address their problems (often drug or alcohol related) and become fit parents. After extended discussion, rounds of education, and amending tribal statutes to include language recognizable and acceptable to the federal government, several tribes could qualify for Title IV-E funds even if the tribal code did not provide for termination of parental rights. Again, the key was that tribes cast a tribal tradition in a form recognizable and acceptable to the federal government.

It is important to note that this Article does not mean *acknowledgment* or *recognition* in the identity-politics sense of the latter term—in this regard it acknowledges that “the act of recognition repeats the colonial hierarchy that gave rise to oppression in the first place.”<sup>112</sup> Similarly, it rejects the notion, put forward by Carpenter and Riley, that such instances of emulation or mirroring are examples of colonization.<sup>113</sup> Instead, what is evident from these case studies is the manner by which tribal legal orders have adapted the *form* of legal practices for the particular end of an increased understanding of this feature or practice *by* the federal legal order. The corollaries of such heightened understandings may vary, of course, and as this Article stated earlier, among these is greater legitimacy for the minority legal culture going forward. Indeed, this often drives the pragmatic act of translating normative cultural practices into identifiable legal forms in the first place. This Article points to this as an example of all-important social learning but stipulates that if this is to be genuinely successful, then this burden must be shared. Mutuality is not simply a desire but rather a requirement: put simply, it must be a two-way street.

The next Part will articulate the importance of an interactive relational conception of legal culture in circumstances of legal plurality, specifically in terms of how it bypasses the epistemic closure that the critical voices in the field get caught up in.

#### IV. INTERACTIVE LEGAL CULTURE

At the heart of this endeavor lies the dilemma, outlined by Frankenberg, of “accepting the otherness of the ‘Other’ without *othering* it.”<sup>114</sup> This Article argues

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112. Kirsten Anker, *Law, Culture, and Fact in Indigenous Claims: Legal Pluralism as a Problem of Recognition*, in *CULTURE IN THE DOMAINS OF LAW* 137 (René Provost ed., 2017).

113. Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 203 (2014).

114. GÜNTER FRANKENBERG, *COMPARATIVE LAW AS CRITIQUE* 71 (2016).

that the critical approaches discussed above are flawed in this very regard: they start from a premise of innate misunderstanding and unknowability. Thus, legal cultures are treated effectively as billiard balls: self-contained, impermeable, and unchanging. Glanert and Legrand, for example, have raised similar arguments within the field of comparative legal studies. They discuss the epistemic closure of legal cultures and the “untranslatability” of law.<sup>115</sup> The authors’ accounts of tribal common law, tribal court reporters, and tribal public-defender provisions stand as rebuttals to this Derridean insistence on untranslatability—in each of these examples there is clear effort on the part of the weaker legal culture to articulate its practices in forms familiar to the dominant one. And although these examples are all ones where the changes have been deliberate, this need not be the case—unsteered and contingent adaptations are just as important.

It should be clear that this Article is not discussing a collapsing of legal cultures or a loss of legal-cultural distinctiveness on the part of anyone within this plural relationship. On the contrary, this Article acknowledges the rich variety of normative practices across legal cultures in the United States, both Indigenous and non-Indigenous, and is strongly in favor of their maintenance and flourishing. Rather, this Article submits that what are often presented as irresolvable epistemic differences and barriers to genuine understanding are actually nothing of the sort. This position stems from the authors’ understanding of legal culture not only as a unit but also as a process, specifically as an “ongoing, open-ended, interactive process of socio-legal learning.”<sup>116</sup> Just as interactions within society are unavoidable, so too are the knock-on effects and influences to which these give rise, leading ultimately to adaptations. This temporally sensitive understanding of legal culture as an inherently interactive process is insightful. It precludes the billiard-ball conceptualization of legal cultures as always-already-formed units ricocheting off each other, always conflicting, never engaging. By embedding the idea of a process of adaptation right at the heart of the concept of legal culture, the interactive dimension comes more readily to the fore—such legal cultures, after all, do not exist in a vacuum. More importantly, it undermines this notion, prevalent in some discussions,<sup>117</sup> that there are essential, fundamental, and original elements to legal cultures—if everything is the result of interaction, then this simply cannot be the case. Legal cultures are constantly in flux, interacting and adapting, and negotiating and reaffirming their features and operations on the basis of internal stimuli and external information.

The radical conceptual potential of interactive legal culture lies, we submit, with its capacity to lay a foundation for discursive approaches capable of giving rise to new, *mutual* traditions. As Robert Cover observes, a legal tradition is “part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by

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115. Glanert & Legrand, *supra* note 84, at 716; *see also* Pierre Legrand, *Siting Foreign Law: How Derrida Can Help*, 21 *DUKE L.J.* 595, 616 (2011); Legrand, *supra* note 84.

116. Hendry, *supra* note 28, at 180.

117. *See, e.g.*, Legrand, *supra* note 84.

those whose wills act upon it.”<sup>118</sup> Therefore, interactivity is connected to jurisgenerativity,<sup>119</sup> which is to acknowledge the continual development of norms and laws (*Nomoi*) by autonomous interpretive communities.<sup>120</sup> As the case study examples illustrate, tribes’ alterations in legal form have reduced epistemic barriers, a process and result that, we argue, can and indeed should be replicated. Indeed, Carpenter and Riley argue that evidence of such jurisgenerative processes can already be observed at domestic and international levels.<sup>121</sup> In conditions of legal plurality, an approach that not only recognizes the normative validity of all legal cultures but also facilitates their genuinely reciprocal interaction must be welcomed.

How then to bring about such an interactive relational approach? The authors submit that legal scholars within the field of Indian and Indigenous peoples law have a particularly important role to play in this regard. Instead of stepping back, they—we—ought to step up. As discussed, tribal legal cultures have historically been open to such interactions—the Navajo Common Law Project encapsulates this position well in its statement that “[w]e can learn the western form of laws and governance to enrich and enhance our traditional way of life and our sovereign nation. We do not have to lose our traditional values and universal principles but only to strengthen it.”<sup>122</sup> As tribal legal cultures do this, so too should dominant legal cultures, which can be achieved by means of recognizing the Other *in its own right*, by means of “operat[ing] and observ[ing] within the bounds of a *particular* context, and interpret[ing] what [is seen] within a *particular* matrix provided by the specific cultural context that constitutes the law and is also constituted by law.”<sup>123</sup> Justice for Indigenous groups in the United States will only ever be achievable under circumstances of genuine understanding and reciprocity between and among its diverse legal cultures.

### CONCLUSION

The primary aim of this Article has been to draw attention to the utility of a legal pluralist approach within the field of Indian and Indigenous peoples law within the U.S. legal academy. We open with a critical historical account of the development of this discipline and provide an explanation as to why such approaches have—by and large—gone underexplored within the research field. Through mapping the U.S. Supreme Court’s Indian law jurisprudence from 1978 to 2001, we then engage in an in-depth analysis of how this effective downgrading of tribal governmental authority (and thus tribal sovereignty) had a specific influence upon both activism and academic engagement concerning tribal justice. Such responses, we argue, fell into two camps: those who advocate the use of constitutional and human rights to address such injustices, and those who simply reject the Anglo-American legal system as incompatible with indigenous norms, practices, and traditions.

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118. Cover, *supra* note 30, at 9.

119. *See id.*

120. *See id.* at 14.

121. Carpenter & Riley, *supra* note 113, at 215.

122. *Navajo Common Law Project*, *supra* note 1.

123. FRANKENBERG, *supra* note 114, at 72.

Our goal in outlining the shortcomings of these two approaches has not been to criticize the scholarship but rather to point to the limitations of these paradigms: one that has been proven time and again as a failure in delivering substantive justice for Native nations, and another that insists upon an inaccurate radical separateness. Significantly, a legally pluralist approach offers a viable conceptual alternative by allowing for the view of the respective legal orders of Indian tribes and the federal government as distinct legal cultures, as well as highlighting the necessary interactivity of these legal cultures. The case studies provided are illustrative examples of situations where legal-cultural adaptation has occurred; indeed, we identified several instances whereby a deliberate strategy by tribes of adapting legal and procedural forms has facilitated the preservation of the normative content of particular legal cultural practices.

It is notable, however, that while we recognize legal cultures as inherently interactive, those adaptations cited in the examples have all been undertaken on the part of tribes; reciprocal adaptations on the part of the dominant U.S. legal culture are far harder to identify. The academy has a role to play in this regard, not least in the recognition, explanation, and promulgation of tribal legal-cultural practices concerning, for example, mediation and dispute resolution, but also in terms of engaging with theoretical insights so as to construct frameworks that underpin innovative communicative practices and create robust foundations upon which new mutual traditions can be premised.

