Feminist Jurisprudence in Tribal Courts: An Untapped Opportunity

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What if every gendered legal issue was not burdened by over 200 years of patriarchal and racist precedent? How would feminists craft legal practices and structures in a way that would be grounded by a clear understanding of the harms of oppression and subjugation? These questions are not just rhetorical; this essay argues that a fresh perspective is possible in the context of an Indigenous feminist jurisprudence. Indigenous feminist legal theory (IFLT) is in its nascent stages as a contemporary academic discipline and praxis.¹ It has largely been elucidated by legal scholars in Canada, including Emily Snyder, Val Napoleon, and John Borrows.² Snyder explains that IFLT lies at the intersection of feminist legal theory, Indigenous feminist theory, and Indigenous legal theory.³

Intersection

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⁴ Created by Sarah Deer, based on Emily Snyder’s table. See id. The dot in the center represents IFLT.
Snyder describes IFLT as “an important analytic tool that is intersectional, attentive to power, anti-colonial, anti-essentialist, multi-juridical, and embraces a spirit of critique that challenges static notions of tradition, identity, gender, sex, and sexuality.” Thus, IFLT is both a crucial intervention and an immense opportunity. Snyder emphasizes that IFLT is “an anti-oppressive analytic tool.” Like intersectionality theory, IFLT offers a closer look at cross-sections of oppressions, but with a particular focus on the oppression brought by settler colonialism. In this case, the word colonialism is modified by the critical term “settler,” which is a more accurate descriptor for the present, ongoing, and future harms presented by the continued occupation of Native lands. In analyzing the current state of affairs, it is imperative to understand that settler colonialism has deep ramifications for oppression based on sex, gender, and sexuality of Indigenous people. This essay will explore how IFLT can provide direction, both theoretically and practically, on how to develop Indigenous feminist legal arguments applicable to tribal courts.

The Lay of the Land

There are currently over 570 federally recognized Tribal Nations in the United States. A significant number of these Nations operate somewhat like a contemporary Anglo-American court system, including trial courts and appellate courts. These court systems often mirror state and federal courts, particularly in structure and procedures. For example, many tribal courts have a courtroom physically modelled after the typical American courtroom. Federal rules of evidence have often been adopted by Tribal Nations, and judges and attorneys in tribal courts are usually (but not always) licensed attorneys educated in American law schools.

In general, these contemporary tribal courts were not originally built on the ideals of feminism or anti-oppression but rather the ideals of settler colonialism. Most tribal criminal courts trace their origin to heavy-handed patriarchal federal government interference in the day-to-day lives of Native people. Indeed, the first “tribal courts” were created in the late 19th century.

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5 Emily Snyder, Indigenous Feminist Legal Theory, 26 CAN. J. OF WOMEN & L. 365, 401 (2014).
6 Id. at 388.
7 Patrick Wolfe is credited with helping start the late-twentieth-century development of settler colonial studies. Wolfe explains that “settler colonizers come to stay; invasion is a structure not an event.” PATRICK WOLFE, SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY: THE POLITICS AND POETICS OF AN ETHNOGRAPHIC EVENT 26 (1999).
8 Tribal law scholars typically use “Anglo-American” to distinguish between the laws of the United States (as informed by English common law) and the laws of Tribal Nations.
9 Interested readers may wish to consult MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (2d ed. 2020). This academic casebook of tribal cases covers a wide variety of topics, including civil rights, criminal law, property, and contracts.
to punish Native people for doing Native things, including participating in ceremonies and using traditional medicine.  

Over the course of the twentieth century, however, tribal courts gradually came under more local control by Tribal Nations, though many are still heavily influenced by colonial hegemony. But there are often still opportunities for “indigenizing” the law by allowing room for tribal culture in the legal system. For example, today, tribal jurists are sometimes encouraged or required by tribal law to look to tribal “customs and traditions” to help answer ambiguous legal questions. Certain tribal courts—in particular, the Navajo Nation Supreme Court—have grounded some of their decisions in tribal language, infusing its body of case law with unique Navajo concepts. Still other tribal courts allow for the admission of expert witness testimony on matters of tribal customary laws. These are efforts to maintain relevance, authenticity, and even cultural lessons for the citizens of the Nation. The jurists issuing decisions that pertain to customary practices leads me to characterize these tribal courts as “hybrid”—that is, American in style and procedure, but Indigenous in substance.

There are many Tribal Nations that have pulled away from Anglo-American style governance or never accepted it altogether. Some Tribal Nations do not rely exclusively on Anglo-American systems to resolve disputes. For the purpose of Indigenous legal studies, these alternative (or original) methods are often grouped together and labelled “peacemaking,” although not all these Tribal Nations actually call their processes peacemaking. Peacemaking systems seek to resolve a dispute without resorting to adversarial justice. The basic approach might be considered similar to what contemporary mainstream American lawyers know as mediation, alternative dispute resolution, or restorative justice. Peacemaking systems are marked by private sessions involving ceremonies, storytelling, and advice for parties in a dispute.

For purposes of this essay, I am focusing on the former public, tribal hybrid legal systems operating today. The latter peacemaking courts raise very different questions for Indigenous feminist legal scholars and deserve separate inquiry.

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11 See, e.g., Hopi Indian Credit Association v. Thomas, 27 ILR 6039 (Hopi Ct. App., Nov. 20, 1998) (finding that “the customs, traditions and culture of the Hopi Tribe deserve great respect in tribal courts, for even as the Hopi Tribal Council has merged laws and regulations into a form familiar to American legal scholars, the essence of our Hopi law as practiced remains uniquely Hopi. The Hopi Tribe has a constitution, ordinances, and resolutions, but these Western forms of law codify the customs, traditions and culture of the Hopi Tribe, which are essential sources of our jurisprudence.”).


13 Biddah Becker & Paul Spruhan, Profile of the Law of the Navajo Nation, 8 TRIBAL L.J. 1 (1999) (explaining that “[a] litigant may demonstrate the common law principle to be applied through recorded Navajo court opinions, learned treatises on the Navajo way, judicial notice, or the testimony of expert witnesses who have substantial knowledge of Navajo common law.”).
The Potentialities

Snyder articulates IFLT as “a framework for thinking about how Indigenous laws are gendered and for thinking about [i]nternal gendered legal realities.”\(^{14}\) In this section, I argue that IFLT also has the potential to inform praxis in tribal courts. I am primarily interested in tribal court cases that involve gendered discrimination and/or gendered violence with an emphatic inclusion of discrimination and violence directed toward Two-Spirit people (Native LGBTQ+).\(^{15}\) IFLT may also be a useful tool for exploring reproductive justice legal questions in tribal courts, especially in the post-

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world.\(^{16}\) There are myriad ways in which legal questions may be informed by IFLT, but this essay is focused on violence, discrimination, and environmental degradation.

In short, Indigenous feminisms could be used to inform legal arguments in tribal court at the trial and appellate levels. Here, I’ll consider three hypothetical cases that could take place in tribal court. These hypotheticals are not based on a single Tribal Nation or tribal culture, but merely serve as examples of what litigants and justices may be inspired to use.

Example A:

A tribal prosecutor has charged a case involving a teenage victim who was sexually assaulted when they were voluntarily incapacitated. They did not report the crime for several weeks. In Anglo-American law, these cases are difficult to prosecute because juries tend to see delayed reporters as less credible.

Unlike a prosecutor in the Anglo-American system, a tribal prosecutor may be able to consult with a knowledgeable elder\(^{17}\) who can speak about customary expectations after trauma. Suppose that the elder explains that, culturally, people are expected to take a lot of time for themselves before they expose someone’s bad behavior. Some survivors may need to undergo a special ceremony before they are able to bring the trauma to light. Bringing in this elder to serve as an expert witness may help the tribal jury to relate to the delayed reporting in a new way. Instead of viewing the victim’s delay in reporting as a strike against their credibility, they

\(^{14}\) Snyder, supra note 3, at 389.

\(^{15}\) Many Native people who fall under the umbrella of LGBTQ+ use the term “Two-Spirit” as a pan-Indian phrase that helps build mobilization and activism. The term Two-Spirit is not universally embraced.


\(^{17}\) Generally, elders refer to persons known in a tribal community to have a great deal of wisdom and knowledge about customary practices and language.
understand that the victim’s delay was in keeping with her own cultural practices.

**Example B:**

A Two-Spirit person is fired from a tribal business after coming out as transgender. The person hires an attorney to challenge the adverse employment action in tribal court. The Tribal Nation does not have any clear constitutional or statutory language that prohibits such discrimination. The attorney could certainly try raising a Bostock argument, but that precedent is merely persuasive, not binding. Relying on tribal common law, the attorney is able to consult with a local Tribal citizen who is a trained historian and a professor at a local university. This member informs the attorney that less than 100 years ago, members of the Tribe had a transitional ceremony for a person who was in the process of changing gender.

This historian could be called as an expert witness in building a case that discrimination against transgender people is counter to tribal customs and practices. This kind of testimony could help the Two-Spirit client’s case and may serve to educate the community as well.

**Example C:**

The parents in this community are very concerned about contaminated breast milk from environmental pollutants. These pollutants have entered the tribal ecosystem from local extractive industries that have ignored tribal land rights and regulation, with no accountability. Many parents in this community have stopped breast-feeding after learning of the pollutants.

The Tribal Council passes a law allowing for a tribal attorney to represent the “seventh generation” of the people. In many tribal cultures, the term “seventh generation” refers to the future—the population that will exist in seven generations.

An attorney with the requisite authority to argue cases on behalf of future generations could craft a tort claim against the corporate interests that have benefited financially from their actions. In theory, this kind of case

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18 Tribal Nations generally have inherent sovereign immunity from suit, but that immunity can be waived upon clear language in treaties, tribal statutes, or contracts.

19 See Bostock v. Clayton Cnty, 140 S. Ct. 1731 (2020). This Supreme Court decision determined that discrimination on the basis of sexuality and gender is prohibited by the Civil Rights Act of 1964.

20 The English term “seventh generation” may have originated in the beliefs of the Haudenosaunee (Iroquois) people: “In our way of life, in our government, with every decision we make, we always keep in mind the Seventh Generation to come. It’s our job to see that the people coming ahead, the generations still unborn, have a world no worse than ours—and hopefully, better. When we walk upon Mother Earth, we always plant our feet carefully because we know the faces of our future generations are looking up at us from beneath the ground. We never forget them.” HARVEY ARDEN & STEVE WALL, WISDOMKEEPERS: MEETINGS WITH NATIVE AMERICAN SPIRITUAL ELDERS 68 (1990) (quoting Onondaga Faithkeeper Oren Lyons).
could be heard in tribal court, although significant questions of jurisdiction may interfere, particularly for non-Native defendants. This attorney could advance the argument that the high rates of breast milk contamination has been fully documented by local epidemiologists that work alongside tribal public health workers, and that this problem is magnified by climate change. Although monetary settlement is the typical way in which matters are handled in Anglo-American law, it is possible that tribal attorneys could negotiate with the corporations for a clean-up of toxic sites and a prohibition on future pollution. This type of litigation (or negotiation) could be grounded by a clear understanding of the long-term effects of breast milk contaminants.

In each hypothetical, we can consider how IFLT could inform the practice of attorneys in tribal courts. While these hypotheticals focus on sexual violence, trans-discrimination, and breast milk, there need not be a clear “gendered” issue before the tribal court for IFLT to find relevance.

There is great potential in advancing Indigenous feminist principles in tribal appellate courts, particularly on monumental questions of gender-based oppression. And this is primarily because Tribal Nations need not be trapped under the weighty case law precedent of the United States. Tribal Nations are not bound to the Bill of Rights, nor are Tribal Courts required to adhere to federal case law precedent interpreting the Bill of Rights. Instead, tribal courts apply and interpret legal questions based on their own constitutions, statutes, and case law. In some cases, Tribal Nations have adopted the language of the Bill of Rights themselves, but under color of tribal law. And the Indian Civil Rights Act (1968) requires tribal courts to apply the language of most of the Bill of Rights.

But, because tribal courts are not bound by the United States Constitution, they can independently analyze certain legal concepts, like “equal protection.” Many feminist legal scholars have bemoaned the messiness of the levels of scrutiny which emerged out of Carolene Products in 1938. Perhaps there is a way to independently analyze the language of “equal protection” to something that would not be possible if tribal courts were forced to adopt the federal courts’ interpretations.

Over the past century, the levels of scrutiny have proven unworkable. They are in no way binding on tribal courts, and they are very messy and have not achieved liberation from the historical and continuing harms.

22 See, e.g., Standing Bear v. Pratt, No. SCO-2016-001, 7 (Osage Nation Sup. Ct. filed Aug. 11, 2017) (“Because the United States Constitution does not apply to tribes, it stands to reason that the cases interpreting those provisions of the United States Constitution also would not apply.”).
24 See, e.g., Shira Galinsky, Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg’s Affirmative Action Jurisprudence in Grutter and Gratz and Beyond, 7 N.Y.CITY L. REV. 357, 357 (“The language of equal protection analysis has become regimented, fixed, and increasingly removed from the problems of ignorance, intolerance, and outright racism that continue to plague American society.”).
including slavery, racism, and sexism. Imagine a new perspective on equal protection; one that is unburdened by bad precedent. This is where feminist, gender-conscious principles could be explored. A tribal court could interpret such a provision as one requiring recognition for the “full humanity of every person.” This then sets precedent for future cases involving equal protection in that tribal court.

Another potential bright spot of an IFL praxis is the opportunity to cultivate or reclaim the customary power of women and Two-Spirit people through tribal law. Assimilated tribal governments have often been predicated on patriarchal principles and IFL praxis may be able to shift the balance of power. IFLT offers an opportunity to re-consider traditional tribal tenets of gender balance and respect.

The Barriers

Thus far, my essay has considered an idealized praxis of IFLT. But, in reality, there are many reasons why IFL theorists and practitioners working in tribal contexts must be cautious of over-anticipating what is really possible in the near term.

First, IFL theorists and practitioners must be very cautious of terms like “custom” and “traditional” because those words could be used to justify patriarchy as well. IFL theorists have thus far challenged the romantic notion that pre-colonial tribal societies were purely peaceful and egalitarian and had no gender discrimination.26 Thus, a look backwards does not always translate into answers to contemporary legal problems. As with American customs, tribal cultural practices are always evolving; just because something was “customary” in the nineteenth century does not mean that we should embrace it today.

Second, tribal court jurisdiction exists in a constantly evolving, complex matrix of United States Supreme Court decisions and federal statutes. Before a feminist argument can be made, the tribal court must have jurisdiction over the matter, and federal law has limited tribal jurisdiction in arbitrary ways. Establishing jurisdiction can be incredibly complex and may overshadow the merits of the case.

Third, the word “feminism” and its affiliation with mid-twentieth century American “white” feminism has proven problematic in tribal contexts and may serve to stop conversations before they even begin. Mainstream feminism brings too much baggage in some tribal communities. I think IFLT might have more legs in some tribal nations if we contemplate framing the theoretical underpinnings to “gender-conscious” Indigenous legal theory.

Perhaps most importantly, even if tribal jurists are convinced by a gender-conscious argument, they may be concerned that doing something too

26 See Snyder et al., supra note 2.
“out of the ordinary” may catch the attention of tribal court skeptics. This is a question of legitimacy. Tribal judiciaries have struggled mightily to establish credibility and respect from federal and state courts. Most tribal judges are trained at American law schools and have applied American laws to tribal cases. A case that is too “outside the box” risks blowback from outsiders, including the federal judiciary.

Directions

IFLT should have a place at the feminist legal table going forward. I think it is clear that there is a gap in the theoretical sense, and it matters to everybody. In praxis, non-Indians are often parties to a case in tribal court. To be clear, this is not a blanket call for outsiders to weigh in on gendered matters in tribal governments. Sustained meddling with tribal justice systems has only led to less liberation for Native people; not more. Instead, feminist legal scholars can provide the space for the development of IFLT but leave the praxis to those on the ground. To the extent this is another “call to action” for the field of feminist legal theory generally, I also encourage efforts to cultivate a new generation of lawyers who are trained in IFLT and encouraged to practice in tribal courts. Federal Indian Law casebooks tend to approach Indian law as a gender-neutral field of study. It is not. Gender has been part and parcel of the colonial process and plays a significant role in society. Let’s bring gender into the Indian law classrooms and tribal courtrooms.

Tribal civilizations existed for thousands of years without using Anglo-American legal norms, structures, or practices. To the extent we sit with these structures now, the independence of tribal judiciaries may allow fertile ground for the development of new, contemporary ways of imagining a different kind of world.