Access to Justice in the Shadow of Colonialism

*By Kirsten Matoy Carlson**

TABLE OF CONTENTS

* Professor, Wayne State University Law School; Visiting Professor, University of Michigan Law School (Fall 2023); ABF/JPB Access to Justice Fellow; Marilyn Williamson Endowed Distinguished Faculty Fellow, The Humanities Center at Wayne State University. Ph.D. 2007 (political science), The University of Michigan; J.D. 2003, The University of Michigan Law School; M.A. 1999 Victoria University of Wellington, New Zealand (Fulbright scholar); B.A. 1997, The Johns Hopkins University. I thank Matthew L.M. Fletcher and Alyx Mark for reading previous drafts; Rebecca Sandefur, Michelle Statz, Nickole Nelson, Shannon Gleeson, Robert Law, Matthew Burnett, Chiara Galli, Claire Johnson Raba, Nylca Munoz, Neel Sukhatme, Maureen Waller, and participants at the 2023 International Access to Justice Conference for asking hard questions about and providing thought-provoking insights into this research; and to my Cherokee, Creek, Choctaw, and Anishnaabek relatives for inspiring my work. The ABF/JPB Access to Justice Scholars Program and The Humanities Center at Wayne State University generously funded this research. The Wayne State University Institutional Review Board ensured that proper safeguards were taken to ensure the protection and confidentiality of individuals interviewed for this research (IRB-23-01-5359). Special thanks to the Native people who shared their experiences in the justice system with me.

Introduction

The legal needs of most Americans go unmet,[1] but American Indians and Alaska Natives face particular challenges in seeking access to justice. Justice in Native communities has never been about solving an individual's legal problem and sending them on their way.[2] The access to justice issues faced by Native communities have always extended beyond the individual because tribal governments, in addition to their citizens, have faced incredible injustices and barriers to resolving their justiciable problems.[3] Tribal leaders and advocates have always fought for justice on multiple fronts—for tribal governments and communities against federal and state oppression and for individual tribal citizens with legal issues in federal, state, and tribal courts and agencies.[4]

The law permeates the lives of American Indians and Alaska Natives in ways unimaginable to most Americans[5]—even in a law thick world, where the law seems to affect even the most mundane aspects of an individual's everyday life, including employment, housing, and family relationships.[6] Since its formation, the United States has dealt with American Indians by establishing legal relationships with them as separate political communities, commonly referred to as "tribes" or "nations."[7] The United States and Native

---

[1] *See* Legal Services Corporation, The Justice Gap: The Unmet Civil Legal Needs of Low-income Americans 7–9 (2022), https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi-0emp3myz1 [https://perma.cc/9V4Y-CNPT]; *see also* The World Justice Project, Civil Justice (2023), https://worldjusticeproject.org/rule-of-law-index/factors/2023/United%20States/Civil%20Justice/ [https://perma.cc/3VMQ-79LF] (ranking the United States 115th out of 142 countries for accessibility and affordability of civil justice, and 124th for discrimination-free civil justice).

[2] *See* Joan C. Lieberman, American Indians: Their Need for Legal Services, A Report Prepared for the Legal Services Corporation (1976).

[3] *Id.* at 22–31; Memorandum from Steve Moore on "Futures" Project to Indian Legal Services Directors, Indian Legal Support Ctr. 10 (Feb. 23, 1989) (on file with author).

[4] I distinguish tribal governments from Native communities for several reasons. First, tribal governments are often distinct from the communities they serve. The two are not interchangeable even though all tribal governments represent Native communities. Second, tribal governments do not represent all Native communities. For example, urban Native communities exist in many cities throughout the United States due to the federal government's relocation policy in the 1950s, which sought to erode Native ties with their tribal communities by moving them to cities. Relocation led to the creation of many urban Native communities, but these communities are not governed by a tribal government.

[5] *See* Justin B. Richland & Sarah Deer, Introduction to Tribal Legal Studies 1 (3rd ed. 2016).

[6] *See* Rebecca L. Sandefur, *What We Know and Need to Know about the Legal Needs of the Public*, 67 S.C. L. Rev. 443, 446 (2016) (defining "law thick" as a world "where many common relationships and routine activities are governed by laws and regulations and can become objects of formal legal action by someone under some aspect of these."); *see also* Gillian K. Hatfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 Fordham Urb. L.J. 129, 133 (2010); Hugh McDonald, *Assessing Access to Justice: How Much "Legal" Do People Need and How Can We Know?*, 11 U.C. Irvine L. Rev. 693, 698 (2021).

[7] Carol Goldberg-Ambrose*, Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 Law & Soc. Rev. 1125, 1125–26 (1994).

Nations entered into treaties acknowledging the tribes' preexisting and ongoing rights and governmental authority. These treaty relationships, along with the U.S. Constitution, federal legislation and Supreme Court decisions, form the basic legal framework governing Indians and tribal governments in the United States today. The foundational principles of this framework include the recognition that tribes are governments with inherent sovereign powers, not delegated or granted by the United States; the U.S. Constitution gives Congress full control or plenary power over Indian affairs—including authority to limit tribal powers; the federal government has responsibilities to Indian tribes and individual Indians known as the trust relationship; Indian Nations retain powers unless Congress has expressed clear and plain intent to abrogate them; and state governments have no authority to regulate Indian affairs absent an express congressional delegation or grant.[8] Federal laws often purport to define the powers and rights of tribal governments and their citizens.[9]

The legacy of colonialism inherent in this legal framework complicates the access to justice issues faced by tribal governments, Native communities, and individual Natives. Access to justice is a framework for understanding and improving the experiences that people have with justice events, organizations, or institutions.[10] Tribal governments, Native communities, and individual Natives encounter justiciable problems, or happenings and circumstances that may raise legal issues, that often involve perplexing questions of jurisdiction, Indian status under federal laws, and treaty rights.[11] The resolution of these issues may require engagement as a community or a government with multiple governmental institutions, including agencies, courts, and even Congress.[12] Similar to others facing justiciable problems, barriers, such as an inability to find a lawyer, a lack of legal knowledge, or cost, often impede their access to justice. Additional obstacles arise from

---

[8] *See* Felix S. Cohen, Handbook of Federal Indian Law xxiii, 122–23 (1941); Felix S. Cohen, Cohen's Handbook of Federal Indian Law 2 (Nell Jessup Newton et al. eds., LexisNexis 2012); Alex Tallchief Skibine, *Dualism and the Dialogic of Incorporation in Federal Indian Law*, 119 Harv. L. Rev. F. 28 (2005); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colorblind Justice, and Mainstream Values*, 86 Minn. L. Rev. 269, 269–73 (2001).

[9] *See* United States Code Title 25 – Indians, 25 U.S.C. §§ 1–4301.

[10] *See* Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 Ann. Rev. Soc. 339, 340, 349 (2008) (noting the lack of access to justice studies investigating race disparities).

[11] *Id*. at 341 (justiciable problems are "happenings and circumstances that raise legal issues but that we may never think of as legal and with respect to which they may never take any legal action."); *see also id.* at 341; Kathryne M. Young & Katie R. Billings, *An Intersectional Examination of U.S. Civil Justice Problems*, 2023 Utah L. Rev. 487, 492 (2023) (discussing the differences between justiciable events and legal needs).

[12] *See* Eric Dahlstrom & Randolph Barnhouse, Legal Needs and Services in Indian Country, 1998 Report to the Legal Services Corporation 8 (1998).

the distance from Native communities to legal services, ethnic and cultural considerations, and the distinct and complex nature of their legal issues.[13]

Yet access to justice studies rarely mention American Indians and Alaska Natives.[14] For example, they are not treated as a separate group of special interest in the Legal Services Corporation's (LSC) last four studies on the justice gap.[15] Rather, data from the Indian programs funded by the LSC are subsumed within the LSC's general reports.[16] The last major report studying access to justice in Native communities was issued by the National Association of Indian Legal Services in 2008.[17] A few scholars have included Native communities in recent studies of rural access to justice.[18] They have started to explore the access to justice issues faced by tribal judges and citizens within the rural communities in which they live.[19] Scholars studying variations across communities, including race, sometimes note the difficulties in collecting data on Native populations.[20] For example, Professors Young and Billings emphasize the need for more data on Native populations in their research on civil justice problems.[21] The access to justice literature generally acknowledges that different groups experience access to justice differently,[22] but scholars have yet to collect and analyze

---

[13] *See* Legal Servs. Corp., Special Legal Problems and Problems of Access to Legal Services of Veterans, Native Americans, People with Limited English-Speaking Abilities, Migrants and Seasonal Farm Workers, and Individuals in Sparsely Populated Areas 27–30 (1979); Lieberman, *supra* note 2, at 33–39.

[14] *See* Young & Billings, *supra* note 11, at 523) (noting the lack of data on Native Americans in access to justice studies); Lisa R. Pruitt & Bradley Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. Rev. 466, 488 (2014) (mentioning American Indians and their distinct legal issues but not discussing them in depth); Sara Sternberg Greene, *Race, Class, and Access to Justice*, 101 Iowa L. Rev. 1263, 1285–86 (studying access to justice experiences by race but not mentioning Natives).

[15] *See generally* Special Legal Problems, *supra* note 13.

[16] *See id.* The data are there but they are not separated out, making it difficult to understand the unique legal needs and experiences of Native communities.

[17] Nat'l Ass'n of Indian Legal Servs., NAILS update to Dahlstrom-Barnhouse's 1998 Report to the Legal Services Corporation 1 (2008) [hereinafter 2008 NAILS Update].

[18] *See* Michele Statz, *On Shared Suffering: Judicial Intimacy in the Rural Northland*, 55 Law & Soc. Rev. 5, 6 (2021); Michele Statz et al., *"They Had Access, But They Didn't Get Justice": Why Prevailing Access To Justice Initiatives Fail Rural Americans*, 28 Geo. J. on Poverty L. & Pol'y 321 (2021); Michele Statz, *"It Is Here We Are Loved": Rural Place Attachment in Active Judging and Access to Justice*, L. & Soc. Inquiry 1 (2022) http://doi.org/10.1017/lsi.2022.73 [https://perma.cc/5US9-SCL9].

[19] *See* Statz, *Shared Suffering*, *supra* note 18; Statz, *They Had Access*, *supra* note 18.

[20] *See* Young & Billings, *supra* note 11, at 523 (noting the lack of data on Native Americans in access to justice studies); Minn. State Bar Assoc. Access to Just. Comm., Minnesota Consumer Debt Litigation: A Statewide Access to Justice Report 21, 47 (2023) (relying on interview data and not reporting out data on Indigenous peoples).

[21] *Id.*

[22] *See* Sandefur, *Access to Civil Justice*, *supra* note 10, at 346–50 (describing how social class, race, and gender affect access to justice experiences); Greene, *supra* note 14, at 1268 (noting a lack of research on how race affects access to justice); Young & Billings, *supra* note 11, at 490 (investigating how a range of factors affect individuals' access to justice experiences);

data on the experiences of tribal governments, Native communities, and individual Natives.

Moreover, most access to justice research focuses on individual level justiciable events and legal problems.[23] Many view access to justice as about access to lawyers or courts. This "thin" conceptualization of access to justice fails to capture the fact that encounters between Natives and justiciable events, organizations, and institutions occur on individual, governmental, and community levels. Native communities often experience justiciable events stemming from interactions with other governments, including disputes over hunting and fishing rights, treaty rights, taxation, and jurisdiction. Thin conceptions of access to justice, which define it as about individual access to lawyers or courts,[24] overlook how the imposition of the law on Native communities affects access to justice for tribal governments and their peoples.

Federal Indian law and tribal law scholars rarely perceive their scholarship as about access to justice in Native communities. Many early practitioners and scholars of federal Indian law wrote about access to justice and legal services delivery in Indian Country[25] because they started their careers as legal aid lawyers.[26] Their work described individual and communal barriers to access to justice in Indian Country and sought to address both. Federal Indian law scholarship, however, has since shifted away from legal services delivery and diverged from the access to justice literature.[27] Recent

---

Sandefur, *What We Know*, *supra* note 6, at 446–47 (discussing the lack of research on how social class and race affect the prevalence of justiciable situations).

[23] *See* Sandefur, *Access to Civil Justice*, *supra* note 10, at 340 (describing the most commonly reported justiciable events faced by individuals in the United States as related to housing and financing); McDonald, *supra* note 6, at 698 (focusing on how the legal capacity of an individual affects access to justice); Sandefur, *What We Know*, *supra* note 6, at 444 (discussing how legal needs assessments are used to identify the prevalence of individuals' justiciable experiences); Young & Billings, *supra* note 11, at 495–97 (discussing five key studies on access to justice in the past decade which collect individual level data); Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 Fordham Urb. L.J. 1213 (2002) (describing changes to legal assistance for low-income individuals).

[24] *See* Sandefur, *Access to Civil Justice*, *supra* note 10, at 344.

[25] Indian Country is a legal term, used for defining tribal lands for criminal jurisdiction purposes. 18 U.S.C. § 1151 (1949). I am using it here in a broader sense, as used colloquially by many Native people when talking about spaces and places occupied by Native communities.

[26] For example, former legal aid lawyers created the Native American Rights Fund (NARF) in 1971. *See About Us*, Native Am. Rts. Fund, https://narf.org/about-us/ [https://perma.cc/SE26-3TQA]. David Getches, who was instrumental in NARF's creation, emerged as one of the most important scholars of federal Indian law at the end of the twentieth century. He wrote several articles and reports related to access to justice. *See* Getches & Greene, *Legal Services Corporation: American Indian Population Study*, Tosco Found. (Oct. 1978); David H. Getches, *Difficult Beginnings for Indian Legal Services*, 30 NLADA Briefcase 181 (1972). *See also* Grant Christiansen & Melissa Tatum, *Reading Indian Law: Evaluating Thirty Years of Indian Law Scholarship*, 54 Tulsa L. Rev. 81, 84 (2018); Kevin K. Washburn, *How a $147 County Tax Notice Helped Bring Tribes More than $200 Billion in Indian Gaming Revenue: The Story of Bryan v. Itasca County, in* Indian Law Stories 448 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey, eds., 2011).

[27] *See* Christiansen & Tatum, *supra* note 26, at 84 (noting that the field of Indian law has grown beyond federal-tribal-state relations to include tribal law, international law, and

scholarship has emphasized justice for Natives as about tribal sovereignty.[28] The bulk of this literature focuses on the relationships among federal, state, and tribal governments, but not does mention how greater recognition of tribal sovereignty affects access to justice in Native communities. Some scholars look to international law or institutions to recognize tribal sovereignty.[29] Others call for the decolonization of federal Indian law[30] or the reclaiming of tribal law.[31] Another set of scholars have focused more narrowly on specific areas such as family law,[32] gaming,[33] natural resources,[34]

---

comparative law). Christiansen and Tatum cite many Indian law articles with justice in the title, but none of them appear to use an access to justice framework. Rather, the majority take a sovereignty empowerment approach to justice in Indian Country.

[28] Maggie Blackhawk, *Federal Indian Law as Paradigm within Public Law*, 132 Harv. L. Rev. 1797 (2019); Walter Echohawk, In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided (2010); Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 Ariz. L. Rev. 933 (2009); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colorblind Justice, and Mainstream Values*, 86 Minn. L. Rev. 267, 273–74 (2001).

[29] *See* Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 Harv. Hum. Rts. J. 57 (1999); Robert Williams, *Encounters on the Frontiers of International Human Rights: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 Duke L.J. 660 (1990); Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 Vand. J. Transnat'l L. 1141 (2008).

[30] *See* Joseph William Singer, *The Role of Jurisdiction in the Quest for Sovereignty: Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 New Eng. L. Rev. 641 (2003); 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); Philip P. Frickey, *Marshalling the Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381 (1993); Robert Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Jurisprudence*, 1986 Wis. L. Rev. 219 (1986); Robert Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 Ark. L. Rev. 77 (1993): Robert A. Williams, Jr., Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America (2005).

[31] Matthew L.M. Fletcher, *The Three Lives of Mamengwaa: Toward an Indigenous Canon of Construction*, 134 Yale L.J. (forthcoming 2024) (manuscript at 7).

[32] *See* Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 Neb. L. Rev. 577 (2000); Barbara Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587 (2002); Bethany Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 Fla. L. Rev. 295 (2015).

[33] *See* Steven Andrew Light & Kathryn R.L. Rand, *The Hand That's Been Dealt: The Indian Gaming Regulatory Act*, 57 Drake L. Rev. 413 (2009); Steven Andrew Light & Kathryn R. L. Rand, Indian Gaming and Tribal Sovereignty: The Casino Compromise (2005); W. Dale Mason, Indian Gaming: Tribal Sovereignty and American Politics (2000).

[34] *See generally* Holly Doremus & A. Dan Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 20 Ecology L.Q. 279 (2003); Robert Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 Stan. Env't. L.J. 195 (2015); Steven Quesenberry, Timothy Seward & Adam Bailey, *Tribal Strategies for Protecting and Preserving Groundwater*, 41 Wm. Mitchell L. Rev. 431 (2015); Judith Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 Lewis & Clark L. Rev. 1065 (2008); Mary Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 Utah L. Rev. 109 (1995).

or violence against women.[35] Few scholars engage with or acknowledge access to justice frameworks in writing about federal Indian or tribal law even though much of their work deals with access to justice issues in Indian Country.

Overlooking access to justice in Native communities may obscure important insights into what access to justice is and how to improve it.[36] This article starts to fill the gap in the existing Indian law and access to justice literatures by exploring access to justice in Indian Country. The purpose of this article is threefold: first, it brings much needed attention to the often overlooked and understudied barriers to access to justice in Indian Country with a particular focus on those obstacles which have not traditionally been characterized as "access to justice" issues in the existing literatures; second, it provides an initial description at a macrolevel of the complexity of access to justice issues, experiences, and strategies in Native communities in the past and present;[37] and third, it suggests the need for a thicker, richer conceptualization of access to justice based on the experiences of Native Nations and their people.

Access to justice in Indian Country exists in the shadow of colonialism. The legacy of settler colonialism, including the imposition of unfamiliar laws and legal processes, has and continues to affect what justice means and how it is experienced by tribal governments, Native communities, and individual Natives. The shadow of colonialism serves as the backdrop to access to justice issues in Native communities on both a collective and individual level.

Understanding this unique backdrop contributes two important insights to the existing access to justice literature. First, it adds another dimension to thinking about the power imbalances underlying access to justice. Understanding access to justice in Indian Country requires consideration of a different form of power dynamics than usually discussed in the access to justice literature. The imposition of law on tribal governments and Native individuals reveals power imbalances on both a government-to-government and a government-to-individual level. These power dynamics have left tribal governments, as representatives of Native communities, with few choices in addressing access to justice issues in their communities. As a

---

[35] *See generally* Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 Suffolk Univ. L. Rev. 455 (2005); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. Rev. 1 (1999); Rebecca Hart, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native Women from Domestic Violence*, 96 Cal. L. Rev. 185 (2008).

[36] Other scholars have explained the importance of investigating access to justice issues faced by different groups. *E.g.,* Sara Sternberg Greene, *Race, Class, and Access to Justice*, 101 Iowa L. Rev. 1263, 1271 (2016) ("Investigations into access-to-justice issues for different groups can provide a lens into how our civil legal institutions may aid in the perpetuation of inequality and how different groups are integrated into—and excluded from—public institutions.").

[37] Microlevel studies of access to justice issues in the 574 federal recognized tribal governments, numerous non-federally recognized tribal communities, and significant urban Native communities are much needed but beyond the scope of this article.

result, individual Natives face the complexity of navigating a legal maze of three intersecting judicial systems. Second, considering the experiences of Natives invites more critical thinking about individual and community level access to justice experiences. They reveal how communities as well as individuals face access to justice issues and suggest that access to justice problems may require solutions at the community level.

Part I describes the complexity of justice in Native communities due to this history of settler colonialism. It discusses the legacy of the imposition of Anglo-American paradigms and systems of justice on Native communities. This imposition of Anglo-American law problematizes "justice" and colors Native tribes' experiences with justiciable events and institutions at the individual, community, and governmental levels.[38] Tribal judicial systems remain subject to federal laws, limiting their ability to dispense with justice on their own terms and dictating procedures and practices that conform to Anglo-American conceptions of justice. These federal laws often have spillover effects on the tribal justice system writ large because they provide incentives for tribal governments to maintain adversarial style courts rather than to adopt more traditional forms of dispute resolution. The result is a mismatch between what tribal governments want and can do to resolve access to justice issues in their communities.

Settler colonialism may distinguish access to justice issues in Native communities from those in non-Native communities in some respects, but the discussion of settler colonialism also brings into stark relief the centrality of power dynamics to access to justice. Marginalizing the experiences of Native communities simply enables the access to justice community to obscure existing power imbalances and focus on solutions to access to justice problems that do not account for underlying inequalities in power relations among and within communities. In contrast, exploring access to justice in Native communities enriches discussions about access to justice by highlighting power dynamics at the community level. It reveals a different form of power relationships and dynamics than those normally explored in the access to justice literature.

The power struggle inherent in access to justice issues in Indian Country emerges front and center in Part II. Conceptions of access to justice in Indian Country have evolved in response to the unique challenges raised by settler colonialism and increasing calls for the recognition of tribal sovereignty. Part II describes the innovative approaches to tackling access to justice, including the struggle for tribal sovereignty, developed by tribal governments and organizations in response to settler colonialism. These strategies extend beyond improving individual access to lawyers, courts, or knowledge of legal doctrines and procedures. For decades, the struggle for access to justice in Indian Country has been a communal endeavor rather than a purely

[38] I use the term "Anglo-American" to refer to the specific legal model used within the United States.

individual one.[39] These communal efforts targeted injustices perpetuated by federal and state governments and sought a major restructuring of the power dynamics among federal, state, and tribal governments. Tribal governments seek the power to choose to solve their problems on their own terms and in their own way. Most do not want to replicate the "justice" of the colonizer but to provide "justice" based on their own understandings to their people. Their efforts to achieve the autonomy to do this have spawned a wide variety of strategies as many tribal governments and Native organizations have sought access to justice for Native communities in legislative and executive institutions as well as in courts. Part II reveals the inseparability of access to justice for Native communities from the recognition of tribal sovereignty.

Part III explores how access to justice is changing in Native communities as federal Indian law and policy has increasingly, albeit somewhat inconsistently, promoted tribal sovereignty. It maps out the shifting terrain of access to justice issues in Indian Country as tribal governments, and especially tribal justice systems, continue to evolve within the colonized space in which they operate. It identifies persistent access to justice issues in Native communities and highlights some of the innovative approaches that tribal governments and tribal justice systems have taken in response to the access to justice crises they face. Tribal government innovations demonstrate how access to justice in Native communities often requires solutions that extend beyond calls for more lawyers or more courts and that lean into the root causes of the justiciable events pushing people and communities into legal systems.

Part IV draws on this preliminary examination of access to justice in Indian Country to reiterate earlier calls for reframing and broadening current understandings of access to justice.[40] It suggests how access to justice in Native communities challenges existing frameworks and understandings of access to justice. Tribal governments', Native communities', and Native individuals' relationships with United States laws and institutions differ dramatically from those of other groups and forces the access to justice community to confront difficult questions about what access to justice is. The experiences of Natives beg the question: what does access to justice look like when the law is imposed?

---

[39] Some high-profile cases with significant impacts on Native communities have arisen out of individual disputes with state governments. *See, e.g.,* People v. LeBlanc, 248 N.W.2d 199 (Mich. 1976); Bryan v. Itasca Cnty., 426 U.S. 373 (1976). Many of these individual cases, however, were supported by the surrounding Native community and seen as communal rather than purely individual. For example, the Bay Mills Indian Community, as a whole, was invested in the LeBlanc case.

[40] *See generally* Pruitt & Showman, *supra* note 14 (suggesting the need to think about access to justice as a community issue and look for community-based solutions); Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 Loy. L. Rev. 913, 914 (2009) (discussing collective action and community organizing as a potential response to access to justice problems); Lauren Sudeall, *Integrating the Access to Justice Movement*, 87 Fordham L. Rev. 172 (2019) (arguing for an approach that recognizes the blurry line between criminal and civil law in peoples' lived experiences).

A related, important aspect of Native experiences with access to justice is that they emphasize how justiciable events, institutions, and organizations affect communities as well as individuals. To date, the access to justice literature has predominantly focused on access to justice at the individual level.[41] The experience of Natives illustrates how justiciable events, institutions, and organizations affect communities and not just individuals. For example, many treaty rights issues involve the rights of the community as exercised by individual Natives. An individual may have the justiciable problem, but the adjudication of their rights affects the entire community's ability to protect and govern their lands, harvest food, or practice spirituality.[42] Thus, similar to recent studies on access to justice in rural communities, my work emphasizes the importance of thinking about access to justice on the community level as well as the individual one.[43] It highlights how communities experience justiciable problems and suggests that communities, once empowered, can and do devise innovative solutions that seek to resolve the root causes underlying access to justice issues.

---

[41] Hugh McDonald, *Assessing Access to Justice: How Much "Legal" Do People Need and How Can We Know?*, 11 U.C. Irvine L. Rev. 693 (2021) (focusing on how the legal capacity of an individual affects access to justice); Sandefur, *What We Know*, *supra* note 6, at 444 (discussing how legal needs assessments are used to identify the prevalence of individuals' justiciable experiences); Young & Billings, *supra* note 11, at 495–97 (discussing five key studies on access to justice in the past decade which collect individual level data).

[42] The facts in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), illustrate how an individual Native's claim about treaty interpretation can affect an entire Native Nation. In that case, Jimcy McGirt, a Seminole Nation citizen, claimed that the state of Oklahoma had no authority to prosecute him because a federal law, the Major Crimes Act, authorizes federal courts and not state courts to try Indians accused of committing serious crimes on Indian reservations. *Id.* at 2459. He argued that under an 1833 Treaty, the lands of the Muscogee Creek Nation were a reservation, and that no federal law had abrogated the Treaty or subjected the lands to state jurisdiction. *Id.* The Supreme Court's affirmation that the lands remained a reservation overturned McGirt's conviction but also recognized the governance authority of the Muscogee Creek Nation over their lands in Eastern Oklahoma. *Id.* at 2476.

The *McGirt* case demonstrates the radiating effects of a court decision adjudicating the justiciable problem of one Native person on several Native communities. After *McGirt*, courts held that the lands in Oklahoma of five additional tribes—the Cherokee Nation, the Choctaw Nation, the Seminole Nation, the Chickasaw Nation and the Quapaw Nation—also remain Indian Country. *See* State ex rel. Matloff v. Wallace, 497 P.3d 686, 689 (Okla. Crim. App. 2021) (reaffirming recognition of the Cherokee, Choctaw, and Chickasaw Reservations); Grayson v. State, 485 P.3d 250, 254 (Okla. Crim. App. 2021) (reaffirming recognition of the Seminole Reservation). These decisions greatly expanded the territory over which tribal governments exercised sovereignty within the state of Oklahoma.

As discussed in Part III, *infra*, tribal communities may also have justiciable problems that have to be addressed on a community level.

[43] A few scholars have articulated the need for a more community-based approach to access to justice. *See, e.g.,* Pruitt & Showman, *supra* note 14 (suggesting the need to think about access to justice as a community issue and look for community-based solutions); Blasi, *supra* note 40, at 914 (discussing collective action and community organizing as a potential response to access to justice problems).

I. The Imposition and Insufficiency of Anglo-American Justice

Justice in Indian Country exists in the shadow of settler colonialism. Justice is not a traditional Native concept.[44] It "is a concept within Western thought that is intrinsically linked to settler colonialism."[45] Mainstream liberal theories of justice are often described as punitive or retributive because they focus on "accountability through punitive mechanisms to deal with the past."[46]

Native Nations maintain their own traditions, values, and worldviews, which do not always translate well into Western or Anglo-American concepts of justice.[47] Exploration of what "justice" means or how it is experienced in a particular Native Nation merits attention (especially by the Native community itself), but is beyond the scope of this article.[48] Here I make some general observations about "justice" more broadly as the concept has generally affected Native communities.[49]

Anglo-American perceptions of justice and the law have been imposed on Native Nations through settler colonialism.[50] Colonialism has perpetuated enduring harms on Native Nations, both collectively as sovereign governments by depriving them of power, and as individuals by fostering disconnection, dispossession, and the demise of their traditional ways.[51]

---

[44] Patricia Monture, *Thinking About Change, in* Justice as Healing: Indigenous Ways (Wanda D. McCaslin, ed.) (2005).

[45] Leanne Betasamosake Simpson, *Indigenous Resurgence and Co-resistance*, 2 Critical Ethnic Stud. 19, 21 (2016). Even outside of Native communities, justice is a normative concept. Sandefur, *Access to Civil Justice*, *supra* note 10, at 340.

[46] Jennifer Llewellyn, *Transforming Restorative Justice*, 4 Int'l J. Restorative Just. 374, 388 (2021); *see also* Monture, *supra* note 44; Menno Boldt & J. Anthony Long, *Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Indians*, 17 Can. J. Pol. Sci. 3 (1984).

Justice is a normative concept. Sandefur, *Access to Civil Justice*, *supra* note 10, at 340. Many competing theories of justice have been suggested other than the mainstream liberal one. Llewellyn, *supra* note 46, at 374–95 (2021) (discussing restorative and transformative theories of justice). Restorative justice focuses on "repairing harms and relationships to make them whole again." *Id.* at 377. Another justice framework is transformative justice. Transformative justice takes justice a step forward by "looking for the good within others while also being aware of complex systems of domination." *Id.*

[47] Alex Tallchief Skibine, *Some Troublesome Aspects of Western Influences on Tribal Justice Systems and Law*, 1 Tribal L.J. 1, 3 (2000) ("[A]s some of the decisions of the Navajo Supreme Court remind us, some native concepts of justice can only be expressed in their native tongue.").

[48] Sandefur, *Access to Civil Justice*, *supra* note 10, at 341 ("The metric of justice is people's subjective evaluations of their own experiences"). Few scholars have conducted legal consciousness studies in contemporary Native communities or investigated the communities' views and experiences with justice or the justice system. *See, e.g.,* L. Jane McMillian, *Colonial Traditions, Co-optations, and Mi'kmaq Legal Consciousness*, 36 Law & Soc. Inquiry 171 (2011).

[49] Part I.B includes a brief discussion based on writings by Native peoples about how Native views on "justice" are distinct from Anglo-American ones.

[50] Simpson, *supra* note 45, at 20–21.

[51] Walter Echohawk (Pawnee) provides an Indigenous perspective on colonialism when he writes, "For indigenous peoples, colonialism was a harsh, life-altering experience because it invariably meant invasion of their country, appropriation of their land and natural resources,

Injustices occurred in multiple ways, creating inequalities experienced on both governmental and individual levels. Settler colonialism, thus, serves as a lens coloring what "justice" means in and to Native communities.

A. Settler Colonialism and the Imposition of "Justice" in Indian Country

Settler colonialism is all about power.[52] Colonialism is "the conquest and control of other people's land and goods."[53] At its most insidious, it attempts to replace a community's traditional ways of thinking and knowing with those of another and erase the community through assimilation and dispossession.[54]

The United States has used the law to colonize tribal governments and their peoples. [55] This section will provide a brief history of the relationship between the United States and Native Nations, which illustrates some of the ways in which the United States engages in settler colonialism and attempts to control Native lands and peoples.[56] I emphasize the imposition of Anglo-American concepts of justice, laws, and legal processes, which have shaped access to justice in Indian Country.

The United States government has always maintained a law-based government-to-government relationship with Native Nations. Native Nations have never consented to legal and political incorporation into the United States.[57] Unlike other groups, they remain sovereigns that predate the U.S.

---

destruction of indigenous habitats and ways of life, and sometimes genocide and ethnocide." Echohawk, *supra* note 28, at 15. *See also* Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction* 112 Cal. L. Rev. 103, 108 (2023) ("Colonization has not only deprived individual rights but also Tribal power.").

[52] Wanda D. McCaslin, *Introduction: Naming Realities of Life*, *in* Justice as Healing 13 (Wanda D. McCaslin, ed., 2005) (defining colonialism as "a triangle of power in which the people at the top claim they have the right to control the people at the bottom.").

[53] Ania Loomba, Colonialism/Post-colonialism 2 (1998) (defining colonialism as "the conquest and control of other people's land and goods.").

[54] Erica-Irene A. Daes, *Traditional Resource Rights in the New Millenium*, *in* Justice as Healing 233 (Wanda D. McCaslin, ed.) (2005) (describing colonization as about "depriving a nation or people of self-*knowledge*, of full awareness and confidence in their unique contribution. Colonialism teaches people to think that they are someone else—it tries to change peoples' identities. A colonized people can free itself physically or legally—it can even become an independent or self-governing state—and yet continue to be completely colonized in its thinking.").

[55] Echohawk, *supra* note 28, at 15.

[56] For more thorough histories of federal-tribal relations, *see* Roxanne Dunbar Ortiz, An Indigenous Peoples' History of the United States (2014); Ned Blackhawk, The Rediscovery of America: Native Peoples and the Unmaking of American History (2023).

[57] *See* Matthew Fletcher, *Tribal Consent*, 8 Stan. J. C.R. & C.L. 45 (2012). Tribal governments have limited options in responding to settler colonialism. Natives can exercise their voice against oppression but they cannot exit the polity because of the relationship they have with the land (loyalty to place). For a discussion of exit, voice, and loyalty, *see* Albert O. Hirshman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (1972).

Constitution and continue to exist largely outside of it. They seek the recognition and protection of their claims to sovereignty over their lands and people rather than equal rights under the law.[58] Their claims do not conform to the traditional emphasis on individual participation in the United States but emphasize governance rights as a way to protect and empower groups in a constitutional democracy.[59]

Congress has used its constitutional power over Indian affairs to extensively regulate Indian nations and their citizens.[60] It has divested tribal governments and individual Natives of their rights by abolishing tribal governments, dispossessing Indians of their lands, limiting tribal authority and jurisdiction, abrogating tribal treaty rights, and undermining Native cultural and religious practices.[61] Federal laws and policies also acutely limited tribal governments' access to lawyers and federal courts well into the twentieth century, preventing them from taking legal action to remedy these injustices.[62] Congress passed these laws without either Native representation in Congress or Native participation in the federal legislative process.[63]

The Supreme Court has largely remained silent as Congress has infringed on tribal treaties, undermined tribal sovereignty, and dispossessed Native Nations of their homelands. It has presumed that Congress acted in perfect good faith in its dealing with Indians[64] and rarely questioned congressional decisions. The Supreme Court has enabled Congress as it has subjugated Native Nations and their citizens without their consent. To this day, the Supreme Court has rarely cabined federal power over Indian Nations when a tribal government or its citizens have challenged federal legislation.[65]

The federal government has imposed an Anglo-American adversarial system and view of "justice" on tribal governments and their citizens through this legal framework.[66] Native Nations have always had their own processes for resolving disputes among their citizens.[67] Many tribal

---

[58] *See generally* Vine Deloria, Custer Died for Your Sins (1969); Will Kymlicka, Multicultural Citizenship (1995).

[59] *See generally* Deloria, *supra* note 58; Kymlicka *supra* note 58.

[60] *See* U.S. Const. art. I, § 8, cl. 3; David E. Wilkins & Heidi Kiiwetinepinesiik Stark, American Indian Politics and the American Political System xxviii, 3 (3rd ed. 2011).

[61] *See* Kirsten Matoy Carlson, *Congress and Indians*, 86 U. Colo. L. Rev. 77 (2015); Wilkins, *supra* note 59.

[62] Getches, *supra* note 26, at 181 (describing the difficulties tribal governments and their citizens had finding legal representation).

[63] *See* Jane Mansbridge, *Rethinking Representation*, 97 Am. Pol. Sci. Rev. 515 (2003); Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 Ann. Rev. Pol. Sci. 387 (2008).

[64] *See* Lonewolf v. Hitchcock, 183 U.S. 553 (1903); *United States v. Lara*, 541 U.S. 193 (2004); McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

[65] Matthew L.M. Fletcher, Federal Indian Law 43 (2016).

[66] Carey N. Vincenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 Judicature 134, 136-37 (1995); Schilfgaarde, *supra* note 51, at 106–08.

[67] Vine Deloria, Jr. & Clifford M. Lytle, American Indians, American Justice 111–16 (1st ed. 1983).

governments retained sole authority over Indians and concurrent jurisdiction over non-Indians in their territories based on their treaties with the United States.[68] The United States continued its practice of recognizing tribal governments' traditional forms of dispute resolution within their communities in treaties until the United States unilaterally ended treatymaking in 1871.[69]

The United States started to meddle in the internal affairs of tribal governments in the 1880s as its Indian affairs policy increasingly focused on assimilating Native Nations and their citizens. In 1883, the Supreme Court affirmed the primacy of tribal jurisdiction in *Ex parte Kan-gi-shun-ca* (otherwise known as Crow Dog), which held that tribes, not the federal government, had the authority to punish crimes between Indians in Indian Country.[70] The "justice" provided by the Brule Sioux and upheld by the Supreme Court differed dramatically from Anglo-American "justice." Similar to many other Native communities, extended families (tiospayes) resolved conflicts when they arose among the Brule Sioux. The Brule Sioux followed traditional custom and practice by allowing the tiospaye to handle the matter when Kan-gi-shun-ca killed another Brule Sioux, Sinte Gleska (Spotted Tail). Kan-gi-shun-ca provided horses and other valuable items to Sinte Gleska's family to restore himself and rejoin the community in accordance with Brule Sioux law.[71]

The traditional approach taken by the Brule Sioux was not "legal" or "justice" in the Anglo-American sense. It did not involve police or courts. Rather, it emphasized relationships, reciprocity, restoration, and restitution rather than retribution or punishment. The Bureau of Indian Affairs (BIA) was not satisfied with the Brule Sioux's handling of the matter or the Supreme Court decision upholding their sovereignty to resolve the matter according to their own ways and traditions. They did not see the traditional resolution of the situation, which involved an apology and compensation, prior to the federal prosecution of Kan-gi-shun-ca as "justice."[72] The BIA created the first Courts of Federal Regulations ("CFR courts") to supplant existing tribal dispute resolution systems and introduce "justice" to Indian

---

[68] *Id.*

[69] Christina Zuni Cruz, *Strengthening What Remains*, 7 Kansas J.L. & Pub. Pol'y 17, 20 (1998).

[70] *Ex parte Crow Dog*, 109 U.S. 556, 570 (1883).

[71] Kan-gi-shun-ca apologized and compensated Sinte Gleska's kin with $600, eight horses, and blankets. Sidney L. Harring, Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty, 14 Am. Ind. L. Rev. 191, 199 (1989). For a full discussion of the *Crow Dog* case, *see generally* Sidney L. Harring, Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century (1994).

[72] Matthew L.M. Fletcher, Federal Indian Law 320 (2016). Harring uses primary documents to show that the BIA used the murder to create a test case to overturn longstanding federal laws acknowledging tribal jurisdiction and assert federal criminal jurisdiction over Natives as a way to assimilate them. Harring, *supra* note , at 195, 200-204.

country.[73] CFR courts served to educate and civilize Indians.[74] They implemented a code, created by the BIA, which outlawed many traditional practices of Native Nations.[75] The United States wanted to keep its Indians under its control.[76]

The imposition of CFR courts has left a legacy of adversarial style "justice" in Indian Country. In the 1930s, the United States reconsidered its Indian policy and allowed tribal governments to replace the CFR courts with their own court systems.[77] Most tribes, however, could not simply reinstitute their traditional systems after fifty years under an imposed legal system.[78] Many either retained a CFR court or adopted a code similar to the BIA code.[79] Tribes that adopted their own codes had "tribal courts" rather than CFR courts,[80] but tribal courts have never really been "an organic product of Tribal communities."[81] Some tribal governments started to revise their judicial systems in the 1960s,[82] but many continue "to look far more like state and federal courts than pre-contact traditional Tribal justice systems."[83]

---

[73] Alex Tallchief Skibine, *Some Troublesome Aspects of Western Influences on Tribal Justice Systems and Law*, 1 Tribal L.J. 1, 2 (2000); Fletcher, *Mamengwaa*, *supra* note 31, at 7 (explaining that CFR courts "were curious affairs, neither federal nor fully tribal.").

[74] Nat'l Am. Indian Ct. Judges Ass'n, Indian Courts and the Future 7–13 (David H. Getches ed., 1978).

[75] Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 Colum. J. Race & L. 681, 697 (2021) (describing the code as punishing Indians when they did not behave like white people).

[76] Many scholars have discussed the relationship between law and control. *See e.g.,* Sally Engle Merry, Colonizing Hawaii: The Cultural Power of Law (2000); Marc Galanter, The Radiating Effects of Courts, in Empirical Theories of Courts 117–42 (K. Boyum and L. Mather eds., 1983); Stanley Diamond, In Search of the Primitive: A Critique of Civilization (1974).

[77] Indian Courts and the Future, *supra* note 74, at 7–13.

[78] Tremendous changes occurred on many Indian reservations, including their allotment, in the interim between the creation of the CFR courts in the late 1800s and the adoption of the Indian Reorganization Act in 1934. Some Native communities may have retained their traditional systems despite these changes. These changes in social and economic conditions, however, would have made it difficult for some Native communities to return wholescale to their traditional systems. Nor did BIA officials encourage this. van Schilfgaarde explains, "Rather than promote the revitalization of traditional governance systems, the IRA encouraged Tribes to reorganize and institutionalize governance components familiar to Anglo systems." van Schilfgaarde, *supra* note 51, at 16.

[79] Indian Courts and the Future, *supra* note 74, at 7–13. Tribal governments frequently retained CFR courts because it was the path of least resistance. Fletcher, *Mamengwaa*, *supra* note 31, at 7. Fletcher suggests two reasons for their possible retention. First, the written constitutions drafted by the BIA under the Indian Reorganization Act often did not include a provision for a tribal court. *Id*. Second, many tribes may have thought that federal officials would object to a tribal court because they already had a CFR court. *Id*.

[80] Indian Courts and the Future, *supra* note 74, at 11.

[81] van Schilfgaarde, *supra* note 51, at 3. Tribal courts vary tremendously in their organization, practices, and procedures, including how adversarial they are. A full discussion of this variation is beyond the scope of this article.

[82] Vincenti, *supra* note 66, at 136.

[83] van Schilfgaarde, *supra* note 51, at 3.

The United States government did not stop at the imposition of Anglo-American adversarial systems in Indian Country. In 1885, Congress enacted the Major Crimes Act, which authorized the federal government to prosecute, try, and punish Indians accused of committing serious crimes on Indian reservations.[84] Other statutes and court decisions have further limited the ability of tribal governments to define and provide "justice" on their own terms in their communities.[85] This network of federal laws has created a jurisdictional maze in Indian Country, making it difficult for tribal governments to protect their communities and regulate their lands.[86]

The imposition of non-Native standards of justice has not been limited to the criminal context. The Indian Civil Rights Act applies many but not all the provisions of the Bill of Rights to tribal governments, transforming these rights into federal statutory limits on tribal government authority.[87] It intrudes into internal tribal affairs based on the assumption that tribal

---

[84] 18 U.S.C. §§ 1152–53.

[85] *Id.*; *see* United States v. McBratney, 104 U.S. 621, 624 (1881) (finding that states could exercise jurisdiction over crimes between non-Indians in Indian Country); Draper v. United States, 164 U.S. 240, 245–47 (1896) (same); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208–09 (1978) (divesting tribal governments of criminal jurisdiction over non-Indians); Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

[86] The authority to investigate and prosecute crimes that occur in Indian Country depends on various factors, including the nature of the crime, the identity of the perpetrator, and the identity of the victim. If the answers to these questions are determinable and not disputed, then jurisdiction depends on federal law. *See* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. Rev. 779 (2006). Federal law allocates criminal jurisdiction in Indian Country to federal and tribal governments, with the limited exception of crimes committed by non-Indians. *See* United States v. McBratney, 104 U.S. 621 (1881); *United States v. Draper*, 164 U.S. 240 (1896); Oklahoma v. Castro-Huerta, 597 U.S. (2022). If the alleged offender is non-Indian and the victim is Indian, the federal or state government has jurisdiction, 18 U.S.C. §§ 1152–53, Castro-Huerta, supra. Tribal governments have extremely limited criminal authority when the alleged offender is non-Indian. *See Oliphant*, 435 U.S. at 208–09; 25 U.S.C. § 1304. Under federal law, tribal governments generally share criminal jurisdiction with the federal government when the alleged offender is Indian and commits a major crime. 18 U.S.C. §§ 1152–53. If an Indian commits a misdemeanor against an Indian, the tribal government may have exclusive criminal jurisdiction. David H. Getches, Charles F. Wilkinson, Kristen A. Carpenter, Robert A. Williams, & Matthew L.M. Fletcher, Cases and Materials on Federal Indian Law 535–37 (7th ed. 2017).

[87] The provisions of the Bill of Rights applied to tribal governments in the ICRA include: First Amendment rights of free exercise of religion, free speech, freedom of the press, right to assemble, and right to petition; Fourth Amendment rights against unreasonable search and seizures and probable cause requirements for warrants; Fifth Amendment rights against double jeopardy and self-incrimination; the Fifth Amendment takings clause; Sixth Amendment rights to a speedy trial, trial by jury (for criminal cases punishable by imprisonment only), to be informed of the charges, compulsory process, and to retain counsel at the defendant's own expense; Eighth Amendment rights against excessive bail and cruel and unusual punishment; Fourteenth Amendment rights of due process and equal protection; and protections against bills of attainder or ex post facto laws. The ICRA does not extend the following: protection against the establishment of religion; a guarantee of a republican form of government; the privileges and immunity clause; provisions for or protecting the right to vote; the requirement of free counsel for the accused; or the right to a jury in a civil trial. The ICRA also places strict limits on incarceration by tribal governments. 25 U.S.C. § 1302.

governments have relationships to their citizens similar to state governments.[88] This assumption ignores how kinship relations have informed relationships between tribal governments and their citizens.[89]

The ICRA "legalized" relationships between tribal governments and their citizens by suggesting that only Anglo-American legal rights and processes could protect tribal citizens from their governments.[90] Its insistence on adversarial courts and individual rights as the only way to protect individuals from governmental overreach limited the ability of tribal governments to follow their own traditions for respecting their citizens.[91] The ICRA, thus, increased the pressure on tribal governments to adopt or maintain adversarial courts,[92] well-suited to applying Anglo-American notions of civil rights. It simultaneously undercut their "ability to organically develop their justice systems, much less to adapt their court practices and process to reflect community normative values."[93] Tribal governments had little choice but to adapt to the ICRA.[94]

The Supreme Court limited the imposition of federal law on tribal governments through ICRA by finding that the statute only granted a cause of

---

[88] van Schilfgaarde, *supra* note 51, at 126 ("ICRA envisions only adversarial Tribal justice systems, and presumes that, like states, Tribal courts are vulnerable to oppressive tendencies.").

Congress did not seek tribal consent and enacted the ICRA over tribal opposition. *See* Vincenti, *supra* note 66, at 136. Tribal governments did not consent to the ICRA but they convinced Congress to include in the act a provision preventing states from assuming jurisdiction under P.L. 280 without tribal consent. *See* 25 U.S.C. §§ 1321-1322. For a history and thorough discussion of the ICRA, *see* The Indian Civil Rights Act at Forty (Kristin A. Carpenter et al. eds.) (2012).

[89] Larry Nesper, *Negotiating Jurisprudence in Tribal Court and the Emergence of a Tribal State: The Lac du Flambeau Ojibwe*, 48 Cult. Anthropology 675, 676 (2007) (observing that traditional values associated with family and kinship inform the expectations that tribal citizens have for tribal governments).

[90] Vincenti, *supra* note 66, at 136 ("Congress inserted a portion of American culture into Indian society and attempted to supplant tribal culture, imposing a new order within tribal society that elevated the interests of the individual well above that of the family, the clan, the band, or the entire tribe. For many this signaled certain death to tribal society."). Fletcher notes that the champions of ICRA intended this paternalistic and assimilative approach. Fletcher, *Mamengwaa*, *supra* note 31, at 9–10. *See also* Donald L. Burnett Jr., *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 Harv. J. on Legis. 557, 576 (1972).

[91] van Schilfgaarde, *supra* note 51, at 26 (describing ICRA as "a gross intrusion into inherent Tribal powers and internal governance.").

[92] *Id.* at 24–25 ("ICRA thereby explicitly compels Tribes to base their judicial systems upon Anglo-American notions of due process, even if the values expressed in the Bill of Rights are not relevant for Native people in relation to the Tribe.").

[93] *Id.* at 25.

[94] The ICRA applies to both civil and criminal context. It mandates that tribal governments provide individuals accused of a crime with specific rights. In doing so, it undermines traditional ways of addressing criminal issues. Washburn, *supra* note 86, at 822 (explaining that ICRA "effectively squelched many traditional ways of addressing criminal justice by requiring tribal governments to adjudicate criminal *justice* in a manner nearly identical to the federal and state governments") (emphasis added). For a discussion of how the criminal procedures required by ICRA can conflict with tribal traditions, *see* Concetta R. Tsosie de Haro, *Federal Restrictions on Tribal Customary Law: The Importance of Tribal Customary Law in Tribal Courts*, 17 Tribal L.J. 1, 10 (2016-2017); van Schilfgaarde, *supra* note 51.

action to challenge detention through habeas corpus relief.[95] As a result, tribal courts have emerged as the primary enforcers of the ICRA. They do not have to interpret the ICRA as a federal court would.[96] The Supreme Court's interpretation of ICRA gives tribal courts some leeway to incorporate tribal traditions and values into their ICRA jurisprudence. Tribal courts, however, are constrained by federal court oversight because federal courts retain authority to determine tribal court jurisdiction.[97] Tribal courts thus act within the shadow of colonialism, knowing that a federal court has final say over the authority that they exercise. Federal courts have used this oversight to severely restrict tribal court jurisdiction over non-Indians and lands held in fee simple within the reservation.[98]

The imposition of Anglo-American standards and procedures for "justice" did not end with the ICRA. As discussed in Part I.B, Congress and the Supreme Court have continued to limit tribal jurisdiction and require compliance with Anglo-American due process even as federal policy has encouraged and facilitated the exercise of greater governance powers by tribal nations.

B. The Legacy of Settler Colonialism on "Justice" in Indian Country

Colonization, facilitated by the imposition of federal laws and Anglo-American legal systems on Native communities, has created injustices in Indian Country and limited access to justice for tribal governments and their citizens. This section describes some of the impacts of settler colonialism on access to justice for tribal governments and individual Natives.

---

[95] Santa Clara Pueblo v. Martinez, 436 U.S. 49, at 71–72 (1978).

[96] Some tribal courts have applied their own customs and traditions in interpreting rights under the ICRA. High Elk v. Veit, 6 Am. Tribal Law 73, 78 (Cheyenne River Sioux Ct. App. 2006); Fletcher, *Mamengwaa, supra* note 31, at 4. At least one scholar has suggested that they do not have to apply it. *See* Carole Goldberg, *Individual Rights*, 35 Az. State L. J. 899, 900. Studies of tribal courts find that their "interpretations of the Act are remarkably consistent with federal court interpretations." *Id*. at 900.

[97] Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853, 857(1985) (finding a federal common law cause of action existed to review tribal court jurisdiction but requiring parties to exhaust tribal remedies first); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16–17 (1987) (clarifying and extending the tribal court exhaustion doctrine).

[98] Montana v. United States, 450 U.S. 544, 565–66 (1981) (holding that tribal governments only have jurisdiction over non-members on land held in fee on the reservation if the non-member has entered into a consensual relationship with the tribe or its members or the non-member's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe); Strate v. A-1 Contractors, 520 U.S. 438, 456–58 (1997) (applying the *Montana* test to tribal adjudicatory jurisdiction); Nevada v. Hicks, 533 U.S. 353, 369 (2001) (holding that the tribal court could not adjudicate federal civil rights claims made against a state law enforcement officer for actions on tribal trust land).

1. Impact on Tribal Governments

Federal laws have created structural barriers to access to justice for tribal governments. The United States restricted tribal governments' access to lawyers and federal courts for most of the nineteenth and twentieth centuries.[99] Federal laws have also impeded tribal governments' ability to govern and ensure justice for and within their own communities. Tribal governments have not been treated like other governments in the United States, but presumed incapable of providing justice in and to their communities. As a result, Anglo-American laws and legal systems continue to be used to displace and disrupt traditional tribal governance, familial relationships, and traditional economic systems.

This disruption arose largely due to differences in Native and Anglo-American conceptions of justice.[100] White settlers did not understand Native concepts of justice and insisted that Native communities adopt Anglo-American standards and practices. Federal laws replaced traditional norms and structures for resolving disputes and addressing the social needs of the community. These laws defined justice and determined what was and was not lawful in Native communities. Native communities lost the ability to decide for themselves what behavior to regulate and how they wanted to regulate it.

As the Kan-gi-shun-ca example discussed in Part I.A above shows, the view of justice imposed on Native communities differs significantly from their traditions and understandings of the world.[101] Each Native Nation has its own traditions, but scholars have sought to identify common themes that distinguish Native justice from Anglo-American justice.[102] Several Native scholars have expressed concerns about the punitive nature of Anglo-American justice.[103] They have identified common values underlying Native

---

[99] Getches, *supra* note 26, at 181 (describing the difficulties tribal governments had finding legal representation).

[100] James Dumont, *Bridging the Cultural Divide: A Report on Aboriginal Peoples and the Criminal Justice System in Canada*, *in* Justice and Aboriginal People 42 (Royal Comm'n on Aboriginal Peoples, ed.) (1993) (on file with author); Justice as Healing: Indigenous Ways (Wanda D. McCaslin, ed.) (2005).

[101] Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 Judicature 126, 133 (1995) ("The strong adversarial features of the American justice paradigm will always conflict with the communal nature of most tribes."); Nesper, *supra* note 89, at 679 (noting the contradiction between Native customs and Anglo-American jurisprudence); Deloria and Lytle, *supra* note 67, at 120 (same).

[102] Dumont, *supra* note 100; James Sa'ke'j Youngblood Henderson & Wanda D. McCaslin, *Exploring Justice as Healing, in* Justice as Healing: Indigenous Ways 3 (Wanda D. McCaslin, ed.) (2005).

[103] Dumont, *supra* note 100, at 69; Harold Johnson, *Promises Worth Keeping, in* Justice as Healing 65, 65–67 (Wanda D. McCaslin, ed.) (2005); James W. Zion, *Punishment versus Healing: How Does Traditional Indian Law Work?, in* Justice as Healing 68, 68–71 (Wanda D. McCaslin, ed.) (2005); Gloria Lee, *Defining Traditional Healing, in* Justice as Healing 98, 100 (Wanda D. McCaslin, ed.) (2005); Judge Bria Huculak, *From the Power to Punish to the Power to Heal, in* Justice as Healing 161, 161–63 (Wanda D. McCaslin, ed.) (2005).

"justice" to include respect, reciprocity, balance, and interdependent relationships.[104] Others have emphasized healing (as opposed to punishment) as central to justice for Native people.[105]

Many Native scholars describe "justice" from a Native perspective as about a way of life,[106] living in a good way,[107] or being a good relative.[108] In other words, "justice" is viewed as an ongoing practice rather than as an isolated goal or objective. To live in a good way refers to "[paying] attention to our relations and obligations here and now … [and] across the generations, or over time".[109] It requires people to take responsibility for their actions and inactions on the surrounding world and to act accordingly.

The imposition of adversarial courts has further undermined the ability of Native Nations to dispense justice on their own terms. Tribal courts continue to operate in the shadow of colonialism.[110] A full description of the variety of the hundreds of tribal courts operating in the United States and how colonialism has affected each of them is beyond the scope of this article, but the legacy of colonialism on them merits mention here and deeper empirical investigation in the future.[111]

The legacy of colonialism on tribal judicial systems is threefold.[112] First, many tribal courts have adopted the Anglo-American adversarial model or

---

[104] Dumont, *supra* note 100, at 57; Zion, *supra* note 103, at 70.

[105] Henderson & McCaslin, *supra* note 102, at 5 ("The goal of healing is not to assimilate the other but rather to allow ourselves to live in a world as Aboriginal people who feel connected with our unique, shared culture.").

[106] Harley Eagle, *Hearing the Hard Stuff, in* Justice as Healing 54, 55 (Wanda D. McCaslin, ed.) (2005); Wanda D. McCaslin, *Introduction: Reweaving the Fabrics of Life, in* Healing as Justice 87, 88; Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 Judicature 126, 127 (1995).

[107] Dumont, *supra* note 100, at 60–61; Ross Gordon Green & Kearney F. Healy, *Aboriginal Notions of Justice: Questioning Relationships of Force, in* Healing as Justice 61, 65 (Wanda D. McCaslin, ed.) (2005).

[108] Henderson & McCaslin, *supra* note 102, at 7.

[109] Kim Tall Bear, *Caretaking Relations, Not American Dreaming*, 6 Koufou 24, 25 (2019); Russel Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 Kan. J.L. & Pub. Pol'y 74, 76 (1999) ("Kinship structure provides the basic set of principles for determining what is just. Justice is a function of individuals' family histories, and the historical relationships between their families. Justice is renewed, furthermore, by *re-negotiating* relationships with the mediation of elders.") (emphasis in original).

[110] Van Shilfgaarde, *supra* note 51, at 28; Ana Pecos Melton, *supra* note 106, at 130. Some scholars have studied how these tensions play out in particular tribal courts. Justin B. Richland, *Sovereign Time, Storied Moments: The Temporalities of Law, Tradition, and Ethnography in Hopi Tribal Court*, 31 Pol. & Legal Anthro. Rev. 8, 13–15 (2008) (Hopi Tribal Court); Nesper, *supra* note 89, at 165 (Lac du Flambeau Tribal Court).

[111] For a fuller description of tribal justice systems, *see* van Schilfgaarde, *supra* note 51, at 8–27; Ana Pecos Melton, *supra* note 106, at 133; Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future*, 79 Judicature 147 (1995).

[112] Over 300 tribal judicial systems operate in tribal communities today. van Schilfgaarde, *supra* note 51, at 28. They serve multiple functions within these communities. *Id*. As Professor van Schilfgaarde explains, "[Tribal courts] are a community service, providing bureaucratic processing, dispute resolution, and criminal accountability for the Tribal community. They are a protector, ensuring that the rights of individual litigants as well as community values are upheld.

some version of it and struggle to depart from it.[113] Second, federal laws limit what tribal judicial systems can do. They impose Anglo-American frameworks for individual rights on tribal justice systems and mandate the processes tribal courts have to follow to protect such rights. Supreme Court decisions have given federal courts the authority to determine tribal court jurisdiction.[114] These decisions have eroded tribal court jurisdiction, limiting the people and places under their jurisdiction. These laws and court decisions enable federal oversight of tribal courts. Third, tribal courts struggle with competing legitimacy demands.[115] They have to walk a fine line between meeting tribal citizens' expectations based on their own culture and satisfying the requirements of non-Native judicial systems.[116]

Consider, for example, the Violence Against Women Act of 2013 (VAWA 2013) as illustrative of how federal laws and policies affect tribal judicial systems.[117] VAWA 2013 restored tribal criminal jurisdiction over specific domestic violence crimes committed by non-Natives against Native

---

They are a check, serving as a safeguard against other branches of Tribal government. They are a nation-builder, interpreting and building Tribal law and processes that impact the cultural relevance, resilience, and very survival of the Tribe." *Id.*

[113] van Schilfgaarde, *supra* note 51, at 28 ("Due to the extensive history of federal pressures on Tribal systems, Tribal court structures tend to mimic the current Anglo-American model."); Fletcher, *Mamengwaa*, *supra* note 31, at 16–19. As discussed in more detail in Part III, *infra*, many tribal judicial systems also engage in less adversarial or more specialized conflict resolution. Some tribal justice systems now have specialized courts to deal with specific kinds of cases, including gaming courts, healing and wellness courts, domestic violence courts, and family courts. Others have expanded to include peacemaking or shifted to "peacemaking from the bench," an approach that allows the judge to encourage resolution of the case by the litigants.

[114] Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853, 857 (1985) (finding a federal common law cause of action existed to review tribal court jurisdiction but requiring parties to exhaust tribal remedies first); *see also* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16–17 (1987) (clarifying and extending the tribal court exhaustion doctrine). Other decisions have expressly limited tribal court jurisdiction. *See, e.g.,* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (holding that tribal governments cannot exercise criminal jurisdiction over non-Indians); Montana v. United States, 450 U.S. 544, 565–66 (1981) (limiting tribal regulatory jurisdiction over non-members on land held in fee simple within the reservation); Strate v. A-1 Contractors, 520 U.S. 438, 456–58 (1997) (extending the limitations in Montana to tribal adjudicatory jurisdiction); Nevada v. Hicks, 533 U.S. 353, 364 (2001) (holding that the Fallon Paiute Tribal Court did not have jurisdiction over state law enforcement for actions within the reservation); Plains Com. Bank v. Long Family Land & Cattle Co., Inc., 554 U.S. 316, 328–31 (2008) (finding that tribal courts cannot adjudicate cases involving the sale of fee land within the reservation).

[115] Richland, *supra* note 110, at 10. *See also* B.J. Jones, *Tribal Courts: Protectors of the Native Paradigm of Justice*, 10 St. Thomas L. Rev. 87, 87 (1997) ("Modern tribal courts have the unenviable task of doing justice in two worlds. They must be familiar with and incorporate traditional practices in order to maintain internal credibility with the very tribal members that they are appointed to serve, and simultaneously appease the non-Indian judicial world.").

[116] Jones, *supra* note 115, at 87 ("This is a delicate balance which, when thrown out of kilter, inevitably brings accusations from tribal members that the court is applying the white man's law to assertions from the non-Indian world of incompetence when the court acts in a manner which appears incongruous with anglo-notions of due process.").

[117] Federal laws with similar provisions include the Indian Civil Rights Act, the Tribal Law and Order Act, and the Violence Against Women Act of 2022.

women in Indian Country.[118] The statute recognizes that tribal governments have inherent sovereign authority to investigate, prosecute, convict, and sentence non-Native offenders as long as the tribal government provides specific procedural protections to the defendant. These protections are meant to ensure justice and fairness in an adversarial system, limiting the ability of the tribal government to handle domestic violence situations in any other way. The protections required by the statute include: effective assistance of counsel; appointed, licensed attorneys for indigent defendants; law-trained judges who are licensed to practice law; publicly available tribal criminal laws and rules; and recorded criminal proceedings.[119] Defendants are also entitled to a fair cross-section of the community in a jury pool that does not systematically exclude non-Indians.[120] They must be informed of their right to file a federal habeas corpus petition if they are ordered to be detained by a tribal court.[121] Under VAWA, the federal government exercises oversight over tribal governments to ensure that defendants receive theses procedural protections. The Department of Justice has to approve tribal governments so they can opt in to exercising the jurisdiction restored under these statutes. This oversight conditions the exercise of a tribal government's inherent authority on its willingness or ability to meet the federal government's standards of justice.[122]

Federal laws, like VAWA, contribute to access to justice problems in Indian Country even though they seek to remedy them. They continue the longstanding colonial project of disregarding and replacing tribal traditions and standards for justice with ones favored by the federal government. These laws reinforce adversarial courts as the only legitimate fora for justice and further mandate tribal governments opting into an adversarial system complete with individual rights.[123]

These federal laws undermine the very tribal justice systems that they seek to empower. Tribal governments cannot address problems on their own terms—exercise their own sovereignty and gain legitimacy as governments—if they are expected to reproduce Anglo-American justice systems. The approach taken in these statutes overlook the fact that "the very viability of the systems of tribal governance depend on the degree to which such

---

[118] 25 U.S.C. § 1304(d). Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.)(2022).

[119] 25 U.S.C. §§ 1302(c), 1304(d) (2022).

[120] 25 U.S.C. § 1304(d) (2022).

[121] 25 U.S.C. § 1304(e) (2022).

[122] Sarah Deer, The Beginning and End of Rape: Confronting Sexual Violence in Native America, 134–35 (2015) ("Tribal nations have been coerced to adopt the legal methodology and philosophy of the colonial state in responding to violence. Taiaike Alfred and Jeff Corntassel explain that indigenous peoples have been put in the untenable position of mimicking coercive practices of the colonial government, which result in 'disconnection, dependency, and dispossession.'")

[123] van Schilfgaarde, *supra* note 51, at 44–45.

governments are allowed to develop their institutions free from any outside interference."[124]

Federal statutes requiring that tribal governments provide Anglo-American procedures hamper tribal sovereignty in other ways as well. They make it difficult for some tribal governments, especially smaller and less resourced ones, to exercise their inherent sovereignty.[125] These tribal governments cannot afford to provide Anglo-American style justice even if they want to. They simply do not have the resources to meet the procedural requirements mandated by the federal government. At the same time, federal law conditions the exercise of their sovereignty on compliance with these federal procedural requirements. Tribal governments are limited in their ability to ensure fairness or justice according to their own traditions.

These federal procedural requirements also create issues for tribal governments that are willing or able to meet them.[126] They create a strange imbalance as many of these enhanced procedures only apply to non-Native defendants. Federal laws currently require tribal governments to provide non-Native defendants with more rights in tribal court than Indians and afford non-Native defendants more rights in tribal court than in state courts.[127]

Additionally, these federal statutory requirements on tribal court procedures may not reflect the traditions and worldview of the Native community.[128] The tribal government may have to adopt practices it does not want and that are not culturally appropriate in order to exercise its sovereignty. Cultural diminution could occur to the community if efforts to comply with federal requirements prevent a Native community from engaging in culturally important projects or responses to social problems.[129] The adoption of these practices often have spillover effects on the tribal justice system writ large because they create incentives for tribal governments to adopt or continue with adversarial style courts rather than pursue traditional forms of dispute resolution.[130] This larger incentive structure may discourage tribal

---

[124] Vincenti, *supra* note 66, at 135.

[125] *See* Kirsten Matoy Carlson, Cameron Ann Fraser, & Norika Kida Betti, *Protecting Victims of Domestic Violence in Indian Country: A Look at the Tools Afforded under the Federal Violence Against Woman Act and the Current Landscape in Michigan*, 50 Mich. Fam. L.J. 8, 11 (2020); Concetta R. Tsosie de Haro, *Federal Restrictions on Tribal Customary Law: The Importance of Tribal Customary Law in Tribal Courts*, 17 Tribal L.J. 1, 11–12 (2016) (noting the high cost of meeting the procedural requirements of the Tribal Law and Order Act and the lack of adequate funding for tribal governments to implement it).

[126] Goldberg, *Individual Rights*, *supra* note 96, at 921 ("Native nations should . . . ponder whether the jurisdiction they may gain from providing protection of Anglo-American individual rights actually will advance goals of tribal revitalization.").

[127] van Schilfgaarde, *supra* note 51 (noting that the ICRA "imposes more limitations on Tribal courts than on state courts under the Court's Fourteenth Amendment jurisprudence.").

[128] One reason some tribal governments have not implemented enhanced sentencing under the Tribal Law and Order Act is that they do not feel like putting more people in jail enhances public safety or addresses the root causes of violence in their communities.

[129] Goldberg, *Individual Rights*, *supra* note 96, at 921.

[130] The ultimate concern is that tribal cultures will finally succumb to assimilative pressures

governments from seeking to deal with issues through traditional means or adopting new ways to resolve them.

The Supreme Court has added to this incentive structure in its jurisprudence on tribal civil adjudicatory jurisdiction. The Court curbed its enthusiasm for tribal courts as the enforcers of the ICRA when it created a federal common law cause of action to review tribal civil adjudicatory jurisdiction in *National Farmers Union Insurance Company v. Crow Tribe of Indians*.[131] In *National Farmers Union*, the Supreme Court recognized a federal common law cause of action for federal courts to review tribal court jurisdiction.[132] The decision mandated that defendants in tribal court exhaust their tribal court remedies first, but the Supreme Court has rarely required defendants to do so before reviewing a case.[133] Instead, it has allowed for federal oversight of tribal civil adjudicatory jurisdiction and often limited it.[134]

The limits on tribal court jurisdiction have radiating effects on access to justice in Indian Country. Tribal courts have almost no authority over non-Indians within the reservation (unless they consent to tribal jurisdiction or exercise jurisdiction under 25 U.S.C. § 1304) or their own members when on non-tribal trust lands within their traditional homelands.[135] As mentioned previously, tribal governments cannot effectively regulate or police their communities due to the lack of jurisdiction over non-Indians. Some tribal governments, however, may not have jurisdiction over their own people either, especially if they have a large service area but few lands held in trust.

Even in situations where tribal governments have jurisdiction, the extensive federal oversight of tribal courts and their procedures can lead to a

---

and that "if Native nations model their governments too closely on the American system, the case for tribal sovereignty based on the right to carry on a distinctive way of live will cease to exist." *Id.*

[131] Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 853, 857 (1985) (finding a federal common law cause of action existed to review tribal court jurisdiction but requiring parties to exhaust tribal remedies first); *see also* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16–17 (1987) (clarifying and extending the tribal court exhaustion doctrine).

[132] *Id.*

[133] *Id.*; Strate v. A-1 Contractors, 520 U.S. 438, 459 n. 14 (1997) (not requiring exhaustion of tribal court remedies because the tribal court would not have jurisdiction); *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (finding that requiring tribal court exhaustion "'would serve no purpose other than delay' and [was] therefore unnecessary."). *See also* GETCHES ET. AL., *supra* note 86.

[134] *See Nat'l Farmers Union*, 471 U.S. 845, 851–52 (1985).

[135] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208–09 (1978) (divesting tribal governments of criminal jurisdiction over non-Indians); Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022); 25 U.S.C. § 1304 (allowing limited tribal jurisdiction over non-Indians for specific crimes); Montana v. United States, 450 U.S. 544, 565–66 (1981) (holding that tribal governments only have jurisdiction over non-members on land held in fee on the reservation if the non-member has entered into a consensual relationship with the tribe or its members or the non-member's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe); Strate v. A-1 Contractors, 520 U.S. 438, 456–58 (1997) (applying the *Montana* test to tribal adjudicatory jurisdiction); Nevada v. Hicks, 533 U.S. 353, 369 (2001) (holding that the tribal court could not adjudicate federal civil rights claims made against a state law enforcement officer for actions on tribal trust land).

mismatch between the practices and policies that are culturally appropriate and work well for a Native community and the ones a tribal government can adopt in the shadow of federal laws.[136] Cultural mismatches, or inconsistencies "between governing institutions and the prevailing ideas in the community about how authority should be organized and exercised" have further negative radiating effects.[137] Empirical studies have found that they undermine governmental stability and thwart economic development in Native communities.[138] Tribal government instability may undermine tribal governance and jeopardize claims for greater tribal authority.[139] It may also present Native communities from effectively providing access to justice.

2. Impact on Individual Natives

Individual Natives have also experienced the injustices of settler colonialism. The impact of the imposition of non-Native views and systems of justice on the everyday lives of Native peoples and their communities cannot be overstated.[140] This imposition was central to settler colonialism and its efforts to assimilate Natives into mainstream American culture. It eroded tribal culture and subjected many families to disruption and disconnection as it supplanted traditional systems with Anglo-American laws and hierarchical processes for dispute resolution.[141] Many continue to experience harm from the loss of tradition and oppression under a foreign system.

Intergenerational trauma from these experiences persists.[142] Native Americans remain the most impoverished group in the United States with high rates of un- or underemployment, homelessness, housing insecurity,

---

[136] Goldberg, *Individual Rights*, *supra* note 96, at 919 ("[I]f generally accepted methods of controlling government abuse involve consensual decision-making by recognized families, clans, or bands, but the prevailing government system is one of majority rule supplemented by individual rights, the likelihood of cultural 'match' will be small, as will the likelihood of successful economic growth.").

[137] Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 Am. Indian Culture & Res. J. 187, 201 (1998).

[138] *Id.*

[139] Goldberg, *Individual Rights*, *supra* note 96, at 921.

[140] Barsh, *supra* note 109, at 76–77.

[141] For description of Anglo-American assumptions about courts and dispute resolution, *see* Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark and Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 Colum. L. Rev. 1471 (2022).

[142] Intergenerational trauma "happens when the effects of trauma are not resolved in one generation, allowing patterns of abuse to continue." Aboriginal Healing Found., *Residential Schools and the Intergenerational Legacy of Abuse*, *in* Justice as Healing 25, 26 (Wanda D. McCaslin, ed.) (2005) (discussing the cycle of abuse that started in boarding schools in the Canada and the United States that continues to harm Native communities); Edward C. Valandra, *Decolonizing "Truth": Restoring More than Justice*, *in* Justice as Healing 29, 30–38 (Wanda D. McCaslin, ed.) (2005) (describing how settler colonialism has traumatized the Oceti Sakowin Oyate); Robert Yazzie, *The Navajo Response to Crime*, *in* Justice as Healing 121, 127 ("*[A]ll I*ndians suffer from a form of mass post-traumatic stress disorder because of the trauma caused by attempts to kill our culture and government.") (emphasis in original).

substance abuse and addiction, domestic violence, and lack of access to basic essential services, including water and adequate housing.[143] Many of these social needs contribute to justiciable events in the lives of individual Natives. Few individual Natives turn to the legal system for help. Instead, many find themselves in a tribal, state, or federal legal system due to social and economic hardship and trauma.[144] They generally distrust the law and legal systems because they have so often been used against them.[145] Indian legal services programs struggle to meet the legal needs of the most impoverished, often representing them in state, tribal, or federal courts on criminal charges, or in eviction, child welfare or treaty rights cases.[146] Due to the lack of empirical studies, the unmet legal needs of individual Natives in the United States remains unknown. For decades, however, the LSC has acknowledged that it underfunds its Indian legal services programs based on estimates of the unmet legal needs in Indian Country.[147] Some tribal governments provide for representation for their citizens in tribal court, but many tribal citizens cannot access their tribal courts due to federal restrictions on tribal court jurisdiction and remain unrepresented in some state proceedings.

The next Part discusses how this legacy of settler colonialism has impacted strategies to address access to justice issues in Indian Country.

II. Natives' Struggle for Access to Justice Under Settler Colonialism

The pursuit of justice in Native communities exists against the backdrop of settler colonialism. Native Nations have long resisted the imposition of power by outsiders. They made alliances with one another long before Europeans arrived in their lands,[148] often respecting one another's authority to govern shared territory.[149] They sought similar relationships with colonial governments almost as soon as Europeans landed on their soil.[150] Native Nations have continued to argue for policies that recognize and protect their

---

[143] Getches et. al., *supra* note 86, at 19–24.

[144] Deer, *supra* note 122, at 98–99 (noting the linkages between childhood trauma and negative health and social outcomes in tribal communities).

[145] Simpson, *supra* note 45, at 21–22. *See also* Nesper, *supra* note 89, at 679 (describing the negative perception that Native people held towards courts).

[146] Dahlstrom & Barnhouse, *supra* note 12, at 1–4; 2008 NAILS Update at 1.

[147] Memorandum from Laurie Schmidt on Native American Funding to Mary C. Higgins, Legal Servs. Corp. (Sept. 17, 1987) (on file with author); 2008 NAILS Update at 21.

[148] Basic Call to Consciousness 14 (Akwesasne Notes ed., 1978).

[149] Leanne Simpson, *Looking After Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships*, 23 Wicazo Sa Rev. 29, 35–38 (2008).

[150] Herman Viola, Diplomats in Buckskins: A History of Indian Delegations in Washington City 13–21 (1995); Daniel Carpenter, *On the Emergence of the Administrative Petition: Innovations in Nineteenth-Century Indigenous North America*, *in* Administrative Law from the Inside Out 349, 349 (Nicholas R. Parrillo ed., 2017).

tribal sovereignty even as the United States government has sought to undermine their sovereignty and assimilate their citizens.[151]

A. Multiple Strategies for Access to Justice

Many tribal leaders, lawyers, and advocates perceive justice as about protecting tribal sovereignty, lands, and bodies from the settler state.[152] They have prioritized legal claims based on the historic government-to-government relationship between tribal governments and the United States rather than ones seeking individual inclusion in the democratic nation-state like other disadvantaged groups.[153] Their work centers on advocacy for the recognition and protection of tribal sovereignty as a way to secure justice for Native communities. Rarely do tribal leaders, federal Indian law scholars, and practitioners speak or think of this work as about access to justice.[154]

Discussions about access to justice in Indian Country, however, have included this approach, sometimes referred to as sovereignty empowerment,[155] since at least the 1960s—even though it differs dramatically from conventional views of access to justice, which center access by individuals to lawyers and courts. The underlying idea is that the protection and development of tribal sovereignty and governance structures will increase access to justice for tribal citizens and others in Native communities because tribal governments will be able to dispense justice to their people in culturally appropriate ways.[156] Tribal governments having the power to take care of their lands and peoples and resolve the issues arising within or relating to their communities is at the core of the sovereignty empowerment approach. Access to justice in Indian Country has, thus, always been multilayered with an emphasis on both sovereignty and individual empowerment. Sovereignty empowerment and individual empowerment have always been

---

[151] For centuries, Indians have faced formidable threats to their existence from outsiders who have sought to occupy their lands, develop their natural resources, and destroy their cultures. Makere Stewart-Harawira, *Indigenous Resilience and Pedagogies of Resistance: Responding to the Crisis of our Age, in* Resilient Systems, Resilient Communities 158, 159 (Jordan B. Kinder & Makere Stewart-Harawira eds. 2018). Many of these threats have come from policies sanctioned by the United States government. *See* Kunesh, *Constant Governments: Tribal Resilience and Regeneration in Changing Times,* 19 Kan. J.L. & Pub. Pol'y 8, 9–10 (2009); Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance under the Indian Self-Determination and Education Assistance Act*, 39 Am. Indian L. Rev. 1, 6–16 (2014–2015). For a discussion of these policies, *see* Getches et. al., *supra* note 86.

[152] *See* Simpson, *supra* note 45, at 21. *See generally* Echohawk, *supra* note 28;

[153] *See generally* Deloria, Custer, *supra* note 58; Kymlicka, *supra* note 58.

[154] Simpson, *supra* note 45, at 21 ("Justice to me . . . means the return of the land, the regeneration of Indigenous political, educational, and knowledge systems, the rehabilitation of the natural world, and the destruction of white supremacy, capitalism, and heteropatriarchy.").

[155] Memorandum from Steve Moore on "Futures" Project to Indian Legal Services Directors, Indian Legal Support Ctr. (Feb. 23, 1989) (on file with author).

[156] Deer, *supra* note 122, at 98.

inseparable, interrelated, and intertwined strategies for access to justice in Indian Country. They are like the two sides of a round doublewoven basket in the Oklahoma Cherokee style.[157] As Cherokee author Marilou Awiakta describes it, "The two sides are distinct, yet interconnected, and they reconverge in the basic law of respect and balance."[158]

This interlayered conceptualization of access to justice has informed federal Indian policy and legal services delivery in Indian Country for decades. The Kennedy and Johnson administrations adopted it when they opted to write Indians into various bills meant to improve the lives of the poor and underserved.[159] Central to the War on Poverty, the Economic Opportunity Act created the Office of Economic Opportunity (OEO) and its Community Action Program to empower poor people on a local level to reform institutions to end poverty. The Johnson administration wanted to include Indians in these programs.[160] In 1964, Indian leaders lobbied for OEO funding to go directly to tribes (rather than the states).[161] The OEO programs also included tribal governments and their citizens in programs meant to increase legal services delivery to the poor.[162]

Legal service delivery, however, differed in Indian Country as it included the representation of tribal governments and the furtherance of tribal sovereignty.[163] Congress reaffirmed the importance of sovereignty empowerment as central to legal services delivery in Indian Country when it created the Legal Services Corporation (LSC) in 1974. The LSC has always recognized the unique, unmet legal needs of Native communities in the United States.[164] It has funded Indian legal services programs through separate

---

[157] I borrow this metaphor from Marilou Awiakta, Selu: Seeking the Corn-Mother's Wisdom 34–35 (1993). Awiakta explains the metaphor by describing a single woven basket in its simplest form: "First, two splits or reeds are centered, like the cardinal points of a compass. Then two more splits of equal size and length are added. These are the ribs of the basket. Weaving begins at the center. The base is tightly woven to hold the ribs in balance. The weaving may become slightly more relaxed as the basket takes shape . . . over . . . under . . . over . . . under . . . until it is finished. From the simplest basket to the most complex of the doublewoven ones, this principle is the same: *The ribs must be centered and held in balance*. In a sense, they are the fixed bearings of that guide the rhythm of the weaving. . . . In the *doublewoven* basket style, buckbrush vines, called runners, are used instead of reeds. At a certain point, the ribs are turned down and weaving begins again, back toward the base" (emphasis in original).

[158] *Id.* at 35.

[159] George Pierre Castile, To Show Heart: Native American Self-Determination and Federal Indian Policy, 1960–1975 4, 24–25 (1998).

[160] *Id*. at 29.

[161] Charles F. Wilkinson, Blood Struggle: The Rise of Modern Indian Nations 127–28 (2005) (identifying this as the first time in American history that "Indian people had conceived of a provision to be inserted in national legislation and then lobbied it through Congress into law.").

[162] Memorandum from John Waubansee to Clint Lyons on Indian Expansion Funds, Legal Servs. Corp. (Oct. 13, 1978) (on file with author) [hereinafter Waubansee Memo]; James A. Keedy, *The History of Indian Legal Services*, Mich. Bar J., Aug. 2019, at 26.

[163] Lieberman, *supra* note 2, at 22–31; Moore, *supra* note 3, at 10.

[164] *See* Waubansee Memo, *supra* note 162 (discussing the creation and functioning of an Indian Desk within the LSC to plan and supervise the expansion of legal services for Natives).

grants and envisioned them as delivering a broad array of legal services to tribal governments, Native communities, and Native individuals.[165]

Over time, sovereignty empowerment has emerged as the more visible strategy for access to justice in Indian Country than individual empowerment. LSC funded Indian legal services have remained on the forefront of individual empowerment strategies but their contribution to the sovereignty empowerment approach has changed as the LSC has restricted their scope of work and limited their ability to lobby and litigate class action cases.[166] Moreover, as explored in Part III, individual needs for access to justice in Native communities have changed as the sovereignty empowerment strategy has restored sovereignty to tribal governments. The next subpart discusses the sovereignty empowerment approach to access to justice in more detail.

B. The Struggle for Sovereignty as Access to Justice

Tribal governments, LSC funded Indian legal services programs, and tribal organizations have transformed the landscape in many Native communities by following a strategy of sovereignty empowerment. The sovereignty empowerment approach has chipped away at the legal structure imposed by settler colonialism. Many of the cases against state and federal governments that shaped modern federal Indian law started as access to justice initiatives brought by Indian legal services programs.[167] These cases recognized and

---

[165] *Id.* (discussing Indian extension grants); Memorandum from Laurie Schmidt on Native American Funding to Mary C. Higgins, Legal Servs. Corp. (Sept. 17, 1987) (on file with author) (retelling the history of LSC funding for Indian programs); Profile: Native American Program Compiled by William J. Lutz, Legal Servs. Corp. (Sept. 9, 1991) (on file with author) (explaining the basic layout, structure, and funding for the LSC's Indian programs); 2008 NAILS Update at 21.

[166] Houseman, *supra* note 23, at 1214–15 (discussing restrictions placed on legal services providers in the 1990s).

[167] *See, e.g.*, Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (finding that the United States owed legal obligations to unrecognized tribes in the Eastern United States) (Pine Tree Legal Assistance, Indian Unit); Natonabah v. Bd. of Ed. of Gallup-McKinley Cnty. Sch. Dist., 355 F. Supp. 716 (D.N.M. 1973) (requiring that Indian education funds be used for their intended purposes) (DNA People's Legal Services Program); Morton v. Ruiz, 415 U.S. 199 (1974) (establishing eligibility of Indians living near reservations for BIA services under federal statute) (DNA People's Legal Services Program); Bryan v. Ithasca Cnty., Minn., 426 U.S. 373 (1976) (finding that P.L. 280 did not grant civil regulatory jurisdiction to states and restricting ability of P.L. 280 states to subject Indians to taxation and police powers) (Leech Lake Legal Services Project); Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976) (determining that tribal police officers have the right to exclude non-Indians from reservation lands) (California Indian Legal Services); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) (upholding treaty rights to fish commercially) (Seattle-King County Legal Services); Mattz v. Arnett, 412 U.S. 481 (1973) (finding that Congress had not diminished the Yurok Reservation and upholding tribal fishing rights along the Klamath River) (California Indian Legal Services); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (finding that the Arizona did not have the right to impose state tax on certain income obtained on the Navajo Reservation) (Dinebeiina Nahiilna Be Agaditahe (DNA)); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 663 F. Supp. 682 (W.D. Wis. 1987) (upholding Lac Courte Oreiles Band of Lake Superior Chippewa Indians' treaty-based hunting and fishing rights) (Wisconsin Judicare); United States v. Michigan., 505 F. Supp. 467

protected treaty hunting, fishing, and gathering rights;[168] prohibited state taxation of tribal citizens on tribal lands;[169] limited state civil jurisdiction under P.L. 280 (and paved the way for Indian gaming);[170] and protected reservations from diminishment.[171] Indian legal services also assisted many terminated and non-federally recognized tribal groups as they sought status as federally recognized tribal governments either through federal legislation or the Bureau of Indian Affairs (BIA).[172] Federal recognition ensured these communities legal status and treatment as separate sovereign governments with legal rights to land, territories and resources; means to economic development through federal grants and loans; funding for cultural, educational programs, and social services; and political participation as a government.[173] The work done by Indian legal services programs helped to transform Native communities from living in abject poverty to operating their own governments, providing social services to their people, and operating multimillion dollar businesses.[174] As these examples show, Indian legal services programs

(W.D. Mich. 1980) (upholding treaty rights) (Native American Rights Fund); Hodel v. Irving, 481 U.S. 704 (1987) (recognizing property rights) (Dakota Plains Legal Services); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (limiting free exercise rights) (California Indian Legal Services); Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990) (restructuring free exercise jurisprudence) (Oregon Legal Services). See *also* Kevin K. Washburn, *How a $147 County Tax Notice Helped Bring Tribes More than $200 Billion in Indian Gaming Revenue: The Story of Bryan v. Itasca County*, *in* Indian Law Stories 448 (Carole Goldberg et al. eds., 2011) ("Through the late 1960s and 1970s, legal aid attorneys around the country—lawyers at local and regional legal services offices, nationally-active Indian law experts at the Native American Rights Fund in Boulder, the DNA-Peoples Legal Services on the Navajo Reservation—helped Indian people and tribes achieve landmark rulings in the Supreme Court and in numerous lower courts.").

[168] *See Washington*, 384 F. Supp. 312; *Lac Courte Oreilles*, 663 F. Supp. 682; *Michigan*, 505 F. Supp. 467.

[169] *See McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973).

[170] *See Itasca Cnty.*, 426 U.S. 373 (1976).

[171] *See* Mattz v. Arnett, 412 U.S. 481 (1973).

[172] *See* James A. Keedy, *The History of Indian Legal Services*, 98 Mich. Bar J. 26 (2019). Indian legal services programs responded to concerns raised by the American Indian Policy Review Commission about the failure of the United States government to recognize several tribal groups. The groups they helped include but are not limited to: Paiute (Utah Legal Services); Northwest Band of Shoshone (Utah Legal Services); Aroostaook Band of Micmacs (Alaska Legal Services); Pokagon Band of Potawatomi Indians (Michigan Indian Legal Services); Little Traverse Bay Bands of Odawa (Michigan Indian Legal Services); Grand Traverse Band of Ottawa and Chippewa (Michigan Indian Legal Services); Little River Band of Ottawa Indians (Michigan Indian Legal Services); and the Lac Vieux Desert Band of Lake Superior Chippewa Indians (Michigan Indian Legal Services).

[173] Cohen's Handbook of Federal Indian Law, *supra* note 8 § 3.02[3].

[174] *See* Matthew L.M. Fletcher, The Eagle Returns: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians (2012) (describing the transformation of the Grand Traverse Band of Ottawa and Chippewa Indians when they regained federal recognition).

initially used a variety of litigation, legislative, and administrative strategies at the federal and state levels in their advocacy.[175]

Advocacy by tribal governments and Native organizations based on a sovereignty empowerment approach also encouraged and supported a fundamental remaking of federal Indian law by Congress and the Executive Branch.[176] As I have recounted in detail in my previous work, tribal leaders and advocates seized on the success of OEO programs in tribal communities.[177] These programs transferred resources and authority to tribal governments, which "gained experience in planning and running their own programs."[178] They served as a model for a new approach to federal Indian policy, which emphasized tribal self-determination rather than the termination of tribal governments and assimilation of individual tribal citizens into mainstream American society.[179]

Since the 1970s, Congress and the Executive Branch have adopted and implemented this new approach, known as the Tribal Self-Determination Policy. This policy committed the United States "to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities."[180] This bipartisan policy supports Indian Nations as governments with inherent sovereign powers, not delegated or granted by the United States, and separate from the states; recognizes federal responsibilities to Indian tribes through the trust relationship; and invites tribal governmental participation in federal policymaking.[181] Congress has implemented the policy through legislation, starting with the Indian Self-Determination and Education Assistance Act, which allows money to flow directly to tribal governments, bypassing the BIA and the states, and enables Native Nations to make important decisions regarding the services provided in their communities.[182]

---

[175] The ability of LSC funded legal services programs, including the Indian programs, to use legislative strategies diminished greatly when a change in the regulations curtailed their ability to lobby.

[176] *See* Kirsten Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 BYU L. Rev. 1159 (2018); Kirsten Matoy Carlson, *Bringing Congress and Indians Back into Federal Indian Law: The Restatement of the Law of American Indians*, 97 Wash. L. Rev 725 (2022). For a discussion of how confrontational politics, including AIM and the Red Power Movement, set the stage for these changes in federal politics, *see* E. Fletcher McClellan, The Politics of American Indian Self-Determination, 1958–75: The Indian Self-Determination and Education Assistance Act of 1975 (Dec. 1988) (Ph.D. dissertation, University of Tennessee, Knoxville) (ProQuest).

[177] Kirsten Matoy Carlson, *Lobbying Against the Odds*, 56 Harv. J. on Legis. 23, 57–60 (2019).

[178] *Id.* at 57.

[179] For a history of this change in policy, *see id.* at 57–60.

[180] 25 U.S.C. § 5302.

[181] Carlson, *Bringing Congress and Indians Back*, *supra* note 176, at 731–41.

[182] Fletcher, *Mamengwaa*, *supra* note 31, at 11 (noting that self-determination contracting allows tribal governments great leeway in developing programs from the ground up).

Native advocacy based on a sovereignty empowerment approach has contributed to the enactment of federal legislation that expands and enhances the Tribal Self-Determination Policy.[183] For example, Congress has recognized the importance of tribal self-determination in the delivery of healthcare through the Indian Healthcare Improvement Act of 1976;[184] ensured tribal control over the placement of Indian children in the Indian Child Welfare Act of 1978;[185] treated tribal governments like other governments for tax purposes in the Indian Tribal Government Tax Status Act of 1982;[186] and fostered the development of tribal legal systems in the Indian Tribal Justice Act of 1993,[187] the Indian Tribal Justice Technical and Legal Assistance Act of 2000,[188] and the Tribal Law and Order Act of 2010.[189]

Sovereignty empowerment arguments lie at the heart of many of these federal laws.[190] Consider the Indian Child Welfare Act (ICWA) as an example.[191] The ICWA recognizes the government-to-government relationship Native Nations have with the United States. It clarifies which government – state or tribal – has jurisdiction over foster care placements, preadoptive placements, termination of parental rights and adoptive placements of Indian children.[192] The ICWA codifies tribal courts' exclusive jurisdiction over an Indian child's placement, including whether the child is removed from their family in the first place, when an Indian child lives or is domiciled on a

---

[183] Carlson, *Bringing Congress and Indians Back*, *supra* note 176, at 731–41; Wilkins & Stark, *supra* note 59; Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 Conn. L. Rev. 1251 (1995). My previous work has documented the tremendous success that tribal governments have had in advocating for the restoration of their sovereignty in Congress. Tribal governments and organizations have emerged as central players in the federal lawmaking process, often shaping legislation related to them. *See* Carlson, *Lobbying as a Strategy for Tribal Resilience*, *supra* note 176, at 1177–220 (documenting how tribal governments have influenced federal legislation to protect and/or extend tribal sovereignty); Carlson, *Beyond Descriptive Representation: American Indian Opposition to Federal Legislation*, 7 J. of Race, Ethnicity, & Politics 65, 74–82 (2022) (showing how unified tribal opposition undermines the enactment of federal legislation and encourages its amendment).

[184] *See, e.g.*, Indian Healthcare Improvement Act of 1976, 25 U.S.C. §§ 1601–1603; Tribally Controlled Schools Grants Act of 1988, 25 U.S.C. §§ 2501–2511.

[185] 92 Stat. 3069 (1978) (current version codified at 25 U.S.C § 1901).

[186] Pub. L. No. 97–473, 96 Stat. 2605 (1982).

[187] Pub. L. No. 103–176, 107 Stat. 2004 (1993).

[188] Pub. L. No. 106–559, 114 Stat. 2778 (2000).

[189] Pub. L. No. 111–211, 124 Stat. 2258 (2010).

[190] For a discussion of the federal laws that recognize tribal sovereignty, see Carlson, *Bringing Congress and Indians Back*, *supra* note 176, at 738–39.

[191] The existence of sovereignty empowering legislation, however, does not necessarily reduce the pressure for tribal governments to assimilate to Western forms. *See* Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 Colum. J. Race. & L. 681, 696–97 (2021) (discussing pressures on tribal governments to adopt Western child welfare practices despite ICWA).

[192] 25 U.S.C. § 1903 (defining child custody proceedings covered by ICWA), § 1911 (establishing which government has jurisdiction over child custody proceedings involving an Indian child).

reservation or is a ward of the tribal court.[193] Tribal and state governments have concurrent jurisdiction over the placements of Indian children that are not residing or domiciled on a reservation. If the case is initially in state court, the ICWA facilitates notice to and involvement by the tribal governments related to the child. It requires that the state court transfer child welfare cases to the tribal court at the request of the tribal government or a parent unless the state court can show good cause.[194]

The ICWA illustrates the sovereignty empowerment approach because it recognizes the authority of the tribal government to empower its citizens. Its enactment attempted to address decades of trauma suffered by Natives due to the loss of connection with their families and cultures that they experienced when state social welfare agencies permanently removed them from their homes without evidence of harm or neglect.[195] The forced separation of Native children increased the likelihood that they struggled with adverse health and social outcomes, including addiction, poverty, homelessness, and violence.[196] The ICWA provided tribal governments with the opportunity to prevent future generations from facing these social problems (and the legal problems cascading from them) through the exercise of jurisdiction over child custody proceedings. Tribal governments can now maintain relationships with their children and help empower them as Native individuals, which research shows reduces their risks for chronic social and economic problems.[197]

---

[193] 25 U.S.C. § 1911(a). The ICWA does not apply to custody disputes among parents. It defines an Indian child as a citizen of or eligible for enrollment as a citizen in a tribal nation. 25 U.S.C. § 1903(4).

[194] 25 U.S.C. § 1911. The ICWA also establishes uniform standards for state courts to follow when they decide Indian child welfare cases. These standards include provisions that ensure that tribal governments are aware of and can have a say in the placement of Indian children. They aim to reduce the trauma of family and tribal separation by instructing courts to make active efforts to keep families together. These standards include recommending courts place children with their relatives—either Indian or non-Indian—someone in their tribe, or an Indian family if possible. *See* 25 U.S.C. § 1915.

[195] *See Indian Child Welfare Act*, Child Welfare Information Gateway, https://www.childwelfare.gov/topics/tribal-child-welfare/indian-child-welfare-act/ (last visited Mar. 3, 2024); Christie Renick, *The Nation's First Family Separation Policy*, The Imprint (Oct. 9, 2018), https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431 [https://perma.cc/8V97-8UGP]; H. R. Rep. No. 1386 (1978) (documenting that between 25 to 35 percent of Indian children were removed from their homes and 90 percent were placed in non-Native homes); Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (recounting high rates of Native children removed from their homes in South Dakota, Montana, and Minnesota that led to the ICWA's enactment).

[196] Brief of the American Academy of Pediatrics and American Medical Association as Amici Curiae in Support of Respondents, *Haaland v. Brackeen*, 599 U.S. 255 (2023) (No. 21-376), 2022 WL 3701711, at *9–15; Pun Plamondon, Lost from the Ottawa: The Story of Journey Back, a Memoir (2004).

[197] Matthew L.M. Fletcher & Wenona Singel, *Lawyering the Indian Child Welfare Act*, 120 Mich. L. Rev. 1756 (2022); Brief of the American Academy of Pediatrics, *Brackeen*, *supra* note 191.

Native advocacy for sovereignty empowerment has also contributed to the shift in Congress and the Executive Branch from diminishing tribal authority to emphasizing the importance of expanding it.[198] Congress has not terminated a single tribal government in the past fifty years.[199] Nor has Congress enacted any pan-tribal bills proposing to strip tribal governments of jurisdiction or sovereign immunity.[200] Some members of Congress continue to introduce these bills, but Congress does not hold hearings on the majority of proposed bills that include provisions that would limit the authority or jurisdiction of all tribal governments.[201]

---

[198] Carlson, *Bringing Congress and Indians Back*, *supra* note 176, at 730–41.

[199] In contrast, Congress has extended federal recognition to 39 tribes in the past fifty years. For a discussion of Congress's role in recognizing Native communities. *See* Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 Ind. L.J. 955 (2016).

[200] *See, e.g.*, Native Americans Equal Opportunity Act, H.R. 13329, 95th Cong. (1978) (proposing to abrogate Indian treaties, break up communal assets, and terminate special services guaranteed to Indians); Ancient Indian Land Claims Settlement Act of 1982, H.R. 5494, 97th Cong. (1982) (proposing to ratify the transfers of land or natural resources within the States of New York or South Carolina, which were made on behalf of an Indian Tribe); To abrogate off-reservation, usufructuary rights of Indian tribes to hunt, fish, and gather in the state of Wisconsin, H.R. 3034, 100th Cong. (1987); ICRA Amendments of 1998, S. 2747, 100th Cong. (1998) (granting jurisdiction over ICRA claims to federal courts and waives tribal sovereign immunity); A Bill To Abrogate Off-Reservation, Usufructuary Rights Of Indian Tribes To Hunt, Fish, And Gather In The State Of Wisconsin, H.R. 2058, 101st Cong. (1989); To amend the Indian Child Welfare Act of 1978, H.R. 1448, 104th Cong. (1995); Indian Civil Rights Enforcement Act, S. 2298, 105th Cong (1998) (proposing to grant jurisdiction over ICRA claims to federal courts and waive tribal sovereign immunity); American Indian Equal Justice Act, S. 1691, 105th Cong. (1998); Tribal Environmental Accountability Act, S. 2301, 105th Cong. (1998) (proposing to waive tribal sovereign immunity for some federal environmental laws); American Indian Contract Enforcement Act, S. 2299, 105th Cong. (1998) (proposing to give federal courts jurisdiction over tribal claims and waiving tribal sovereign immunity); American Indian Tort Liability Insurance Act, S. 2302, 105th Cong. (1998) (proposing to give federal courts jurisdiction over tort claims against tribes and waiving tribal sovereign immunity); Indian Gaming Tax Reform Act, H.R. 1554, 105th Cong. (1998); Indian Child Welfare Act Amendments of 1999, S. 1213, 105th Cong. (1999); Emergency Supplemental Appropriations Act for Fiscal Year 1999, S. 544, 106th Cong. (1999) (preventing Secretary of Interior from promulgating regulations allowing for tribal gaming without a state-tribal compact); Tobacco Smuggling Eradication Act, H.R. 2503, 106th Cong. (1999); To sever United States' government relations with the Cherokee Nation of Oklahoma until such time as the Cherokee Nation of Oklahoma restores full tribal citizenship to the Cherokee Freedmen disenfranchised in the March 3, 2007, Cherokee Nation vote and fulfills all its treaty obligations with the Government of the United States, and for other purposes, H.R. 2761, 111th Cong. (2009); A bill to abrogate the sovereign immunity of Indian tribes as a defense in inter partes review of patents, S. 1948, 115th Cong. (2017); To sever United States Government relations with the Creek Nation of Oklahoma until such time as the Creek Nation of Oklahoma restores full Tribal citizenship to the Creek Freedmen disenfranchised in the October 6, 1979, Creek Nation vote and fulfills all its treaty obligations with the Government of the United States, and for other purposes, H.R. 4673, 117th Cong. (2021). See also Carlson, *Congress and Indians supra* note 176, at 738–39

[201] The few bills that include limits on tribal authority that do receive hearings are often tribe-specific bills that have the support of the tribal government to be affected by the bill. For examples of water rights settlements in which Congress has limited tribal rights, *see, e.g.*, Salt River Pima-Maricopa Water Rights Settlement Act, Pub. L. No. 100–512, 102 Stat. 2549 (1988); Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108–34, 117 Stat. 782 (2003); Claims Resolution Act of 2010, Pub. L. No. 111–291, 124 Stat. 3064 (2010) (White Mountain Apache and Crow Tribe Water Rights Settlements); Bill Williams River Water Rights

The cornerstone of the sovereignty empowerment approach, the Tribal Self-Determination Policy, has received bipartisan support for almost 50 years and been expanded repeatedly because it has led to positive outcomes for Natives and non-Natives. Scholars and tribal leaders have praised it as the most successful Indian affairs policy ever established by Congress.[202] Empirical studies by the Harvard Project on American Indian Economic Development and others have repeatedly shown that the adoption, implementation, and expansion of the Tribal Self-Determination Policy is a central causal factor in economic and social improvements in Native communities.[203] It has contributed to the diversification of tribally owned and operated businesses, rapid growth in per capita incomes among tribal citizens on reservations, and dramatic improvements in the delivery of social services on reservations.[204] Their research suggests that sovereignty empowerment leads to individual empowerment—at least in terms of standard social and economic measures.

Settlement Act of 2014, Pub. L. No. 113–223, 128 Stat. 2096 (2014) (Hualapi Tribe). For a discussion of federal recognition bills that propose to limit tribal jurisdiction and/or authority, see *generally* Kirsten Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 Ind. L. Rev. 955 (2016).

[202] Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination*, Joint Occasional Papers on Native Affairs 1, 26 (2010) (working paper); Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 Conn. L. Rev. 777, 780 n.20 (2006); Johnson & Hamilton, *supra* note 183, at 1.

[203] Cornell & Kalt, *supra* note 202, at 1, 10; Joseph P. Kalt, Harv. Univ. Native Am. Program & Harv. Proj. on Am. Indian Econ. Dev., Policy Foundations for the Future of Nation Building in Indian Country (2001), https://indigenousgov.hks.harvard.edu/publications/policy-foundations-future-nation-building-indian-country [https://perma.cc/6DEH-3QX6]; Randall Akee, *Forty Years Ago We Stopped the Practice of Separating American Indian Families: Let's Not Reverse Course*, Brookings Inst., Oct. 11, 2018, https://www.brookings.edu/articles/40-years-ago-we-stopped-the-practice-of-separating-american-indian-families-lets-not-reverse-course/ [https://perma.cc/G483-Z3ZZ] ("My research has failed to uncover a single example of how removing control, jurisdiction, or authority from tribal governments improves outcomes for the AIAN population. While tribal governments are not perfect by any means, it cannot be shown with any credibility that removal of tribal government authority has improved outcomes for the American Indian population—not in policing, governance, education policy, environmental protection, or civil jurisdiction—and certainly not for child welfare.").

In contrast, the few studies of federal laws undercutting tribal jurisdiction and subjecting tribal governments and their citizens to state laws show that these federal laws have adverse impacts on social and economic conditions. *See* Valentina Dimitrova-Grajzl, Peter Grajzl, & A. Joseph Guse, *Jurisdiction, Crime, and Development: The Impact of Public Law 280 in Indian Country*, 48 Law & Soc. Rev. 1, 127–60 (2014) (finding that the application of P.L. 280 increased crime and decreased incomes in Native communities affected by the law); Goldberg, *supra* note 96, at 1; Joseph Kalt, Amy Besaw Medford, & Jonathan B. Taylor, Economic and Social Impacts of Restrictions on the Applicability of Federal Indian Policies to the Wabanaki Nations in Maine, Harv. Project on Am. Indian Econ. Dev. (2022), https://ash.harvard.edu/publications/economic-and-social-impacts-restrictions-applicability-federal-indian-policies [https://perma.cc/8MPB-RFP2] (finding that federal legislation allowing the state of Maine to limit the applicability of many of the programs enacted under the Tribal Self-Determination Policy to the Wabanaki Tribes has undermined economic development in the state of Maine generally and had negative economic and social impacts on both Natives and non-Natives).

[204] Cornell & Kalt, *supra* note 202, at 7, 13; Kalt, Medford, & Taylor, *supra* note 203.

C. Continued Barriers to Sovereignty

The sovereignty empowerment approach to access to justice eroded settler colonialism and restored some aspects of tribal sovereignty to tribal governments, but it has not been a panacea.[205] It has yet to fully dismantle settler colonialism. Tribal governments continue to exist at the sufferance of the United States. Congress and the Supreme Court maintain that they have the power to determine the metes and bounds of tribal sovereignty, including the jurisdiction of tribal courts.[206] Tribal leaders and advocates know that more work has to be done.

The sovereignty empowerment approach has led to federal laws more supportive of tribal governments and tailored to meet the needs of Native peoples, but the federal government has failed to fund many of these laws. This lack of funding greatly limits the ability of tribal governments to exercise their authority and provide programs to their communities. For example, Congress emphasized the importance of tribal justice systems by passing the Indian Tribal Justice Act of 1993. The act included authorization for an appropriation of $58.4 million per year[207] but Congress did not appropriate any of the funds, leaving tribal justice systems without resources.[208] Tribal justice systems remain underfunded despite congressional reports revealing that tribal court weaknesses stem from low levels of funding.[209]

Moreover, federal laws that recognize tribal sovereignty often mandate that tribal governments have adversarial courts that provide procedural protections to litigants that reflect Anglo-American understandings of justice.[210]

---

[205] Many criticisms exist of the sovereignty empowerment approach and its focus on improving access to justice by reforming federal laws and policies. Deer, *supra* note 122, at 96 ("I recognize a fundamental problem with federal law reform, because it requires a tribe to petition the colonizing government to ask for help for a problem that the colonizer created, to ask for a solution that will be on the colonizer's terms. The federal government is the source of the problem, so why would we expect it to be the source of the solution?"); Kirsten Matoy Carlson, *Statutes and Special Interests* (forthcoming) (noting that working within Congress may impede more radical efforts at structural reform of the settler colonial system); van Schilfgarde, *supra* note 51, at 26–27 (arguing that tribal communities should focus on their own resurgence and solutions rather than turning to a colonizing government).

[206] Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 853 (1985); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16–17 (1987); Strate v. A-1 Contractors, 520 U.S. 438, 446, 454 (1997); Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 327 (2008).

[207] For a discussion of the act and its provisions, *see* Joseph A. Myers and Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future*, 79 Judicature 147 (1995).

[208] The Navajo Nation criticized Congress for not appropriating the funds in its testimony on the Tribal Justice Technical and Legal Assistance Act of 2000. *Hearing on S. 1508 Before the Subcomm. on Indian Affairs*, 106th Cong. 24 (1999) (testimony of Taylor McKenzie, Vice President, Navajo Nation).

[209] U.S. Comm'n on Civ. Rts., The Indian Civil Rights Act, 72, 73 (Government Printing Office 1991).

[210] The irony of federal statutes intended to decrease injustice creating more injustice has not gone unobserved. *See* Vincenti, *supra* note 66, at 135 ("America, in its attempts to correct what it perceives as injustice in Indian America, creates a greater injustice by forcing its culture on Indian peoples.").

A major benefit of the sovereignty empowerment approach to access to justice is that it should enable the Native Nation to decide its own laws and use its own systems to regulate behavior, resolve disputes, and provide for the needs of the community. As discussed in Part I, many tribal governments either had federal and state laws imposed on them or extensively borrowed from them in creating their judicial systems, but these laws do not necessarily reflect the community's values.[211] The imposition of laws that are not organic to a community may "legalize" problems that the community would rather resolve in non-legal ways.[212] Under the sovereignty empowerment approach, Native communities that prefer their own dispute resolution systems or not to legalize certain relationships should be able to make those choices for themselves. Yet, as discussed in Part I, many of the federal statutes enacted to restore tribal jurisdiction often impose federal standards and thus, mandate that tribal governments provide "justice" as defined by the federal government.[213]

Despite these limitations, the sovereignty empowerment approach remains dominant in federal Indian law,[214] largely because of its demonstrated success in improving social and economic conditions in Indian Country. An evaluation of the success of the approach is beyond the scope of this article, but it is worth considering what scholars and practitioners know and still need to know about the success of this approach. Existing evidence shows that sovereignty empowerment has: (1) dramatically changed federal Indian law; and (2) that these changes in the law have led to the institutional and economic development of some tribal governments and to improvements in social and economic conditions in some Native communities. Empirical studies, however, have yet to examine whether, when, and how federal laws enacted to empower tribal sovereignty have affected access to justice—either traditionally defined as access to lawyers and courts or as defined by Native communities themselves. The following Part presents some initial insights into the state of access to justice in Native communities in the wake of sovereignty empowerment efforts and identifies areas for additional research.

---

[211] Laws and legal problems are socially constructed. *See* Patricia Ewick and Susan S. Sibley, The Common Place of Law: Stories from Everyday Life 18 (Univ. of Chicago 1998); William L.F. Felstiner, Richard L. Abel, and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . . , 15 Law & Soc. Rev. 631 (1980). The imposition of federal laws on tribal communities undermines the ability of the community to determine its own laws.

[212] Sandefur, *What We Know*, *supra* note 6, at 449 (discussing situations in which people prefer not to view their problems in legal terms).

[213] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258; Violence Against Women Act of 2013, 42 U.S.C. §136; Violence Against Women Act of 2022, 42 U.S.C. §136.

[214] van Schilfgaarde, *supra* note 51, at 110 ("For tribes, the contemporary answer to historical oppression is self-determination.").

III. The Shifting Terrain of Access to Justice on the Ground as Tribal Governments Exercise their Sovereignty

How has the pursuit of the sovereignty empowerment approach affected access to justice on the ground in Native communities? This Part offers some preliminary observations about how the changes in Indian Country due to the shift in federal Indian policy have affected access to justice on the ground in Native communities. It calls for and identifies lines of potential inquiry for future empirical research on access to justice in Indian Country.

A. Continuing Access to Justice Issues in Native Communities

Many Native Nations experienced dramatic transformations in the twentieth century. Fifty years ago, the federal government administered social, educational, and welfare programs in Indian Country.[215] Most tribal governments did not have their own police forces, courts, or health clinics.[216] If they had them at all, the BIA or the Indian Health Service (IHS) ran them.[217] Living conditions in many Native communities were deplorable. In Michigan, for example, Indians lived in homes insulated with newspaper and cardboard, heated by wood stoves and without running water well into the 1970s.[218]

Today, tribal governments operate law enforcement agencies to ensure public safety, offer traditional and Western-style medical care to community members in their tribal health clinics, monitor environmental quality standards and manage natural resources through their departments of natural resources, teach children in their native languages in tribal education programs, and provide tribal courts to resolve civil disputes between members

---

[215] *See* Reid Peyton Chambers, *Reflections on the Changes in Indian Law, Federal Indian Policies and Conditions on Indian Reservations since the Late 1960s*, 46 Ariz. St. L.J. 729, 734–35 (2014) (noting that the Bureau of Indian Affairs "controlled many, perhaps most, actions by tribes and reservation Indians").

[216] *See, e.g.*, Donald L. Fixico, *Witness to Change: Fifty Years of Indian Activism and Tribal Politics, in* Beyond Red Power: American Indian Politics and Activism Since 1900 2, 8 (Daniel M. Cobb and Loretta Fowler eds., 2007) ("During the first fifty years of the twentieth century, Native people had limited influence. The Bureau of Indian Affairs controlled their lives. As we say, BIA stood for 'Boss Indians Around.'").

[217] *Id.*; Chambers, *supra* note 215, at 734–35; Warren H. Cohen & Philip J. Mause, *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1818, 1820 (1968) ("Although the normal expectation in American society is that a private individual or group may do anything unless it is specifically prohibited by the government, it might be said that the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the government.").

[218] *See* Matthew Fletcher, The Eagle Returns: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians 166 (2012).

and nonmembers, including employment, child welfare, housing, torts, contracts and crimes committed by Indians.[219]

This transformation reflects the cumulative effects of federal legislation enacted in response to the sovereignty empowerment approach.[220] Many tribal governments seek to effectively govern their peoples and territories, but they do so in the shadow of colonialism.[221] The needs of tribal communities are great, including intergenerational trauma, loss of culture, poverty, substance abuse, violence, and a lack of adequate services.[222] Addressing, much less improving, living conditions for Native communities is not easy.[223] Tribal governments are reclaiming and rebuilding their institutions and revitalizing their communities. Many tribal governments legislate, adjudicate, tax, contract, police, and provide programs and services to their communities.[224] They have institutionalized procedures and practices through tribal codes and court decisions.[225] Tribal governments have to make hard decisions about how to structure programs and provide services often with limited resources. They do so knowing that their decisions may be scrutinized not only by their citizenry but by federal and state governments.[226]

Tribal governments have confronted various access to justice issues as they have developed their governing institutions. Relationships and power dynamics among tribal governments and their citizens are changing as tribal governments take on responsibilities for law enforcement, child welfare,

---

[219] Programs and services vary greatly by tribe.

[220] Nesper, *supra* note 89, at 675–76.

[221] *Id*. at 676. (discussing "the development of extensive tribal bureaucracies deeply articulated with both federal and state agencies").

[222] van Schilfgaarde, *supra* note 51, at 108. ("The needs of Tribal communities are vast, and the many issues they face include mounting intergenerational drama and cultural loss couple with urgent and constant crises of violence, substance abuse, and child maltreatment, among many others.").

[223] Lorna June McCue, *Treaty-Making from an Indigenous Perspective: A Ned'u'ten-Canadian Treaty Model, in* Justice as Healing 23, 23 (Wanda D. McCaslin, ed.) (2005) ("Self-determination can be a painful process when your people are already in pain."); Deer, *supra* note 122, at 98 ("[W]hen people are hurting, they cannot effectively govern themselves or provide guidance and support for the children in the community.").

[224] Nesper, *supra* note 89, at 676 supra("As a result of these congressional acts and court decisions, tribes are now legislating and adjudicating, supervising public health, taxing and policing, managing health clinics and housing authorities, autonomously removing and placing children, certifying membership and marriages, establishing businesses, contracting for federal programs, negotiating with state agencies, exercising broad and exclusive territorial and personal jurisdiction, sponsoring express cultural productions, and placing monuments.").

[225] Many tribal governments relied on Indian legal services programs throughout the 1990s to draft constitutions and tribal codes. Moore, *supra* note 150, at 1. Today, most have their own in-house counsel and no longer rely on or qualify for legal services.

[226] Many scholars have discussed this tension in terms of tribal courts. Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 Judicature 110, 111 (1995) ("Tribal courts must strive to respond competently and creatively to federal and state pressures coming from outside, and to cultural values and imperatives from within."). This tension is not limited, however, to tribal courts and extends to many other actions taken by Tribal governments.

housing, and other services, previously provided by state or federal governments.[227] Jurisdiction over these areas has and continues to shift from state and federal governments to many tribal governments. Tribal governments now address many of the pressing social needs in their communities.[228] They run child protective services, law enforcement, housing, and other social services programs. Many have borrowed from state and federal practices in organizing and operating tribal programs. This borrowing often includes reliance on the legal system in their provision of social services.[229] Replication of state run programs or practices by tribal governments may lead to conflicts between tribal governments and their citizens that did not exist when the state or federal government administered those programs.

Consider child welfare as an example.[230] If a tribal government borrows child welfare laws and practices from the state, they may conflict with traditional child raising practices and expectations.[231] Many states rely on the legal system to enforce child welfare laws and bring civil actions to remove children from parents suspected of neglecting them.[232] Some tribal governments may feel compelled to adopt these practices even if they do not reflect the community's values because the tribal government wants to appear legitimate to state and federal governments[233] or because it relies on federal

---

[227] Nesper, *supra* note 89, at 675–76; Bruce G. Miller, The Problem of Justice: Tradition and Law in the Coast Salish World 11 (2000).

[228] Social needs "captures the range of needs (including those that some might characterize as economic) that are inextricable from racial, economic, and gender inequality." Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 Colum. L. Rev. 1471, 1477 (2022).

They are distinguishable from legal needs because there is no "underlying assumption that people should engage the legal system to resolve" them. *Id*. In contrast, "a legal need is a justice problem that a person cannot handle correctly or successfully without some kind of legal expertise." Sandefur, *supra* note 6, at 451.

[229] States often rely on the legal system in the provision of social services. Shanahan et al., *supra* note 228, at 1474–75 (finding that state civil courts often address social needs because the executive and legislative branches have failed to do so).

[230] Another example is tribal governments adopting probation codes and practices similar to states. Some tribal citizens experience probation as the tribal government exercising control over them rather than helping them to meet their social needs or resolve a problem. Interview with Tribal Community Member (July 2023) (on file with author).

[231] The traditional childrearing practices in many Native communities differ considerably from Western ones. Best Start Res. Ctr., A Child Becomes Strong: Journeying Through Each Stage of the Life Cycle (2010); van Schilfgaarde & Shelton, *supra* note 186, at 702–05.

[232] Shanahan, Steinberg, Mark, & Carpenter, *supra* note 228, at 15–19 ("It is hard to conceive of a more violent state act than the removal of a child from a parent"); Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 Fam. Ct. Rev. 453, 453 (2002); Vivek Sankaran, Christopher Church, & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Child Removal on Children and Their Families*, 102 Marq. L. Rev. 1161, 1194 (2019); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523, 579–80 (2019).

[233] Vine Deloria, Jr. explained the situation that tribal governments find themselves in: "We're being asked to import institutions and procedures that are wholly foreign to Indian communities and that are not working in white communities either." Vine Deloria, Jr., Keynote Address at the 9th National Indian Nations Conference: Justice for Victims of Crime, Palm Springs, Cal. (Dec. 10, 2004).

funding to support these services.[234] A lack of resources may leave a tribal government with little choice but to accept federal funding and implement the policies mandated by the federal government even if they disagree with them or think they do not serve their community well.[235]

At the same time, the tribal government may undermine its credibility with its own citizens by adopting the practices and policies required by the federal government. When the tribal government follows Anglo-American practices, the tribal government replaces the state government as the entity enforcing child welfare laws and commencing abuse and neglect cases against tribal citizens.[236] It steps into a role, traditionally held by the state and viewed as oppressive by many Native people. Many Natives continue to live with trauma and family disruption from federal policies that removed children from their homes and placed them in boarding schools or facilitated their adoption by non-Natives. Tribal citizens may resist a tribal government's actions if they resemble prior federal and state practices. They may see the situation as about their social needs and not as a legal issue.[237] Tribal citizens may question why the tribal government has legalized the issue rather than informally provided support services to the family.[238] They may

---

[234] Similar to tribal justice systems, *see* Part I, *supra*, tribal child welfare systems often rely on federal funding that requires that they adopt Anglo-American child welfare practices. Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 Colum. J. Race & L. 681, 696–702 (2021) (describing how federal funding streams require tribal child welfare systems to adopt outdated practices based on a Western model of child welfare).

Other social services are structured the same way with funding to tribal governments dependent upon compliance with federal laws. For example, if a tribal government receives HUD money for tribal housing, it has to comply with HUD rules even though these rules may exacerbate homelessness within the tribal community by preventing the tribal government from offering housing to citizens with prior criminal records. The HUD housing rules also often conflict with traditional Native practices, such as taking in relatives in need of housing. As one tribal community member told me, these rules demonstrate why adopting the white way doesn't work in Native communities. Interview with Tribal Community Member (Feb. 2024) (on file with author).

[235] *See id.* at 698–99.

[236] Scholars have noted the violence inherent in this approach to child welfare and familial social needs. Shanahan, Steinberg, Mark, & Carpenter, *supra* note 137, at 1518–19 ("It is hard to conceive of a more violent state act than the removal of a child from a parent"); Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 Fam. Ct. Rev. 453, 453 (2002); Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Child Removal on Children and Their Families*, 102 Marq. L. Rev. 1161, 1194 (2019); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523, 579–80 (2019). van Schilfgaarde & Shelton note that federal "funding requires the termination of parental rights if a child has been in foster care for fifteen out of the last twenty-two months." van Schilfgaarde & Shelton, *supra* note 75, at 701 (citing 42 U.S.C. § 675(5)€. This practice conflicts with ICWA's emphasis on reunification as well as many Tribal philosophies about childrearing and familial relationships. *Id.*

[237] Professor Sandefur's research has shown that many people do not identify their problems, including their social needs, as legal. Sandefur, *supra* note 6443–44.

[238] *See* Nesper, *supra* note 89, at 676, 675–76 (observing that traditional values associated with family and kinship inform the expectations that tribal citizens have for tribal governments).

have expected the tribal government to treat them like family rather than use an adversarial process against them.[239]

This change in the relationship between the tribal governments and their citizens affects access to justice in Native communities. The unmet legal needs in the Native communities have changed. Most tribal governments no longer rely on Indian legal services programs to draft codes, defend tribal rights in federal or state courts, or seek federal recognition. Individual Indians, however, continue to need representation. Their needs for representation have shifted. In the 1970s, tribal citizens often found themselves fighting injustices against the state and federal government *alongside* tribal governments. Today, individual Natives still find themselves encountering injustices perpetrated by state and federal governments but may also face a tribal government pursuing a civil or criminal case against them. They may need representation in tribal court or legal advice to deal with tribal agencies. Tribal governmental evolution, and adoption of state and federal systems, has not necessarily decreased the legal needs in Native communities or the justiciable events experienced by tribal citizens. Instead, tribal citizens may more frequently need individual representation in federal, state, and tribal courts.

B. Tribal Innovations to Access to Justice in their Communities

The challenge for tribal governments lies in how not to recreate the access to justice problems plaguing the United States more generally.[240] As discussed in Part I, tribal governments walk a tightrope between federal laws mandating Anglo-American style justice and the needs and desires of their communities. Tribal governments have pursued innovative solutions to address access to justice issues within the constraints in which they operate.[241] These innovations vary tremendously by tribal government. This section discusses some of the ingenious ways that tribal governments, and tribal justice systems in particular, have devised to increase access to justice within their communities.[242]

---

[239] *Id*.

[240] Goldberg, *Individual Rights*, *supra* note 96, at 915. Goldberg argues that this may require the restructuring of tribal governments to avoid conflicts between individual rights and tribal governments. *Id.* ("More importantly, tribal communities may want to examine not only the role of Anglo-American individual rights within their court systems, but also whether their governing systems should be redesigned to minimize possibilities for perceived abuse of individual rights.").

[241] Miller, *supra* note x, at 7–10 (describing three different innovative justice initiatives tried by Coastal Salish tribes).

[242] Indian legal services programs have also adjusted to the changes in Indian Country by increasingly providing representation to Natives in tribal, state, and federal courts. Indian legal services programs have never been able to meet the unmet legal needs in Indian Country. Underfunding continues to limit their ability to provide services. Eric Dahlstrom & Randolph Barnhouse, Legal Needs and Services in Indian Country 4–5 (1998); 2008 NAILS Update at 1. Some contract with tribal governments as well, which allows them to represent

Some tribal governments have acknowledged the need for legal services for their communities and worked towards ensuring that tribal citizens have representation in tribal courts. Some have adopted tribal codes that provide representation to their tribal citizens in child welfare and criminal proceedings.[243] Others have judges that liberally appoint counsel, regardless of whether the litigant could afford it.[244] Still others contract with Indian legal services programs to provide representation for their citizens and community members or have used Indian legal services programs as court appointed attorneys in criminal and child welfare cases.[245]

Another way that tribal governments have sought to address access to justice in their communities is by re-evaluating and revising their justice systems. Many tribal courts are still in their formative stages and continue to evolve over time.[246] Some tribal governments have replaced the CFR codes and courts imposed on them with more culturally appropriate ones.[247] Others have brought traditional practices and customs into tribal courts modeled after Anglo-American adversarial systems.[248]

Efforts to incorporate Native traditions into tribal judicial systems vary greatly and have yet to be systemically studied and evaluated. Anecdotal evidence suggests that some tribal governments have started to depart from federal and state models both in drafting their laws and in structuring their judicial systems.[249] Many add flexibility or traditional values into their court processes or codes.[250] For example, some tribal codes depart from state child

---

tribal citizens even if they do not meet the poverty guidelines established by the LSC. *See, e.g.*, *Southwest Michigan Tribal Contracts*, Mich. Indian Legal Servs., https://www.mils3.org/client-services/southwest-michigan-tribal-contracts [https://perma.cc/CQA9-HVSM] (last visited Mar. 3, 2024). A few have shifted their practices to emphasize representation in tribal court because states appoint lawyers to tribal citizens in child welfare and criminal cases. A focus on tribal court representation, while justified due to the shortage of lawyers with tribal law expertise, leaves many Natives without representation in state and federal courts.

[243] Pokagon Band Child Protection Code § 5(B) (2023).

[244] Interview with Tribal Judge (Nov. 2023) (on file with author); Interview with Tribal Judge (Jan. 2024) (on file with author).

[245] *See Southwest Michigan Tribal Contracts*, *supra* note 242.

[246] Some tribal courts have only existed for twenty to thirty years so they remain in the formative stages of development.

[247] *See* Getches et al., *supra* note 86, at 477.

[248] Interview with Tribal Judge (Jan. 2024) (on file with author); Interview with Court Administrator (July 2023) (on file with author); Interview with Tribal Judge (July 2023) (on file with author).

[249] *See* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*. 84 U. Colo. L. Rev. 59, 71–95 (2013).

[250] Few studies have investigated the extent to which tribal courts incorporate tradition into their processes. Russell Barsh attempted to examine the frequency and ways in which tribal courts have shifted towards tradition, but encountered problems generating a viable sample. Barsh, *supra* note 109, at 77–81. Barsh expressed serious concerns about tribal courts saying that they were following tradition or reciting boilerplate language about it while continuing to act in adversarial ways. *Id.* A more recent study found that tribal courts do not determine their jurisdiction by following the test for civil jurisdiction established by the U.S. Supreme Court in *Montana*. Jacob Maiman-Stadtmauer, *A Jurisprudential Quilt of Tribal Civil Jurisdiction:*

welfare codes that mandate termination of parental rights after a certain number of months and encourage ongoing efforts to reunite the family.

Some tribal governments have implemented alternatives to Anglo-American adversarial courts as a way to facilitate justice in their communities that more accurately reflects Native views of justice.[251] Many tribal courts have adopted specialized courts, such as Drug Courts or Healing to Wellness Courts, to promote healing among their citizens.[252] Healing to Wellness Courts replace traditional punitive approaches to criminal infractions with integrated mental health and substance abuse treatment for offenders as a way to help individuals make restitution and return to their community.[253] Some tribal judicial systems have also adopted peacemaking or circle keeping to resolve conflicts in more community based, non-legal ways.[254] Peacemaking and talking circles vary by community in terms of

An Analysis of Tribal Court Approaches to Determining Civil Adjudicatory Jurisdiction, 11 Am. Ind. L.J. 1, 1 (2022) (finding that tribal courts do not follow the *Montana* test in determining their own civil adjudicatory jurisdiction). For a more recent discussion of tribal court decisions incorporating tribal traditions, *see* Fletcher, *supra* note 249, 71–95.

Nesper suggests that the informality of tribal court processes can undermine access to justice by placing unfair burdens on unrepresented litigants. Nesper, *supra* note 89, at 681 ("Here, the informality of the court, permitting self-representation, works against the interests of the defendants in that they are the only people in the courtroom who must both interrogate others and give narrative testimony of their own.").

[251] The existence of both Anglo-American courts and alternative fora for settling disputes can complicate access to justice. Ada Pecos Melton, *supra* note 101, at 117 ("Tribes face the inevitable conflict created by two justice paradigms competing for existence in one community.").

[252] Tribal Healing to Wellness Courts, http://www.wellnesscourts.org [https://perma.cc/XS2Y-XEN3] (last visited Mar. 3, 2024) http://www.wellnesscourts.org(providing information on and map of Tribal wellness courts throughout the United States and resources for the development of such courts); Joseph Thomas Flies-Away & Carrie E. Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence*, 2013 Mich. St. L. Rev. 403, 411–12 (2013) (describing commitment of tribal governments to wellness courts); *see, e.g.,* Denise Parish et al., *Healing to Wellness Court Policies and Procedures Manual*, Bay Mills Indian Cmty. (Dec. 13, 2019), https://baymillstribalcourt.org/wp-content/uploads/2021/01/HTWC-Policies-and-Procedures_hmw.pdf [https://perma.cc/2UPV-W5JC]; *Waabshki-Miigwan Drug Court Manual,* Little Traverse Bay Bands of Odawa Indians Drug Ct. Team (May 1, 2022), https://ltbbodawa-nsn.gov/judicial-branch/waabshki-miigwan/https://ltbbodawa-nsn.gov/wp-content/uploads/2023/02/WMDCP-Court-Manual.pdf [https://perma.cc/SD2F-2CPA].

[253] For a description of the key components and operation of wellness courts, *see* Flies-Away & Garrow, *supra* note 252, at 412–13.

[254] *See generally* Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 Univ. Det. Mercy L. Rev. 875 (1999); Kay Pranis, Barry Stewart, Mark Wedge, Peacemaking Circles: From Crime to Community (2003); Navajo Nation Peacemaking: Living Traditional Justice (Marianne O. Nielson & James W. Zion eds., 2005). For more resources on peacemaking, *see* Pokegnek Bodawadimik, *Tribal Courts, Native Justice Resources*, Pokagon Band of Potawatomi, https://www.pokagonband-nsn.gov/wp-content/uploads/2023/04/Native-Justice-Resources.pdf [https://perma.cc/3M29-7AWP] (last visited Mar. 3, 2024); Peacemaking Publications, Native Am. Rts. Fund, https://peacemaking.narf.org/peacemaking-publications/ [https://perma.cc/Z7Y7-PTUS] (last visited Mar. 3, 2024); Peacemaking and Probation, Little River Band of Ottawa Indians, https://lrboi-nsn.gov/government/tribal-judicial/peacemaking-probation/ [https://perma.cc/DR4U-TA2C] (last visited Mar. 3, 2024); Mnodaawain Peacemaking Circles, Little Traverse Bay Bands of Odawa Indians, https://ltbbodawa-nsn.gov/judicial-branch/peacemaking/ [https://perma.cc/AMK3-YER2] (last visited Mar. 3, 2024); Community Peace Circle, Pokagon Band of

access and practices but in general, they are processes where people talk together to resolve conflict.[255] Often, community members come together in a circle where "people are encouraged to speak from the heart, and together to identify and agree upon the steps necessary for healing the relationships harmed by the conflict."[256] Peacemaking processes and circles can divert conflicts from an adversarial style tribal court and resolve them through more community based practices.[257] The effects of these alternatives on access to justice remain unknown due to a lack of empirical studies on them.[258]

Another approach taken by some tribal governments has been to alter how they address social needs.[259] For example, some tribal governments provide parents with support, suggest guardianships rather than push for termination of parental rights, or use talking circles to help families resolve conflict and move forward.[260] Others have developed practices that focus on working with tribal citizens in tribal housing rather than evicting them. Tribal efforts to identify and address social needs may prevent cascading justiciable problems for tribal citizens.[261] Access to justice studies have consistently documented how the failure to address a justiciable problem often leads to more justiciable problems.[262] For example, an eviction may lead to homelessness, disrupt children's education, lead to the opening of a child protective services case, undermine the ability of a family to secure housing in the future, and increase the likelihood of intergenerational poverty.[263] When a tribal housing authority works with its tenants to prevent an eviction,

---

Potawatomi, https://www.pokagonband-nsn.gov/wp-content/uploads/2023/04/Peacecircle-brochure_lv-New-4-19-2023.pdf [https://perma.cc/9WC8-CNSF] (last visited Mar. 3, 2024).

[255] *About Peacemaking*, Native Am. Rts, Fund Indigenous Peacemaking Initiative, https://peacemaking.narf.org/about-peacemaking/ [https://perma.cc/U56M-YZHE] (last visited Mar. 3, 2024); *Native Justice*, Pokegan Band of Potawatomi, https://www.pokagonband-nsn.gov/government/tribal-courts/native-justice/ [https://perma.cc/94TD-5Z86] (last visited March 3, 2024).

[256] *About Peacemaking, supra* note 255.

[257] *Native Justice*, *supra* note 255.

[258] Several studies and evaluations of the effectiveness of wellness and drug courts exist. For a list of research and evaluations of wellness and drug courts, *see* Tribal Healing to Wellness Courts: Drug Research, *supra* note 252. Much of this research does not include tribal wellness courts, much less consider their effectiveness in addressing access to justice issues in Indian Country (e.g., by preventing cascading justiciable problems).

[259] Goldberg, *Individual Rights*, *supra* note 96, at 915 (discussing how a tribal community could frame the questioning of an elder by tribal police as a welfare check based on family concerns for the elder rather than an unlawful search).

[260] van Schilfgaarde & Shelton, *supra* note 75, at 705–708.

[261] It may also prevent tribal courts from having to take on policymaking functions inappropriate to them. Shanahan, Steinberg, Mark, & Carpenter, *supra* note 228, at 1521–28 (describing how state courts take on policymaking functions to address litigant's unmet social needs).

[262] Sandefur, *Access to Civil Justice*, *supra* note 10; Shanahan, Steinberg, Mark, & Carpenter, *supra* note 228.

[263] Matthew Desmond, Evicted: Poverty and Profit in the American City (2016). For Natives, eviction may also lead to disconnection from their Native community if they have to leave tribal territory to find housing.

it may also decrease the likelihood of these cascading problems as well as homelessness and poverty in the community.

Tribal governments' access to justice initiatives, however, are limited by structural barriers, including federal restrictions placed on their funding, jurisdiction, and procedures. Federal laws prevent them from providing less adversarial courts or less punitive laws to Natives living off tribal trust lands. For some tribal governments, this greatly impedes their ability to achieve access to justice in their communities. Nationwide, a majority of tribal citizens now live off tribal lands and are subject to state laws and court systems.[264] The jurisdictional restrictions placed on tribal governments prevent tribal governments with little tribal trust land from providing access to their justice systems for their citizens living adjacent or close to tribal trust lands and within their service areas.[265]

C. What We Still Need to Know about Access to Justice in Indian Country

The shifting terrain of access to justice in Indian Country suggests the need for more research, especially empirical research in this area. As this article indicates, much remains to be discovered about access to justice in urban and reservation Native communities. Here I have only attempted to describe the potential landscape of these issues in broad brush strokes. Future studies should examine important questions about what access and justice mean in Native communities, the justiciable events and unmet legal needs faced by Native individuals and communities, and how Natives experience justice, the law, and legal systems in their everyday lives.

Another rich area for future research is tribal justice systems. Federal Indian law scholars increasingly argue for the need for more attention to tribal law[266] and tribal justice systems.[267] Scholars, practitioners, tribal leaders and judges have long emphasized Native communities as places for legal innovation and experimentation.[268] As this article shows, tribal governments and judicial systems are finding their own ways to achieve access to justice in their communities through court appointed representation for litigants;

---

[264] One innovative way that tribal courts have sought to deal with the lack of jurisdiction problem is by obtaining consent. For example, some tribal courts ask the parents of tribal citizens to consent annually to making the children wards of the tribal court, which gives the tribal court jurisdiction over the child under the ICWA. *See, e.g.*, Parental Consent Form from the Little Traverse Bay Band of Ottawa Indians (on file with author).

[265] Interview with Tribal Court Administrator (Jan. 2024) (explaining that "all the action is in state court") (on file with author); Interview with Tribal Judge (Nov. 2023) (noting that jurisdictional limitations prevent tribal citizens from accessing their own courts) (on file with author).

[266] Elizabeth Reese, *The Other American Law*, 73 Stan. L. Rev. 555, 557 (2021).

[267] *See* van Schilfgaarde, *supra* note 51, at 7–8.

[268] *See generally* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1 (1997); Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental "Laboratories*," 86 Colo. L. Rev. 789 (2015).

peacemaking, both from the bench and as an alternative to courts; health and wellness courts; and the incorporation of traditional laws and practices. Yet few empirical studies have documented tribal initiatives or tried to measure their effectiveness.[269]

Scholars also have yet to investigate access to justice initiatives that may extend beyond tribal justice systems in Native communities. Some tribal governments are exploring innovative ways of providing social services that rely less on the legal system to resolve conflicts or enforce rules and regulations. Future studies should examine the effectiveness of many of these innovations and their impact on access to justice.

IV. Rethinking Access to Justice: Lessons from Indian Country

How does the landscape of access to justice in Native communities inform existing understandings of access to justice? Native Nations and individuals face particular obstacles to achieving access to justice due to settler colonialism and the imposition of Anglo-American laws and legal systems within their communities. The experiences of Native communities trying to promote access to justice in the shadow of colonialism provide two core theoretical insights into access to justice. The first is that power plays an important role in how people experience access to justice. The second is that people experience access to justice on a community as well as an individual level. Framing access to justice as about an individual's access to courts and lawyers often obscures the centrality of power and community. I advocate for a thicker, richer conception of access to justice based on a broader understanding of the roles that power and community play in how people experience access to justice.

A. Power

My account of access to justice in Indian Country problematizes existing narratives about power and access to justice. Access to justice scholars have long acknowledged a relationship between the two, but they tend to explore inequalities and power imbalances faced by an individual seeking justice against an opposing party within the legal system.[270] This individual

---

[269] For example, few studies have tried to measure the extent to which tribal justice systems have shifted towards traditional practices. *See generally* Barsh, *supra* note 109, at 81 (detailing attempt to investigate tribal courts' use of tradition, but noting issues with sample and expressing serious skepticism about "boilerplating" by tribal courts); Jacob Maiman-Stadtmauer, *A Jurisprudential Quilt of Tribal Civil Jurisdiction: An Analysis of Tribal Court Approaches to Determining Civil Adjudicatory Jurisdiction*, 11 Am. Ind. L.J. 1, 23 (2022) (finding that tribal courts do not strictly follow the *Montana* test in determining their own civil adjudicatory jurisdiction).

[270] *See* Blasi, *supra* note 40, at 914; Sandefur, *Access to Civil Justice*, *supra* note 10, at 339.

level approach overlooks power dynamics between a litigant's community or a community of litigants and the court system in which they are litigating. Moreover, inherent in an individual level approach is the assumption that the individual accepts the legal system and that the legal system dispenses justice.[271] The experiences of Native Nations and their people bring into stark relief the reality that these assumptions do not hold for all individuals or communities. It introduces different power dynamics into access to justice conversations by highlighting how the power dynamics among multiple governments create a complex maze of access to justice problems on both an individual and community level in Indian Country.

The imposition of Anglo-American "justice" on Native communities demonstrates that justice and the law are social constructs that can be forced on and enforced against a community.[272] This insight is not new.[273] The Native experience, however, shows how the imposition of law on a community can undermine access to justice. It brings issues of power front and center, and begs the question: how can we understand access to justice without accounting for the power dynamics that continue to contribute to injustices in Indian Country? Similar questions and experiences may exist for other communities, especially as social, racial, and economic disparities enforced through the law persist.[274] Examples may include power disparities in labor and consumer relations as the rules of dispute resolution limit collective action and privatize legal systems,[275] in policing and criminalizing behavior, especially in marginalized communities, in enforcement actions taken against undocumented immigrants,[276] in the provision of healthcare in Puerto Rico, and in the housing crisis in Hawaii.[277] These examples highlight how the law creates and perpetuates unequal distributions of power.

---

[271] *See* Sameer Ashar & Annie Lai, *Access to Power*, 148 Dædalus 82 (Winter 2019); Echohawk, *supra* note 28, at 31 ("People often equate the American legal system with justice, but courts of law are not always concerned with dispensing justice.").

[272] *See generally* Sandefur, *What We Know*, *supra* note 6, at 448–52 (explaining that law is socially constructed and affects normative values, such as how to legalize social relationships like divorce); Ewick & Sibley, *supra* note 211, at 43 ("legality consists of cultural schemas and resources that operate to define and pattern social life"); Laura Nader, The Life of the Law: Anthropological Projects, 117 (2002) ("law is often not a neutral regulator of power but instead the vehicle by which different parties attempt to gain and maintain control and legitimization of a given social unit.").

[273] *Id.*

[274] *See* Sandefur, *Access to Civil Justice*, *supra* note 10, at 349.

[275] Ashar & Lai, *supra* note 271 at 84.

[276] *See generally* Shannon Gleeson, *Legal Status and Client Satisfaction: The Case of Low-Wage Immigrant Workers*, 46 Law & Soc. Inquiry 364 (2021) (describing differences in employment claims by immigrants based on document status as related to power dynamics); Ashar & Lai, *supra* note 271, at 84–85 (explaining some of the power inequities affecting immigrants and their efforts to achieve access to justice); Cecelia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants Lives' in the United States*, 111 Am. J. Socio. 999 (2006) (documenting how legal status affects the lives of undocumented immigrants).

[277] *See generally* Claire Wang, *The US Promised to Return Stolen Lands to Native Hawaiians a Century Ago. Most Are Still Waiting*, The Guardian (Dec. 22, 2023) https://www.

These power imbalances often limit communities' ability to shape the justice applied to them. Undocumented immigrants, who have little say in U.S. immigration laws, immediately come to mind. They often live in a liminal legal status that affects every aspect of their lives. [278] Their legal exclusion from many channels of participation in the polity makes them virtually powerless to contest effectively or change the laws applied to them. Undocumented immigrants are acutely aware of the power of the law because they are limited by their vulnerable legal status, which undermines their ability to use the law to redress perceived injustices.[279] Consider, for example, the challenges faced by undocumented workers with wage theft claims, who risk deportation if they assert their rights under the Fair Labor Standards Act.[280] These workers may have valid claims but their unstable legal status threatens to make them legally invisible. The existing justice system marginalizes their claims and deeply restricts their ability to make them because the very act of using the law to redress the injustice places them at risk of deportation. By undercutting their ability to protect their rights legally, the law increases their vulnerability and enables employers to continue to perpetuate injustices by engaging in wage theft contrary to federal law.[281] The law creates the very power dynamics that prevent it from providing the justice that it promises.

Legal disempowerment exists in less obvious forms as well and can function to impose a version of justice that further oppresses a community. For example, courts have upheld (and federal laws favor) arbitration clauses based on arguments that they benefit consumers by ensuring the quick and easy resolution of disputes and lowering prices.[282] Yet consumers have little choice but to agree to these mandatory contract provisions, which tend to suppress aggregate claims. Consumers, as individual one-time litigants, lack the ability to shape the law. In contrast, corporations regularly litigate these cases and assert the justice of arbitration even though critics suggest that it may enable corporations to evade liability and increase costs to consumers over time. Courts' upholding of these agreements undermines collective action, accentuates the power imbalance between consumers and corporations,

---

theguardian.com/us-news/2023/dec/22/native-hawaiians-wait-decades-return-colonized-land-state-failure, [https://perma.cc/R7YT-BGWL].

[278] Menjivar, *supra* note 276, at 1001.

[279] Cecelia Menjivar, The Power of the Law: Central Americans' Legality and Everyday Life in Phoenix, Arizona, 9 Latino Stud. 377, 379–80 (2011).

[280] Gleeson, *supra* note 276, at 367–68.

[281] Some federal judges have limited discovery in wage theft cases involving undocumented immigrants. See EEOC v. First Wireless Group, Inc. 225 F.R.D. 404 (E.D.N.Y. 2004) (granting protective order where disclosure of immigration status would cause embarrassment, potential criminal charges, or deportation); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. (2002) (denying discovery request for information on plaintiff's legal status due to risk of injury to plaintiffs).

[282] Theodore Eisenberg, Geoffrey P. Miller, and Emily Sherwin, *Mandatory Arbitration for Consumers But Not for Peers: A Study of Arbitration Clauses in Consumer and Non-consumer Contracts*, 92 Judicature 118, 118 (2008).

and denies consumers, as a community, the ability to assert their views of justice. These examples illustrate how imbalances in power can lead to "the deployment of the state against common people."[283]

Unequal power relationships embedded in the law raise important questions about whether the "law" and the "legal system" are dispensing justice or adding to the injustices already experienced by common people.[284] These examples show that these questions have applicability beyond the access to justice issues faced by Native communities and that obscuring the power dynamics impedes access to justice more broadly. They exemplify the importance of considering the power dynamics underlying and inherent in access to justice situations. As Professors Ashar and Lai explain, "There can be no real justice without altering this reality."[285]

Power dynamics, however, may also shape strategies for achieving access to justice. Tribal governments, Native communities, and Native individuals have long identified the power imbalances inherent in settler colonialism as sources of injustice and resisted them. Their strategies for achieving access to justice have reflected their resistance and their desire to fundamentally change these power dynamics. Thus, they have differed from mainstream approaches that focus on increasing access to courts, lawyers, and legal knowledge for individuals and do not necessarily challenge the underlying structural conditions and root causes of the access to justice crisis.[286] The demonstrated successes of the sovereignty empowerment approach to access to justice, which has used judicial, legislative, and administrative strategies, in improving social and economic conditions in Indian Country suggest the value inherent in addressing power imbalances to achieve access to justice.[287]

B. Community

Access to justice in Indian country is not just about power; it's about community. Yet the subject in most conversations about access to justice is the individual.[288] Legal services developed out of concerns for the unmet

---

[283] Ashar & Lai, *supra* note 271, at 84.

[284] *See generally* Sandefur, *Access to Civil Justice*, *supra* note 10, at 340 (discussing how "civil justice experiences reflect inequality, create inequality, and destroy inequality.").

[285] Ashar & Lai, *supra* note 271, at 84.

[286] *Id*. at 83 ("Legal disputes take place in the context of a larger political field. Pure access-to-justice initiatives that ignore this context and the structural conditions that impoverish and immiserate people along the lines of race, class, gender, sexual identity, and disability may bring temporary relief on an individual level, but will not fundamentally change such conditions of life."); Blasi, *supra* note 40, at 914.

[287] *See generally* Cornell & Kalt, *supra* note 137, at 212–13; Kalt, *supra* note 197, at 3; Akee, *supra* note 197.

[288] *See, e.g.*, Hugh McDonald, *Assessing Access to Justice: How Much "Legal" Do People Need and How Can We Know?*, 11 U.C. Irvine L. Rev. 693, 703 (2021) (focusing on how the legal capacity of an individual affects access to justice); Sandefur, *What We Know*, *supra* note 6, at 444 (discussing how legal needs assessments are used to identify the prevalence of individual's justiciable experiences).

legal needs of urban, poor individuals.[289] Individuals have remained the core subject even as scholars have identified the importance of community in solving access to justice issues.[290]

The experiences of Native communities demonstrate how access to justice is a community level problem rather than only an individual one. Native people have experienced injustices as communities as well as individuals. Many legal actions brought by tribal governments or Native individuals seek to address injustices against the community. The efforts for federal recognition by Indian legal services programs and their Native clients illustrate how Native communities have experienced justiciable problems.[291] For example, the BIA intentionally stopped dealing with several bands of Odawa, Chippewa, and Potawatomi in Michigan in the 1930s. As a result, the United States government treated these bands as federally unrecognized. They could not govern their lands or peoples, access federal funding for cultural, educational, social services, and other programs, or develop economically through federal grants and loans. Their lack of federal recognition was a justiciable problem but it existed on a community level rather than an individual one. Leaders of the Grand Traverse Band of Ottawa and Chippewa, Little River Band of Ottawa Indians, and the Little Traverse Bay Bands of Odawa Indians sought help from Michigan Indian Legal Services to restore federal recognition.[292] They knew that federal recognition would transform their communities by recognizing their sovereignty and providing them with the resources to exercise it. Today, these Native communities are federally recognized and govern their lands and people.[293] They provide health

---

[289] *See* Alan Houseman & Linda E. Perle, Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States 8 (2018).

[290] Pruitt & Showman, *supra* note 14, at 497; Blasi, *supra* note 40, at 865. The civil legal aid community has periodically leaned into more community-based approaches and some advocates continue to push for their adoption. Most notably, the OEO was interested in community empowerment as a way to reduce poverty. The OEO's community empowerment model worked well in tribal communities and contributed to the development of the Tribal Self-Determination Policy, but was discontinued elsewhere. Wilkinson, *supra* note 161, at 197. More recently, the legal aid community has embraced impact litigation as a vehicle for constructive social change, *see* Houseman & Perle, *supra* note 289, at 10, but impact litigation may not be community driven or supported. Individual representation and clients' day to day legal problems remain the mainstay of the services provided by civil legal aid. *Id.*

[291] Other examples include cases involving jurisdictional questions, which place the sovereign authority of the tribal government at issue.

[292] *See* Keedy, *supra* note 162, at 28. For a listing of other Native communities that have benefited from legal services in achieving federal recognition, *see supra* note 172.

[293] *See, e.g.*, *Who is the Grand Traverse Band?,* Grand Traverse Band of Chippewa and Ottawa Indians, https://www.gtbindians.org/downloads/we_are_gtb_2022_final.pdf, [https://perma.cc/LN6J-GKCK]; https://www.gtbindians.org/downloads/we_are_gtb_2022_final.pdf Little Traverse Bay Bands of Odawa Indians, https://ltbbodawa-nsn.gov [https://perma.cc/DS5D-MQG8];https://ltbbodawa-nsn.gov Little River Band of Ottawa Indians, https://lrboi-nsn.gov [https://perma.cc/BVA7-7LT5].

services, housing, courts, employment opportunities, preschool programs, law enforcement, and culture and language programs to their communities.

Legal actions brought by individual Natives also tend to address justiciable problems faced by the wider community. Consider for example, *Bryan v. Itasca County*.[294] Leech Lake Legal Services brought a class action lawsuit on behalf of Russell Bryan, a tribal citizen, and those similarly situated, to challenge the imposition of state taxes on personal property on the Leech Lake reservation.[295] The case was not just about the Bryans, but about oppression faced by the entire Native community at the hands of the state. The state attempted to tax Bryan's land on the reservation even though states lack the authority to tax tribal trust lands. The state waited until the land had a trailer on it and then asserted the tax as on personal (rather than real) property.[296] The Minnesota Chippewa Tribe filed an amicus brief in the case because they knew it involved an issue much broader than the taxation of the Bryan's trailer, namely that the state was seeking to extend its powers to tax tribal lands.[297] A loss in the Bryan case would have dealt a blow to tribal sovereignty as well as perpetuated the shortage of adequate housing and increased poverty in Indian Country. The *Bryan* case illustrates how Natives have resisted—and benefited—as communities even when an individual Native faced the justiciable problem. It shows how many justiciable problems may implicate the community as well as the individual and how community wide strategies may be necessary to revolve them.

The sovereignty empowerment approach to access to justice used by Native communities further indicates how communities not only seek justice, but also empowerment to resolve their own problems. In this respect, Native experiences confirm and extend scholars' emphasis on community in finding innovative solutions to access to justice problems. Some scholars have proposed that communities can be empowered to find new solutions to the rural access to justice crisis by encouraging "communities and organizations within them to help identify legal needs."[298] Others have identified collective action as a strategy for addressing the power imbalances underlying justiciable events, such as poor housing conditions.[299] The experiences of Native Nations enrich these existing conversations about the relationship between community and access to justice. They build on access to justice solutions that center the community rather than the individual. The experiences of Native communities provide an example of how community-based and supported strategies such as sovereignty empowerment can push back

---

[294] Bryan v. Itasca Cnty., 426 U.S. 373 (1976). Treaty rights cases are also often brought by an individual Native but have wider implications for the entire community.

[295] *See* Washburn, *The Story of Bryan v. Itasca County*, *supra* note 26, at 424.

[296] *Id.* at 423.

[297] *Id*. at 428, 438.

[298] Pruitt & Showman, *supra* note 14, at 510.

[299] Blasi, *supra* note 40, at 914.

against the structural barriers to access to justice. They also show how community empowerment can lead to ground-breaking solutions like reforms to dispute processing (e.g., peacemaking) and institutional changes that more effectively address social needs and prevent justiciable problems.

Additionally, this idea of empowering the community to resolve access to justice problems resonates with and could be used to extend the concept of people centered justice, which puts people rather than institutions at the center of justice initiatives and has gained popularity in recent years.[300] People centered justice seeks to understand what people want and need in seeking justice.[301] It shifts the focus towards the person with the justiciable issue and away from longstanding assumptions that more lawyers and courts will remedy perennial access to justice problems. The experiences of Native communities suggest that access to justice is not just about what individuals want and need, but what communities want and need in seeking justice. It pushes scholars and practitioners to think about a community centered rather than just people centered justice. Community centered justice expands on people centered justice by suggesting that communities are central to achieving access to justice. It shifts conversations away from the individual as the only subject affected by justiciable events, institutions, and organizations. Community centered justice suggests that justiciable problems affect communities as well as individuals and that once empowered, communities can come up with their own solutions.[302] It seeks to empower the community to address the root causes underlying justiciable problems in more holistic and relational ways. This includes community-level (and led) efforts to treat social needs before they become justiciable problems through innovative institutional and policy reforms. Native understandings of access to justice demonstrate how community centered justice can be achieved and encourage critical thinking about access to justice as a community problem rather than only an individual one.

---

[300] *See generally* the principles of people centered justice include: (1) put people and their justice needs at the center of justice systems; (2) resolve justice problems; (3) improve justice journeys; (4) use justice for prevention and to promote reconciliation; and (5) empower people to access services and opportunities. Kelechi Achinonu, Akingbolahan Adeniran, Maaike de Langen & David Steven, From Justice for the Few to Justice for All 9 (2023); *What is People Centered Justice?*, World Just. Proj. (May 18, 2023) https://worldjusticeproject.org/news/what-people-centered-justice [https://perma.cc/YFR4-H3XB]. People centered is also sometimes referred to as user-centric justice. McDonald, *supra* note 6, at 699.

[301] *People Centered Justice: Putting People's Needs and Wants at the Heart of Rule of Law Programming*, ABA (Nov. 13, 2022), https://www.americanbar.org/advocacy/rule_of_law/blog/roli-people-centered-justice-programming-1122/ ("By proactively identifying and addressing the root causes of legal issues, people-centered justice services can both prevent larger issues from arising and resolve them as they arise. A people-centered approach to justice should also build people's legal capabilities and seek to enable their meaningful participation in the justice system, which will also contribute to the overall efficacy of justice processes and outcomes. Justice services should be part of an integrated system of services that can be readily accessed by all.").

[302] *See* Pruitt & Showman, *supra* note 14, at 510.

Conclusion

American Indians and Alaska Natives face particular challenges in seeking access to justice. The access to justice issues faced by Native communities have always extended beyond the individual because tribal governments in addition to their citizens have faced incredible injustices and barriers to addressing justiciable problems. The unique obstacles to access to justice in Indian Country, however, are rarely mentioned in the access to justice or Indian law literatures. This article starts to fill the gap in existing knowledge about access to justice in Indian Country. It explores how access to justice exists in the shadow of colonialism. The article brings much needed attention to access to justice issues in Indian County by describing the complexity of access to justice issues, experiences, and strategies in Native communities. It then identifies areas for more research, especially empirical research on access to justice in Native communities. The article concludes with some preliminary insights into how studying access to justice in Native communities provides a unique lens for thinking about access to justice issues more generally.