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Human Rights, Indigenous Peoples, and the Pursuit of Justice

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Introduction

Felix Cohen's comparison of the treatment of Indians to the miner's canary—"the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith"[1]—is perhaps one of the most frequently used quotations in Indian law, in large part because it captures the relationships both between Indian tribes and the dominant U.S. culture and between tribes and other minority groups. The treatment of Indians, however, signals far more than solely whether democracy is being applied fairly and even-handedly. It also serves as a profound warning about the problems inherent in Western rights-based legal regimes and the dangers inherent in the export of those regimes to non-Western cultures.

Western legal systems have spent most of the last two centuries disseminating their particular liberal brand of individual rights and freedoms around the world, using it to shape and to justify legal processes at both the national and international levels. This endeavor is based not only upon the claims that these rights and freedoms are universal to all individuals and that such truths are self-evident but also upon the idea that rights are a vehicle for justice, perhaps even *the* vehicle for justice.[2] These claims to universality are, however, open to query, in no context more than that of Indigenous justice. Indeed, even when the Indigenous case appears to be a strong one, the attempts of Indigenous people to rely upon these purportedly universal rights and freedoms have more often than not ended in failure.

An illustrative example is the case of *Lyng v. Northwest Indian Cemetery Protective Association*.[3] *Lyng* involved practitioners of a traditional tribal religion who sought to enjoin the U.S. Forest Service from allowing commercial timber harvesting in a section of Northern California's Six Rivers National Forest, on the grounds that it violated their First Amendment right to free exercise of religion. According to the test in force at the time, when a plaintiff demonstrated that a government action placed a substantial burden on the practice of religion, the burden shifted to the government to prove the existence of a compelling governmental interest.[4] Since the plaintiffs' evidence in *Lyng* consisted of the government's own report recommending against the project on the grounds

1. Felix S. Cohen, *The Erosion of Indian Rights, 1950-53: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

2. As Costas Douzinas has written, "Human rights are the necessary and impossible claim of law to justice." COSTAS DOUZINAS, THE END OF HUMAN RIGHTS 380 (2000).

3. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). For the sake of simplicity, this Article focuses on U.S. cases, although similar arguments can be made about other countries.

4. *See* Sherbert v. Verner, 374 U.S. 398 (1968).

that it would destroy the Indians' ability to practice their religion, the plaintiffs had every expectation that they would be able to successfully demonstrate that the government action substantially burdened their First Amendment free exercise rights. The economics of timber harvesting in the area made it unlikely that the government could prove the existence of a compelling governmental interest, which meant that the plaintiffs were likely to prevail. Instead, however, the U.S. Supreme Court changed the test, holding for the first time that "substantial burden" was a term of art, limited to being jailed or fined for religious practices or being deprived of a governmental benefit to which the plaintiffs were otherwise entitled.[5] The *Lyng* plaintiffs could not satisfy this revised standard, and they therefore lost the case.

Lyng was neither the first nor the last case where Indians and Indian tribes lost when they should have won. This phenomenon is not new and, indeed, has been explored on multiple previous occasions.[6] Our approach, however, departs from the norm in ways that may appear counter-intuitive. Almost without exception, scholars exploring the failure of Indigenous claims for justice begin by assuming that these quests are and must be built on the foundation of rights, whether this concerns rights enshrined at the nation-state level or those secured by the international human rights regime.[7] We challenge the foundation of this assumption and argue that a rights-based approach not only is not always the answer but is, in fact, also part of the problem. We posit that Western legal culture, and the rights-based approach that forms its liberal political philosophical

5. This more limited version of *Sherbert* would later be overturned by *Employment Div. v. Smith*, a case also involving Native plaintiffs. 494 U.S. 872 (1990). Those plaintiffs were members of the Native American Church and had been fired from their jobs for testing positive for the use of peyote, which they had ingested as part of a sacrament. *Id.* at 874. They were denied unemployment benefits, which should have satisfied even the more limited version of *Sherbert*, but the Court again changed the test, declaring that a neutral law of general applicability by definition could not violate the Free Exercise Clause. *Id.* 879.

6. *See, e.g.*, David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 286-87 (2001); Melissa L. Koehn, *The New American Caste System: The Supreme Court and Discrimination Against Civil Rights Plaintiffs*, 32 U. MICH. J.L. REFORM 49 (1998); Alex Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism,"* 38 CONN. L. REV. 667 (2006).

7. *See* Angela Riley & Kristen Carpenter, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173 (2014); S. James Anaya, *Foreword* to WALTER ECHOHAWK, IN THE LIGHT OF JUSTICE (2013). Anaya states:

> [T]he *Declaration* [*on the Rights of Indigenous Peoples*] embodies a common understanding about the rights of indigenous peoples on a global scale, upon a foundation of fundamental human rights . . . . With these characteristics, the *Declaration* should now serve as a beacon for executive, legislative, and judicial authorities to guide all their decision making on issues concerning the indigenous peoples of the country.

foundation, is often ill suited to accommodating claims made by subaltern legal cultures. Recognizing the deep problem as the rights-based approach itself—an approach that is integral to the dominant Western legal culture underpinning the postcolonial legal landscape of, notably, the CANZUS[8] settler states—it follows that a solution cannot be achieved simply by strengthening these rights or by adding yet further rights rooted in the same tradition. Instead, it is necessary to analyze the reasons *behind* the failure of the rights-based approach to handling conflicts between the dominant legal culture and Indigenous individuals and communities and to use that understanding to develop alternative strategies.

That analysis reveals three major problems with the use of the rights-based approach to tackle issues of Indigenous justice:

1. It privileges (the worldview of) the dominant legal culture;
2. It artificially restricts the conversation about causes of and solutions to problems of Indigenous justice; and
3. It masks the inherent tension between human rights and legal pluralism.

We explore the first of these problems in Part I by examining what is meant by a "rights-based approach," how those ideas came into being, and how they differ from Indigenous conceptions. We address the second problem in Part II, which examines six representative U.S. cases and the patterns that can be derived from those cases. In Part III we turn to the third issue, which we operationalize in order to begin building possible solutions to the problem and possible alternate approaches to achieving justice for Indigenous people.

I. The Rights-Based Approach and Indigenous Alternatives

For those raised in the Anglo-American legal tradition, discussions about fairness and justice are, apparently inevitably, couched in the practice and language of rights, be they constitutional or (international) human rights. Individuals have, for example, rights to free speech and equal protection,[9] which are in turn protected through a right to due process.[10] The concept of rights has become so embedded in legal discourse, so normalized in contemporary legal practice, and so synonymous with justice, that it is all too easy to forget that a rights-based approach is not the only option available for addressing conflicts between the state and its citizens and, moreover, to accept it as such without any real critical engagement. In this Part, we first explore the nature and origins of the rights-based approach and then contrast it with Indigenous approaches.

8. The CANZUS countries are **C**anada, **A**ustralia, **N**ew **Z**ealand, and the **U**nited **S**tates. The four countries share similar legal and colonial roots.

9. U.S Const. amends. I, XIV.

10. U.S. Const. amends. V, XIV.

A. The Functioning, Origins, and Critique of the Rights-Based Approach

To provide an accurate critique of the rights-based approach, it is necessary to understand both what that approach is and how it transpired. Placing the rights-based approach in context allows us to recognize that the rights paradigm is not an innately neutral one but, rather, a creature of the legal culture of which it is part. Acknowledging that critical fact is the first important step towards understanding not only why the rights-based approach became the dominant paradigm but also why it is so effective in masking and even ignoring Indigenous alternatives to regulating the interaction between the individual and the state.

Although their contemporary form may differ from their original one, rights are rooted in Western liberal thought, particularly in social contract theory, and in the political philosophy of liberalism. As such, their origins can be traced back to the Enlightenment and thus to the start of modernity: the lineage of these ideas started with Hobbes' *Leviathan*[11] and continued forward through Locke's *Second Treatise*,[12] Rousseau's *Social Contract*,[13] Rawls' *A Theory of Justice*,[14] and Nozick's *Anarchy, State, and Utopia*.[15]

The heyday of the nation-state saw the absolute power of the Hobbesian sovereign subjected to a single effective restriction, namely that the exercise of that power ought not to interfere unnecessarily with the autonomy of the individual subject. Although this was a high threshold, with necessary interference being construed as anything required to preserve order and to prevent a reversion to the state of nature, even Hobbes recognized the importance of the sphere of individual autonomy free from state interference,[16] which he located in the idea of individual natural rights. This thinking is even more apparent in the Lockean construction of the social contract, whereby an individual ought not to be interfered with in terms of his "life, liberty and possessions," on the basis that he is the bearer of "certain inalienable rights."[17]

From the SEVENTEENTH century onwards, therefore, the ideas that the relationship between the state and the individual is governed with reference to individual natural rights and that these rights operate as a bulwark against the excesses of state power were robustly established. This view reached its zenith with the Declaration of Independence, the American and French Revolutions, and

11. THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMON WEALTH ECCLESIASTICALL AND CIVIL (1651).

12. JOHN LOCKE, TWO TREATISES ON GOVERNMENT (1689).

13. JEAN-JACQUES ROUSSEAU, OF THE SOCIAL CONTRACT, OR PRINCIPLES OF POLITICAL RIGHT (DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE) (1762).

14. JOHN RAWLS, A THEORY OF JUSTICE (1971).

15. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

16. HOBBES, *supra* note 11; *see also* MARTIN LOUGHLIN, SWORD & SCALES 182-85 (2000).

17. LOCKE, *supra* note 12.

the drafting and ratification of the U.S. Constitution. This conceptualization of the relationship between the individual and the state is found not only in the language of the U.S. Constitution[18] but also in its structure: the Bill of Rights was circulated and ratified shortly after the Constitution in order to allay concerns about the authority given by the latter to the stronger federal government.[19] Individual natural rights became synonymous with modernity, which was, in turn, irrevocably and undeniably Western.[20]

The international rights declarations of the post-World War II period continued in a similar vein, although the crimes against humanity perpetrated under Nazism gave rise to a new *universal* dimension in the rhetoric of rights. No longer simply presented as natural rights, the rights recognized and enshrined in postwar international documents[21] took the moniker *human* rights—rights held freely and equally by all people by virtue of their shared humanity—and as such were explicitly designated as being of universal ambit and application. Leaving aside for a moment issues related to the effective implementation of these rights protections, the effect of this *universalization* process[22] was projecting a recognizably (by both pedigree and context) Western approach not only as the *de facto* norm but as the *only* form of interaction between the individual and the state deemed acceptable by the international community. But, the claim to human rights' universality, an innately inclusive and egalitarian provision when viewed from a Western perspective and from a position of familiarity with a rights-based approach, becomes a somewhat presumptuous exercise in hegemony if the worldview assumed is an Indigenous one unfamiliar with the

18. The preamble to the U.S. Constitution makes clear that power flows from the people by declaring, "We the People of the United States . . . ." U.S. CONST. pmbl.

19. Interestingly, the Federalist No. 84 actually opposed the Bill of Rights, arguing that it would limit rather than protect the rights of citizens. THE FEDERALIST NO. 84 (Alexander Hamilton).

20. *See* Mariana Valverde, *Studying the Governance of Crime and Security: Space, Time and Jurisdiction*, 14 CRIMINOLOGY & CRIM. JUST. 379, 381 (2014).

21. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

22. "A universalization project takes an interpretation of the interests of some group, less that the whole polity, and argues that it corresponds to the interests or to the ideals of the whole. . . . [T]he factoid character of rights allows the group to make its claims as claims of reason, rather than of mere preference." Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE 178, 188 (Wendy Brown & Janet Halley eds., 2002).

individualistic nature of rights discourse and the very particular way in which it conditions and shapes interactions between citizen and state.[23]

It was the Critical Legal Studies movements of the 1970s and 1980s[24] that first put forward the idea that law is not a value-neutral system but rather a creature of the power structures that built it. Critical legal theory, as Alan Hunt has outlined, "grounds itself on the critique of the historical project of the Enlightenment [that] is perceived as offering a rationalist and consensual solution to the problem of social order,"[25] with a core insight that, in spite of its posturing as a body of objective rules and procedures, law is neither impartial in its operation nor a vehicle for social justice. Law instead embodies and reflects the inherent biases of society's dominant ideology and power structures and deliberately facilitates the perpetuation of these power asymmetries; it denies "the oppressive nature of the existing hierarchies."[26]

Nowhere is this more apparent than in rights discourse, which, by means of some audacious sleight of hand, presents itself as a means of achieving social justice while at the same time legitimating and perpetuating the status quo. It does not stop there, however: its second masterstroke is to weave hierarchy and hegemony through the legal system, privileging a particular white male bourgeois individualism and designating it somehow as the *norm.* Duncan Kennedy makes this point particularly well:

> Rights talk was the language of the group—the white male bourgeoisie—that cracked open and reconstituted the feudal and then mercantilist orders of Western Europe, and did it in the name of Reason. The mediating power of the language, based on the presupposition of fact/value and law/politics distinctions and on the universal and factoid character of rights, was a part of the armory of this group.[27]

It is this dual step—the misrepresentation of rights as factoid and rights' subsequent gilding in a "veneer of impartiality"[28]—that gives the rights paradigm its power. By presenting itself as the only option, it effectively shuts down any alternatives to which minority groups might make recourse while, at the same time, restricting such action based on individual rights to an arena wholly in the control of society's hegemonic group.

23. *See infra* Part III.

24. Notable scholars within these movements are, among others, Costas Douzinas, Peter Fitzpatrick, Peter Gabel, Alan Hunt, David Kennedy, Duncan Kennedy, Catherine MacKinnon, Mark Tushnet, and Roberto Unger.

25. Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1, 5-6 (1986).

26. Peter Gabel & Jay M. Feinman, *Contract Law As Ideology*, *in* THE POLITICS OF LAW 497, 498 (David Kairys ed., 3d ed. 1998).

27. Kennedy, *supra* note 22, at 214.

28. Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013).

Once again, *Lyng*, the Free Exercise case discussed in the introduction, provides an illustrative example, as the issue in that case went beyond the plaintiffs' identity as Indigenous; it also concerned the nature of the tribal religion involved. The *Lyng* plaintiffs practiced a traditional land-based religion, something that does not fit neatly into the Judeo-Christian religious practices that influenced the development and formation of the Supreme Court's Free Exercise jurisprudence. In the 1970s and 1980s, the federal courts struggled with several cases in which Indians and Indian tribes sought to secure access and to protect sacred sites located on federal public land,[29] and *Lyng* is essentially the culculmination of those struggles. The Court's opinion in *Lyng* is far from a model of clarity, but the motivation behind the decision rang very clear in the Court's declaration that "[w]hatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."[30] Most of the federal court decisions addressing rights of access to sacred sites, including *Lyng*, viewed Indians as claiming a right of *exclusive* access. As noted scholar Vine Deloria, Jr., has explained, however, "It's not that Indians should have exclusive rights . . . . [i]t's that that location is sacred enough so that it should have time of its own. And once it has had time of its own, then the people who know how to do ceremonies should come and minister to it. That's so hard to get across to people."[31]

Lyng demonstrates that the "rights" protected by the U.S. legal system are limited in scope by the connection between those rights and American mainstream culture, thereby privileging the worldview of the dominant culture. It follows, then, that the "rights" and what they protect are not value neutral but rather are defined by the dominant culture, itself a hegemonic act. Through this presentation of a particular worldview as value-neutral,[32] rights have a positive effect for those included as rights-holders but a "concomitantly . . . negative effect for those who are excluded from that status."[33]

These negative effects take several forms. First, because the right is defined with reference to the dominant culture, it does not include the requisite vocabulary to explain the perspective and claims of the Indigenous group. While this situation is not one restricted to Indigenous groups alone, of course, the extent of the cultural differences of these groups from the prevailing culture compounds the problem beyond that experienced by other minorities. To cite an example, the Amish, for instance, have very distinctive dress and practices,

29. *See infra* notes 130-134 and accompanying text. For more on these cases, see MELISSA L. TATUM & JILL KAPPUS SHAW, LAW, CULTURE & ENVIRONMENT (2015).

30. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988).

31. IN THE LIGHT OF REVERENCE (Sacred Land Film Project 2001) (interview).

32. *See* Melissa L. Tatum, *Group Identity: Changing the Outsider's Perspective*, 10 GEO. MASON U. CIV. RIGHTS L.J. 357 (2000).

33. Rebecca Tsosie, *NAGPRA and the Problem of "Culturally Unidentifiable" Remains: The Argument for a Human Rights Framework*, 44 ARIZ. ST. L.J. 809, 814 (2012).

but they are a Christian group and their way of life is premised on their interpretation of the Bible. While that interpretation may be very different from other Christian groups, the common root in Christianity provides a shared set of norms and vocabulary that allow for meaningful dialogue between these groups. In this regard the key element is how closely the group is related to the prevailing culture.

Second, by failing to recognize the existence of other forms of religious practice, the legal system not only constrains its analysis of the issues at hand but also reduces the scope of possible solutions. For truly meaningful discussion and negotiation to occur, each party must understand the perspective and argument of the opposing party, and the existing legal structure must have the capacity to make room for and accommodate compromise. Since it privileges the worldview of the dominant culture, the rights-based approach simultaneously limits the vocabulary for Indigenous groups to use in explaining their perspective, limits the ability of the dominant culture to understand that a different approach exists, and restricts the space for compromise.

This is the juncture at which most current scholars argue for increased dialogue or increased rights. The problem, however, is more than a surface-level miscommunication. The fact that the rights-based approach privileges the worldview of the dominant culture is not an accident, nor is it mere happenstance. Rather, it is a deliberate choice to subjugate the minority group. As the nature and existence of the right is bound up with the dominant culture, only the dominant culture will enjoy the full protections of the right. In *Lyng*, and again later in *Employment Division v. Smith*,[34] although the plaintiffs had put together a prima facie case that met all of the Court's articulated requirements, on both occasions the Court altered the contours of the test in a manner that not only was detrimental to the tribal groups but also privileged dominant cultural norms.

These changes are particularly jarring because these actions fly in the face of assertions by both the Supreme Court and the political branches that they take a model approach in the fair and equitable treatment of Indigenous peoples.[35] The foundation for this assertion rests on the provision of procedural rights, with the corollary idea that fair procedures achieve just outcomes. Procedural rights[36] thus underpin and facilitate this overt positioning on the side of "justice," for how can a litigant still complain when she has exercised, for example, her rights to notice and opportunity to be heard, to counsel, and to trial by jury? The insights of the rights critics, namely the counterintuitive notion that rights "legitimate and thus perpetuate greater injustices that they address,"[37] therefore presents a challenge to the *moral* character of rights. Often presented

34. 494 U.S. 872 (1990).

35. See *infra* notes 135-143 and accompanying text.

36. Butler, *supra* note 28, at 2201.

37. Robin West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 716 (2011).

as a bulwark against the excesses of governmental power, rights might rather and more accurately from this perspective be viewed as crumbs from the table, sufficient to mask entrenched social injustices and perpetuate existing hegemonies but deficient in providing genuine tools for either solution or challenge.[38] We explore this more fully in Part II, but for now it is sufficient to show that the conceit of the rights-based approach compels it to privilege its worldview over that of other groups.

B. Indigenous Alternatives

Far from being the only way of understanding the relationship between government and citizen, the Western rights-based conception is foreign to most traditional Indigenous communities and cultures, many (if not most) of whom have a notably less individualistic conceptualization of societal interactions. Indeed, the rights-based conception may go so far as to be anathema to some Indigenous groups, which take a much more collaborative approach to resolving conflict. This contrasts with the familiar Western rights/remedies paradigm, usually initiated by conflict, viewed retrospectively, and settled by restitutive remedy or compensatory payment. Indigenous alternatives use more collective notions of community and society, including the role and duty of the government, and are oriented towards future (cooperative) action. The aim of many tribal justice processes is to restore the harmony between the individuals involved and the group, be that a family unit, a section of the community, or the Nation as a whole.[39]

Given its status as one of the largest tribes in the United States, and the fact that its reservation is larger than nine states, it is perhaps not surprising that the most writing has come from and about the Navajo legal system.[40] As has been

38. This phenomenon has been highlighted in the arena of international human rights law and labeled "rights ritualism." This is the phenomenon whereby a government appears to speak the language of human rights but in fact merely pays lip service to them; this empty formalism is specifically intended to divert attention from what is, in actuality, routine ignoring or violation of human rights. Hilary Charlesworth explains that "[r]ights ritualism can be understood as a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses. Countries are often willing to accept human rights treaty commitments to earn international approval, but they resist the changes that the treaty obligations require." *See* Hilary Charlesworth, *Kirby Lecture in International Law—Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict*, 29 AUSTL. Y.B. INT'L L. 1, 12-13 (2010).

39. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983).

40. In light of the differences between Indigenous and European dispute resolution mechanisms, this Part includes excerpts from several papers in which persons trained in both their traditional approach and in the Anglo-American legal system compare and contrast those systems. Although these excerpts are longer than typical, we made a conscious choice not to edit or paraphrase further. The

detailed by Dr. Raymond Austin, a former Chief Justice of the Navajo Nation, the Navajo Nation provides two routes for tribal members to resolve controversies: a traditional Peacemaking path and a more Western-style adversarial court system.[41] Parties can thus opt into the Peacemaking path, in which a trained facilitator assists the interested persons in working through the problem and finding an acceptable solution.[42] The process of Peacemaking is explained in multiple sources,[43] and we will not repeat it here, except to note the significant differences that exist between Peacemaking and mediation. As the Navajo Nation Peacemaking Program describes:

> Unlike a mediator, *hózhǫ́ójí naat'áanii* is an engaged part of the dispute resolution course, signifying the weight of tradition and timelessness in the healing process. *Hózhǫ́ójí naat'áanii* scolds, persuades, pleads, cajoles and educates everyone, using stories, to fully talk out their problems, in order to reach their mutual decision for the good of the whole. They are guides and educators. *Hózhǫ́ójí naat'áanii* are the keepers of the peacemaking method, *hózhǫ́ji naat'aah,* serving as guides from *hóóchxǫ'/anáhóót'i'* through self-realization to *hózhǫ́*.[44]

Peacemaking, with its very different approach to conflict resolution, arises from Navajo concepts of justice. Robert Yazzie, another former Chief Justice of the Supreme Court of the Navajo Nation, explains:

> Navajo justice is unique, because it is the product of the experience of the Navajo People. . . . To fully understand these concepts, the essential character of Anglo-European law must be compared to that of Navajo law. . . .
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> . . . [T]he Anglo-European legal system [can be described] as "vertical" and the Navajo legal system as "horizontal." . . . The goal of the vertical system or adversarial law is to punish wrongdoers and teach them a lesson. . . Adjudication makes one party the "bad guy" and the other "the good guy;" one of them is "wrong" and the other is "right." The vertical justice system is so concerned with winning and losing that when parties come to the end of a case, little or nothing is done to solve the underlying problems which caused the dispute in the first place.

explanations demonstrate how Native people are required to be conversant in both legal systems.

41. *See* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW (2009).

42. *Id.*

43. NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE (Marianne O. Nielsen & James W. Zion eds., 2005); AUSTIN, *supra* note 41.

44. *I. HÓZHǪ́JI NAAT'AAH – (Diné Traditional Peacemaking)*, THE JUDICIAL BRANCH OF THE NAVAJO NATION, http://www.navajocourts.org/Peacemaking/Plan/peace.html (last visited May 31, 2016).

> The "horizontal" model of justice is in clear contrast to the "vertical" system of justice. [It] uses a horizontal line to portray equality: no person is above another. A better description of the horizontal model, and one often used by Indians to portray their thought, is a circle. In a circle, there is no right or left, nor is there a beginning or an end; every point (or person) on the line of a circle looks to the same center as the focus. The circle is the symbol of Navajo justice because it is perfect, unbroken, and a simile of unity and oneness. . . .
>
> Navajo justice is a sophisticated system of egalitarian relationships where group solidarity takes the place of force and coercion. . . . The process—which we call "peacemaking" in English—is a system of relationships where there is no need for force, coercion or control. There are no plaintiffs or defendants; no "good guy" or "bad guy." These labels are irrelevant.[45]

This approach to justice is supported by descriptions of the Seneca Nation's traditional approach to dispute resolution. Professor Robert B. Porter, who has also served as Attorney General and as President of the Seneca Nation, writes:

> The Seneca People have a peacemaking tradition that is hundreds of years old and coincides with the establishment of the Six Nations Iroquois Confederacy, or Haudenosaunee, under the Great Law of Peace. For the Haudenosaunee, peace was not simply the absence of war, it "*was* the law" and an affirmative government objective. So dominant was this philosophy that its pursuit affected the entire range of international, domestic, clan, and interpersonal relationships of the Haudenosaunee.
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> . . . .
>
> Most disputes in Seneca society were resolved by mutual consent. . . . Major disputes . . . were resolved with the assistance of a peacemaker. The peacemakers, who might be the chiefs, elders, or other respected persons, relied upon their position, as well as precedent (for example, legends and stories from the community) to move the parties toward reconciliation. For example, if a husband and wife were unable to resolve matters between them, the mothers of the married pair would intercede to facilitate a reconciliation. Throughout the dispute resolution process, the restoration of peace—amongst the disputing individuals and within the community as a whole—was paramount.[46]

45. Robert Yazzie, *Life Comes From It: Navajo Concepts of Justice,* 24 N.M. L. REV. 176, 176-81 (1994) (internal citations omitted).

46. Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal System Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 240-47 (1997) (citations omitted).

Professor Porter's article goes on to describe how this collective approach was (and is) shared by other Indigenous groups in the United States.[47]

When contrasted with this harmonic group approach, the dynamic of "muscular and self-asserted individualism"[48] within the distinctly Western rights-based approach becomes overt. The rights-based approach arose out of a particular liberal understanding of the interaction between individual and government, an interaction paradigmatic to Western governmental systems. It consequently models a specific form of dispute resolution, a form that has a more narrow definition of rights and remedies. Indeed, Professor Porter goes so far as to declare that "the American dispute resolution mechanism is a process of structured aggression in which the parties, assisted by lawyers, engage in a self-interested pursuit of justice."[49]

Indigenous equivalents, by contrast, require that "full networks of social, political, economic and religious systems" be taken into account, alongside contextualized meanings and associated relationships between people and objects and/or places.[50] This broader perspective is often difficult to convey in the context of adversarial litigation rooted in a discussion of rights. Moreover, rather than paying more attention to the importance of contextual understandings, the purportedly universal and neutral character of rights discourse leads to their being detached from precise situations and thus effectively decontextualized.

In this regard, it should also be acknowledged that the contours of rights discourse, like any other social practice, are constructed and determined by the socio-cultural context from which it emerges, which is, of course, the *dominant legal culture*. Intentional or not, therefore, the presentation of such an approach as the only, the universal, the *neutral*, takes on a sinister complexion, not least because the conceptual architecture of the rights paradigm is intrinsically linked to that of modernity, which is in turn entwined with colonial projects responsible for either the exclusion of other legal forms and practices or their forced assimilation on its terms.[51]

To be clear at this stage: we do not raise these points in an attempt to undermine or otherwise impugn the important role of individual and human rights and the work done by practitioners and activists within that field. Such work is critical and has in many cases achieved important results. Rather, it is our contention that an approach such as the rights-based approach, fully understood vis-à-vis its Western pedigree and implicit power structures, is unlike-

47. *Id.* at 251-59.

48. JEREMY WALDRON, NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN (1987).

49. Porter, *supra* note 46, at 263.

50. KIRSTEN ANKER, DECLARATIONS OF INTERDEPENDENCE: A LEGAL PLURALIST APPROACH TO INDIGENOUS RIGHTS 57 (2014).

51. Eve Darien-Smith & Peter Fitzpatrick, *Laws of the Postcolonial: An Insistent Introduction*, *in* LAWS OF THE POSTCOLONIAL 1, 1-3 (Eve Darien-Smith & Peter Fitzpatrick eds., 1999).

ly always to be the optimal one for achieving justice for Indigenous peoples, as is illustrated by the examples presented in the next Part of this Article. It is therefore important to pause and reflect on the proper strategy, rather than to automatically pursue a rights-based approach.

II. Failures of the Rights-Based Approach

Over the last forty years, Indigenous people have pursued their claims for justice in a variety of national and international fora, including federal and national supreme courts,[52] international courts and commissions,[53] and United Nations treaty bodies.[54] These claims have met with decidedly mixed and often negative results, even when the case appeared to be a strong one. Furthermore, on those rare occasions where the court ruled in favor of the Indigenous group, enforcing the decision has often proved troublesome.[55] In fact, Indians have

52. Examples include the High Court of Queensland's decision in *Mabo v. Queensland*, [No. 21] (1992) 175 C.L.R. 1 (Austl.), and the Canadian Supreme Court's decision in the *Grassy Narrows First Nation v. Ontario*, [2014] 2 S.C.R. 447 (Can.).

53. Examples include the decision of the Inter-American Commission on Human Rights in the *Western Shoshone* case, Dann v. United States, Case 11.140, Inter-Am. Comm'n. H.R., Report No. 75/02, doc. 5 rev. 1 at 860 (2002); the decision of the Inter-American Court in the *Awas Tingni* case, Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); and the decision of the African Human Rights Commission in the *Endorois* case, Ctr. for Minority Rights Dev. (Kenya) and Minority Rights Group Int'l on Behalf of Endorois Welfare Council v. Kenya, No. 276/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (Feb. 4, 2010).

54. Such as, for example, the Commission on the Elimination of All Forms of Racism. The UN Treaty bodies are not the only ones who hear petitions from Indigenous people, the Expert Mechanism on the Rights of Indigenous People and the UN Special Rapporteur on the Rights of Indigenous People read and respond to claims that international law has been violated. *See Monitoring the Core International Human Rights Treaties*, Office of the High Comm'r, United Nations, http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx (last visited June 20, 2016); *Training Materials on the Expert Mechanism*, Office of the High Comm'r, United Nations, http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/TrainingmaterialsonEM.aspx (last visited June 20, 2016).

55. After the U.S. Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), President Andrew Jackson is rumored to have said, "Chief Justice Marshall has made his decision, now let him enforce it," a reference to the fact that the U.S. Supreme Court relies on the Executive Branch to enforce its decisions. *See* Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 Case W. Res. J. Int'l L. 215, 224 (2007) (quoting H.W. Brands, Andrew Jackson: His Life and Times 293 (2005)). After the Inter-American Court ruled in favor of the Awas Tigni Community, it took seven years for Nicaragua to actually issue the Community title to its land. *See* Press Release N° 62/08, Inter-Am. Comm'n on

fared so poorly in the U.S. Supreme Court that a national consortium has been organized to coordinate litigation strategy, and a generally accepted maxim is that the way to win an Indian law case is to keep it out of the Supreme Court.[56]

Cases brought by Indigenous people and Indigenous nations cover a wide spectrum of issues, but this spectrum can be divided into three general categories: (1) conflicts between sovereign governments; (2) disputes over regulatory issues; and (3) individual claims. Obviously, these are not discrete, separate categories but are rather overlapping points on a spectrum. They do, however, capture the three major types of disputes that recur in Indian law litigation, and this Part illustrates those three categories in more detail by providing an example of a "win" and a "loss" from each of them. From the "clash of sovereign governments" category we have chosen *Lonewolf v. Hitchcock*[57] and *United States v. Sioux Nation*,[58] each of which raised challenges to the federal government's appropriation of land. From the regulatory section we have chosen *Brendale v. Confederated Tribes*[59] and *Mississippi Band of Choctaw v. Holyfield*,[60] one a claim to regulation through legislation, the other through judicial processes. Finally, from the individual claims category, we have chosen the Crazy Horse Malt Liquor cases and *Santa Clara Pueblo v. Martinez*.[61] We selected these six cases because each (1) is widely cited as establishing key principles and is generally considered to be a foundational case, (2) represents either a "win" or a "loss" embodying the core nature of its category in easily explainable terms, and (3) illustrates the type of cultural clash where the system breaks down because rights-based approaches restrict the conversation artificially. This Part begins with an examination of each individual case and then proceeds to explore the cases as a collective, looking for patterns that can be extracted.

A. Conflicts Between Sovereign Governments

Indian law is inextricably intertwined with historical events and with federal Indian policy and can generally be broken into five "eras." In the first era, the United States dealt with tribes as foreign governments, negotiating treaties—including alliances and trade agreements. As the European population spread from coast to coast, treaty-making began to wane, and pressure built to incor-

Human Rights, IACHR Hails Titling of Awas Tingni Community Lands In Nicaragua (Dec. 18, 2008), http://www.cidh.oas.org/Comunicados/English/2008/62.08eng.htm.

56. *See* Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project,* 37 NEW ENG. L. REV. 695 (2003).

57. 187 U.S. 553 (1903).

58. 448 U.S. 371 (1980).

59. 492 U.S. 408 (1989).

60. 490 U.S. 30 (1989).

61. 436 U.S. 49 (1978).

porate tribes into the United States. Congress officially ended treaty-making in 1871,[62] and the U.S. government embarked on a new policy that sought to break up tribal governments and assimilate Indians into the general population.[63] The United States sought to achieve this goal through two primary methods: (1) the removal of Indian children from their families and their education at boarding schools; and (2) the allotment process, in which Congress divided reservation lands into specific plots and assigned those plots to individual Indians, thus ending the practice of holding reservation lands in common and forcibly introducing Western-style individual property ownership. Once the plots were allocated to individual tribal citizens,[64] the remaining lands were declared "surplus" and opened to white settlement. As a result of this process, by 1934, approximately ninety million acres had passed out of Indian hands, an aggregate which constituted approximately two-thirds of the lands originally reserved for tribes and tribal members.[65]

In *Lonewolf v. Hitchcock*, the Chief of the Kiowa tribe filed suit seeking to stop the allotment of the Kiowa reservation, on the grounds that it violated the treaty the United States had signed with the tribe. Article 12 of that treaty, the Treaty of Medicine Lodge, guaranteed that no further land cession would occur without the consent and signatures of three-quarters of the adult males of the tribe.[66] That consent was not provided for the allotment process.[67] The U.S. Supreme Court rejected the challenge, declaring that Congress possessed "plenary power" over Indian affairs and, as a result, it had the unilateral authority to abrogate treaty obligations.[68]

Lonewolf left tribes with no legal challenges to halt the allotment process, and indeed, no legal challenges to contest or remedy treaty violations. An earlier case, *Johnson v. M'Intosh*, had ruled that the aboriginal title to land possessed by tribes was only a right of occupancy, not a full possessory interest.[69] This ruling left tribes with no standing to bring a Fifth Amendment Takings claim, a con-

62. 25 U.S.C. § 71 (2012). The process of negotiating agreements continued, but the resultant pacts were executive agreements, not formal treaties. *See* LEXIS NEXIS, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.01, at 7 (2012) [hereinafter COHEN'S HANDBOOK].

63. *See* COHEN'S HANDBOOK, *supra* note 62, § 1.04, at 72.

64. The plots ranged in size from FORTY to 160 acres, and the quantity received by each person depended on his or her age, whether he or she was married, and whether he or she was the head of a household. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10 (1995)

65. Lonewolf v. Hitchcock, 187 U.S. 553 (1903).

66. *Id.* at 564.

67. *Id.* at 559-60.

68. *Id.* at 566.

69. 21 U.S. 543 (1823).

clusion confirmed by the U.S. Supreme Court in 1955's *Tee-Hit-Ton Indians v. United States*.[70]

Although tribes had no Fifth Amendment claim and no automatic right to judicial process for redressing treaty violations, Congress did eventually establish, in 1946, a mechanism for tribes to bring land claims against the United States. That process started with the Indian Claims Commission and later worked through the U.S. Court of Claims.[71] The Sioux Nation used this process as a forum to pursue its claims that the United States had wrongfully taken the Black Hills, which had been guaranteed to the tribe[72] in the 1868 Fort Laramie Treaty.

Unusually, the United States signed this treaty as the losing party in the Powder River War, also known as Red Cloud's War. The treaty reserved the Black Hills for the Sioux, proclaiming that any further land secession required the signatures of three-quarters of the adult males of the tribe, as was the case in the Treaty of Medicine Lodge relied upon in *Lonewolf*, and obligated the United States to keep all whites out of the territory.[73] Six years after the treaty was signed, gold was discovered in the Black Hills, and the United States began a campaign to wrest control of the territory from the tribe. The government opened the Black Hills to white settlement—Deadwood, South Dakota was one of the towns that sprang up as a result—and began systematically withholding rations and payments due under the treaty in an effort to compel the required signatures.[74] When these efforts were still not sufficient to gather more than a small fraction of the required signatures, Congress simply passed a statute seizing control of the land.[75]

The Sioux had no difficulty establishing the merits of the wrongful taking claim.[76] Indeed, the Court states that "a more ripe and rank case of dishonorable dealing will, in all probability, not be found in our history."[77] The difficulty, rather, was with the remedy, as the only remedy the Commission was empowered to provide was monetary compensation. That remedy comports with the Fifth Amendment's Takings Clause, which provides for "just compensation" when the government seizes private property, with "fair market" value the

70. 348 U.S. 272 (1955).

71. *See* John T. Vance, *The Congressional Mandate and the Indian Claims Commission,* 45 N.D. L. REV. 325 (1969). Vance was Chair of the Commission. *Id.* at 325 n.*.

72. The "Sioux Nation" is not one monolithic tribe; instead, the "Great Sioux Nation" was a label used by the Europeans as their way of naming the ethnic and language groups that were part of the Seven Fires Council.

73. EDWARD LAZARUS, BLACK HILLS WHITE JUSTICE 48-49 (1991).

74. *Id*. at 90-91.

75. 19 Stat. 192 (1876).

76. *See* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

77. *Id*. at 388.

standard compensation for land under the U.S. legal system. For the tribe, however, money was not "just compensation," as they sought return of the land itself. The Black Hills, or Paha Sapa (which translates to "The Heart of Everything That Is"), is central to the tribe's religion and its origin stories and, as such, is not land that can be bought and sold. The language of property rights, takings claims, and just compensation is wholly deficient in recognizing or encompassing such interests in land. All that the U.S. law provides for the taking of real property is the payment of fair market value.[78]

B. Disputes over Regulatory Issues

By the late 1920s the allotment policy had been deemed a failure,[79] and it was officially repudiated in 1934.[80] The new federal policy, as reflected in the Indian Reorganization Act, supported tribal governments—not as foreign governments, but rather as "domestic dependent sovereigns" who were part of the body politic of the United States.[81] Subsequent disputes thus tended to focus on which government possessed jurisdiction to regulate what conduct in Indian country.

One such case, *Brendale v. Confederated Tribes of the Yakima Reservation*, concerned the tribes' zoning authority.[82] The case began when the tribes filed suit seeking to stop developers from building in violation of tribal zoning ordinances.[83] The developers argued that the tribes lacked the ability to regulate the

78. Even that, however, is questionable in this case. Despite the fact that the land was taken for the gold it contained, only the value of the gold taken prior to the passage of the statute was factored into the price—not the more than $1 billion subsequently mined. Moreover, the tribe received only simple and not compound interest, with the result that the actual award was $105 million. LAZARUS, *supra* note 73, at 375. The tribes have refused to accept the award, with the result that the funds are still sitting in the U.S. Treasury. Ruth Hopkins, *Reclaiming the Sacred Black Hills*, INDIAN COUNTRY TODAY (Jun. 28, 2014) http://www.indiancountrytodaymedianetwork.com/2014/06/28/reclaiming-sacred-black-hills.

79. *See* Royster, *supra* note 64, at 16 ("The [Meriam R]eport, a nongovernmental study undertaken at the request of the Secretary of the Interior, investigated Indian policy and administration and heir impacts on Indian life. The destructive effects of the allotment policy documented in the Meriam Report—effects on the economic, social, cultural, and physical well-being of the tribes—generated sympathy and popular support for a change in the federal approach."). The Meriam Report is officially entitled INST. FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928).

80. *See* Indian Reorganization Act, 25 U.S.C. §§ 461-79 (2012).

81. With the exception of a short detour in the 1950s for the Termination Policy, this policy of encouraging tribal self-governance remains the current Indian policy pursued by the federal government.

82. 492 U.S. 408 (1989).

83. *Id.* at 419.

land in question because the tribes did not own the land.[84] The U.S. Supreme Court sided with the developers, ruling that the tribal governments lacked the ability to apply their zoning ordinances to non-Indians and non-Indian lands on the reservation.[85] This holding demonstrates a very strange notion of sovereignty and disregards the entire purpose of zoning, which is to establish a comprehensive strategy throughout a government's territory and not just on land owned by the government.[86]

The tribes were more successful in the case of *Mississippi Band of Choctaw v. Holyfield*.[87] That case involved interpreting the Indian Child Welfare Act (ICWA), a 1978 federal statute enacted to stop states and state social workers from wrongfully removing Indian children from their homes.[88] ICWA employed a two-step process to achieve its goals. The statute's first step was a set of procedural rules allocating jurisdiction over child welfare matters between state and tribal courts: for Indian children domiciled on the reservation, the tribal court had exclusive jurisdiction, while the state and tribal courts shared concurrent jurisdiction over Indian children domiciled off the reservation.[89] The statute's second step was a set of special procedural rules applicable to those cases that remained in state court.[90]

The dispute in *Holyfield* centered on whether the twins involved in the case were domiciled on or off the reservation.[91] The children's parents were unmarried and both lived on the reservation.[92] They decided to place their children with a white family off the reservation and arranged for the mother to give birth off the reservation.[93] The state court held that since the children had never lived on the reservation, they were not domiciled there, which meant that they were domiciled in the state.[94] Since that meant that the state court had concurrent jurisdiction, the state court presided over the adoption case.[95] The Supreme Court overturned that decision, holding that under the federal standards, a child's domicile was the same as the mother's.[96] Since ICWA provides that trib-

84. *Cf. id.* at 420-21.

85. *Id.*

86. *Id.* at 423-24.

87. 490 U.S. 30 (1989).

88. 25 U.S.C. §§ 1901-1963 (2012).

89. *Id.* § 1911.

90. *Id.* §§ 1912-1916.

91. *Holyfield*, 490 U.S. at 41.

92. *Id.* at 37.

93. *Id.* at 37-39.

94. *Id.* at 38-40.

95. *Id.*

96. *Id.* at 51-53.

al court possess exclusive jurisdiction over the adoption of a child domiciled on the reservation, the state court lacked jurisdiction and the adoption was null and void.[97]

C. Individual Claims

Our first two categories of cases involved the jurisdiction and authority of tribal, federal, and state governments. Our final category examines the rights of individual tribal citizens. The first case (or more accurately, the first series of cases) concerned attempts to stop a beer company from naming one of its products after Crazy Horse, a leader of the Oglala band of Lakota. The second case, *Santa Clara Pueblo v. Martinez*, involved an equal protection claim under the Indian Civil Rights Act (ICRA).[98]

The Crazy Horse cases began when a New Jersey beer company decided to name one of its malt liquors after the deceased Oglala leader.[99] The use of Crazy Horse's name was considered offensive by many, as Crazy Horse was a deeply revered political and religious leader who during his lifetime had spoken out against alcohol.[100] The litigation over the use of the name took place in three waves. The first wave comprised a suit challenging a federal statute prohibiting the use of Crazy Horse's name for alcoholic beverages:[101] the federal courts agreed that the statute violated the company's First Amendment rights and allowed the beer companies to proceed.[102] The second wave involved a suit filed in the Rosebud Tribal Court by the Estate of Crazy Horse.[103] That suit asserted both tribal and federal claims, including intentional infliction of emotional distress, the right of publicity, and claims under the Indian Arts and Crafts Act and the Lanham Act.[104] The defendants argued that the tribal court lacked jurisdiction over them and, in the third wave of litigation, took these claims to federal court. The federal court, in a highly technical and contested decision, agreed that the tribal court lacked jurisdiction, as none of the beer company's actions took place on the reservation.[105] The Eighth Circuit's decision did not address

97. *Id.* at 53.

98. 436 U.S. 49 (1978).

99. Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1017 (1995).

100. *Id.*

101. Pub. L. No. 102-393, § 633, 106 Stat. 1729 (1992).

102. Hornell Brewing Co. v. Brady, 819 F. Supp. 1227 (E.D.N.Y. 1993).

103. *See* Newton, *supra* note 99, at 1021-22.

104. *Id.* at 1045-46.

105. Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998). *See also* Frank Pommersheim, *The Crazy Horse Malt Liquor Cases: From Tradition to Modernity and Halfway Back*, 57 S.D. L. REV. 42, 55 (2012).

the difference between personal and subject matter jurisdiction, however, apparently instead treating these as the same thing when considering tribal jurisdiction over non-Indians.[106] Nor did the Court discuss or consider standard conflict of laws principles which declare that states possess personal jurisdiction over persons and corporations whose activities outside the state's borders have certain impacts within the state's borders.[107]

The case of *Santa Clara Pueblo v. Martinez*[108] was also decided on a technicality, although in that case the Indigenous group was able to use the procedural obstacle in its favor. Julia Martinez filed the lawsuit challenging a tribal ordinance as violating the ICRA's Equal Protection provision.[109] The ordinance provided that the children of male tribal citizens who married outside the tribe were eligible for citizenship, but the children of female tribal citizens who married outside the tribe were not so eligible.[110] The U.S. Supreme Court ruled that the ICRA did not contain an implied right of action, thus leaving tribal governments in control of defining their own citizenship criteria and requiring Julia Martinez to take her equal protection claim to tribal court.[111]

D. Analyzing the Patterns

These six cases provide examples of the types of "wins" (*Santa Clara*, *Holyfield*, and *Sioux Nation*) and "losses" (*Lonewolf*, *Brendale*, and the *Crazy Horse Cases*) experienced in the U.S. courts by Indians and Indian tribes. In each of the three losses, a key factor in the loss was the fact that the claimant was either an Indian or a tribe. Had *Lonewolf* been a case brought against a trustee for selling trust assets in violation of the trust agreement and for less than market value, the trustee would have lost. However, as the beneficiary was the tribe and the trustee was the United States, the trustee was deemed to possess the necessary power.[112] Similarly, in *Brendale*, had a developer flouted city-zoning ordinances on the basis that the land in question was neither owned nor controlled

106. This is in contrast with the *Rosebud* Supreme Court, which did perform the more detailed and nuanced analysis. *See* Pommersheim, *supra* note 105, at 56-57.

107. *Id.* at 57.

108. 436 U.S. 49 (1978).

109. 25 U.S.C. § 1302(a)(8) (2012). Tribal governments are not bound by the individual rights provisions of the U.S. Constitution, *see* Talton v. Mayes, 163 U.S. 376, 384 (1896), but instead are bound by the provisions of the ICRA, which is codified at 25 U.S.C. §§ 1301 et seq.

110. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52 n.2 (1978).

111. *Id.* at 52.

112. *See, e.g.*, WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS, AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS 560, 568-69 (4th ed. 2001).

by the city, the developer would have been laughed out of court.[113] Finally, if a beer company had attempted to label its new malt liquor Elvis of Graceland, you can be confident that the Estate of Elvis Presley would have had a say in the matter.[114]

An examination of the three "wins" supports the conclusion that race, culture, and legal culture play a major role in the outcome of cases. In *Sioux Nation*, the tribe may have ostensibly won the litigation, as the U.S. Supreme Court upheld the finding that the federal government had wrongfully taken the land in question,[115] but, from the tribal perspective, the case is seen largely as a failure. The land in question was sacred land, and the tribe sought its return, not a monetary payment in compensation for its loss.[116]

Santa Clara and *Holyfield* are also not the "wins" they first appear to be. Both are celebrated as victories for tribal sovereignty but, when put in context, they do not come across as ringing endorsements of tribal sovereignty. Both cases involved conflicts between a tribe and its citizens and focused on tribal authority over its citizens. Neither considered tribal authority over non-Indians, and as *Brendale* and *Crazy Horse* demonstrate, that is where the Supreme Court has limited or eliminated tribal jurisdiction. It is a very odd notion of sovereignty that permits a tribal government's control over what happens in its territory to be markedly reduced by the involvement of non-Indians or land owned by non-Indians.[117]

In addition, it is interesting to note that all three "victories" involved federal legislation: *United States v. Sioux Nation* happened only because Congress allowed the United States to be sued; *Holyfield* occurred because Congress gave tribes exclusive jurisdiction under those facts in the Indian Child Welfare Act; and *Santa Clara Pueblo* was made possible because of a balance struck by Congress when enacting ICRA. Importantly, the cases involving more rights-based claims were all losses. A comparison of the "wins" and "losses" in these cases reveals three common themes, namely: (1) an intersection of distinct legal cultures; (2) the cultural identity of the individuals and groups involved; and (3) the identity of the individual involved. More generally, however, the rights-

113. The purpose of zoning is to regulate all land uses in a specified governmental territory, not just on government land.

114. In April 2014, the estate of Elvis Presley filed a federal suit against the manufacturer of Beretta handguns alleging that the company's advertising falsely implied that Elvis endorsed their product. *See* ABG EPE IP LLC v. Fabbrica d'Armi Pietro Beretta S.p.A., No. 2:14-cv-02263 (W.D. Tenn. Apr. 10, 2014).

115. U.S. v. Sioux Nation of Indians, 448 U.S. 371, 421-23 (1980).

116. Indeed, at last check, the funds awarded were still sitting in the U.S. Treasury, where they have spent more than three decades, as tribes involved in the litigation have refused to accept the monetary compensation.

117. *See, e.g.*, Allison M. Dussias, *Geographically-Based And Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 4 (1993).

based approach appears to break down for tribes and individual Indians at the *intersection* of legal cultures and where the person requesting protection under the law differs from the prevailing norm within the dominant legal culture.

We have argued above that the rights paradigm governing interactions between individuals and the state not only originated from a particularly European intellectual heritage but that this pedigree also means that the parameters and operations of the rights paradigm conform to a specific worldview. Their overtly Western and Anglo-American inheritance means rights are not the neutral concept that they are often presented to be, but rather are imbued with meaning drawn from that heritage—importantly, to the exclusion of alternative conceptualizations.[118] As this Part demonstrates, it is our contention that, while some issues of Indigenous justice can be satisfactorily resolved with recourse to a rights-based approach, there are many situations for which such an approach is unsuitable. The next Part examines how we can start the process of developing alternatives to the rights-based approach.

III. Building on Legal Pluralism

An oft-repeated critique of Critical Legal Studies and Critical Race Theory is that they tear down existing structures without offering any alternatives. We are mindful of this critique, as well as of the fact that academics working in the field of Indigenous justice owe a responsibility to the communities with whom they work. The field of Indigenous justice is not an academic playground for experimentation—real lives and real claims and real futures are at stake. It is not sufficient merely to identify the problem, therefore, as we must also at least make a start on the path towards a solution.

One of our allegations is that the rights-based approach masks the inherent tensions between human rights and legal pluralism. Inherent in that critique is our belief that legal pluralism is a valuable and sometimes preferable approach. We start this Part of our Article with a brief discussion of legal pluralism as it relates to our argument and then turn to two case studies that provide the kernels of alternatives to the rights-based approach.

A. Rights-Based Approaches and the Inherent Tension Between Human Rights and Legal Pluralism

As the previous Part identifies, the rights-based approach breaks down at the intersection of legal orders and where the party requesting protection under the law differs from the prevailing norm within the dominant legal order. It is the very multiplicity of legal orders that generates this interface—this point of genuine normative conflict—and it is thus here, with legal pluralism, that any search for solutions must begin. Legal pluralism is the term commonly used to describe a situation of normative heterogeneity within a specific legal space and to encompass "a notion of normativity [that does] not correspond to an ideal-

118. Deloria & Lytle, *supra* note 39, at 194.

ised understanding of law in western thought, necessarily centered upon the state."[119] Often seen as a "messy compromise" made by the nation-state to reconcile itself to challenging circumstances,[120] legally plural constellations such as those currently found in the United States to accommodate Indian normative orders are considered practical, albeit flawed, solutions to endemic post-colonial problems. Whereby the monist legal form presumes the "territorial exclusivity of the sovereign,"[121] legal pluralism not only acknowledges different forms of normativity within the bounded legal space of the nation-state but also often is perceived as being innately counter-hegemonic.[122]

However, the extent to which legal pluralism has been successful in either its promotion of legal heterarchy or the related but usually unstated ideological aim of remedying existing structural biases within society is questionable; indeed, in this regard we can point to similar fault lines to those identified by the rights critics discussed earlier. It is our contention that, in spite of the emancipatory potential often thought to exist at the heart of legal pluralism, particularly in its instrumental conceptualization, its Achilles heel lies in the asymmetry of effective power between state and non-state legal orders—or rather, for our purposes, dominant and Indigenous legal cultures.[123] While this asymmetry may not appear immediately problematic, it raises issues in situations of normative conflict irresolvable by the simple recognition of jurisdiction or the lack thereof, and, more importantly, in situations when these conflicts place under pressure those concepts that go to the heart of the liberal state, namely individual *rights*.

Nowhere is the potential for the critique of the rights-based approach more apparent than where we move from discussing Indigenous peoples as minority groups within society to considering Indigenous and tribal legal cultures. This shift in focus from the more politically minded "rights critique" to analyses concerned with understanding legal normativity within society, such as legal pluralism, serves to draw attention explicitly to the jarring quality of universal

119. René Provost & Colleen Sheppard, *Human Rights Through Legal Pluralism*, *in* DIALOGUES ON HUMAN RIGHTS AND LEGAL PLURALISM 1, 2 (René Provost & Colleen Sheppard eds., 2012).

120. This condition was famously described by John Griffiths as "recalcitrant social reality" in his seminal article, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 7 (1986).

121. ANKER, *supra* note 50, at 72.

122. For a discussion of this point, *see* Jennifer Hendry, *Legal Pluralism & Normative Transfer*, *in* ORDER FROM TRANSFER: COMPARATIVE CONSTITUTIONAL DESIGN AND LEGAL CULTURE 153, 161-62 (Günter Frankenberg ed., 2012).

123. *See*, *e.g.*, ANKER, *supra* note 50, at 3 ("But what struck me, on closer inspection of the native title debates in Australia, was the asymmetric nature of the shift: national law admits only change over which it has firm control. It maintains the prerogative of the final decision. It recognizes rights derived from Indigenous law but determines the meaning of that law and the parameters for recognition.").

claims within rights discourse and the way in which such claims embody a desire on the part of the dominant legal culture "to exercise sovereign agency as mastery over meaning."[124]

To justify this statement, it is necessary to take a moment to explain further the concept of legal culture and also to consider the ways in which Indigenous legal cultures are jurisdictionally, epistemologically, and ontologically distinct from the dominant federal or state legal culture. In contrast to other minority social groups, such as, for example, the Amish or Hasidic Jews, both discrete cultures with their own traditions, customs and cultural norms, Indigenous and tribal communities can rather be considered as *sovereign legal* cultures, understood in the sense of genuinely discrete normative orders.[125] Part of this discreteness results from a geographical separateness, as Indigenous peoples are often confined to specific territories that may or may not be ancestral lands. This element, however, is insufficient in and of itself. Rather, it is a combination of (i) this territorial dimension; (ii) the specific manner in which contextualized legal meaning is created by a distinctive cognitive structure;[126] and (iii) the different criteria of existence for Indigenous law norms—as opposed to state norms—that allow for their conceptualization as ontologically distinct.[127] As Anker explains, "neither written nor institutionalized, Indigenous law is unlikely to be characterized by sovereign command, to use a rule of recognition, or to give two figs for the difference between law and custom"[128]—as such, it must be considered as fundamentally dissimilar to state norms.

A look at the Supreme Court's decisions involving tribal jurisdiction illustrates and reinforces this point. Beginning with its 1978 decision in *Oliphant v. Suquamish*,[129] the Supreme Court has paid lip service to tribal jurisdiction but has steadily limited the ability of tribal governments and tribal courts to regulate the activity of non-Indians within Indian country. In many of these decisions, the Court has commented on the "strange" or "different" nature of tribal laws and its concerns about holding non-Indians accountable in such a differ-

124. ANKER, *supra* note 50, at 64.

125. For a discussion of the contours of the concept of legal culture, see DAVID NELKEN, USING LEGAL CULTURE (2012), and David Nelken, *Using the Concept of Legal Culture*, 29 AUSTL. J. LEG PHIL. 1 (2004). *See also* Roger Cotterrell, *Comparative Law and Legal Culture*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 709 (Mathias Reimann & Reinhard Zimmermann eds., 2008); Lawrence M. Friedman, *The Place of Legal Culture in the Sociology of Law*, *in* 8 LAW & SOCIOLOGY: CURRENT LEGAL ISSUES 185 (Michael Freeman ed., 2006).

126. *See* Pierre Legrand on, respectively, legal *episteme* and legal *mentalité*, in *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L. Q. 52 (1996), and *How To Compare Now*, 16 LEGAL STUD., 232 (1996).

127. Brian Z. Tamanaha, *The Folly of the 'Social Scientific' Concept of Legal Pluralism*, 20 J. L. & SOC'Y 192, 209 (1993).

128. ANKER, *supra* note 50, at 75.

129. 435 U.S. 191 (1978).

ent system. One such example is found in *Oliphant,* in which the Court commented on the need to protect non-Indians:

> from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . . which judges them by a standard made by others and not for them . . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . .[130]

While this position has initial, sympathetic appeal, a closer look reveals two major problems. First, the United States allows its citizens who break the laws of other countries, such as Michael Fay in the famous incident in 1994, to be tried, convicted, and sentenced, even when those punishments appear draconian, such as caning.[131] The question that arises here is why U.S. citizens who break the laws of a political unit that is part of the United States should be excused because they are not part of the tribal citizenry, particularly when the non-Indians involved in these suits often *live* in Indian country. The United States holds foreign citizens who live within the United States responsible for knowing and following its laws, even when they are arcane zoning regulations,[132] so why should non-Indians who reside in Indian country be exempt from the same standard? Second, the actual laws in question in these cases are often standard legal provisions found throughout the United States. In *Oliphant*, for example, the two defendants assaulted a tribal police officer and led police on a high-speed car chase that ended when one of the defendants crashed into a tribal police car. Far from being strange or different, assaulting an officer, reckless driving, and destruction of government property are activities criminalized in *every* U.S. jurisdiction.

What *Oliphant* highlights very sharply is the degree to which the Supreme Court is quick to jettison any pretense of legal pluralism when its consideration would affect those individual rights guaranteed by the dominant legal culture. While the Court has declared that the individual rights protections found in the ICRA need not be interpreted "jot for jot" the same as those found in the U.S. Constitution,[133] it has yet to make that declaration a reality. Indeed, the Court's decisions display a marked reluctance to subject any persons to tribal justice mechanisms (other than citizens of the tribe).[134] This reluctance is almost al-

130. *Id*. at 210-11 (quoting Ex Parte Crow Dog, 109 U.S. 556, 571 (1883)).

131. *See U.S. Student Tells of Pain Of His Caning In Singapore*, N.Y. TIMES (June 26, 1994), http://www.nytimes.com/1994/06/26/us/us-student-tells-of-pain-of-his-caning-in-singapore.html.

132. Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 34 (1992).

133. COHEN'S HANDBOOK, *supra* note 63, at § 14.04.

134. *See* Dussias, *supra* note 117, at 4.

ways accompanied by a statement expressing concern about subjecting U.S. citizens to tribunals not required to follow the dictates of the U.S. Constitution.[135]

Once again, upon closer analysis, an initially appealing argument collapses under its own weight. The Supreme Court expresses concerns *only* when the defendant is not a tribal member; the Court does not seem to share the same concern for defendants who *are* Indian.[136] Furthermore, the Court has never looked beyond reflexive, surface concerns in order to test the analytical truth of its assertions, even though it has had ample opportunity to do so.[137]

These decisions exemplify a clear desire on the part of the Supreme Court, as an agent of the dominant legal culture, to maintain tight control of the meaning of rights and the circumstances under which they apply. More than this, however, is the stark manner in which the Court overtly prioritizes rights protections over accommodations of legal pluralism, even when that pluralism is the official policy of the legislative and executive branches of the federal government. This, we argue, privileges the allegedly universal quality of rights at the expense of important contextual considerations.

This tension between the universal nature of rights and the contextual particularity of legal pluralism is the same whether this discussion concerns civic or human rights. As Provost and Sheppard have noted, there is a propensity for human rights discourse to "veer towards essentialism regarding the human condition," with a vital aspect of their claim to universality being that they are

135. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353, 383 (2001) (Souter, J., concurring):

> The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given "[t]he special nature of [Indian] tribunals," . . . . which differ from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes.

136. We are aware that in *Duro v. Reina*, 495 U.S. 676 (1990), the Supreme Court expressed concern about the "nonmember Indian." *Id. passim.* Congress, however, declared in the *Duro*-Fix Amendment, 25 U.S.C. § 1302 (2012), that tribal jurisdiction extended equivalently to all Indians, and the Supreme Court upheld this amendment in *United States v. Lara*, 541 U.S. 193 (2004).

137. A full discussion of this complex issue is beyond the scope of this Article. To provide a brief example, however, the Court's primary concern appears to be with ICRA's lack of a guaranteed right to indigent defense counsel. Under the Court's own precedents, states are required to provide indigent defense counsel only when the defendant is accused of a felony or when that defendant is sentenced to incarceration. *See* Alabama v. Shelton, 535 U.S. 654 (2002); Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v Wainwright, 372 U.S. 335 (1963). Since ICRA restricted (at least prior to 2010) tribes from imposing felony-level incarceration, and many tribes specifically do not sentence defendants to incarceration, the U.S. Constitution's right to indigent counsel would not apply in many tribal courts. Yet the Court has never seen fit to conduct such an analysis. *See* MAUREEN L. WHITE EAGLE ET AL., TRIBAL L. & POL'Y INST., TRIBAL LAWS IMPLEMENTING TLOA ENHANCED SENTENCING AND VAWA ENHANCED JURISDICTION 10-11 (2015).

"not subject to variation from place to place."[138] Indeed, this is the main reasoning behind the "rights as trumps" position adopted by Western legal culture, which designates this specific approach as the *only* possible approach, thus excluding any contributions that might be made by subaltern legal cultures to the form or content of dispute resolution.[139]

In the next Part, we explore two cases studies and analyze how the lessons they offer sow the seeds of alternative approaches to addressing Indigenous issues, approaches that further the goals of legal pluralism.

B. Two Case Studies: VAWA 2013 and Sacred Sites

1. Violence Against Native Women in the United States

Domestic violence attracted the attention of the U.S. legal system in the 1970s and 1980s, with widespread attention focused on the issue by the mid-1980s. Multiple factors contributed to this movement, but two dramatic personal stories helped capture public attention—those of Francine Hughes, who set fire to her abusive husband while he slept,[140] and Tracy Thurman, who won a $2.3 million verdict in 1985 against a Connecticut police department for its repeated failures to arrest her abusive husband.[141]

Once the public's attention was focused on the issue, education about both the dynamics of domestic violence and its consequences could begin. The statistics were startling:

> Domestic violence was the leading cause of injury to women in United States;
>
> More women were injured through acts of domestic violence than the combined total of women injured in auto accidents, stranger rapes, and mugging;
>
> One-third of all women who sought treatment at hospital emergency rooms did so as a result of domestic violence; and

138. Provost & Sheppard, *supra* note 119, at 4.

139. We recognize that a potential criticism of our approach is that human rights regimes protect individual members of Indigenous groups from discrimination at the hands of the group. *See, e.g.*, Leslie Green, *Internal Minorities and Their Rights*, *in* THE RIGHTS OF MINORITY CULTURES 257 (Will Kymlicka ed., 1995). As discussed more fully below, we are not arguing for the complete abandonment of the rights-based approach. *See infra* Part IV. It is important, however, not to import cultural norms from the dominant into the subaltern legal culture under the guise of human rights.

140. Her story was chronicled in the 1984 TV movie *The Burning Bed*, in which Hughes was played by Farrah Fawcett. *The Burning Bed* (NBC television broadcast Oct. 8, 1984).

141. Thurman v. Torrington, 595 F. Supp. 1521 (D. Conn. 1984).

> One-third of female homicide victims were killed by their husbands or boyfriends.[142]

As awareness grew about the nature and consequences of domestic violence, states began treating domestic violence as a matter for the criminal justice system, as opposed to a private family matter, and a number of procedures were either implemented or strengthened, including mandatory arrests, no-drop prosecutions, and protection orders. Protection orders proved to be an effective tool in the fight against domestic violence, but they suffered from an inherent enforcement limitation. Due to their nature as temporary, modifiable orders, they fell outside the ambit of the full faith and credit provisions, which required states to recognize and enforce each other's court judgments.[143] Because protection orders did not satisfy the requirements for full faith and credit, they were enforceable only within the jurisdiction that issued them. This created problems if the protected party left the jurisdiction for vacation, to visit family, to travel on business, or to flee the abuser.

Congress turned its attention to this problem in the 1994 Violence Against Women Act (VAWA),[144] an omnibus bill taking a multi-pronged approach to addressing domestic violence. One of those prongs, the full faith and credit requirements for protection orders, required all states and all tribes to recognize and enforce each other's protection orders.[145] By mandating that all tribes and all states recognize and enforce each others' protection orders,[146] Congress sought to make one order good everywhere in the country. This seemingly simple directive, however, concealed a wealth of complexity, due to the differences between state and tribal jurisdictions.[147] The complications existed both in issuing the orders and in enforcing them, although the difficulties were particularly acute on the enforcement side.

One reason protection orders were effective at addressing domestic violence was that while most protection orders were civil orders issued by civil

142. *See* Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123, 126-27 (2002).

143. *Id.* at 130.

144. Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C).

145. 28 U.S.C. §§ 2265-66 (2012). The other two prongs were creating a federal private right of action for gender violence, which was struck down by the U.S. Supreme Court in *United States v. Morrison*, 529 U.S. 528 (2000), and a series of new federal crimes, including interstate travel to violate a protection order and interstate domestic violence. 18 U.S.C. §§ 2261-62 (2012).

146. VAWA's full faith and credit provisions originally encompassed only tribes and states; they were expanded to include territories in 2006. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 STAT. 2960 (2006).

147. *See* Tatum, *supra* note 142.

courts, most states prosecuted violations of a protection order as a separate crime.[148] Tribes did not have that same ability, at least not where the perpetrator was a non-Indian, as a result of the 1978 U.S. Supreme Court declaration that tribal governments lack criminal jurisdiction over non-Indians.[149] This gap presented significant problems, as government statistics showed that well over eighty percent of the sexual violence against Native women was perpetrated by non-Native men.[150] Native women were victims of domestic and sexual violence at almost two-and-one-half times the rate of other women, with one in three Native women being raped or sexually assaulted in their lifetime, a rate that increased to two in three for the Alaska Native population.[151]

Efforts began almost immediately after the passage of VAWA 1994 to reinstate tribal criminal jurisdiction over non-Indians, but those efforts did not even make it out of committee.[152] This failure is a paradigmatic example of the circumstances under which the rights-based approach breaks down—that is to say, at the intersection of two legal cultures and where the parties seeking protection (in this instance Native women) are members of the minority legal culture. Indeed, it was on this premise that a group of activists in 2000 embarked upon a multi-layered strategy to change the law. The core of this strategy was a concerted focus on the shocking statistics and the "maze" of criminal jurisdiction rules, not taken in isolation but, rather, wrapped in the personal narratives of individual Native women. In 2007, Amnesty International issued its *Maze of Injustice* report,[153] which concluded that the rates of sexual violence against Native women in the United States were so high, and the cause so attributable to governmental policy, that the result was a human rights violation.[154] That report captured the attention of key members of Congress, who lobbied other members of Congress, and soon Congress had passed both the 2010 Tribal Law and Order Act[155] and the 2013 Violence Against Women Act.[156]

The Tribal Law and Order Act provides tribes with enhanced sentencing authority,[157] while the 2013 Violence Against Women Act restores to tribes mis-

148. *Id.*

149. Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978).

150. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NLJ 203097, AMERICAN INDIANS AND CRIME 1992-2002 (2014).

151. *Id.*

152. *See* Tatum, *supra* note 142, at 170-71.

153. AMNESTY INT'L, MAZE OF INJUSTICE (2007).

154. *Id.*

155. Pub. L. No. 111-211, 124 Stat. 2258 (2010).

156. Pub. L. No. 113-4, 127 Stat. 54 (2013).

157. The Tribal Law and Order Act was an omnibus bill addressing elements of the entire criminal justice system. The enhanced sentencing provisions were codified as part of the ICRA at 25 U.S.C. § 1302 et seq. (2012).

demeanor criminal jurisdiction over non-Indians who commit domestic violence or dating violence, or who violate a protection order on the reservation.[158] Both statutes contain a number of prerequisites,[159] but they do restore to tribes those valuable powers that had been lost. Here, the rights-based approach appears to have worked. By focusing on the rights of Native women to be free from sexual violence, activists were successful in crafting legislation to return to tribes the authority necessary to prosecute those who commit domestic violence in their territory.

Both the argument and the solution could have unfolded in very different ways, however. The argument could easily have been characterized as a conflict between governments, with tribal governments waving the flag of sovereignty and arguing in favor of a government's ability to protect its citizens, or the federal government could have responded by assuming more power for itself to prosecute these crimes or by allocating more funds to federal prosecutors to enforce existing laws. Yet in the interests of avoiding a governmental showdown, advocates kept the focus on the individual Native women and used the language of human rights to shame the U.S. government into action. As a result, they achieved what was arguably the greatest expansion of tribal sovereignty since President Nixon established the government-to-government relationship in 1970.[160]

The issue in this example was framed as an individual rights issue—the rights of Native women—as opposed to a question regarding the scope of governmental power. By comparing Native women to other women in the United States, advocates also laid the groundwork for an equal protection claim. The requested remedy—the ability to prosecute criminals—was also a remedy recognized and used by the dominant legal culture, with the effect that this strategy *clothed* the requests in the language of rights, making the request both cognizable and familiar, and even had the effect of making those who opposed the request seem as if they condoned the abuse.[161] The result—VAWA 2013 and the return to tribes of special domestic criminal jurisdiction—was revolutionary,

158. The portions of VAWA 2013 relating to Tribal Special Domestic Violence Criminal Jurisdiction were codified as part of the ICRA at 25 U.S.C § 1304 et seq. (2012).

159. Most of these prerequisites relate to procedural rights, and the cornerstone of both statutes is a requirement that tribes provide indigent defendants with defense counsel at least equal to that guaranteed by the Sixth Amendment to the U.S. Constitution. *See* 25 U.S.C. §§ 1302(b)-(c), 1304 (2012).

160. *See* Richard Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970), *reprinted at* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds.), http://www.presidency.ucsb.edu/ws/?pid=43215 (last visited June 20, 2016).

161. The headline of one Washington Post blog post read, "Protecting Rapists, Murderers by Killing VAWA" and reported that the editor of one feminist magazine had labeled the House Majority Leader "the patron saint of rapists." Jonathan Capehart, *Protecting Rapists, Murderers by Killing VAWA*, WASH. POST: POSTPARTISAN (Dec. 20, 2012), http://www.washingtonpost.com/blogs/post-partisan/wp/2012/12/20/protecting-rapists-murderers-by-killing-vawa/.

although not the only possible option. When the pilot project began on February 20, 2014, it was the first time in more than thirty-five years that tribes were able to arrest and prosecute non-Indians who had committed crimes in Indian country. The statute overturned a Supreme Court case and pushed aside decades of court decisions questioning the fairness of tribal courts.

2. Access to Sacred Sites on Federal Public Lands

As illustrated by *Lyng*, the rights-based approach also breaks down in the context of access to sacred sites on federal public lands. While in the case study of VAWA activists were able to employ a strategy of individual rights, such an approach was impossible in the sacred site context, as the history of the United States and its treatment of Indian religious practices is not a model of constitutional compliance. Even though the federal government has been under a restriction since the ratification of the First Amendment in 1791 to "make no law . . . prohibiting the free exercise" of religion,[162] Indians practicing their traditional religions have never enjoyed the same freedoms as those who hold Judeo-Christian beliefs. The federal Code of Indian Offenses, which governed the behavior of Indians on reservations, made it a crime to practice traditional religions,[163] while children attending Indian boarding schools were required to attend Christian services and were punished severely for practicing their religion.[164] Indeed, after the passage of the Bald and Golden Eagle Protection Act, Indians were required to apply to the federal government for permission to acquire and possess so much as an eagle feather.[165]

This background did not bode well for attempts to use the Free Exercise Clause to protect and access Native sacred sites located on federal public land. The National Park Service and the U.S. Forest Service manage many of these sites, so Indians must apply for permission to be at their sacred sites. This point deserves emphasis, for no other group is required to seek federal permission to do the functional equivalent of attending church.

In addition to needing to obtain a government permit to access sacred sites, Indians must also battle any federal land management plans placing them under threat. A series of federal lawsuits in the 1970s and 1980s contained such battles.[166] The three primary cases in that series are:

162. U.S. CONST. amend. I.

163. Religious practice was punishable by rations withholding and incarceration. *See* RULES GOVERNING THE COURT OF INDIAN OFFENSES § 4 (1883), https://rclinton.files.wordpress.com/2007/11/code-of-indian-offenses.pdf; *see also* Robert N. Clinton, *Code of Indian Offenses*, FOR THE SEVENTH GENERATION BLOG (Feb. 24, 2008), http://tribal-law.blogspot.com/2008/02/code-of-indian-offenses.html (explaining what the Code is and why it is so difficult to locate).

164. *See* AMNESTY INT'L, SOUL WOUND (2007).

165. *See* 50 C.F.R. § 22.22 (1999).

166. *See, e.g.*, TATUM & SHAW, *supra* note 29.

1. *Wilson v. Block*, in which Indians challenged the expansion of a ski resort in Arizona's Coconino National Forest;[167]
2. *Badoni v. Higginson*, where various groups challenged the construction of Glen Canyon Dam and the subsequent flooding of Lake Powell, which affected Rainbow Bridge in southeastern Utah;[168] and
3. *Lyng v. Northwest Cemeteries Protective Association*, in which practitioners of a traditional, land-based religion sued the U.S. Forest Service to stop commercial timber harvesting in a section of northern California's Six Rivers National Forest.[169]

These cases raised multiple challenges, including both statutory and constitutional claims. As discussed above, the Free Exercise claim in *Lyng* appeared particularly strong, and it was this case that ultimately reached the Supreme Court. The test at the time for the Free Exercise Clause required the plaintiff to demonstrate that the government action substantially burdened their free exercise of religion—once that was established, the burden shifted to the government to demonstrate a compelling governmental interest for doing so, with the law narrowly tailored to achieve that goal.[170] While the Court did not change the language of the test, it did shift from using a general definition of "substantial burden" to treating that phrase as a legal term of art, thereby narrowing its meaning, with the result that the plaintiffs no longer satisfied the test.

The new "substantial burden" test, when coupled with the traditional deference given by federal courts to the actions of federal agencies,[171] meant that any use of the Free Exercise Clause to protect Indians' use of their sacred sites was in all likelihood doomed to failure. This result left tribes and tribal advocates in search of a new strategy.

Within a few years of the *Lyng* decision, the park ranger in charge of Devils Tower National Monument decided it was time for a new site management plan, in particular to accommodate the greatly increased number of climbers.[172] This increase strained the Park Service's infrastructure at the site and impacted its ability to fulfill other statutory directives, such as protecting the environment and the habitats of migratory birds.[173] The Park Service had also noticed in-

167. 708 F.2d 735 (D.C. Cir. 1983).

168. 638 F.2d 172 (10th Cir. 1980).

169. 485 U.S. 439 (1988).

170. Sherbert v. Verner, 374 U.S. 398 (1963).

171. Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 845 (1984).

172. The number of climbers at the site had skyrocketed from 312 in 1973 to more than 6,000 annually in the early 1990s. NAT'L PARK SERV., DRAFT CLIMBING MANAGEMENT PLAN AND ENVIRONMENTAL ASSESSMENT, DEVILS TOWER NATIONAL MONUMENT, WYOMING ii (1994).

173. *Id.*

creased friction between visitors and Indians who came to worship at the site,[174] which is sacred to more than fifteen tribes.[175] Federal land management planning had historically proceeded with the agency in charge of a site developing a plan internally, publishing the draft of the plan for notice and comment, and then issuing a final plan after making any necessary changes—after reviewing the comments received.[176] This process limited input into the development of the plan and often resulted in the agency having such substantial investment in the plan that few, if any, significant changes were made as a result of the notice-and-comment period.

Rather than following this standard approach in developing a new climbing plan for Devils Tower, however, the Park Service borrowed from a method used successfully at Medicine Wheel National Landmark in Wyoming. They assembled a working group of interested parties and engaged them in the development of the plan from the beginning. This process resulted in a consensus and a Final Climbing Management Plan (FCMP) that called for the following: signage at the site requesting that people stay on the trails and avoid disturbing prayer bundles; a display in the visitors' center recounting the cultural history and importance of the site to tribes; and a voluntary moratorium on climbing during the month of June. While a group of local residents did file a suit challenging the FCMP as violating the Establishment Clause, the federal courts quickly and efficiently dismissed the suit on standing grounds.[177]

The success of the consultation process at Medicine Wheel and Devils Tower were major factors contributing to Executive Order 13007, a directive from the President requiring all federal agencies to consult with tribes before undertaking activities that impact sacred sites.[178] Although 1978's American Indian Religious Freedom Act declared that respect for Native religious practices was the policy of the United States,[179] EO 13007 put that policy into practice in a manner that changed the operation of many federal agencies who manage lands containing sacred sites.

3. Lessons From the Case Studies

This Article started by highlighting the legal cultural pedigree of the rights-based approach and its consequent limitation to cases pursuing claims for Indigenous justice. As we stated earlier, we are not calling into question the viabil-

174. *Id.*

175. Lloyd Burton & David Ruppert, *Bear's Lodge or Devils Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands*, 8 CORNELL J. L. & PUB. POL'Y 201, 201 n.1, 206-08 (1999).

176. TATUM & SHAW, *supra* note 29.

177. The history of the negotiation and the resulting litigation are detailed in *id.*

178. Exec. Order 13007, 61 Fed. Reg. 26,771-26,772 (1996).

179. 42 U.S.C. § 1996 (2012).

ity of the rights-based approach in all circumstances. Indeed, we do not reject rights in their entirety; on the contrary, they are valuable tools in the contemporary legal toolbox for Indigenous peoples. Nevertheless, what our critique highlights is the unsuitability of rights discourse for providing justice in relation to many of the issues encountered by Indigenous individuals and communities. To the extent that we can move beyond a rights-based approach—and we must—there must be greater acknowledgement at both national and international levels of the importance of contextual considerations to issues of Indigenous justice and further genuine commitments to legal plurality that take account of these in order to surpass the current tokenism.

These two case studies identify, within the microcosm of the United States, successes for Indigenous groups that were the result of deliberate and carefully crafted strategies, albeit very different ones. While in the VAWA study the ultimate goal was the restoration of tribal sovereignty, the problem was structured and framed as a rights-based issue, thus facilitating a better fit within the rights discourse. Circumstances necessitated a different approach in the sacred sites case study, leading advocates to target administrative decision-making and introduce into that process Indigenous horizontal dispute resolution mechanisms.

Perhaps the most important lesson that can be derived from these case studies is that there is no one-size-fits-all solution. The ultimate success or failure of the undertaking depends upon maintaining flexibility as to the method adopted. If it is possible to frame the issue in the language of rights, then this is the most promising approach; if such reframing is not possible, however, then it is best to look for a solution beyond the rights-based approach and outside formal adversarial processes. In all situations, the strategy chosen must be contextualized to the Indigenous justice claim at issue.

Conclusion

As Abraham Maslow famously stated, "it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail."[180] In this Article, we have put forward the argument that the rights-based approach—the hammer, as it were—contains certain structural biases that can affect its operation in situations concerning minority and Indigenous justice. Nevertheless, this is not to say that there are not some occasions that specifically call for a hammer: indeed, even within the CLS movements there have been voices cautioning against throwing the baby out with the rights-skepticism bathwater, notably from the Critical Race Theory camp. A number of CRT scholars have maintained that legal rights are still an important tool for minority groups, even in light of their evident shortcomings and the tendency for such purportedly universal entitlements to preserve the interests of the privileged.[181] This Article does not adopt a

180. Abraham H. Maslow, The Psychology of Science 16 (1966)

181. *See* Richard Delgado & Jean Stefancic, Critical Race Theory: The Cutting Edge (2d ed. 2000); Patricia J. Williams, The Alchemy of Race and Rights 147-

wholly rights-skeptical position. On the contrary, we recognize that in certain situations the interests of Indigenous justice are best served by a rights-based approach, and we offered the Violence Against Women Act of 2013 as a paradigmatic example of such a success story, although it does urge caution in terms of the apparent myopia engendered by the dominance of the rights paradigm.

While Indigenous peoples should of course take advantage of every tool in the toolbox in order to achieve the aim of justice, not every situation warrants articulation in the language of rights. This is so regardless of whether it is better dealt with outside of the legal system, such as with racist sports franchise names and mascots, like those of the Washington Redskins, where a program of public education is likely to bring more satisfactory and longer-lasting results than one of litigation; whether because a rights-based approach forces the issue's articulation in terms or within parameters that cause its distortion; or whether the very adoption of such an approach locks the rights claimants into a form of interaction that accords to a logic that is essentially "other."

Importantly, therefore, we are not arguing in favor of either a complete loss of faith in the potential of rights-based approaches to achieve justice for Indigenous people/s or a complete cessation of any and all recourse to the rhetoric, for a, and power of rights. Instead, we recommend acknowledgment that: first, there is no truth to the idea that rights (or law) are intrinsically a vehicle of social justice; second, rights discourse is not a neutral one but rather comes with its own baggage; and, third, that reliance on rights discourse is a choice that ought to be made on a case-by-case basis. It is vital, therefore, that *in each situation* such a choice occurs in the full awareness not only that it is a choice but that it ought to be selected on particular grounds and for particular reasons, namely the suitability of its underpinning logic and processes.

65 (1991); Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1296-1297 (2011).