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Customary Law of Indigenous Communities: Making Space on the Global Environmental Stage

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CUSTOMARY LAW OF INDIGENOUS COMMUNITIES: MAKING SPACE ON THE GLOBAL ENVIRONMENTAL STAGE

*Melissa L. Tatum**

The high stakes often involved in controversies regarding who owns valuable natural resources and who has the authority to regulate environmental contaminants have resulted in fierce legal battles and struggles to establish and define international principles of law. Grand theoretical debates have played out on the international stage regarding the principle of free, prior, and informed consent and the legal contours of corporate social responsibility. Meanwhile, often under the radar, Indigenous people around the world have worked to create a sustained niche for their community and culture in the face of exploitation and environmental devastation at the hands of the dominant culture. Working both within and outside of formal legal systems, Indigenous communities have consciously stayed rooted in their customary law and traditions to address the biggest challenges facing their way of life. As the beginning of an effort to study these approaches more thoroughly, this article sets forth a taxonomy for classifying different uses of the customary law of Indigenous peoples. A taxonomy will provide a common language for identifying and discussing these efforts and how they fit into a multicultural, international legal system.

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INTRODUCTION

In his article *The Jurist in a Global Age*, Neil Walker examines the impact of the so-called “Global Age” on what could be labeled the most persistent questions regarding the law as an academic field—namely what *is* law as an academic discipline? and what distinguishes it from other social sciences?¹ Walker examines these questions not just as an abstract principle, but in the context of inquiring how the legal academy should prepare students to enter the modern practice of law.² In discussing these questions, Walker explores the ways in which the law is changing. In particular, Walker examines how the interdependence of the global community and economy have resulted in a multiplicity of sources of law. According to Walker:

The jurist of the global age must perforce be interested in the rich diversity of transnational law, in the national legal orders with which transnational law interacts, and in the ways in which the universal or general

1. Neil Walker, *The Jurist in a Global Age* 15 (Edinburgh Sch. of L. Research Paper No. 2015/13, 2015), <https://ssrn.com/abstract=2580114>.

2. *Id.* at 1.

claims of an increasingly influential body of global law draw upon different legal, ethical and philosophical traditions.³

As someone who has worked in the field of Federal Indian Law for almost a quarter of a century, a field that almost by definition includes working with a “rich diversity” of law and legal traditions, I can attest to the fact that it is not enough to be “interested in the rich diversity of transnational law.” To fully appreciate different legal, ethical, and philosophical traditions, and to understand how they relate and interact, one must first learn to *recognize* those different traditions.

The laws relating to management of natural resources and the environment provide a fertile field for exploring the “rich diversity of transnational law.” While it is impossible to explore all aspects of this field within the confines of a single article, a focus on the efforts of Indigenous people to carve out a place for themselves in the management and control of their lands and resources can provide a useful perspective from which to observe the interactions of diverse transnational legal regimes. These interactions not only reveal multiple relevant layers of law, they also reveal varied approaches to resolving difficult legal questions.

The high stakes often involved in controversies regarding who owns valuable natural resources and who has the authority to regulate environmental contaminants have resulted in fierce legal battles and struggles to establish and define international principles of law. Grand theoretical debates have played out on the international stage regarding the principle of free, prior, and informed consent⁴ and the legal contours of corporate social responsibility.⁵ Meanwhile, slowly and often quietly, Indigenous people around the world have been carving out a role for themselves in bringing about real and lasting change despite struggling to survive in the face of seizure of their lands, pollution of their resources, and exploitation of their knowledge. Sometimes the solutions to these controversies take shape through recognizable legal processes established by international law and nation-states. Sometimes these solutions are more surreptitious, either working outside formal legal systems or working within those systems in new and different ways. One common theme connecting many of these efforts is the reliance upon and incorporation of Indigenous customary law as part of the solution.

3. *Id.* at 20.

4. See, e.g., Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 NW. U. J. INT'L HUM. RTS. 54 (2011); G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) (“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”).

5. See, e.g., Jide James-Eluyode, *The Blurred Lines: Analysing the Dynamics of States' Duty and Corporate Responsibility to Consult in Developing Countries*, 32 AFR. J. INT'L AND COMP. L. 405 (2015).

This article begins with an explicit discussion of its methodology in Part I. The methodology may at first appear to be more political science than law, but at its foundation is strongly rooted in law and legal analysis. Part II of the article surveys the environmental and natural resource challenges confronting Indigenous people, as it is impossible to explore solutions without first understanding the scope of the problem. Once this foundation is established, Part III of the article sets forth a proposed taxonomy for classifying different uses of the customary law of Indigenous peoples. In Part IV, the article returns to the questions raised by Walker: how this knowledge impacts the work of legal academics, and how the academy can use it to better prepare students for the practice of law in this new modern reality.

I. METHODOLOGY

Law review articles rarely contain a section devoted to methodology unless they include an empirical study, with the attendant need to explain how data was collected and analyzed. Most law review articles, however, are written for readers who share the same legal training and legal tradition as the writer. In such situations a common framework, that is, a mutual understanding of how the system works, already exists. This shared foundation makes it possible for the writer to provide any necessary factual background and then launch directly into the analysis, trusting that the reader will follow. This direct approach, however, is perilous if the reader and writer do not share the same common foundation, as the reader is apt to make assumptions that may result in misunderstandings or confusion. The direct approach is also potentially perilous where, as is likely to be the case with this article, the subject of the article is a legal culture (or cultures) unfamiliar to the reader.

It is axiomatic that each person processes information through the filter of her own cultural biases and assumptions. Pattern recognition plays a significant role in how we sort through and make sense of new information. But pattern recognition can lead us astray, particularly if the pattern buffers are not set to appropriately recognize and tag all the relevant factors. Many Indigenous communities approach law very differently than those which follow Anglo-American legal traditions, or even Western European intellectual traditions.⁶ Anglo-American legal culture, as with most of the Western intellectual tradition, is premised upon the individual as the basic rights holder in society; the primary role of government is to protect and ensure those rights.⁷ Most Indigenous groups, in contrast, tend to prioritize collective rights and view government as a vehicle for fostering consensus. These dis-

6. See Jennifer Hendry & Melissa L. Tatum, *Justice for Native Nations: Insights from Legal Pluralism*, 60 ARIZ. L. REV. 91 (2018); Jennifer Hendry & Melissa L. Tatum, *Human Rights, Indigenous People, and the Pursuit of Justice*, 34 YALE L. & POL'Y REV. 352 (2016).

7. See Hendry & Tatum, *Human Rights*, *supra* note 6, at 354-60.

inctions are explained and illustrated in the writings of several very influential Native scholars. For example, Robert Porter, a former President of the Seneca Nation, has discussed how traditional Haudenosaunee practices of consensus and peacemaking are undermined by Anglo-American legal traditions which rely on a more adversarial process for achieving law and justice.⁸ Robert Yazzie, a former Chief Justice of the Navajo Nation's Supreme Court, has described the Navajo approach to justice as "horizontal" (that is, treating everyone as equal and viewing the role of the judge to be that of a facilitator or mediator) in contrast to the Anglo-American approach, which he labels as "vertical" (that is, treating the judge and jury as presiding over the parties and serving in the role of truth-finder).⁹ John Borrows, in his book *Drawing Out Law*, uses a combination of fiction and nonfiction to illustrate the process by which the Ashininabek extract legal principles from traditional stories.¹⁰

From these and other Native scholars we learn that the laws of other cultures and other traditions may take very different forms and be applied through a diverse array of channels. Not all cultures record their laws in statute books and court reporters, and not all cultures view law through the lens of individual human rights. We thus need some sort of guide to help us navigate this potentially unfamiliar terrain and avoid the hazards inherent in failing to recognize the impact of our cultural biases.

Finding such a guide can be problematic for several reasons. First, we must be careful not to overgeneralize or homogenize Indigenous cultures. Within the United States alone, there are approximately 600 different Native Nations.¹¹ While

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

9. Robert Yazzie, *Life Comes From It: Navajo Concepts of Justice*, 24 N.M. L. REV. 176, 177, 180 (1994).

10. JOHN BORROWS, *DRAWING OUT LAW: A SPIRIT'S GUIDE* (Univ. of Toronto Press 2010).

11. The United States publishes annually an official list of federally recognized tribes. See 84 Fed. Reg. 1,200 (Feb. 1, 2019). The obvious temptation here is to point to that list of federally recognized tribes, of which there were 573 as of the time this article was written. That number, however, is both over- and under-inclusive. Not all federally recognized tribes are from different cultural traditions. To cite three obvious examples, the Cherokee Nation and the Eastern Band of Cherokee are each a separate federally recognized tribe, but they were once a single people, as is the case for the Seminole tribes of Oklahoma and Florida, as well as the Muscogee (Creek) Nation and the Poarch Creek. Some federally recognized tribes were actually once distinct peoples whom the federal government confined onto one reservation, such as the Confederate Salish and Kootenai Tribes of the Flathead Reservation and the Three Affiliated Tribes of the Fort Berthold Reservation. See, e.g., *History and Culture, CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION*, <http://www.csktribes.org/history-and-culture> (last visited Sept. 16, 2019). In addition, the list of federally-recognized tribes does not include the tribes currently petitioning for recognition, the tribes that are state but not federally recognized, and the tribes whose federal recognition was terminated during the Termination Era of the 1950's and who are still seeking to have that status restored. ADVISORY COUNCIL ON HISTORIC PRESERVATION, *GUIDE TO WORKING WITH NON-FEDERALLY*

some may share a common language or be culturally related, the various Native Nations can and do vary quite dramatically from each other. Some tribes in what is now the northeastern and southwestern parts of the United States had sophisticated agricultural societies,¹² some tribes in the Midwest were nomadic hunter/gatherers,¹³ and some tribes in the Great Lakes and Pacific Northwest had economies based on commercial hunting and fishing practices.¹⁴ While some degree of generalization is inevitable when talking collectively about Indigenous groups, it is important to remember both their commonalities and their distinctions.

Thus, our guide needs to be knowledgeable about the legal traditions and cultures of a variety of tribes but must also be sufficiently experienced so as to avoid unduly homogenizing or stereotyping those cultures. An additional complication is that the nature of what we are seeking—examples of situations in which principles and/or processes drawn from the legal customs and traditions of Indigenous cultures are used to resolve issues relating to the environment and natural resources—requires that our guide also be conversant with the legal culture of the dominant society, so as to distinguish between the legal traditions of the Indigenous and dominant societies. Finally, our guide must be sufficiently connected to the two legal cultures as to be able to locate and share examples that relate to what we are seeking.

No one person can fill all these roles with respect to Indigenous communities around the world. That would be a task beyond the capabilities of a single individual. This article makes no claims of being a comprehensive account of all relevant examples from around the world. Indeed, it cannot (and does not) claim to provide a representative sampling. Instead, what it seeks to do is take the first steps in developing a taxonomy of ways in which Indigenous people have employed their own customs and traditions to resolve issues relating to natural resources and the environment.

The approach of developing a taxonomy has been chosen for two primary reasons. First, by its very nature, a taxonomy helps calibrate our pattern recognition systems.¹⁵ It provides a way for us to look beyond the limitations of our own cul-

RECOGNIZED TRIBES 4-7 (Feb. 2018), <https://www.achp.gov/sites/default/files/whitepapers/2018-06-GuidetoWorkingwithNon-FederallyRecognizedTribesintheSection106Process.pdf>.

12. Max Fisher & Dylan Matthews, *70 Maps that Explain America: Economic Activity in Pre-Columbus North America*, VOX (July 1, 2015) <https://www.vox.com/2015/2/17/7917165/maps-that-explain-america>.

13. *Id.*

14. *Id.*

15. Numerous disciplines use taxonomies as a method of developing a common language for discussing items ranging from objects to concepts. Perhaps the most famous taxonomy is the one developed by biologists for sorting organisms into genus and species, but many other fields have developed their own taxonomies. *See, e.g.*, BLOOM ET AL., *TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS* (1956 New York: David McKay Company) (creating a

tural biases and recognize uses of Indigenous custom and tradition. In doing so, it also helps provide a common vocabulary for understanding and discussing comparative uses of different legal cultures and traditions. Second, it provides a basic data set to which others can both add examples to existing categories and propose entirely new categories.

In looking for additional examples to expand the proposed taxonomy, other scholars must be careful not to let themselves be misdirected by tangential issues or stereotypes. Two of the most common forms of stereotyping are (1) proceeding on the assumption that all Indigenous people live in harmony with nature, making as little impact as possible and (2) freezing the Indigenous culture at a historic point in its development. The first form of stereotyping, which builds a romanticized version of “the Noble Savage,” asserts that Indians lived as one in harmony with nature.¹⁶ While it may be true that some Indigenous groups lived simply and with minimal impact on the natural world, other groups made extensive changes to the world around them. The Native peoples of the southwestern United States, for example, have used sophisticated irrigation systems for thousands of years, diverting water from rivers and streams for agricultural purposes.¹⁷ Aboriginal groups in Australia and Tribes in the United States have used fire and deliberate burns as a way of managing ecosystems.¹⁸

Moreover, Indigenous groups, like any political or cultural group, must be allowed to grow and change over time; that is how they continue to exist and thrive as separate entities. In seeking examples to use in developing our taxonomy, we must be sensitive in recognizing and accepting these changes. As an example, suppose a Tribe receives permission to hunt and take a whale.¹⁹ If that permission comes with the stipulation that the hunt must take place using “traditional” means such as a canoe, oars, and a spear (no outboard motors or harpoons), then the

taxonomy for the field of education); MSCI & S&P GLOBAL MARKET INTELLIGENCE, GLOBAL INDUSTRY CLASSIFICATION STANDARD (2018), https://www.spglobal.com/marketintelligence/en/documents/112727-gics-mapbook_2018_v3_letter_digitalspreads.pdf (creating a taxonomy for the global financial community).

16. While depictions of “the Noble Savage” have been a standard literary trope for centuries, perhaps the most famous of these is the television commercial depicting a crying Indian looking at pollution. See Finis Dunaway, *The Crying Indian Ad That Fooled the Environmental Movement*, CHI. TRIB. (Nov. 21, 2017), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-indian-crying-environment-ads-pollution-1123-20171113-story.html>.

17. Jerry B. Howard, *Hohokam Legacy: Desert Canals*, WATERHISTORY.ORG, <http://www.waterhistory.org/histories/hohokam2/> (last visited May 26, 2018).

18. E.g., Ed Yong, *Aborigines Improve Biodiversity by Setting Fires*, NAT’L GEOGRAPHIC (Sept. 23, 2008) <https://www.nationalgeographic.com/science/phenomena/2008/09/23/aborigines-improve-biodiversity-by-starting-fires/>; *Fire Management Today*, U.S. FOREST SERV., https://www.fs.fed.us/fire/fmt/fmt_pdfs/FMT64-3.pdf (last visited May 27, 2018) (collection of articles).

19. This example is loosely based on the efforts of the Makah to seek permission to hunt a Gray Whale. See Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 263-65 (2001).

Tribe's development has been "frozen." To imply that a Tribe must hunt in exactly the same way as it did one hundred years ago in order to be "authentic" or "real Indians" is ludicrous. No group hunts in exactly the same way with exactly the same weapons as it did in the "olden" days.

Having established and explained this article's chosen methodology, the next section turns to surveying the spectrum of environmental issues confronting Indigenous groups around the world. Two predominant themes run through the vast majority of these disputes: (1) the power of colonial or post-colonial governments to seize and re-allocate land and (2) the ability of colonial or post-colonial governments to appropriate for themselves the minerals and other natural resources found on the homelands of Indigenous communities. Both themes illustrate the problems that occur when differing legal systems, value structures, and economies come into conflict. Section II briefly surveys the usual approaches taken to resolving these disputes, while Section III turns to exploring alternative approaches and starting the process of building a taxonomy.

II. A BRIEF LOOK AT STANDARD APPROACHES TO ADDRESSING ENVIRONMENTAL ISSUES CONFRONTING INDIGENOUS COMMUNITIES

Stories of Indigenous peoples' struggles with respect to environmental and natural resource issues are frequent fodder for the news media. In August 2017, the media reported on efforts by the Tanzanian government to forcibly evict a group of Maasai people living in a 1500-kilometer strip of land near the Serengeti National Wildlife Park.²⁰ The Maasai were on their ancestral grazing grounds, which provide critical sustenance for their cattle during the dry season. According to the news reports, this eviction was part of a series of events designed to make room for tourism, particularly from high-paying big game hunting firms.²¹

The media have also reported on the damage inflicted on the Niger Delta as a result of oil drilling operations. It has been estimated that the Niger Delta experiences hundreds of oil spills per year, many of which have not been cleaned up decades later.²² As one BBC reporter described, "[v]isitors to the Nigerian village of Kpor, deep in the Niger Delta, are greeted by strange sights: silver frogs blink

20. Chris Lang, *Violent Evictions of Maasai Underway in Loliondo, Tanzania to Make Way for Otterlo Business Corporation's Hunting Concession*, CONSERVATION WATCH (Aug. 16, 2017), <http://www.conservation-watch.org/2017/08/16/violent-evictions-of-masai-underway-in-loliondo-tanzania-to-make-way-for-otterlo-business-corporations-hunting-concession/>.

21. See Deogratus Kamagi, *Human Rights Commission Stops Evictions in Loliondo*, THE CITIZEN (Sept. 5, 2017), <http://www.thecitizen.co.tz/News/Human-Rights-Commission-stops-evictions-in-Loliondo/1840340-4083752-5nes8w/index.html>; Abdi Latif Dahir, *Ecotourism is Being Used to Displace One of East Africa's Long-Standing Indigenous People*, QUARTZ AFRICA (May 15, 2018), <https://qz.com/1278167/maasai-evicted-in-tanzania-for-ecotourism-and-land-conservation/>.

22. See Mark Dummett, *Ken Saro-Wiwa 20 Years On: Nigeria Delta Still Blighted by Oil Spills*, CNN (Nov. 10, 2015), <https://www.cnn.com/2015/11/10/africa/niger-delta-oil-pollution/index.html>.

from gleaming puddles, sunlight bounces from an eerie black lake, and dragonflies hover over cauldrons of tar.”²³ The Niger Delta is home to many ethnic groups and the oil that constitutes eighty percent of Nigeria’s income.²⁴ Through a series of laws, the Nigerian government declared itself the owner of all mineral and natural resources found in the country, including petroleum reserves.²⁵ The Indigenous people who live on the land, and who may have some ownership rights to the surface lands, thus have no control over the companies who drill for oil. They do, however, live in what has been called the “global capital of oil pollution.”²⁶ A business and human rights researcher at Amnesty International has written that researchers from the United Nations Environment Programme “found that the people of Ogoniland . . . had ‘lived with chronic oil pollution throughout their lives.’ This pollution had contaminated the fields where they grew food, the water where they fished and the wells from which they drank.”²⁷

Similar devastation has been inflicted by coal mining operations at Black Mesa on the Navajo Reservation. Extensive mining has damaged the Navajo aquifer, imperiling the drinking water for area residents.²⁸ In addition, many of those who worked in the mines now suffer from Black Lung disease.²⁹ One article reported that “there are no independent studies showing the impact of the mines on the health of the people in the tribal lands,” but quotes an environmental scientist as stating, “[t]he fact is, their environment and public health are subsidizing much of the power in the Southwest.”³⁰

Indigenous people have long sought redress for these types of harms. In 2016, the world’s attention was riveted by efforts to avoid another round of environmental damage, this time centering on efforts by the Standing Rock Sioux Tribe to halt construction of the Dakota Access Pipeline.³¹ The pipeline was designed to carry

23. Caroline Duffield, *Nigeria: ‘World Oil Pollution Capital’*, BBC NEWS (June 15, 2010), <http://www.bbc.com/news/10313107>.

24. Jide James-Eluyode, *Collective Rights to Lands and Resources: Exploring the Comparative Natural Resource Revenue Allocation Model of Native American Tribes and Indigenous African Tribes*, 29 ARIZ. J. INT’L & COMP. L. 177, 180-81 (2012).

25. *See id.* at 185-86.

26. Duffield, *supra* note 23.

27. Dummett, *supra* note 22.

28. Tim Grabiel, *Drawdown: An Update on Groundwater Mining at Black Mesa*, NAT. RES. DEF. COUNCIL (Mar. 2006), <https://www.nrdc.org/sites/default/files/draw.pdf>.

29. Claudia Rowe, *Coal Mining on Navajo Nation in Arizona Takes Heavy Toll*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/2013/06/06/coal-mining-navajo-nation_n_3397118.html.

30. *Id.*

31. *See, e.g.*, Brad Plumer, *The Battle Over the Dakota Access Pipeline, Explained*, VOX (Nov. 29, 2017), <https://www.vox.com/2016/9/9/12862958/dakota-access-pipeline-fight>.

oil from the Bakken fields in North Dakota to holding tanks in Illinois. Activists from around the world poured into the camps to support the Tribe's efforts.³²

The pipeline was originally planned to route near Bismarck, the capital of North Dakota. An alternate route was selected for a variety of reasons, including concerns about possible contamination of the city's water supply.³³ The alternate route moved the pipeline close to the Standing Rock Sioux Reservation. Although the pipeline does not cross the reservation boundary, it does cross through lands reserved to the tribe by treaty.³⁴ These include lands which the U.S. Supreme Court has declared were unilaterally and wrongfully appropriated by the U.S. Federal Government.³⁵

The Standing Rock Sioux Tribe sought to stop construction, alleging that the federal government had not complied with its legal obligations to consult with tribes and to engage in informed decision-making.³⁶ After reviewing the evidence, the Obama Administration agreed that the proper procedures had not been followed, and ordered the construction halted so that those procedures could be completed.³⁷ That order was issued shortly before President Obama left office. Within days of being sworn in, President Trump took steps to allow the project to go forward.³⁸ The Standing Rock Sioux Tribe continued to fight the pipeline in federal court, but the court refused to halt construction while the case was pending.³⁹

32. *Id.*

33. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock III)*, 255 F. Supp. 3d 101, 135 (D.D.C. 2017); See also Plumer, *supra* note 31.

34. See *Standing Rock III*, 255 F. Supp. 3d at 115, 130.

35. See *United States v. Sioux Nation*, 448 U.S. 371 (1980). The Supreme Court's decision was the culmination of a long litigation process, one which was ultimately filed under the Indian Claims Commission process authorized by Congress. See EDWARD LAZARUS, *BLACK HILLS WHITE JUSTICE*, at xv (1st ed. 1991). Thus, although the Supreme Court upheld the Court of Claims' decision that the land was wrongfully taken, monetary compensation was the only remedy authorized. The Tribe refused to accept the monetary compensation and continues to seek return of the land. Hendry & Tatum, *Human Rights*, *supra* note 6, at 367-68.

36. These allegations were based on several federal statutes and regulations, most particularly the National Historic Preservation Act, 54 U.S.C. §§ 300101-307108, and the National Environmental Policy Act, 42 U.S.C. § 4321-4370m. Both statutes establish a series of procedural requirements designed to ensure that the federal government make an informed and deliberate decision before taking actions with the potential to harm the environment or certain protected sites. *Standing Rock III*, 255 F. Supp. 3d at 112-13; *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock II)*, 205 F. Supp. 3d 4, 8-10 (D.D.C. 2016).

37. See *Standing Rock III*, 255 F. Supp. 3d at 119.

38. *Id.*; See Memorandum from the White House to the Secretary of the Army (Jan. 24, 2017), <https://assets.documentcloud.org/documents/3410448/Construction-of-the-Dakota-Access-Pipeline.pdf> (presidential memorandum to advance pipeline construction).

39. *Standing Rock II*, 205 F. Supp. 3d at 8-10.

Within months of being completed, the pipeline had already leaked in several places, although not under the river near the reservation.⁴⁰

During the controversy at the Dakota Access Pipeline, a documentary filmmaker spoke to several of the parties, including David Archambault II, who was then serving as Chairman of the Standing Rock Sioux Tribe. Archambault expressed the hope that one result of the controversy and the ensuing publicity would be a recognition of the need to change the way large infrastructure projects are undertaken.⁴¹ Achieving this goal, however, is not easy. How can Indigenous peoples go about changing the way large infrastructure projects are done? Through the administrative agencies in charge? Through the courts? Through the legislature? Standing Rock tried each of those avenues and was unsuccessful in halting construction of the pipeline.⁴²

The story of the Dakota Access Pipeline is not unique. It is a story played out in various incarnations around the world, as Indigenous people struggle to protect and preserve their homelands in the face of increasing incursion by colonial powers seeking access to those lands and resources. The usual approach to handling these issues is for the Indigenous group to assert its rights through existing administrative and/or judicial forums. Exactly which rights the group asserts varies depending on the context, but the rights are usually ones guaranteed by international law or by the laws of the relevant nation-state.⁴³ The remainder of this Part of the article takes a closer look at efforts to seek redress through administrative processes and judicial tribunals. It concludes by examining the complications introduced when the problems cross an international boundary line.

40. *Leaks Found on Dakota Access Pipeline System*, AP NEWS (May 22, 2017), <https://apnews.com/f05582dd1a344cc0be1cc0a9311129f1/APNewsBreak:-2-more-leaks-found-along-Dakota-Access-pipeline>.

41. WATER IS LIFE, NATIVE NATIONS INSTITUTE (Dec. 20, 2016), available at <http://nni.arizona.edu/news/articles/water-is-life-video-series>.

42. *See Standing Rock III*, 255 F. Supp. 3d at 114-21.

43. Most governments and legal systems provide administrative and judicial avenues for seeking to influence decisions made by government agencies or to seek redress for injuries caused by those decisions. Given that the purpose of this portion of the article is to provide a brief overview of the standard approaches, the decision was made to focus primarily on representative examples from the United States. Exploring examples from one government makes it possible to trace a couple of examples through the entire process, thereby providing the reader with a view of how the various parts of the process relate to each other. Given the intricacies of each government's administrative and judicial processes, it would be difficult to provide the reader with as succinct a picture by using examples that jump between legal systems. The purpose here is not to provide the reader with an exhaustive account, but rather to provide a flavor of the problems with the standard approaches so the reader has a basic context for understanding the ways in which the approaches set forth in the taxonomy below either work in conjunction with or in opposition to those standard approaches.

A. Administrative Processes

As the Standing Rock Sioux Tribe learned, attempts to assert rights through administrative processes are often highly dependent on the attitudes and inclinations of those in key positions.⁴⁴ The disagreements between the Obama and Trump Administrations over the scope of the consultation requirement is prima facie evidence of malleability of the relevant standards.⁴⁵ Such malleable standards make it difficult for Indigenous people to argue in favor of a particular outcome if the officials in charge are inclined toward an opposite view.

The difficulty of obtaining administrative remedies is exacerbated because agencies are often charged with balancing diverse goals and types of evidence, essentially comparing apples and oranges. For example, the United States Forest Service is under a statutory directive to manage the national forests to maximize multiple uses.⁴⁶ These uses include recreation and maintaining access to sacred sites, as well as both preservation and sustainable harvesting of timber resources. The Coconino National Forest, which is managed by the Forest Service, includes within it a ski resort that operates on a special use permit.⁴⁷ When that ski resort encountered economic difficulties due to lack of snowfall, the resort sought permission to install artificial snowmaking machines and to pipe in reclaimed water for the machines to use.⁴⁸ Three tribes located in the area objected to the ski resort's request, on the basis that the area was sacred and using reclaimed water would contaminate and destroy the sacredness of the area.⁴⁹ After review, the Forest Service overruled tribal objections and granted permission for the expansion, citing the importance of the ski resort to the economic life of the neighboring area.⁵⁰ This conclusion was arguably flawed, as there was a significant argument that the economic benefits had been overstated and the economic costs under-estimated, but the Forest Service was still faced with weighing and balancing concrete numbers versus unquantifiable harms to sacred sites.⁵¹ In such circumstances, the Forest Service would be hard pressed not to focus on concrete numbers as opposed to abstract principles.

In addition to statutes setting missions and goals for specific agencies, Congress has also enacted a series of statutes providing general guidance for agency

44. Such problems are not unique to environmental issues. See, e.g., Lorinda Riley, *When a Tribal Entity Becomes a Nation: The Role of Politics in the Shifting Federal Recognition Regulations*, 39 AM. INDIAN L. REV. 451 (2015).

45. See *Standing Rock III*, 255 F. Supp. 3d at 117-21.

46. See, e.g., National Forest Management Act of 1976, Pub. L. 94-588, § 94 (1976).

47. MELISSA L. TATUM & JILL K. SHAW, LAW, CULTURE & ENVIRONMENT 77 (2014).

48. *Id.* at 82-83.

49. *Id.* at 77-78, 83, 87, 88.

50. *Id.* at 83-84.

51. See *id.* at 84.

decision-making. These include the Administrative Procedure Act,⁵² which establishes the basic notice and comment process whereby agencies are required to give the public notice and a chance to provide input before certain types of decisions are finalized.⁵³ The National Historic Preservation Act (NHPA)⁵⁴ and the National Environmental Policy Act (NEPA)⁵⁵ set standards for informed decision-making by agencies.⁵⁶ Each statute requires agencies to follow procedures designed to ensure that, before the federal government takes an action that has a significant impact on the environment or on a protected site, the agency makes a conscious and informed decision to proceed.⁵⁷ It is important to note that neither the NHPA nor NEPA forbid the government from these projects: the statutes simply require the government to make an explicit decision to proceed, even accounting for the likely impact.⁵⁸ Neither of these statutes proved sufficient to stop the completion of the Glen Canyon Dam, with the subsequent impacts on Rainbow Bridge,⁵⁹ nor the flooding of Cherokee cemeteries by the Tennessee Valley Authority.⁶⁰

The current wrangling over potential mining in the Oak Flat area in the southwestern United States illustrates the tenuous nature of using the NHPA to protect against adverse environmental impacts. In 2014, the U.S. Federal Government enacted a statute agreeing to swap land owned by Resolution Copper Mine, a joint venture owned by Rio Tinto and BHP Billiton, for 2400 acres of National Forest land.⁶¹ The National Forest included land in the Oak Flat area, which was sacred to the San Carlos Apache tribe.⁶² The federal statute also permitted the mining company to dig an underground copper mine, 2100 meters deep, on the National Forest land.⁶³ In an effort to prevent mining operations from beginning, advocates successfully sought to have Oak Flat added to the National Register of

52. Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2011).

53. 5 U.S.C. § 553.

54. 54 U.S.C. § 300101 (2012).

55. 42 U.S.C. § 4321 (2012).

56. The key portion of the NHPA is set out in 54 U.S.C. § 306102, and the key portion of the NEPA is set out in 42 U.S.C. § 4331.

57. See, e.g., *supra* note 36.

58. See, e.g., *supra* note 36.

59. See *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).

60. See *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980).

61. Osha Gray Davidson, *How a Huge Arizona Mining Deal Was Passed—And Could Be Revoked*, HIGH COUNTRY NEWS (Feb. 2, 2016), <https://www.hcn.org/issues/48.2/how-a-huge-arizona-mining-deal-was-passed>. The land exchange was included in the National Defense Authorization Act of 2015. Pub. L. 113-291 § 3003, 128 Stat. 3732 (2014).

62. See David Bell, *San Carlos Apache Tribe Objects to Apache Leap Management Plan*, E. ARIZ. COURIER (Oct. 25, 2017), https://www.eacourier.com/news/san-carlos-apache-tribe-objects-to-apache-leap-management-plan/article_eb718e7a-b924-11e7-9adb-4f034ad74146.html.

63. Pub. L. 113-291 § 3003(c)(8).

Historic Places.⁶⁴ Being listed on the National Register, however, does not prevent mining or other activities from taking place. It simply requires that the federal government make an informed decision to proceed even knowing of the likelihood of harm to a listed site.⁶⁵ Thus, it would be dangerous for activists seeking to protect Oak Flat to rely on the tenuous protection of the NHPA. Being listed on the National Register can make it more difficult, expensive, and time-consuming to seek permission to undertake such activities.⁶⁶ But given the potentially high stakes for the mining companies, the true value of being a listed site is that it buys time for activists to seek a more permanent negotiated solution.⁶⁷

B. *Judicial Tribunals*

When administrative remedies are insufficient, as they so often are for Indigenous people, the usual next response is for the Indigenous community to take its claim to a court or other judicial tribunal for resolution. Litigation, however, often proves to be a costly and ineffective means of resolving these disputes. There are three reasons for this ineffectiveness. First, the Indigenous communities are often unable to prevail in litigation due to procedural obstacles, unfavorable legal standards, issues of proof, and so on.⁶⁸ Second, even if the Indigenous community prevails in litigation, the holding is often narrow and limited, so that it does not prevent a similar problem in the neighboring area or in the next year.⁶⁹ Third, the remedy is often too little too late—the damage has already been done and cannot be remediated.⁷⁰

64. *Oak Flat Listed on the National Register of Historic Places*, SOUTHWEST ARCHAEOLOGY TODAY, <https://www.archaeologysouthwest.org/2016/03/20/oak-flat-listed-on-the-national-register-of-historic-places/> (last visited May 27, 2018).

65. See 54 U.S.C. § 306102(b) (2014).

66. See Tatum & Shaw, *supra* note 47, at 95-101.

67. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Assoc.*, in which the Native litigants failed in their bid to protect the site using the NHPA and the First Amendment but were ultimately able to use the delays to have the area designated a protected wilderness area. 485 U.S. 439, 442-45 (1988).

68. See, e.g., the case studies discussed in Tatum & Shaw, *supra* note 47.

69. This is a problem inherent in the nature of litigation in a common law jurisdiction. Court decisions can serve as precedent, but the extent to which they are dispositive depends on a number of doctrines, including claim and issue preclusion, as well as on how narrowly or broadly a court is willing to interpret prior decisions, which in turn can depend on whether decisions of the prior court are binding on the second court. These variables make litigation a very uncertain and expensive vehicle for developing and implementing environmental policy.

70. See, e.g., *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock II)*, 205 F. Supp. 3d 4 (D.D.C. 2016), in which the court refused to issue a preliminary injunction, and by the time a decision was reached on the merits, the pipeline had been completed.

Even when the Indigenous community can prove quantifiable economic harm,⁷¹ it is often unable to prevail in litigation. This difficulty is illustrated by a lawsuit filed by the Navajo Nation against the United States, alleging that the federal government violated its obligations with respect to the tribe.⁷² The United States acts as trustee for a substantial portion of tribal lands, which means that any deals to lease land or permit mineral extraction are negotiated by the federal government on behalf of the tribe.⁷³ In this role as trustee the United States negotiated an agreement on behalf of the Navajo Nation with Peabody Coal regarding permission to conduct mining operations on tribal land.⁷⁴ The royalty rate negotiated as part of that agreement was substantially below market rates at the time.⁷⁵ When the litigation reached the United States Supreme Court, that Court declared that the government did not violate a legal duty:

Because the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, we do not reach the question whether the trust duty was money mandating. Thus, neither the Government's "control" over coal nor common-law trust principles matter.⁷⁶

The Court's ruling leaves one questioning what would be a sufficiently specific law, and whether Congress would ever enact such a law. What would such a law actually say? That the Executive Branch must abide by the laws enacted by Congress? Would Congress really pass such a statute?

As if all the difficulties discussed above were not enough, Indigenous peoples' efforts to redress environmental harms often run aground on the shoals of jurisdictional difficulties. Tar Creek, which runs through the Quapaw reservation in northeastern Oklahoma, has a nuclear orange color, contaminated by toxic byproducts of zinc and lead mining.⁷⁷ The area is one of the oldest sites still on the Superfund list awaiting cleanup.⁷⁸ As one case study described it:

71. As is starkly illustrated by the litigation involving sacred sites on federal public lands, many disputes raised by Native peoples involving issues relating to land, natural resources, and the environment do not raise claims of purely economic harm, but spiritual issues relating to land-based religions. *See supra* notes 47-51.

72. *United States v. Navajo Nation*, 556 U.S. 287 (2009).

73. *United States v. Navajo Nation*, 537 U.S. 488, 494-96 (2003).

74. *Id.*

75. *Id.*

76. 556 U.S. at 302.

77. Timothy Kent & Rebecca Jim, *The Results of Mining at Tar Creek: Environmental Case Study by NRE 492 Group 5*, http://umich.edu/~snre492/cases_03-04/TarCreek/TarCreek_case_study.htm (last visited Oct. 15, 2019).

78. Jim Myers, *Pruitt Says New Push On Superfund Sites Can Bring Accountability To Tar Creek Cleanup*, THE OKLAHOMAN (Mar. 21, 2018), <https://newsok.com/article/5587813/pruitt-says-new-push-on-superfund-sites-can-bring-accountability-to-tar-creek-cleanup>.

Mining has destroyed the land and water and poisoned the Quapaw people who live in the Tar Creek area. Large piles of leftover mine tailings, called chat piles, are in close proximity to local residences and school yards. These chat piles are contaminated with heavy metals that pose a threat to children who play on them. When the wind blows, the contaminated dust from the mine tailings fills the homes of the residents. Those living around Tar Creek are exposed to large amounts of lead, zinc, and cadmium from the watershed and the soil in residential areas . . . Tar Creek is highly toxic and, for all intents and purposes, dead. The fish have disappeared from the creek, which has had a significant impact on the lifestyle of the Native Americans in the area. The banks of the creek are a sickening orange color and the groundwater has also been affected by acid water from the abandoned mines.⁷⁹

While some cleanup efforts have been made, those efforts have been complicated by struggles over jurisdiction and allocation of governmental responsibility.⁸⁰

Clearly, litigation has often proven an imperfect and ineffective vehicle for protecting the environmental and natural resources of Native Nations and Indigenous people. As the next section makes clear, these problems are magnified when an international border is involved.

C. *Problems Resulting From International Borders*

The prior two sections focused primarily on administrative remedies and judicial processes available within the United States. All the problems discussed with respect to those domestic issues are even further complicated when the borders involved are international ones—in other words, when issues cross the Canadian or Mexican border.

One such example is found on the border between Alaska and Canada. That border divides the Gwitch'in people, who traditionally live near the Arctic Circle in what is now Alaska and Canada. The Gwitch'in people rely heavily on the Porcupine Caribou, both for traditional cultural practices and for subsistence. Oil exploration in Alaska and Canada has negatively impacted the migration patterns of the Porcupine Caribou, whose breeding grounds are in and near the Alaskan National Wildlife Refuge and which span the international boundary line.⁸¹ Attempts to agree on comprehensive plans to manage the herd have run into jurisdictional

79. *Results of Mining at Tar Creek*, *supra* note 77.

80. *See Myers*, *supra* note 78. The jurisdictional issues are particularly complicated as the area encompasses territory within the borders of several states and tribes.

81. RACHEL R. STARKS, JEN MCCORMACK, & STEPHEN E. CORNELL, NATIVE NATIONS AND U.S. BORDERS: CHALLENGES TO INDIGENOUS CULTURE, CITIZENSHIP, AND SECURITY 74-75 (Udall Ctr. for Studies in Pub. Pol'y 2011).

obstacles, with competing plans being drafted by Canada, the United States, and the Gwitch'in people.⁸²

These problems are not limited to the northern borders of the United States. The Kuymaak and the Tohono O'odham tribes, each of which span the border between the United States and Mexico, have both discovered that remediating pollution damage becomes particularly problematic when the contaminated waterways cross an international border.⁸³ In the Tar Creek and Black Mesa situations discussed above, the pollution at issue was the result of mining activities. Mining is not, however, the only source of pollution. Chemicals from various manufacturing processes and pesticide runoff have also contaminated rivers, lakes, and other waterways.⁸⁴ These toxins have been absorbed by fish, resulting in those fish possessing dangerously high levels of mercury and other chemicals.⁸⁵ These high levels of contamination are particularly problematic for Indigenous populations, many of which exercise subsistence fishing rights and/or depend on personal catches to feed their families.⁸⁶ The contamination also impacts the rushes and other plants that grow alongside the waterways, which are gathered by Indigenous people and woven into traditional baskets.⁸⁷ Efforts to address these pollution issues often run aground on the shoals of jurisdictional disputes or become entangled in issues of which rules and procedures govern.⁸⁸

The illustrations presented in this Part of the article only scratch the surface of the ever-increasing list of environmental issues facing Indigenous communities around the world. In addition to the problems discussed above, Indigenous groups also struggle with harms caused by the dominant society's overuse/exhaustion of resources in activities such as whaling;⁸⁹ the impacts of incompatible agricultural techniques, such as slash and burn agriculture versus modern mechanized farming operations;⁹⁰ and intellectual property issues that arise with respect to the pharmaceutical industry and exploitation of traditional plant knowledge.⁹¹

82. *Id.* at 75.

83. *See id.* at 41.

84. *See, e.g., id.* at 45, 64, 80, 82.

85. *See Fish Consumption and Environmental Justice*, NAT'L ENVTL. JUST. ADVISORY COUNCIL (Nov. 24, 2002), https://www.epa.gov/sites/production/files/2015-02/documents/fish-consump-report_1102.pdf.

86. *See, e.g., id.* at 2-10. Pollution from mining activities can also contribute to these problems. *See, e.g.,* Marc Dadigan, *CA Indian Leaders Discuss Lasting Effects of the Gold, Greed and Genocide Era*, INDIAN COUNTRY TODAY (Jan. 28, 2015), <https://newsmaven.io/indiancountrytoday/archive/ca-indian-leaders-discuss-lasting-effects-of-the-gold-greed-and-genocide-era-aHJ8ZzuR8kuHLR94IIsNMQ/>.

87. Dadigan, *supra* note 86; STARKS, MCCORMACK & CORNELL, *supra* note 81, at 44.

88. *See* STARKS, MCCORMACK, & CORNELL, *supra* note 81, at 13.

89. Rupa Gupta, *Indigenous Peoples and the International Environmental Community: Accommodating Claims Through a Cooperative Legal Process*, 74 N.Y.U. L. REV. 1741, 1785 (1999).

90. Barbara Fraser, *Indigenous Communities, Slash and Burn and Changing Landscapes in the Amazon*, LANDSCAPE NEWS (Jan. 8, 2015) <https://news.globallandscapesforum.org/12424/indigenous-communities-slash-burn-changing-landscapes-amazon/>; *Global Forest Atlas: Traditional Land Uses*, YALE

Indigenous groups often lack the political clout necessary to successfully lobby for legislative changes, and all too often the law applied by administrative agencies and the courts is rooted in the colonial mission to subjugate Indigenous peoples and appropriate their land.⁹² Even when everyone is operating in good faith, there is often no way to avoid the colonial roots of Indian and Indigenous Peoples law.⁹³ The examples provided above clearly illustrate that Indigenous communities are seeking to regain: (1) control over their lands and territories, (2) access to their sacred sites, (3) an effective voice in relevant decision-making processes, and (4) an effective voice in judicial forums/processes. In setting these goals, Indigenous communities strive to preserve and protect their way of life, their traditions, and their cultures. It does no good to gain a seat at the table if you must sacrifice your identity to do so.⁹⁴

III. A TAXONOMY OF USES OF INDIGENOUS CUSTOMARY LAW

As the above section illustrates, Indigenous communities around the world are seeking more effective ways of protecting their lands and resources. At the same

SCH. OF FORESTRY & ENVTL. STUDIES, <https://globalforestatlas.yale.edu/land-use/traditional-land-uses> (last visited May 28, 2018).

91. See World Intellectual Property Organization, *Intellectual Property and Traditional Knowledge* (WIPO Pub. 920(E)).

92. See Jennifer Hendry & Melissa L. Tatum, *Human Rights, Indigenous People, and the Pursuit of Justice*, 34 YALE L. & POL'Y REV. 351 (2016). For example, the first case in the so-called Marshall Trilogy, a series of three United States Supreme Court decisions authored by Chief Justice John Marshall that are generally considered to establish the basis for the relationship between the federal and tribal governments, was a dispute over land title. See generally Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627 (2006) (providing a critical review of the Marshall Trilogy and its applicability to modern Federal Indian Law). The case, *Johnson v. M'Intosh*, employed international law principles, known as the Doctrine of Discovery, to reach the conclusion that only the federal government possesses the authority to purchase land from tribes. The opinion concluded that individual land speculators had no such authority. In defining the nature of Indian, or aboriginal, title, the Court ruled that tribes had only a right of use and occupancy. *Johnson v. M'Intosh*, 21 U.S. 543 (1823). The Supreme Court would later hold that Indian title is not "compensable title" under the terms of the Fifth Amendments Takings Clause. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 290-91 (1955).

93. See, e.g., Kirsty Gover, *Indigenous-State Relationships and the Paradoxical Effects of Antidiscrimination Law: Lessons from the Australian High Court in Maloney v The Queen*, in *INDIGENOUS JUSTICE: NEW TOOLS, SPACES, AND APPROACHES* 27-52, Jennifer Hendry et al. eds. (2018); Jennifer Hendry & Melissa L. Tatum, *Justice for Native Nations: Insights from Legal Pluralism*, 60 ARIZ. L. REV. 91, 102-04 (2018).

94. Much has been written about the implicit and explicit pressures placed upon tribes to harmonize their laws and procedures with those of the dominant U.S. culture. See, e.g., Porter, *supra* note 8; Larry W. Emerson, *Diné Sovereign Action: Rejecting Colonial Sovereignty and Invoking Diné Peacemaking*, in *NAVAJO SOVEREIGNTY: UNDERSTANDINGS AND VISIONS OF THE DINÉ PEOPLE* 168-69 (Lloyd L. Lee & Jennifer Nez Denetdale eds., 2017); Melissa L. Tatum, *Tribal Courts: The Battle to Earn Respect Without Sacrificing Culture and Tradition*, in *HARMONIZING LAW IN AN ERA OF GLOBALIZATION: CONVERGENCE, DIVERGENCE AND RESISTANCE* 81 (Larry Catá Backer ed., Carolina Acad. Press 2007).

time, there has been a resurgence of Indigenous groups seeking to reclaim their heritage, their power, and their traditions. These streams have coalesced into approaches whereby the Indigenous communities are employing their own customs and traditions—their traditional rules and processes—for resolving disputes. These rules and processes take a number of different forms and have been used in a number of different ways.

This section presents six different ways that Indigenous communities have used their own traditional rules and processes to contribute to a resolution of an environmental problem. These examples have been selected because they highlight the breadth of approaches and methods. They are not intended to be a comprehensive list, nor are they in-depth studies. Rather, they are presented here as a starting point for developing a robust taxonomy of the ways in which the legal traditions and cultures of Indigenous communities can intersect in a positive way with the legal culture of the dominant society. It is hoped that others will add on to and further develop this initial taxonomy. Each of the six categories below is assigned a label, but it is important to note that these are simply labels of convenience, designed primarily as a memory aid. They are not labels used by the Indigenous communities themselves, nor are they rigid boxes. The approaches described below can be used in combination with each other and are better described as points on a spectrum than as discrete approaches.

A. *The Plug and Play Approach*

In some circumstances, a law will provide a space in which another legal system can apply its own substantive standards. That is to say, the standards of the second legal system can be “plugged” into the first system, which will then proceed to incorporate those standards in resolving the outstanding dispute. This type of incorporation happens when one legal system recognizes and enforces a judgment reached by the other system, such as when a party who prevailed in litigation seeks to collect by garnishing assets located in another jurisdiction, or when a non-custodial parent takes a child across international borders and the parent with custody seeks return of the child.

A similar phenomenon occurs within the context of some environmental protection statutes enacted by the United States Federal Government, such as the Clean Water Act,⁹⁵ the Clean Air Act,⁹⁶ and the Safe Drinking Water Act.⁹⁷ Each of these statutes has what is known as a Treatment as States, or TAS, provision.⁹⁸

95. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2012).

96. Clean Air Act, 42 U.S.C. §§ 7401-7671q (2017).

97. Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j (2017).

98. The Clean Water Act’s TAS provisions are found at 33 U.S.C. § 1377(c) (2017). The Clean Air Act’s TAS provisions are found at 42 U.S.C. § 7601(d) (2017). The Safe Drinking Water Act’s TAS provisions are at 42 U.S.C. § 300j-11 (2017).

A closer look at the Clean Water Act provides an illustration of how these provisions work. The Clean Water Act sets a spectrum of permissible water quality standards, and each state can choose where on that spectrum to set its requirements.⁹⁹ Tribes that qualify for TAS status can do the same.¹⁰⁰

The Isleta Pueblo is located within the state of New Mexico, immediately south of the City of Albuquerque. The Isleta Pueblo sought, and received, permission from the Environmental Protection Agency (EPA) to act and be treated as a state for purposes of the Clean Water Act.¹⁰¹ The Isleta Pueblo then promulgated regulations setting its required water quality standards at the highest possible level permitted by the CWA.¹⁰² The Pueblo adopted these stringent standards because it conducts ceremonies that require their citizens to be physically in the river.¹⁰³ The standards were more stringent than those adopted by the state of New Mexico.¹⁰⁴ Because the Isleta Pueblo is immediately downstream from the city of Albuquerque, the water flowing out of Albuquerque and into the boundaries of the Isleta Pueblo was required to (and did not) meet the Pueblo's stringent standards.¹⁰⁵ To satisfy the standards, the city would have to build a multimillion-dollar water treatment facility.¹⁰⁶ When the city sued the EPA challenging the application of the tribal water quality standards, the federal appellate court upheld the statute and the tribal standards:

Albuquerque argues that [the TAS provision] does not expressly permit Indian tribes to enforce effluent limitations or standards . . . outside of tribal boundaries. Albuquerque misconstrues the Clean Water Act . . . Under the statutory and regulatory scheme, tribes are not applying or enforcing their water quality standards beyond reservation boundaries. Instead, it is the EPA which is exercising its own authority in issuing NPDES permits in compliance with downstream state and tribal water quality standards. In regard to this question, therefore, the 1987 amendment to the Clean Water Act clearly and unambiguously provides tribes the authority to establish NPDES programs in conjunction with the EPA. Under [the CWA], the EPA has the authority to require up-

99. 33 U.S.C. §1251(b). See also *How are Water Quality Standards Developed?*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/standards-water-body-health/how-are-water-quality-standards-developed> (last updated May 16, 2018).

100. *Tribal Assumption of Federal Laws - Treatment as a State (TAS)*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas> (last visited Oct. 22, 2018).

101. *Albuquerque v. Browner*, 97 F.3d 415, 419 (10th Cir. 1996).

102. *Id.* at 422-23.

103. *Id.* at 426-27.

104. *Id.* at 419.

105. *Id.*

106. *Id.*

stream . . . dischargers, such as Albuquerque, to comply with downstream tribal standards.¹⁰⁷

Thus, in this first method, even though Indigenous legal standards are applied, they are applied according to a choice made by and as part of another legal system. They are essentially “adopted” and incorporated as the law of the other system.

B. *The Private Property Approach*

In the Private Property Approach, an Indigenous community uses the dominant society’s legal system to gain ownership rights or a right of control over particular pieces of property—usually land (real property). These rights of ownership or control are achieved through a process such as Native Title in Australia and Canada¹⁰⁸ or the federal recognition process in the United States.¹⁰⁹ The federal recognition process establishes a government-to-government relationship between the U.S. and tribal governments. This relationship entitles the tribal government to exercise a certain degree of regulatory control over land located within the tribe’s territorial boundaries, and also entitles the tribal government to petition the federal government to take land into trust on behalf of the tribe.¹¹⁰ Of course, it is also always possible that the Indigenous group could simply purchase a piece of land in fee simple and exercise the landowner’s right to make decisions regarding the use of that land.

One illustration of this approach is found in the Indigenous Protected Area program in Australia. Indigenous Protected Areas (IPAs) are areas “of Indigenous-owned land or sea where traditional Indigenous owners have entered into an agreement with the Australian Government to promote biodiversity and cultural resource conservation.”¹¹¹ The lands are added to the National Reserve System and

107. *Id.* at 423-24.

108. See generally PETER SUTTON, *NATIVE TITLE IN AUSTRALIA: AN ETHNOGRAPHIC PERSPECTIVE* (Cambridge Univ. Press 2003) (discussing Native Title in Australia); Renee Racette, *Tsilhqot’in Nation: Aboriginal Title in the Modern Era*, in *INDIGENOUS JUSTICE: NEW TOOLS, APPROACHES, AND SPACES* 89-96 (Jennifer Hendry et al. eds. 2018) (discussing Aboriginal Title in Canada).

109. Although Congress can recognize a tribe by statute and federal courts can order the federal government to place a tribe on the official list of federally recognized tribes, the primary process for seeking federal recognition is for a tribe to file a petition with the Department of Interior’s Office of Federal Acknowledgment. The procedures for filing and reviewing such petitions are contained in 25 C.F.R. § 83 (2015).

110. See Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 *IDAHO L. REV.* 519, 527-29 (2013).

111. *Indigenous Protected Areas – Background*, AUSTL. GOV., DEPT. OF THE ENV’T, WATER, HERITAGE AND THE ARTS, <https://web.archive.org/web/20080907165159/http://www.environment.gov.au/indigenous/ipa/background.html> (last updated July 17, 2008).

are managed by Aboriginal and Torres Strait Islander peoples according to cultural values and in accordance with international conservation standards.¹¹² The Gunditj Mirring Traditional Owners Aboriginal Corporation owns three areas which have been designated as Indigenous Protected Areas, including the Kurtonitj IPA and the Lake Condah IPA. Both of these are managed by the Winda-Mara Aboriginal Corporation on behalf of the Gunditjmarra people. The Kurtonitj IPA includes important cultural sites for the Gunditjmarra people including “[a]ncient stone Kooyang (eel) traps and stone channels, house sites and Kooyang smoking trees.”¹¹³ The Lake Condah IPA includes evidence of the stone eel trap systems used by the Gunditjmarra for thousands of years; one of the goals of the Gunditjmarra is “engaging the local community, using traditional methods to harvest eels and other fish, and using traditional knowledge to support land and water management.”¹¹⁴

While the Private Property Approach does have the advantage of putting the Indigenous group in a position to exercise control over the property, that control is not necessarily absolute. Control can be limited by someone further up the food chain. For example, a landowner must comply with any relevant zoning or other land use restrictions placed on the property. The government who enacts those zoning restrictions may have its power limited by a more powerful sovereign, as happened in *Brendale v. Confederated Tribes*.¹¹⁵ In *Brendale* the United States Supreme Court ruled that a tribe did not have the ability to enforce its zoning laws within a portion of the reservation that had lost its Indian character, even though it was within the boundaries of the reservation.¹¹⁶ Thus even when they own the land in question, tribal interests may still be subsumed by the preferences of the dominant culture.

C. *The Local Knowledge Approach*

In what I have dubbed the Local Knowledge Approach, the substantive standards developed by the Indigenous group are used to regulate, govern, or manage the resource in question. This category does overlap somewhat with both the Plug

112. TONI BAUMAN & DERMOT SMYTH, AUSTL. INST. OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES, INDIGENOUS PARTNERSHIPS IN PROTECTED AREA MANAGEMENT IN AUSTRALIA: THREE CASE STUDIES 5 (2007); TONI BAUMAN ET AL., AUSTL. INST. OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES, PATHWAYS TO THE CO-MANAGEMENT OF PROTECTED AREAS AND NATIVE TITLE IN AUSTRALIA 9-10 (2013).

113. BUSH BLITZ, KURTONIJ, LAKE CONDAH, TYRENDARRA, INDIGENOUS PROTECTED AREAS 10 (2011), <http://bushblitz.org.au/wp-content/uploads/2016/03/bb-LakeCondah-VIC-report-2011-untagged-20.pdf>.

114. *Id.* at 9.

115. *Brendale v. Confederated Tribes*, 492 U.S. 408, 408-09 (1989).

116. *Id.* at 433-37 (Stevens, J., concurring). The Court decision was badly fractured, with no opinion garnering a majority of the Justices' votes. As a result, the rationale underlying the decision must be pieced together from a plurality and a concurring opinion, leaving it unclear as to what is meant by the area's "Indian character."

and Play Approach and the Private Property Approach. It is broken out into its own separate category, however, because important differences do exist. In the Plug and Play Approach, the substantive Indigenous standard was incorporated into the dominant society's law through a deliberate decision of the dominant culture to adopt that standard; the Indigenous community's law did not apply of its own force. In the Private Property Approach, the Indigenous community was able to apply its standards because it owned or otherwise had control over the land in question. The Local Knowledge Approach differs in that, in this category, the Indigenous standards apply because they have proven to achieve more desirable results than the standards developed by the dominant society. Two examples best illustrate this approach—one relating to forest management and one relating to rehabilitation and reintroduction of wild salmon.

Managers of forests in North America and around the world have begun studying Indigenous methods of forest management as a result of scientific studies establishing that Indigenous management methods are more likely to achieve desired results than the management standards of the dominant community.¹¹⁷ One such study compared forests managed by Menominee and Ojibwe communities to those managed by non-tribal groups in northern Wisconsin.¹¹⁸ That study concluded that Menominee and Ojibwe forests “sustain greater biodiversity and higher tree regeneration than nontribal lands.”¹¹⁹ The study concluded:

Indigenous Nations in Wisconsin have long managed their lands, waters, and wildlife in ways that reflect their cultural traditions and values We conclude that Wisconsin's tribal Nations steward forests in ways that foster sustainability. These outcomes reflect in part the fact that these Nations see their health and welfare tied directly to the health of their forests.¹²⁰

Similar results have been reported in efforts to restore wild salmon runs, which have been adversely impacted by hydroelectric dams and other industrial practices. Salmon are important to Indigenous people in several parts of the world.¹²¹ One study comparing efforts to restore and rehabilitate wild salmon runs looked at the influence on these efforts of the Saami in Norway and the Nez Perce

117. Frank Lake, et al., *Returning Fire to the Land: Celebrating Traditional Knowledge and Fire*, 115 J. FORESTRY 343, 344 (2017).

118. Donald M. Waller & Nicholas J. Reo, *First Stewards: Ecological Outcomes Of Forest And Wildlife Stewardship By Indigenous Peoples Of Wisconsin*, 23 ECOLOGY AND SOC'Y, no. 1, Art. 43, at 2 (2018), <https://doi.org/10.5751/ES-09865-230145>.

119. *Id.* at 8.

120. *Id.* at 7, 10.

121. KEYSTONE NATIONS: INDIGENOUS PEOPLES AND SALMON ACROSS THE NORTH PACIFIC (Benedict J. Columbi & James F. Brooks eds., 2012).

tribes in the U.S. Pacific Northwest.¹²² The study focused on the Tana River in Norway and the Columbia River in the United States. The Tana River efforts were coordinated by the Norwegian government, which prioritized biological diversity and established uniform standards for measuring that result.¹²³ These standards contained no special role or consideration for the Saami, despite the fact the salmon are a major part of their culture and way of life.¹²⁴ The Columbia River efforts prioritized cultural as opposed to biological diversity.¹²⁵ By prioritizing cultural diversity, the rehabilitation efforts created a space for the Nez Perce tribe to use its sovereignty and treaty rights to exercise its right to operate and manage tribal hatcheries.¹²⁶ The study concluded that although it was too early to reach a definitive conclusion, preliminary evidence indicated that tribal hatcheries, managed according to tribal cultural techniques, experienced more success in raising fish that are genetically similar to wild salmon.¹²⁷

In the Local Knowledge Approach, the traditional knowledge of the Indigenous group is adopted for use by the dominant group not because any particular law requires the incorporation of that knowledge, but because the knowledge has been proven to reach better results, or at least the results desired by the dominant culture.

D. *The Schrödinger's Cat Approach*

The paradox of Schrödinger's Cat was originally a thought experiment designed to explore aspects of quantum mechanics.¹²⁸ It postulated that a cat simultaneously existed in two contradictory states—the cat was both alive and dead at the same time—until it interacted with a certain subatomic particle.¹²⁹ I have borrowed this paradox to describe an approach that exists simultaneously both within and outside the legal system.

The natural inclination of attorneys addressing issues relating to Indigenous communities is to look to the specific body of law known (depending on where you are) as Federal Indian law, Indigenous peoples' law, or some other such label.¹³⁰

122. Gro B. Ween & Benedict J. Colombi, *Two Rivers: The Politics of Wild Salmon, Indigenous Rights and Natural Resource Management*, 5 SUSTAINABILITY 478, 478-95 (2013).

123. *Id.* at 483-84, 487-89.

124. *Id.*

125. *Id.* at 485-87.

126. *Id.*

127. *Id.* at 489-91.

128. Davide Castelvecchi, *Reimagining of Schrodinger's Cat Breaks Quantum Mechanics — and Stumps Physicists*, 561 NATURE 449, 449 (2018).

129. *Id.* at 450.

130. Canada, for example, generally uses the term First Nations in reference to its Indigenous peoples, whereas in Australia, the term generally used is Aboriginal and Torres Strait Islander people. ALISDAIR ROGERS, ET AL., A DICTIONARY OF HUMAN GEOGRAPHY: "FIRST NATIONS" (Oxford

Attorneys working in this area focus on the specialized body of law precisely because it was developed to address issues relating to Indigenous people and often contains special doctrines developed specifically for situations that arise in Indigenous communities.¹³¹ Those doctrines however, as discussed above, can be problematic for a number of reasons.¹³²

In an effort to avoid these obstacles, a few attorneys have begun looking to other parts of the law, such as private contract law, to develop innovative strategies that use existing legal tools in new and different ways. One such strategy can be found in the state of South Australia. As a result of a very divisive experience with the Australian Federal Government involving a dispute over a cultural site on Hindmarsh Island, the Ngarrindjeri opted out of dealing with the Federal Government and instead decided to work directly with the state and local governments.¹³³ As part of their strategy, the Ngarrindjeri chose to develop relationships with state and local governments through a series of private contracts, and not pursuant to the body of law relating to Aboriginal and Torres Strait Islander peoples.¹³⁴ These contracts contained specific clauses defining cultural knowledge, specifying who owned and controlled that knowledge, and how disputes would be resolved.¹³⁵ As a result, the Ngarrindjeri have more control over their cultural resources and cultural sites than sovereign tribal governments in the United States. Indeed, at one cultural site, the traditional custodian of the site and the park warden for the site are the same person. Both the Ngarrindjeri and the state of South Australia viewed the arrangement as beneficial, as evidenced by the state of South Australia's decision to encourage other Aboriginal groups to organize in the same manner.¹³⁶ Unfortunately, a change in leadership ended this process before it came to fruition.¹³⁷

Univ. Press 2013), <https://www.oxfordreference.com/view/10.1093/acref/9780199599868.001.0001/acref-9780199599868-e-615?rskey=pEVnxS&result=1>.

131. See, e.g., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (LexisNexis 2015).

132. See Jennifer Hendry & Melissa Tatum, *Human Rights, Indigenous People, and the Pursuit of Justice*, 34(2) YALE L. & POL'Y REV., 352-86 (2016).

133. The author learned of this story through conversations with members of the Ngarrindjeri Regional Council and with their attorney who developed the strategy. The Ngarrindjeri, in consultation with their attorney, made the strategic decision not to use the existing body of law relating to Aboriginal and Torres Strait Islander people, but rather to forge a new path and develop a relationship with local and state governments based on other areas of law, such as contract law. Meetings with representatives of the Ngarrindjeri, in Tucson, AZ (Jan. 2013); Meetings with representatives of the Ngarrindjeri, in South Australia (Sept. 2013); see also *New Model for State and Indigenous Agreements*, FLINDERS UNIV. NEWS BLOG (June 19, 2012), <https://news.flinders.edu.au/blog/2012/06/19/new-model-for-state-and-indigenous-agreements/> ("It's quite ground-breaking: it's using contract law to set up a formal relationship between an Indigenous Nation and a State government.").

134. *New Model for State and Indigenous Agreements*, *supra* note 133.

135. *Id.*

136. *Id.*

137. *Id.*

Parties choosing to pursue this approach are working within the legal system in that they are relying on standard legal doctrines and principles to support their arguments and their approach. Parties using this approach are also working outside the legal system, in that they have chosen to ignore or shunt aside the body of law developed specifically for addressing Indian and Indigenous issues. In a sense, this seems counterintuitive, as it ignores the specialized legal doctrines purportedly developed to recognize the special status of Indigenous people. But as the Australian example demonstrates, ignoring those protections and relying instead on other areas of the law may effectively lead to more success. As a result of their use of standard principles of contract law, the Ngarrindjeri are able to exercise more control over their cultural resources than are tribes in the United States, who possess governmental powers.

E. *The Post Hoc Ratification Approach*

Sometimes communities work outside the official legal process. Their hope is that they will either go unnoticed or receive post hoc ratification for what they do. In the words of Dr. Stephen Cornell:

In Australia and Aotearoa New Zealand and in the less developed rights domains of North America, some nations are taking what might be called the Nike approach to governance, after the company's advertising slogan: 'Just do it'. Carefully, deliberately, sometimes stealthily, some Indigenous communities are searching out the interstices in the various legal and political constraint regimes they face, inserting themselves into those spaces, making decisions, pushing the envelope, and creating track records of capable governance If this is done well, one possible result is what Paul Chartrand, an Aboriginal attorney in Canada, refers to as practices crystallising into rights. It doesn't always work, and the scope may be limited at first, but there is at least some evidence that as Indigenous nations assume governmental functions and govern well, outsiders may grant them a tacit right to govern.¹³⁸

Communities pursuing this option walk a fine line, one that often takes them into gray, shadowy areas. Consequently, it is often difficult to document the precise details of any particular illustration. One anecdotal example that the author has heard from several different sources centers on a Native Village in Alaska that was experiencing significant problems with hunters who would camp upstream of the Village during certain times of the year. The hunters would toss their garbage and wash their laundry in the river, which resulted in polluted water flowing into

138. Stephen Cornell, *Justice as Position, Justice as Practice: Indigenous Governance at the Boundary*, in *INDIGENOUS JUSTICE: NEW TOOLS, SPACES, AND APPROACHES* 21-22 (J. Hendry et al. eds., Palgrave MacMillan, 2018) (citations omitted).

the Village. The people living in the Village tried without success to get the United States Forest Service to take action against the hunters, who were violating federal regulations. The Forest Service Rangers asserted they were spread too thin and were unable to police the hunting camp.

During a frustrated discussion at a Village Council meeting, one of the council members declared that if the Forest Service would not take action, the Village Council would have to do it themselves. The Village Council enacted regulations, purchased badges and ticket books off the internet, and began writing tickets and assessing fines for the hunters who polluted the river. The pollution problem was quickly remedied, although a hunter did eventually question the authority of the Village Council to regulate the area. The hunter complained to the Forest Service, whose response was essentially, “we know what they are doing, and it works for us, as it has solved the problem. As far as we are concerned, you should stop polluting the river and pay your fine.”

The Post Hoc Ratification Approach is essentially based on the old adage that sometimes it is easier to seek forgiveness rather than permission. It is likely to work best in circumstances where bureaucratic red tape presents difficult obstacles to implementing formal legal solutions, but where the same bureaucratic inertia is unlikely to reverse a successful solution that is already in place and functioning.

F. *The Process Approach*

In the prior categories, the Indigenous community used its substantive legal standards in addressing the environmental issue in question. This last category differs in that the Indigenous community uses its dispute resolution processes as opposed to its substantive standards. One example can be found in the efforts of the Zuni Pueblo to repatriate its missing War God statues.¹³⁹ The Zuni War Gods, more properly known as *Ahuya:da*, are sculptures placed at various shrines around the Pueblo.¹⁴⁰ These statues are to remain at their shrines, exposed to the natural elements, and their removal is believed to cause war, violence, and natural disasters.¹⁴¹ When several of these sculptures went missing, the Zuni formulated a strategy to seek their return. According to Zuni tradition, a person is supposed to approach a person with whom they have a dispute four times in an effort to resolve the grievance.¹⁴² Only then may stronger efforts be undertaken. The Zuni used this as a basis to develop a strategy for approaching museums and collectors known to have *Ahuya:da* in their possession.¹⁴³ Using this strategy the Zuni were success-

139. T. J. Ferguson, Roger Anyon, & Edmund J. Ladd, *Repatriation at the Pueblo of Zuni: Diverse Solutions to Complex Problems*, 20(2) AM. INDIAN Q., 251-73 (1996).

140. *Id.* at 251-52.

141. *Id.* at 252.

142. *Id.* at 255.

143. *Id.*

ful in repatriating every missing sculpture they were able to locate.¹⁴⁴ They achieved this success without filing a single lawsuit.¹⁴⁵

Another illustration can be found in the use of peacemaking strategies and sentencing circles. Many Indigenous communities use a dispute resolution process in which all relevant parties are assembled and given an opportunity to discuss their perspectives and points of view.¹⁴⁶ This discussion is usually facilitated by a mediator to assist the parties in developing their own mutually satisfactory resolution to the dispute.¹⁴⁷ A similar approach is used by federal agencies in the United States who manage federal public lands containing sacred sites.¹⁴⁸ The approach originally used for managing these sites almost always resulted in time consuming and expensive litigation.¹⁴⁹ In the 1990's two site managers, one at Medicine Wheel National Monument and one at Devil's Tower National Park, experimented by assembling a working group of consultants to help develop a new management plan for the sites.¹⁵⁰ The consulting groups included representatives from each of the groups with a significant interest in the site.¹⁵¹ This new approach helped to minimize the time and expense of litigation, and was so successful that the President issued an executive order mandating all site managers use the same method.¹⁵²

Thus, the key to this final category is not the substantive law of the Indigenous group, but rather the process used by the group for resolving disputes. It is thus important to make space not just for accommodating or incorporating Indigenous law, but also for accommodating or incorporating other dispute resolution processes.

IV. CONCLUDING THOUGHTS

This article opened with a look at Neil Walker's discussion of the role of legal academics in the Global Age, and his prediction that legal academics must develop

144. *Id.* at 257.

145. Even more remarkable, the Zuni achieved this success even before the enactment of the Native American Graves Protection and Repatriation Act (NAGPRA), which requires museums receiving federal funding to repatriate wrongfully acquired items of cultural property. *Id.* at 257-58; 25 U.S.C. §§ 3001-13 (2010).

146. Porter, *supra* note 8; Yazzie, *supra* note 9

147. See I. HÓZH, ÓJI NAAT'AAH — (*Diné Traditional Peacemaking*), JUDICIAL BRANCH OF THE NAVAJO NATION, <http://www.navajocourts.org/indexpeaceplanops.htm> (last visited May 29, 2018); Porter, *supra* note 8.

148. Hendry & Tatum, *supra* note 6, at 382-84.

149. Tatum & Shaw, *supra* note 47.

150. *Id.* at 51-67; See also Lloyd Burton & David Ruppert, *Bear's Lodge or Devils Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands*, 8(2) CORNELL J. L. & PUB. POL'Y 201, 201-47 (1999).

151. *Id.*; Hendry & Tatum, *supra* note 6.

152. Exec. Order No. 13,007, 61 Fed. Reg. 26771 (May 29, 1996).

an interest in and appreciation for the rich diversity of transnational law. For Walker, part of the change heralded by the Global Age is a de-emphasis on the role of the nation-state as a source of law, and the emergence of a multiplicity of sources of law.¹⁵³ Indigenous communities are one such source.

There exists an understandable and natural reluctance to incorporate Indigenous customary laws and traditions.¹⁵⁴ This reluctance is rooted in uncertainty about the ability of outsiders to access these customs and traditions.¹⁵⁵ Access is becoming less of an issue, however, as Indigenous people become more active on the global legal stage, creating vehicles for increasing awareness and understanding of Indigenous law.¹⁵⁶ In addition, movements have begun in Australia, Canada, and the United States to require that law schools incorporate information about Indigenous groups into the legal curriculum.¹⁵⁷

Perhaps the strongest argument supporting the inclusion of Indigenous law as a source is found in the taxonomy presented above. As that taxonomy illustrates, incorporating the substantive law developed by Indigenous communities, as well as the dispute resolution procedures of those communities, can help to further the interests of all communities involved in a given dispute, both Indigenous and non-Indigenous alike. It does so because applying Indigenous legal norms and processes can help settle disputes more efficiently and justly. As non-Indigenous communities have come to recognize the utility of incorporating Indigenous legal standards and methods, a sort of enlightened self-interest is growing whereby those in the dominant culture are becoming more open to other methods. It is hoped that the taxonomy included in this article can also assist in alleviating concerns about the ability of legal academics to access, understand, and incorporate Indigenous laws into their classroom.

153. See Walker, *supra* note 1, at 15.

154. See Hendry & Tatum, *supra* note 6, at 105-07.

155. See *id.* at 105-06.

156. *Id.* at 106-07.

157. For information regarding cultural competency in the Australian legal curriculum, see A.J. Wood, *Incorporating Indigenous Cultural Competency Through the Broader Law Curriculum*, 23 LEGAL ED. REV. 57, 57-81 (2013). In Canada calls to incorporate Indigenous law into the legal curriculum came as a recommendation of the Truth and Reconciliation Commission. See Kerry Banks, *The Rise of Aboriginal Law*, UNIV. AFFAIRS (Sept. 5, 2018) <https://www.universityaffairs.ca/features/feature-article/the-rise-of-aboriginal-law/>. While the United States has not experienced such a nationwide call for change, several states have incorporated Indian law into the state bar exam. See Gloria Valencia-Weber & Sherri N. Thomas, *When the State Bar Exam Embraces Indian Law: Teaching Experiences and Observations*, 82 N.D. L. REV. 741, 741-75 (2006). And, the subject is arguably included in calls for increasing cultural competency skills in legal education. See, e.g., Anastasia Boles, *Seeking Inclusion from the Inside Out: Towards a Paradigm of Culturally Proficient Legal Education*, 11 CHARLESTON L. REV. 209, 209-69 (2017).