JUSTICE BEYOND THE STATE

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ABSTRACT

For decades the intersectionality of extreme rurality and cultural difference has led scholars and tribal leaders to advocate for recognition of local authority as a solution to the justice gap in rural Alaska. Local control often means developing courts in and extending jurisdiction to Alaska Native villages. This Article evaluates strengthening tribal courts or justice systems through restorations of jurisdiction as a way to address access to justice issues in Alaska Native villages. It argues that restorations of jurisdiction and the development of tribal justice systems must ensure that Alaska Natives define the justice provided in their communities. Restorations of jurisdiction that require Alaska Native villages to replace their traditions and laws with adversarial processes and values threaten to undermine access to justice.

I. INTRODUCTION

The United States has a serious, well-documented justice gap.[1] Most Americans face justiciable problems—happenings and circumstances that

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1. LEGAL SERVS. CORP. , THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 7 (2022) ("Low-income Americans do not get any or enough legal help for 92% of their substantial civil legal problems."). Civil legal problems or needs include "securing and protecting basic needs, such as housing, education, health care, income, and safety." *Id.*

may raise legal issues[2]—but do not access the help they need.[3] Justiciable problems arise because so many aspects of everyday life have legal dimensions or intersect with the law. The law seems to affect everything, even the most mundane aspects of an individual's everyday life. [4] It reaches employment, housing, and family relationships. Laws govern who gets married and divorced. They decide how taxes are paid, licenses are issued, property inherited, and benefits distributed.

Individuals struggle to navigate these legal hurdles alone. People need help ending marriages, writing wills, accessing benefits, obtaining licenses, and more. The justice gap indicates that many people, regardless of socioeconomic status, but especially the impoverished, do not receive the help they need.[5]

In this law-thick world,[6] many, especially lawyers, conflate access to justice with access to lawyers or courts. They suggest "more lawyers" as the answer to the justice gap.[7] Scholars and practitioners have increasingly criticized this notion. They suggest that an increased supply

2. Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339, 341 (2008) (discussing that justiciable problems are "happenings and circumstances that raise legal issues but that people may never think of as legal and with respect to which they may never take any legal action"); Kathryne M. Young & Katie R. Billings, *An Intersectional Examination of U.S. Civil Justice Problems*, 2023 UTAH L. REV. 487, 492 (2023) (discussing the differences between justiciable events and legal needs).

3. LEGAL SERVS. CORP., *supra* note 1 (defining the justice gap as "the difference between the civil legal needs of low-income Americans and the resources available to meet those needs"). The Legal Services Corporation (LSC) Report found that low-income people did not seek out help and expressed concerns about finding and affording legal assistance. *Id.* at 8; *see also* Sandefur, *supra* note 2, at 346 (explaining that the justice gap extends to people with varying levels of socio-economic status).

4. *See* Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 446 (2016) (explaining that "many common relationships and routine activities are governed by laws and regulations and can become objects of formal legal action by someone under some aspect of these"); Hugh McDonald, *Assessing Access to Justice: How Much "Legal" Do People Need and How Can We Know?*, 11 U.C. IRVINE L. REV. 693, 698 (2021) (discussing how people encounter different types of law in their "political, economic, and social life").

5. LEGAL SERVS. CORP., *supra* note 1, at 7–8.

6. *See* Sandefur, *supra* note 4 (defining "law-thick" as a world "where many common relationships and routine activities are governed by laws and regulations and can become objects of formal legal action by someone under some aspect of these"); *see also* Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 133 (2010) (stating that in our "law-thick world" there is an "utter lack of attention to the size and vitality of the legal markets serving ordinary individuals in the conduct of their everyday lives").

7. *See* Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49, 50 (2019) ("[D]iagnosis of the problem proceeds from a preference for a single specific solution: more legal services.")

of lawyers has not necessarily eased unmet needs for legal services.[8] Less commonly, however, have scholars imagined living in a less law-thick world where the justice gap operates differently.

Rural Alaska presents an alternative to our law-thick world.[9] There are no lawyers. There are very few law enforcement officers, and the nearest court may be miles away in a larger town.[10] The law simply does not reach in the same way that it does in urban contexts (or even some rural spaces) in other parts of the world.

Even so, legal needs abound. In 2017, the Alaska Court System Access to Justice Committee estimated that "on average, an individual Alaskan experiences 2.1 legal issues every eighteen months."[11] This statistic indicates that Alaska faces a justice gap more severe than most other parts of the United States. It raises important questions: What does access to justice look like in places where the law has a limited reach and lawyers and courts are not necessarily relevant? How can solutions to access to justice issues be designed and implemented to work in these places?

Scholars and tribal leaders have proposed and advocated for the recognition of local authority as a solution to the justice gap in rural Alaska for decades.[12] Local control often means developing courts in and extending jurisdiction to Alaska Native villages. This Article argues that

8. *See, e.g.*, *id.*; Sandefur, *supra* note 4, at 450 ("Even when lawyers are free we see an interesting lack of recourse to them."); Emily A. Spieler, *The Paradox of Access to Civil Justice: The "Glut" of New Lawyers and the Persistence of Unmet Need*, 44 U. TOL. L. REV. 365, 365 (2013) (describing the "market failure between the growing supply of lawyers and the unmet need for legal services in these [small] communities"); Zachariah DeMeola & Michael Houlberg, *To Close the Justice Gap, We Must Look Beyond Lawyers*, UNIV. OF DENV. INST. FOR ADVANCEMENT AM. LEGAL SYS. BLOG (Nov. 4, 2021), https://iaals.du.edu/blog/close-justice-gap-we-must-look-beyond-lawyers ("Reliance on more lawyers – and more pro bono services – to address our country's justice crisis is a practical impossibility under the circumstances."); STACY MARZ ET AL., ALASKA'S JUSTICE ECOSYSTEM: BUILDING A PARTNERSHIP OF PROVIDERS ii (2017), https://courts.alaska.gov/jfa/docs/plan.pdf ("Expanding access to justice requires innovation and moving past the idea that an attorney or a courtroom is the best or only solution for Alaskans.").

9. N.E. Schafer & Antonia Moras, *Delivering Justice in Rural Alaska: The Last Frontier*, 10 J. CONTEMP. CRIM. JUST. 109, 113 (1994) ("It is difficult for urban dwellers to comprehend the problems surrounding delivery of law enforcement services to [Alaska's] small, isolated villages.").

10. *See Court Directory*, ALASKA CT. SYS., https://courts.alaska.gov/courtdir/index.htm (last visited Oct. 27, 2024) (stating the location of Alaska's courthouses).

11. MARZ ET AL., *supra* note 8, at 2.

12. *See, e.g.*, John E. Angell, Alaska Village Justice: An Exploratory Study 138 (1979); INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 49–51 (2013), http://www.aisc.ucla.edu/iloc/report; Ryan Fortson & Jacob A. Carbaugh, *Survey of Tribal Court Effectiveness Studies*, 31 ALASKA JUST. F. 14, 14 (2014).

proposals for more courts and greater jurisdiction must ensure that Alaska Natives define the justice provided in their communities.[13] Restorations of jurisdiction often require Alaska Native villages to replace their traditions with adversarial processes and values. These expectations create problems of cultural mismatch because adversarial justice systems do not necessarily reflect the prevailing norms and expectations of Alaska Native villages. Cultural mismatch undermines access to justice because the justice provided does not mirror the community's views of justice.

Access to justice issues and solutions are place-based and context-specific.[14] Part II situates the justice gap in the context of rural Alaska Native villages. Settler colonialism and rurality present unique barriers to accessing justice in these communities. In response to these challenges, many commentators have suggested that more Alaska Native courts exercising extended jurisdiction will alleviate the justice gap in rural Alaska.[15]

Despite these proposals, scant information exists about Alaska Native justice systems beyond case studies or legal histories of the tribal court movement. Part III charts new territory in this understudied area by analyzing data from the Alaska Legal Services Corporation Directory of Alaska Tribal Courts and other secondary sources to provide an overview of existing knowledge of Alaska Native justice systems and how they operate on the ground. The limited data available shows that justice systems continue to evolve in Alaska Native villages.[16] Many Alaska Native villages exercise jurisdiction in family law and public safety cases, providing important legal access in their communities.[17] Existing data also indicates that many Alaska Native villages have not adopted Anglo-American adversarial style courts or processes.[18] This reality suggests that the imposition of Anglo-American legal concepts and adversarial systems could erode Alaska Native traditions and forms of dispute resolution.[19]

13. I frame access to justice issues in rural Alaska as about Native or Indigenous access to justice because the majority of rural Alaskans are Alaska Natives. INDIAN L. & ORD. COMM'N, *supra* note 12, at 35.

14. This article starts from the premise that context matters in thinking about and addressing the justice gap. *See* Michele Statz, "*It Is Here We Are Loved": Rural Place Attachment in Active Judging and Access to Justice*, 49 LAW & SOC. INQUIRY 247, 249 (2024) (emphasizing the importance of place in understanding access to justice in rural spaces).

15. *See* discussion *infra* Part II.B.

16. *See* discussion *infra* Part III.

17. *See* discussion *infra* Part III.

18. *See* discussion *infra* Part III.

19. I use the term "Anglo-American" to refer to the specific legal model used within the United States. For description of Anglo-American assumptions about courts and dispute resolution, see Colleen F. Shanahan et al., *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1478 (2022) (explaining that

Building on this knowledge about Alaska Native justice systems, Part IV emphasizes the need to ensure cultural match in proposing extended jurisdiction and more courts as solutions to access to justice issues. Cultural match exists where governing institutions reflect the prevailing ideas in the community about how authority should be organized and exercised.[20] Restorations of jurisdiction for tribal governments in the United States often come with increased pressures for Anglo-American adversarial style courts.[21] These conditions on jurisdiction undermine the local control necessary to resolve access to justice issues and may erode alternative forms of dispute resolution.[22] Ultimately, these conditions may lead to another kind of justice gap—one in which the legal standards and processes imposed by the state do not meet the traditions or needs of the community.

II. AT THE INTERSECTION OF SETTLER COLONIALISM AND RURALITY: THE CHALLENGES TO ACCESSING JUSTICE IN RURAL ALASKA NATIVE VILLAGES

The context-specific nature of access to justice requires a consideration of why an individual or community is accessing the legal system and how they got there.[23] Standard narratives suggest that individuals or communities identify problems as legal and turn to the legal system. This narrative holds true for some Native individuals and communities, but it obscures the reality that settler colonialism introduced Anglo-American legal systems to Native communities.[24] This Part briefly describes how the Anglo-American legal system came to Alaska Natives. Then, it explains the reach of federal and state laws in rural Alaska Native villages—seemingly both everywhere and nowhere. This legal liminality, along with extreme rurality, contributes to the challenges to access to justice in Alaska Native villages. Finally, this Part introduces one of the most commonly proposed solutions to the justice

the primary assumption underlying adversarial courts is that they are "sites of dispute resolution").

20. Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RSCH. J. 187, 201 (1998).

21. *See* discussion *infra* Part IV.

22. *See* discussion *infra* Part IV.

23. Daria Fisher Page & Brian R. Farrell, *One Crisis or Two Problems? Disentangling Rural Access to Justice and the Rural Attorney Shortage*, 98 WASH. L. REV. 849, 872 (2023) (discussing the wide-ranging spectrum of legal issues a person may encounter).

24. Kirsten Matoy Carlson, *Access to Justice in the Shadow of Colonialism*, 59 HARV. C.R.-C.L. L. REV. 69, 79 (2024).

gap in rural Alaska, namely more courts and extended jurisdiction for Alaska Native villages.

A. The Settler Colonial Framework: The Colonizer's Law Is Everywhere

Access to justice for Alaska Natives exists in the shadow of colonialism.[25] Alaska Natives had established their own systems of order long before contact with non-Natives.[26] Settler colonialism sought to disrupt and replace these existing practices by imposing unfamiliar laws and legal processes.[27] The legacy of settler colonialism continues to affect what justice means and how it is experienced by tribal governments, Native communities, and individual Natives.[28] The Indian Law and Order Commission described this legacy for Alaska Native governments when it stated, "Alaska Natives and Alaska Native Tribal governments have had relatively little say in the way crime and justice are addressed in their communities."[29] The resulting impact is that "[t]he state courthouse has essentially become a symbol of oppression for many Native people in Alaska."[30]

Settler colonialism has operated differently for Alaska Natives than it has for Indian Nations in the continental United States. The United States claims Alaska based on a treaty made with Russia in 1867.[31] The

25. *Id.*

26. LISA JAEGER, TRIBAL COURTS: A HISTORICAL PERSPECTIVE FOR BUSH JUSTICE IN ALASKA 2 (2009). The practices used by Alaska Natives varied by the cultural group. *Id.* at 3. For a discussion of the vast literature of the pre-contact traditions of Alaska Natives, see David Parry, *Central Themes in Bush Justice Theory and Research*, 2 SOC. PATHOLOGY 87 (1996).

27. ANIA LOOMBA, COLONIALISM/POSTCOLONIALISM 8 (John Drakakis ed., 2d ed. 2005) (defining colonialism as "the conquest and control of other people's land and goods"); Erica-Irene A. Daes, *Traditional Resource Rights in the New Millennium*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS 231, 233 (Wanda D. McCaslin ed., 2005) (describing colonization as about "depriving a nation or people of self-*knowledge*, of full awareness and confidence in their unique contribution. Colonialism teaches people to think that they are someone else—it tries to change peoples' identities. A colonized people can free itself physically or legally—it can even become an independent or self-governing state—and yet continue to be completely colonized in its thinking" (emphasis in original)).

28. *See generally* Carlson, *supra* note 24, at 80–94 (describing how the U.S. has historically "used the law to colonize tribal governments and their peoples").

29. INDIAN L. & ORD. COMM'N, *supra* note 12, at 47.

30. Brian Jarrett & Polly Hyslop, *Justice for All: An Indigenous Community-Based Approach to Restorative Justice in Alaska*, 38 N. REV. 239, 250 (2014).

31. JAEGER, *supra* note 26, at 4. Contrary to many accounts, the United States did not "purchase" Alaska from Russia. A purchaser can only acquire what the seller owns or claims to own. Russia did not "own" Alaska or the United States would not have had to litigate, see Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 291 (1955) (denying compensation under the Fifth Amendment to Tlingit

Treaty of Cession mentioned Alaska Natives, but obscured their status and relationship with the United States.[32] By this time, the federal government no longer executed treaties with Indian Nations in the Lower 48 states. Accordingly, it did not enter into treaties with Alaska Natives.[33] The United States initially paid little attention to Alaska Natives and their claims to land and governance.[34]

The establishment of a rudimentary territorial government formally brought Anglo-American law to Alaska in 1884.[35] The territorial government sought to create an Anglo-American "justice" system, but this system remained underfunded, understaffed, and poorly enforced until Alaska became a state in 1959.[36] The federal government used education to try to assimilate Alaska Natives and expose them to Anglo-American laws. At the end of the nineteenth century, the Secretary of the Interior established schools in many Alaska Native villages.[37] These schools spread settler-colonist ideas by introducing Alaska Natives to Anglo-American laws, traditions, and cultures.[38]

The extension of Indian affairs policies to Alaska Natives by the federal government in the early twentieth century further subjected Alaska Natives to Anglo-American laws and legal systems.[39] These policies applied federal laws to Alaska Natives. For example, in 1906, Congress extended Anglo-American property laws through the Alaska Native Allotment Act, which permitted Alaska Natives, like Indians in the Lower 48, to receive allotments of up to 160 acres of non-mineral land.[40] Over time, the federal government increasingly treated Alaska

Indians for the taking of timber from lands in Alaska), and negotiate with Alaska Natives over their rights to and within the territory. *See* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAW 167–68 (Univ. of Alaska Press, 3d ed. 2012) (describing land settlements negotiations among Alaska Natives and the United States).

32. JAEGER, *supra* note 26, at 4–5.

33. *Id.* at 5–6; CASE & VOLUCK, *supra* note 31, at 42.

34. *See* JAEGER, *supra* note 26, at 5 ("The tribes were in the process of losing their land base through the General Allotment Act (also known as the Dawes Act) which divided up Indian lands by allotting it to individual Indians, and then 'surplussing' the remainder by selling it to non-Indians.").

35. Schafer & Moras, *supra* note 9, at 110; JAEGER, *supra* note 26, at 6.

36. Schafer & Moras, *supra* note 9, at 112.

37. JAEGER, *supra* note 26, at 6.

38. *Id.*

39. ALASKA LEGAL SERVS. CORP., TRIBAL JURISDICTION IN ALASKA: CHILD PROTECTION, ADOPTION, JUVENILE JUSTICE, FAMILY VIOLENCE AND COMMUNITY SAFETY 2–3 (2012), https://alaskatribes.org/wp-content/uploads/2023/02/Tribal-Juridiction-in-Alaska.pdf (describing the actions taken by all three branches of the federal government that recognized "that the federal government had a relationship to Alaska Natives that paralleled its relationship to Indians in the contiguous states").

40. CASE & VOLUCK, *supra* note 31, at 27–28; Alaska Native Allotment Act, 43

Natives like Indians in the continental United States. In 1931, the Bureau of Education transferred the responsibility for Alaska Native Affairs to the Bureau of Indian Affairs (BIA),[41] further signaling that the United States government had the same responsibility to and relationship with Alaska Natives as with Indians in the continental United States.[42] Congress extended the Indian Reorganization Act of 1934 (IRA) to Alaska Natives in 1936, subjecting them to the same status and laws as Indians but also attempting to deal with their unique needs.[43] The IRA allowed Alaska Natives to organize as villages rather than bands or tribes, in part as a reflection of their existing organizational structures[44] and in part because of the lack of reservations in the territory.[45]

The IRA provided Alaska Native villages with incentives to adopt Anglo-American governing structures.[46] The BIA encouraged Alaska Natives to adopt constitutions.[47] These constitutions allowed village councils to establish tribal courts, but very few included provisions for tribal court structures or procedures.[48] Most village councils continued to

U.S.C. §§ 270-1–3 (repealed 1971); Alaska Native Claims Settlement Act § 18, 43 U.S.C. §§ 1601–1629(h) (1971). A similar law, the 1926 Townsite Act, also applied Anglo-American property laws to Alaska Natives. It attempted to protect Alaska Native land rights by preventing Alaska Natives from alienating their townsite lots unless they had permission of the Secretary of the Interior. CASE & VOLUCK, *supra* note 31, at 28. For discussion of other laws enacted by Congress specific to Alaska Natives in the early twentieth century, see JAEGER, *supra* note 26, at 7–8.

41. CASE & VOLUCK, *supra* note 31, at 28.

42. ALASKA LEGAL SERVS. CORP., *supra* note 39, at 3. This responsibility has continued through the present day with the BIA providing "Alaska Natives with a broad range of human services and programs" since the 1930s. CASE & VOLUCK, *supra* note 31, at 30.

43. CASE & VOLUCK, *supra* note 31, at 28–29 (explaining that the IRA did not initially apply fully to Alaska Natives, but was ultimately intended to treat Alaska Natives similarly in terms of governmental authority and land ownership as Indians); *see also* ALASKA LEGAL SERVS. CORP., *supra* note 39, at 3 (discussing how Congress "extended the IRA to Alaska" two years after it initially passed the act).

44. Prior to the IRA, missionaries and educators had encouraged Alaska Natives to form village councils, which often governed by consensus and resolved disputes. JAEGER, *supra* note 26, at 9 (describing village councils as hearing complaints, lecturing wrongdoers, and sometimes invoking the authority of the church or the United States to reinforce their authority). Jaegar attributes their success in the administration of justice to their avoidance of confrontational trials, preference for group decisions in which no individual had to take responsibility, and ability to craft solutions that encouraged correction and deterrence. *Id.*

45. CASE & VOLUCK, *supra* note 31, at 29.

46. Initially, Indian Nations and Alaska Natives only received the benefits in the IRA, including the ability to take land into trust, if they organized their governing structures under the Act. CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 233 (7th ed. 2015).

47. CASE & VOLUCK, *supra* note 31, at 29 (explaining that the BIA sought "to organize Native villages under IRA Constitutions and corporate charters").

48. JAEGER, *supra* note 26, at 10.

act as dispute resolution bodies. Seventy-one Alaska Native villages established IRA governments, but "most of the reservations contemplated under the Alaska amendments never became a reality."[49]

Statehood further imposed Anglo-American laws and justice systems on Alaska Natives. Alaska sought to consolidate its legal authority and extend its laws throughout the state, as its constitution "centralized the justice system at the state level."[50] It created a court system of hubs in larger population centers with spokes out into more rural regions.[51]

Congress granted the new state some civil and criminal jurisdiction over Indian Country through Public Law 83-280 (P.L. 280).[52] Alaska has relied on this congressional grant of authority to claim that it has exclusive jurisdiction over Alaska Natives under P.L. 280.[53] Statehood, however, did not resolve important legal issues related to Alaska Natives, including their claims to land and governance within the state.[54] The state claimed jurisdiction over Alaska Native territory as Indian Country,[55] but Indian Country remained undefined within Alaska as Native land and governance claims clouded the state's assertions.[56]

Despite the uncertainty, the United States continued to enact statutes that imposed its laws on American Indians and Alaska Natives. In 1968, Congress enacted the Indian Civil Rights Act (ICRA), which applied many (but not all) of the provisions of the Bill of Rights to tribal governments. [57] The ICRA transformed these rights into federal statutory

49. CASE & VOLUCK, *supra* note 31, at 33.

50. N.E. SCHAFER, STATE OPERATED JAILS: HOW AND WHY 21 (Mar. 1994), https://scholarworks.alaska.edu/bitstream/11122/10008/5/9401.01.schafer.1994.state-operated-jails.pdf.

51. Parry, *supra* note 26, at 88. For a detailed description of the Alaska state court system, see Schafer & Moras, *supra* note 9, at 116–18.

52. JAEGER, *supra* note 26, at 12. Jaeger explains that Congress extended P.L. 280 to Alaska "[i]n response to lack of Alaska territorial jurisdiction over a criminal case within the jurisdiction of the Tyonek tribal government in 1958." *Id.* The state of Alaska would subsequently argue that P.L. 280 terminated all tribal jurisdiction in the state. *Id.*

53. *Id.*; *see* ALASKA LEGAL SERVS. CORP., *supra* note 39, at 4 ("P.L. 280 generated in later years a large debate over whether its passage had been designed only to open state courthouse doors to people within Indian country, or also to close tribal courthouse doors to those same persons.").

54. JAEGER, *supra* note 26, at 13 (explaining that statehood did not settle Alaska Native claims to lands and resources).

55. *Id.* at 12; ALASKA LEGAL SERVS. CORP., *supra* note 39, at 4.

56. JAEGER, *supra* note 26, at 13.

57. The provisions of the Bill of Rights applied to tribal governments in the ICRA include: First Amendment rights of free exercise of religion, free speech, freedom of the press, right to assemble, and right to petition; Fourth Amendment rights against unreasonable search and seizures and probable cause requirements for warrants; Fifth Amendment rights against double jeopardy and self-

limits on tribal government authority.[58]

The ICRA mandates that all tribal courts comply with Anglo-American standards of due process.[59] In 1978, the Supreme Court held that the ICRA only granted a cause of action to challenge detention through habeas corpus relief.[60] This decision effectively recognized tribal courts as the primary enforcers of ICRA.[61] Tribal courts do not have to interpret the ICRA as a federal court would and can incorporate tribal traditions and values into their ICRA jurisprudence.[62] However, federal courts retain authority to determine tribal court jurisdiction.[63] Federal

incrimination; the Fifth Amendment takings clause; Sixth Amendment rights to a speedy trial, trial by jury (for criminal cases punishable by imprisonment only), to be informed of the charges, compulsory process, and to retain counsel at the defendant's own expense; Eighth Amendment rights against excessive bail and cruel and unusual punishment; Fourteenth Amendment rights of due process and equal protection; and protections against bills of attainder or ex post facto laws. The ICRA does not extend the following: protection against the establishment of religion; a guarantee of a republican form of government; the privileges and immunity clause; provisions for or protecting the right to vote; the requirement of free counsel for the accused; or the right to a jury in a civil trial. The ICRA also places strict limits on incarceration by tribal governments. 25 U.S.C. § 1302 (1968).

58. Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction*, 112 CAL. L. REV. 103, 126 (2023).

59. *See id.* ("ICRA thereby explicitly compels Tribes to base their judicial systems upon Anglo-American notions of due process, even if the values expressed in the Bill of Rights are not relevant for Native people in relation to the Tribe.").

60. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71–72 (1978).

61. Mark D. Rosen, *Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 282 (Kristen A. Carpenter et al. eds., 2012).

62. Some tribal courts have applied their own customs and traditions in interpreting rights under the ICRA. *See generally* High Elk v. Veit, No. 05-008-A, 2006 WL 5940784 (Cheyenne River Sioux Ct. App. Feb. 10, 2006); Matthew L.M. Fletcher, *The Three Lives of Mamengwaa: Towards an Indigenous Canon of Construction*, 134 YALE L. J. (forthcoming 2024–25); Paul Spruhan, *The Meaning of Due Process in the Navajo Nation*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 119, 119–28 (Kristen A. Carpenter et al. eds., 2012). At least one scholar has suggested that tribal courts may not have to apply ICRA. *See* Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 899 (2003) (stating that the ICRA "is not necessarily binding law"). Studies of tribal courts find that their "interpretations of the Act are remarkably consistent with federal court interpretations." *Id.* at 900; *see* Frank Pommersheim, *Due Process and the Legitimacy of Tribal Courts*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 105, 108 (Kristen A. Carpenter et al. eds., 2012) (describing how tribal courts in the continental United States have adapted and integrated their traditions into Anglo-American adversarial systems).

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

courts have used this oversight to severely restrict tribal court jurisdiction over non-Indians and lands held in fee simple within a reservation.[64]

The United States sought to settle Alaska Native land claims by imposing a distinct legal structure on tribal relationships and property rights in the late 1970s.[65] The Alaska Native Claims Settlement Act (ANCSA) departed dramatically from previous Indian affairs laws and policies.[66] ANCSA restructured tribal relationships in Alaska by creating Alaska Native corporations to hold Native lands.[67] It abolished all reserves except Metlakatla and allowed for the conveyance of forty-five million acres of land and the payment of nearly $1 billion to these corporations in exchange for the extinguishment of Native land claims.[68] It did not, however, address key issues in federal, state, and Alaska Native relations, including the status and authority of Alaska Native governments, the provision of federal services to Alaska Natives, or the subsistence rights of Alaska Natives.[69]

The legal landscape continues to evolve as both the state and federal governments assert their laws and legal systems over Alaska Natives. The remoteness of Alaska Native villages often thwarts the state's ability to extend its laws. Alaska's state court system has remained urban, spurring criticism that it is unresponsive or indifferent to rural justice issues.[70] The state court system has tried providing travelling judges and lay magistrates in its attempts to reach these remote villages,[71] but it still

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

65. CASE & VOLUCK, *supra* note 31, at 35, 170.

66. *Id.*

67. *See id.* at 170 (describing the corporate structure and how it applies to Alaska Natives).

68. Parry, *supra* note 26, at 35.

69. *Id.* Case and Voluck explain, "[t]he Native service issue appears to have been resolved in 1988 when, along with other comprehensive changes, ANCSA was amended to specify that Alaska Natives were to remain eligible for federal Native services." CASE & VOLUCK, *supra* note 31, at 36.

70. Parry, *supra* note 26, at 89; INDIAN L. & ORD. COMM'N, *supra* note 12, at 35 (finding that the centralized law enforcement and justice systems in Alaska "do not serve local and Native communities adequately, if at all").

71. Andrea Charlotte Floersheimer, Kitchen Courthouses and Flying Judges: Bush Justice in Alaska, 1959-1980 (Apr. 10, 2019) (senior thesis, Colum. Univ.) (on file with Arts & Sciences IT, Colum. Univ.),

struggles to provide justice services throughout the state.[72]

The state's inability to reach these villages, however, has not prevented it from consistently (and often insistently) asserting jurisdiction over them. Alaska continues to claim jurisdiction over Alaska Natives under Public Law 83-280, which grants some civil and criminal jurisdiction over Indian Country to the state.[73] The state has only recently abandoned its longstanding assertion that Alaska Native governments did not exist and thus retained no jurisdiction.[74] The Alaska Supreme Court has recognized that tribal courts have the authority to adjudicate core tribal matters between their members, including child custody and welfare cases.[75] State courts are to respect Alaska Native courts but may not recognize Alaska Native court jurisdiction.[76] They have conditioned the enforcement of Alaska Native court judgments on compliance with Anglo-American standards of due process.[77] The state has yet to fully

https://sites.asit.columbia.edu/historydept/wp-content/uploads/sites/29/2019/07/Floersheimer-Thesis-2019.pdf.

72. *See* JAEGER, *supra* note 26, at 2 (noting a "lack of adequate state resources to address justice problems in rural Alaska").

73. *See* CASE & VOLUCK, *supra* note 31, at 48 ("Congress applied P.L. 280 to Alaska, authorizing the state to assume a large measure of civil and criminal jurisdiction over 'Indian Country' in Alaska . . . the geographic scope of P.L. 280's current application to Alaska is limited to Indian lands held as restricted allotments and townsite lots . . . .").

74. *See* John v. Baker, 982 P.2d 738, 749 (Alaska 1999).

75. *See id.* at 761 ("Alaska Native tribes have inherent sovereignty to adjudicate internal tribal disputes . . . tribal sovereignty over issues like family relations includes the right to enforce tribal law in resolving disputes."). The Alaska Supreme Court has rejected attempts to overturn John v. Baker. *See, e.g.*, Runyon v. Assoc. of Vill. Council Presidents, 84 P.3d 437, 439 n.3 (Alaska 2004) (declining "the invitations of the Runyons and amicus Legislative Council to revisit *John v. Baker*").

76. *See* KPMG LLP v. Kanam, No. 3:15-cv-00129-SLG, 2015 U.S. Dist. LEXIS 178537, at *2 (D. Alaska Aug. 14, 2015) (determining the tribal court's jurisdiction presumptively invalid because the village provided no evidence that the plaintiff was a tribal member). *But see* J.P. v. State, 506 P.3d 3, 4 (Alaska 2022) (noting that the Supreme Court of Alaska lacked authority to order a tribal court to transfer jurisdiction of a child custody case to state court); Peidlow v. Williams, 459 P.3d 1136, 1144 (Alaska 2020) (recognizing tribal court jurisdiction).

77. *See* Simmonds v. Parks, 329 P.3d 995, 1011 (Alaska 2014) (instructing Alaska superior state courts to "deny full faith and credit to the final judgment of a sister state," including tribal courts, "only in limited circumstances, including situations where (1) the issuing court lacked personal or subject matter jurisdiction when it entered its judgment; or (2) the issuing court failed to render its judgment in accordance with minimum due process"); *Peidlow*, 459 P.3d at 1142 (restating language in *Simmonds* about due process). Alaska state courts have refused to extend comity in some cases. *See* Starr v. George, 175 P.3d 50, 58 (Alaska 2008) (refusing to extend comity to a tribal court adoption order due to lack of notice to the parties); Evans v. Native Vill. of Selawik IRA Council, 65 P.3d 58, 60 (Alaska 2003) (denying recognition to a tribal adoption order because the Alaska Native village had violated the biological father's due process rights).

acknowledge the authority of Alaska Native governments to exercise civil and criminal jurisdiction over their peoples and territories.[78]

The federal government subjects Alaska Natives to federal law much like it does tribal governments and their citizens in the continental United States. [79] The same general principles govern the relationship between tribal, state, and federal governments in Alaska and the Lower 48 states alike.[80] One principle is the recognition that tribes are governments with inherent sovereign powers not delegated or granted by the United States.[81] The U.S. Constitution gives Congress full control or plenary power over Indian affairs—including authority to limit tribal powers.[82] The federal government has responsibilities to tribal governments and individual Indians known as the trust relationship.[83] Indian Nations retain powers unless Congress has expressed clear and plain intent to abrogate them.[84] Further, state governments have no authority to regulate Indian affairs absent an express congressional delegation or grant.[85] In short, federal laws purport to define the powers and rights of Alaska

78. Alaska state courts curtailed jurisdiction of tribal governments in a series of decisions in the 1980s. *See* Native Village of Nenana v. State Dept. of Health and Soc. Servs., 722 P.2d 219, 221 (Alaska 1986) (requiring that the Village obtain approval by the Secretary of the Interior of a petition for reassumption of jurisdiction before it could require transfer of an ICWA case from state court under 25 U.S.C. § 1911(b)), *overruled in part by In re* C.R.H., 29 P.3d 849 (Alaska 2001); *In re* K.E., 744 P.2d 1173, 1174 (Alaska 1987) (per curiam) (upholding *Nenana* and requiring approval of a reassumption petition under ICWA before allowing transfers of child protection cases from state to tribal court), *overruled in part by In re* C.R.H., 29 P.3d 849 (Alaska 2001); Native Village of Stevens v. Alaska Mgmt. and Plan., 757 P.2d 32, 32, 35 (Alaska 1988) (holding that Stevens Village was not entitled to tribal sovereign immunity and suggesting that Metlakatla was the only federally recognized tribe in Alaska). For a history of the relationship between state and tribal courts in Alaska, see ALASKA LEGAL SERVS. CORP., *supra* note 39, at 6–16 (noting that state court decisions often conflicted with federal court decisions on tribal jurisdiction. Alaska state courts have shown more willingness to recognize Alaska Native authority and collaborate with Alaska Native governments since in the mid-2000s).

79. The Federally Recognized Indian Tribe List Act of 1994 clarified the status of 226 Alaska Native villages as federally recognized tribal governments. *See* 25 U.S.C. § 479(a); Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 74 Fed. Reg. 40218 (Dep't of Interior July 29, 2009) (recognizing 229 Alaska Native governments); CASE & VOLUCK, *supra* note 31, at 49 ("Alaska Natives have the same tribal status as tribes in the continental United States.").

80. CASE & VOLUCK, *supra* note 31, at 40–49.

81. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04 (Nell Jessup Newton ed., 2023).

82. U.S. CONST. art. I, § 8.

83. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 81.

84. *Id.*

85. *Id.*

Native governments and their citizens.[86]

This legal framework means that the federal and state governments do not recognize the full, inherent sovereignty of Alaska Natives but continue to insist that they have the power to limit it.[87] For example, the Supreme Court has diminished Alaska Native governmental authority by finding that they do not have the same territorial jurisdiction as tribal governments in the continental United States.[88] The Supreme Court in *Alaska v. Native Village of Venetie Tribal Government* limited the territorial reach of Alaska Native governments by holding that ANCSA lands are not Indian Country.[89] This limitation on the territorial reach of Alaska Native governments complicates questions about Alaska Native jurisdiction.[90] It means that Alaska Native jurisdiction is primarily extraterritorial.[91] Often federal and state courts recognize Alaska Native jurisdiction as based on consent or membership. Frequently, it is assumed to be shared (or concurrent) with the state of Alaska. In short, jurisdictional lines remain unclear and are often contested.[92]

Federal law has occasionally clarified jurisdictional lines by confirming the authority of Alaska Native governments. Federal statutes—including but not limited to the Indian Child Welfare Act, the Violence Against Women Act, and the Indian Self-Determination and

86. *See generally* 25 U.S.C. (compiling federal laws regulating American Indian and Alaska Native governments and their peoples).

87. *See* Alaska Tribes, *Jurisdiction*, ALASKA LEGAL SERVS. CORP., https://alaskatribes.org/jurisdiction (last visited Sept. 30, 2024) ("A Tribe's definition of its own jurisdiction may or may not be the same as the scope of jurisdiction recognized by the State or United States government.").

88. CASE & VOLUCK, *supra* note 31, at 390.

89. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 532–34 (1998).

90. CASE & VOLUCK, *supra* note 31, at 392 (explaining that "the jurisdictional limits of Alaska Native governments are yet to be fully determined"). Case and Voluck assert that the absence of territorial jurisdiction does not prevent Alaska Native governments from providing "significant types of governmental services to the residents of their communities." *Id.* at 51.

91. Federal courts have recognized the extraterritorial jurisdiction of Native Nations outside of Alaska as well. *See* Kelsey v. Pope, 809 F.3d 849, 855 (6th Cir. 2016) (addressing the question of extra-territorial criminal jurisdiction by breaking this governing framework into three separate inquiries: (1) do Indian tribes have inherent sovereign authority to exercise extraterritorial criminal jurisdiction? (2) If so, has that authority been expressly limited by Congress or treaty? And (3) if not, have the tribes been implicitly divested of that authority by virtue of their domestic dependent status?).

92. *See* INDIAN L. & ORD. COMM'N, *supra* note 12, at 47 (noting that "the extent of Tribal jurisdiction in Alaska is not yet clear"); CASE & VOLUCK, *supra* note 31, at 392 (stating that "the jurisdictional limits of Alaska Native governments are yet to be fully determined"); Jarrett & Hyslop, *supra* note 30, at 252 ("Because these lengthy legal disputes continue until the US Supreme Court can produce a final word on any given matter, the legal issues surrounding questions of jurisdiction often remain unsettled for long periods.").

Education Assistance Act—empower Alaska Native villages to adjudicate child custody cases,[93] exercise criminal jurisdiction over non-Natives in specific circumstances,[94] and provide health and social services in their communities.[95]

However, federal and state laws often condition Alaska Native jurisdiction on compliance with Anglo-American legal standards, thus incentivizing Alaska Native governments to replicate Anglo-American systems.[96] For example, the ICRA subjects all tribal government action to Anglo-American standards of due process.[97] Tribal courts have leeway to interpret ICRA.[98] Yet federal courts retain the authority to, and often do, limit tribal court jurisdiction.[99] Similarly, Alaska state court decisions

93. CASE & VOLUCK, *supra* note 31, at 393 ("Significantly, the Indian Child Welfare Act (ICWA) also permits Alaska Native villages, regardless of their reservation status, to obtain retrocession of *exclusive* jurisdiction to adjudicate the child custody issues covered by the act.").

94. *See Violence Against Women Act 2022 Reauthorization – Alaska Pilot Program*, U.S. DEP'T OF JUST., https://www.justice.gov/tribal/vawa-2022-alaska-pilot-program (last visited Oct. 27, 2024) (explaining when tribes can exercise "special Tribal criminal jurisdiction").

95. CASE & VOLUCK, *supra* note 31, at 394 (explaining that, because the Self-Determination Act requires the BIA and IHA to contract with tribes upon request, "[n]early 100 percent of all BIA and IHS programs statewide are managed by Alaska Native villages as tribes or by their designated regional or subregional nonprofit tribal organizations").

96. *See* ALASKA LEGAL SERVS. CORP., *supra* note 39, at 18 (explaining that a "tribal court that issues a decision without complying with the requirements of due process is likely to find that its decision will not be respected by state or federal courts, or by the parties themselves").

97. For a discussion of how ICRA complicates access to justice for tribal governments, *see* Carlson, *supra* note 24, at 84–86.

98. Some tribal courts have applied their own customs and traditions in interpreting rights under the ICRA. *See* High Elk v. Veit, No. 05-008-A, 2006 WL 5940784 (Cheyenne River Sioux Ct. App. Feb. 10, 2006) ("Just as Lakota tradition requires the respectful listening to the position of all interested persons on any important issue, the legal requirement of due process of law requires that all persons interested in a matter receive adequate written notice . . . ."); Fletcher, *supra* note 62, at 4; Goldberg, *supra* note 62, at 900 (noting debate surrounding whether ICRA is binding law for tribal courts and stating that studies of tribal courts find that their "interpretations of the Act are remarkably consistent with federal court interpretations").

99. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853, 857 (1985) (determining that federal courts have jurisdiction to review tribal court jurisdiction but requiring parties to exhaust tribal remedies first). Other cases have expressly limited tribal jurisdiction. *See* Montana v. United States, 450 U.S. 544, 565–66 (1981) (stating that tribal governments only have jurisdiction over non-members on land held in fee on the reservation if the non-member has entered into a consensual relationship with the tribe or its members or the non-member's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe); Strate v. A-1 Contractors, 520 U.S. 438, 456–58 (1997) (applying the *Montana* test to tribal adjudicatory jurisdiction); Nevada v. Hicks, 533 U.S. 353, 369 (2001) (holding that the tribal court could not

require Alaska Native governments to conform to Anglo-American legal standards. For example, the Supreme Court of Alaska has refused to grant comity to Alaska Native court decisions when the tribal court does not meet the due process standards established by the Supreme Court of Alaska.[100] Neither the federal nor the state government seem to have fully contemplated, much less accepted, that Alaska Natives have their own traditions distinct from (but functionally equivalent to) Anglo-American concepts of due process.[101] Many tribal governments, including Alaska Native villages, have little choice but to adopt Anglo-American laws and legal processes if they want to exercise jurisdiction in their communities.[102]

B. The Realities of Extreme Rurality: Where the State Cannot Reach

Alaska Native villages face a situation distinct from many tribal governments in the continental United States because of their extremely remote geographic locations. The federal and state governments' settler-colonial laws and policies encounter a harsh reality in Alaska: extreme rurality. This Section investigates how rurality intersects with indigeneity, affecting access to justice issues in Alaska.

The vastness of Alaska challenges the imagination of most Americans. It covers a territory greater than the next three largest states combined (Texas, California, and Montana) and has far fewer inhabitants,

adjudicate federal civil rights claims made against a state law enforcement officer for actions on tribal trust land).

100. *See* John v. Baker, 982 P.2d 738, 763 (Alaska 1999) ("We also agree with the Ninth Circuit that state courts should afford no comity to proceedings in which any litigant is denied due process"); Simmonds v. Parks, 329 P.3d 995, 1015–16 (Alaska 2014) (discussing due process analysis undertaken by courts to grant comity).

101. *See* Floersheimer, *supra* note 71, at 53–59 (discussing the tensions raised by differences in Native and Western-style justice and state efforts to incorporate Natives into the western system). Nor did the federal government contemplate that tribal citizens may relate differently to tribal governments than U.S. citizens do with the state and federal governments. *See* Carey N. Vincenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 136 (1995) ("Congress inserted a portion of American culture into Indian society and attempted to supplant tribal culture, imposing a new order within tribal society that elevated the interests of the individual well above that of the family, the clan, the band, or the entire tribe. For many this signaled certain death to tribal society."); Fletcher, *supra* note 62, at 9–10 (noting that the champions of ICRA intended to treat tribal governments in a paternalistic and assimilative way).

102. *See* Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 COLUM. J. RACE & L. 681, 696–98 (2021) (describing the pressures placed on tribal courts to adopt Anglo-American standards and practices despite ICWA).

with a population density of less than two people per square mile.[103] This rurality complicates the delivery of justice services and intensifies many of the problems faced in other places.[104]

Extreme rurality mediates colonialism to some extent. Alaska is the home to forty percent of the federally recognized tribal governments in the United States (229 of 574).[105] Many Alaska Native villages are located off the road system and are only seasonally accessible by plane, boat, all-terrain vehicle, or snowmachine.[106] The remoteness of these villages makes it difficult for residents to access water, food, fuel, and telecommunication services.[107] Even relatively accessible places, like the Metlakatla Reservation, lack what most Americans think of as basic necessities—for example, a grocery store.[108] Residents often rely on subsistence hunting, fishing, and gathering for sustenance.[109] Social services are also few and far between in Alaska Native villages. There are very few domestic violence shelters.[110] Health care may only be available outside the village.[111] There are no detox centers, much less substance misuse treatment facilities.[112]

These communities remain small with only 250 to 300 inhabitants,

103. INDIAN L. & ORD. COMM'N, *supra* note 12, at 35.

104. Schafer & Moras, *supra* note 9, at 109 ("The delivery of justice services to rural residents of Alaska entails surmounting the same problems encountered in the delivery of rural justice in other states, but these problems are intensified by the extremes of Alaska: its vast distances, its harsh climate, its small and ethnically diverse population, its economic and governmental structures."); MARZ ET AL., *supra* note 8, at 1–2 (describing the unique challenges to access to justice in Alaska).

105. INDIAN L. & ORD. COMM'N, *supra* note 12, at 35.

106. Schafer & Moras, *supra* note 9, at 109–10.

107. U.S. DEP'T OF JUST., U.S. DEPARTMENT OF JUSTICE TRIBAL CONSULTATION ON PUBLIC SAFETY IN ALASKA NATIVE VILLAGES 1 (2017) [hereinafter *Tribal Consultation*], www.justice.gov/tribal/page/file/930406/dl.

108. *See* INDIAN L. & ORD. COMM'N, *supra* note 12, at 35 (stating that "[f]ood, gasoline, and other necessities are expensive and often in short supply.").

109. *Id.*

110. *See id.* at 41 (documenting the lack of domestic violence shelters, substance abuse treatment centers, and mental health treatment centers in rural Alaska); Kate Humphrey, *Oldest Native Women's Shelter Seeks Help*, INDIAN COUNTRY TODAY (Sept. 12, 2018), https://ictnews.org/archive/oldest-native-womens-shelter-seeks-help (noting that the Emmonak Woman's Shelter was one of just two facilities located in an Alaska Native community for decades).

111. Claire Stremple, *Alaska Villages Build Safety Network for Abuse Survivors*, ALASKA BEACON (Dec. 8, 2023), https://ictnews.org/news/alaska-villages-build-safety-network-for-abuse-survivors.

112. *See* INDIAN L. & ORD. COMM'N, *supra* note 12, at 41 (documenting the lack of substance abuse and mental health centers in southwestern, northern, and central Alaska); *SUD Residential Treatment: Statewide Bed Availability*, ALASKA DEP'T OF HEALTH DIV. OF BEHAV. HEALTH, https://bedcount.health.alaska.gov/BedCount/statewide.aspx?ProgramType=SRT (last visited Dec. 12, 2024) (list of residential treatment centers for substance use disorder throughout the state).

many of whom are related.[113] Local councils, often operated by federally recognized Alaska Native entities, govern each village, managing its local affairs.[114] Much like other tribal governments, these local councils, or the regional or subregional organizations affiliated with them, provide federal and state services to Native and non-Native residents in their communities.[115]

The state and its laws simply do not and cannot fully reach these communities in a meaningful way.[116] One in three rural Alaska communities has no local law enforcement or public safety program.[117] Few, if any, lawyers reside in them.[118] Many have no state courts and only occasional access to a magistrate, who serves as the only representative of the state court system.[119] Alaska's ardent claims to jurisdiction matter very little in places where the state cannot realistically exercise it. Often, the only government is the local village government, and the only justice system is the tribal "court."[120]

The inability of the state to reach remote Alaska Native villages has many consequences for access to justice. The lack of law enforcement contributes to high rates of violence, substance abuse, and suicide in rural Alaska villages.[121] Much of the research and commentary has emphasized

113. INDIAN L. & ORD. COMM'N, *supra* note 12, at 35.

114. *Id.*

115. CASE & VOLUCK, *supra* note 31, at 394 ("In most of rural Alaska, these regional and subregional organizations are the only effective service-delivery agencies, so the state relies on them to provide certain state services to rural Native and non-Native residents alike").

116. *See* Parry, *supra* note 26, at 92 (stating that "penetration of the state's legal system into rural Alaska has remained only partial"); STEPHEN CONN, BUSH JUSTICE UNPLUGGED: THE ROAD TAKEN AND THE RESEARCH TRAIL LEFT BEHIND 5 (2013) (describing how the state has not held up its end of the deal in providing justice in Native villages).

117. Kyle Hopkins, *Lawless*, PROPUBLICA (May 16, 2019), https://features.propublica.org/local-reporting-network-alaska/alaska-sexual-violence-village-polic; *see also* INDIAN L. & ORD. COMM'N, *supra* note 12, at 39 ("At least 75 communities in Alaska lack any law enforcement presence at all.").

118. Joy Anderson et al., *Community Justice Workers: Part of the Solution to Alaska's Legal Deserts* (forthcoming ALASKA L. Rev.) (describing rural Alaska as a legal desert with few attorneys).

119. INDIAN L. & ORD. COMM'N, *supra* note 12, at 39 (stating that magistrates often serve rural circuits and visit individual communities infrequently).

120. I use the word "court" loosely here. As discussed *infra* in Part II, the "court" in an Alaska Native village may not be an Anglo-American adversarial style court, but the village council. *See* ALASKA LEGAL SERVS. CORP., *supra* note 39, at 28 ("To varying degrees, traditional councils still address civil matters in many rural Alaska Native villages. Many communities have realized that there are substantial benefits to using traditional tribal justice models that reflect more respectful, healing approaches to behavior modification.").

121. Danika Watson, *Issues in Implementing Special Domestic Violence Criminal Jurisdiction in Alaska Tribal Courts*, 40 ALASKA L. REV. 1, 24–25 (2023).

the serious law enforcement and public safety problems faced by Alaska Native villages,[122] but civil legal issues also contribute to the justice gap.[123] Like Indians in the continental United States, Alaska Natives face unique justiciable problems both as communities and individuals.[124]

Alaska Native villages experience many of the same community-level issues as tribal governments in the Lower 48, including perplexing questions of jurisdiction and status under federal law.[125] While Alaska Natives do not contend with the same treaty rights issues as tribal governments in the continental United States, they face a number of unique and complex legal issues that the ANCSA has generated or left unresolved.[126] For example, ANCSA failed to address the communal and individual subsistence rights of Alaska Natives, and these rights remain undefined.[127] These rights are increasingly important in the face of the climate and other economic changes faced by rural communities. ANCSA has also created complicated questions about the inheritance of shareholder status.[128] Distinct and complex legal issues arise for Alaska Native individuals outside of ANCSA as well.[129]

These justiciable problems accompany the more common ones faced by people everywhere, but additional barriers may prevent Alaska

122. INDIAN L. & ORD. COMM'N, *supra* note 12, at 33; Fortson & Carbaugh, *supra* note 12, at 1; *Tribal Consultation*, *supra* note 107, at 3.

123. Civil legal issues exist, but have been less well documented. It is less clear how individuals perceive civil justiciable issues in these communities, and whether they identify them as "legal" problems at all, especially in places where the "law" cannot interfere in a person's life in the same way. For example, people who live a subsistence lifestyle may not seek governmental food assistance. *See* Anderson, *supra* note 118.

124. *See* Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339, 341 (2008) (justiciable events are "happenings and circumstances that raise legal issues but that we may never think of as legal and with respect to which they may never take any legal action"); Young & Billings, *supra* note 2, at 492 (discussing the differences between justiciable events and legal needs).

125. For a discussion of the justiciable problems faced by tribal governments in the continental United States, *see* Carlson, *supra* note 24, at 71, 86–93, 106–10.

126. CASE & VOLUCK, *supra* note 31, at 35.

127. *Id.* at 35 (explaining that ANCSA "made no comprehensive provision" for "subsistence"). For a discussion of the complicated nature of subsistence rights in Alaska, see Liza Mack, *Unangam Unikangis: Aleut Stories of Leadership and Knowing* (Mar. 2019) (Ph.D. dissertation, Univ. of Alaska Fairbanks), at 4–9.

128. *See* CASE & VOLUCK, *supra* note 31, at 188–93 (discussing the stockholder issues created by ANCSA and attempts to resolve them).

129. For example, some Alaska Natives are still waiting for allotments under the 1906 Allotment Act, which allowed them to receive allotments of up to 160 acres of non-mineral land. *See Native Allotments*, ASS'N OF VILL. COUNCIL PRESIDENTS, https://www.avcp.org/tribal-resources/native-allotments/ (last visited Oct. 27, 2024) (discussing individual Native allotments and listing some of the legal issues related to them).

Natives from resolving even the most commonplace issues. Consider, for a moment, trying to obtain a divorce in a community where there are no courts. The United States has legalized the dissolution of a marriage and requires a court order for a divorce (but not for marriage).[130] The resolution of property issues face similar difficulties. For example, the division of property following a property owner's death may remain cloudy since there is no court to probate it. In rural Alaska, an individual must either find the resources to travel to the closest urban area, navigate the process of requesting a virtual hearing, or wait to have the legal issue resolved.[131]

Other common legal responses to justiciable problems are simply ineffective. Consider a woman with a violent partner. The standard legal advice is for the woman to obtain a no-contact order or a personal protection order.[132] Yet these orders seem nonsensical in a small, rural village of less than 300 people. In these communities, "no contact" is virtually impossible due to the close proximity of housing and the lack of law enforcement to implement the order.[133]

Geographic isolation, along with the lack of lawyers and legal institutions, means that people may not perceive their problems as justiciable or expect the law to solve them. Instead, they continue to rely on informal ways to resolve their problems.[134] Scholars have documented how Alaska Native villages have maintained their own traditions and adapted (rather than adopted) the laws and systems the state government has tried to impose upon them.[135] Others describe the development of tribal courts in Alaska Native villages as an effort to fill the gap in law enforcement left by the state.[136] As one tribal judge explained, "there's a

130. *Common Questions About Divorce and Dissolution*, ALASKA L. HELP (Apr. 11, 2023), https://alaskalawhelp.org/resource/common-questions-about-divorce-and-dissolutio (noting that Alaska state law allows a person to appear telephonically but only at the discretion of the judge. An individual has to file a motion to appear by phone, and the judge does not have to grant the request).

131. *See* Ryan Fortson, *Advancing Tribal Court Criminal Jurisdiction in Alaska*, 32 ALASKA L. REV. 93, 96–97 (2015) (documenting the difficulty Alaska Natives face in accessing state courts).

132. Personal protection orders are a common legal remedy for domestic violence. Laura S. Johnson, *Frontier of Injustice: Alaska Native Victims of Domestic Violence*, 8 MOD. AM. 2, 9–10 (2012).

133. Johnson explains that temporary or permanent banishment of the abuser might make more sense in remote villages. *Id.* at 11.

134. For example, some people may turn to community elders or rely on Alaska Native village councils to solve problems. *See* Lisa Rieger, *Rural Courts in Alaska: Keeping Peace – The Melding of Western and Native Values and Procedures*, 10 J. OF CONTEMP. CRIM. JUST. 123, 123 (1994).

135. Floersheimer, *supra* note 71 (describing how Native magistrates in Alaska Native villages adapted the law to fit their communities).

136. Others attribute the creation of tribal courts in Alaska to the Indian Child

court system underneath the Alaska Court system shouldering a huge amount of the burden . . . tribal courts are handling these cases."[137]

Based on their observations, scholars, tribal judges, federal commissions, and even Congress have advocated for recognition and restoration of local authority as a solution to the justice gap in rural Alaska.[138] These proposals often suggest two related reforms: first, the development of more tribal courts, and second, the recognition of more jurisdiction for existing tribal courts.[139] Some, like the Indian Law and Order Commission, have documented the failures of the state court system and view Alaska Native villages as better positioned to provide justice in their communities.[140]

Many argue that Alaska Native villages would be more accountable to the people than a remote state government. In theory, these villages

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Welfare Act and a desire for Alaska Native villages to protect their children. JAEGER, *supra* note 26, at 19 ("Shortly after the passage of ICWA, tribes in Alaska re-organized their traditional tribal courts which had largely fallen into disuse and began hearing child custody and protection cases.").

137. David Voluck, *The Resurgence of Tribal Courts: A Tribal Judge's Perspective*, UNIV. OF ALASKA ANCHORAGE JUST. CTR., at 20 (Nov. 18, 2013), https://scholarworks.alaska.edu/bitstream/handle/11122/10864/2013-11-18.tribal-courts-voluck.transcript.pdf?sequence=2&isAllowed=y.

138. *Id.*, at 14–15; JOHN E. ANGELL, CRIM. JUST. CTR., UNIV. OF ALASKA FAIRBANKS, ALASKA VILLAGE JUSTICE: AN EXPLORATORY STUDY, (1979); INDIAN L. & ORD. COMM'N, *supra* note 12, at 43 (stating that "control and accountability directed by local tribes is critical for improving public safety"); Fortson, *supra* note 131, at 93–94 ("The best hope Native communities in rural Alaska have . . . is the revival of their tribal courts and traditions and the recognition of their ability to be valued participants combating these challenges, including the ability to adjudicate criminal offenses.").

139. INDIAN L. & ORD. COMM'N, *supra* note 12, at 49 ("More Tribal villages need Tribal courts and sentencing circles, and where such institutions already exist, greater Tribal jurisdiction could make them even more effective."); Johnson, *supra* note 132, at 2 (arguing that Alaska Native tribes should exercise regulatory civil jurisdiction over domestic violence crimes in their communities to help survivors obtain justice).

140. The Indian Law and Order Commission attributed the criminal justice crisis in Alaska Native villages to the failures of the state's justice system. INDIAN L. & ORD. COMM'N, *supra* note 12, at 43 ("Responsibility, it appears, lies primarily with the State's justice system."); *id.* at 45 ("The serious and ongoing crime and disorder problems in rural and Native regions of the State are evidence that the system is deeply flawed and that it has failed."). It identified two main problems: first, a lack of services provided in rural and Native regions in the state, and second, limited collaboration between state and tribal partners. *Id.* at 43. The Commission was not the first to come to these conclusions about the ineffectiveness of the state. Parry, *supra* note 26, at 89 ("A number of authors have carried the centralization theme a step further, arguing that the urban orientation of the Alaska justice system has produced a normative pattern of nonresponsiveness or even indifference to problems arising in remote villages."); CONN, *supra* note 116, at 9 (noting "the failure of the Alaska judiciary to trust that rural Alaskans had answers to their own problems.").

would rely on place-specific knowledge, prioritize scarce resources in accordance with community needs, and provide better access to institutions of justice.[141] Some advocates for local control cite innovative Alaska Native programs—like Kake Circle Peacemaking, which decreases recidivism among local youths[142]—as evidence that local control can improve access to justice in Alaska Native villages.[143] Still others suggest that local control will enable Alaska Natives to develop justice systems more in line with traditional law ways and methods of dispute resolution.[144]

III. ALASKA NATIVE JUSTICE SYSTEMS

Scholars, advocates, and tribal leaders currently know little about modern tribal courts and Alaska Native justice systems beyond legal histories that generally explain the emerging tribal court movement[145] or

141. INDIAN L. & ORD. COMM'N, *supra* note 12, at 43–44.

142. *Organized Village of Kake Circle Peacemaking*, TRIBAL ACCESS TO JUST. INNOVATION, https://tribaljustice.org/places/traditional-practices/circle-peacemaking/#section4 (last visited Oct. 27, 2024) ("During its first four years of operation, 78 of the 80 youth referred to the Circle Peacemaking Program completed the program and complied with their circle-imposed sentence—a 97 percent success rate. Further, all of the 24 young people assigned to peacemaking for underage drinking successfully completed the program and complied with the terms of their sentences.").

143. Not all Alaska Natives like or benefit from Circle Peacemaking. *See* THE NAT'L JUD. COLL., *Walking on Common Ground: Tribal-State-Federal Justice System Relationships* 28 (2008) ("Not everyone in the village agrees with the use of circle healing. We tend to throw out a whole system if we do not like one aspect of the process. For circle healing or peacemaking to work, we need to realize that we have two different primary goals: to help the offender and to make the community safer."). Some studies have found that mental health outcomes improve in Alaska Native villages when they exercise local governance. For a discussion of these studies, see Heather Sauyaq Jean Gordon, Self-Determination, Sustainability, and Wellbeing in the Alaska Native Community of Ninilchik, 9 (May 2019) (Ph.D. dissertation, University of Alaska Fairbanks), http://hdl.handle.net/11122/10492.

144. INDIAN L. & ORD. COMM'N, *supra* note 12, at 51 ("When Tribal governments have a larger decision-making role, it is likely that even more locally based, therapeutic sentencing models will emerge; that treatment resources in Native villages will be more integrated with law enforcement; that criminal justice and social services will be deployed more often for prevention and harm reduction than for intervention and punishment; and that new players, such as nonprofit organizations or Tribal collaboratives, will join in.").

145. *See generally* JAEGER, *supra* note 26. A rich literature also exists on the traditional law ways of various Native groups in Alaska. Most of this anthropological work attempted to document pre-contact justice practices or detail how they shifted over time with contact. For a description of this research, see Parry, *supra* note 26, at 90–94. *See also* Arthur E. Hippler & Stephen Conn, *Traditional Athabascan Law Ways and Their Relationships to Contemporary Problems of "Bush Justice"*, ISEGR Occasional Paper No. 7, INST. OF SOC., ECON. & GOV. RES.,

case studies of specific tribal courts or justice programs.[146] This Part charts new territory in this area by using data from the Alaska Legal Services Corporation (ALSC) Directory of Alaska Tribal Courts. The analysis of this data is an initial step toward developing a more comprehensive understanding of Alaska Native justice systems. A review of the existing literature on Alaska Native justice systems supplements my analysis of the ALSC data to provide a preliminary overview of current knowledge of how these systems operate on the ground. A more detailed understanding of how Alaska Native justice systems operate in practice will help to evaluate proposals to restore local control.

In 2021, Alaska Legal Services Corporation conducted its third survey of Alaska tribal courts and published a directory of Alaska tribal courts.[147] Analysis of the data compiled from the ALSC directory presents some preliminary, descriptive statistics about Alaska Native justice systems. Although it is incomplete, this data appears to be the most robust currently available.[148] It provides a big picture view, albeit a limited one,

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UNIV. OF ALASKA FAIRBANKS, (1972) [hereinafter *Paper #7*] (describing Athabascan law ways and contrasting them with the experiences of Athabascans in the Alaska state system); Arthur E. Hippler & Stephen Conn, *Northern Eskimo Law Ways and Their Relationships to Contemporary Problems of "Bush Justice"*, ISEGR Occasional Paper No. 10, INST. OF SOC., ECON. & GOV. RES., UNIV. OF ALASKA FAIRBANKS (1973) [hereinafter *Paper #10*] (investigating Inupiat law ways in relation to the Alaska state system).

146. *See generally* Jarrett & Hylsop, *supra* note 30. Several scholars and judges have lamented the lack of information on Alaska Native Courts. Fortson & Carbaugh, *supra* note 12, at 1; Fortson, *supra* note 131, at 101–02; David Avraham Voluck, *Counterpoint: Alaska's Sister Sovereign: Federally Recognized Tribal Courts*, ALASKA BAR RAG, Apr.–June 2014, at 3, 5 ("The full scope of activity for Alaska's tribal courts remains largely unmeasured . . . .").

147. *See* ALASKA LEGAL SERVS. CORP., 2022 ALASKA TRIBAL COURT DIRECTORY 18 (2022), https://alaskatribes.wpenginepowered.com/wp-content/uploads/2022/01/ALSC-Tribal-Court-Directory-2022-Digital-Version.pdf.

148. Information on Alaska Native courts remains limited. Fortson & Carbaugh, *supra* note 12, at 1. A Bureau of Justice Statistics Report identified 152 tribal courts in Alaska, but only reported data in the aggregate. STEVEN W. PERRY, MICHAEL B. FIELD, & AMY D. LAUGER, U.S. DEPT. OF JUST., BUREAU OF JUST. STATS., TRIBAL COURTS IN THE UNITED STATES, 2014 – STATISTICAL TABLES, 6 (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/tcus14st_0.pdf.

The Alaska State Court System relies on the ALSC Directory in providing information to the public about Alaska Native courts. *Court Directory*, ALASKA CT. SYS., https://courts.alaska.gov/courtdir/index.htm (last visited Oct. 27, 2024). The ALSC Directory purports to include information on all 229 tribes in Alaska and includes the following disclaimer:

> This Directory is not a definitive statement on the number of tribal courts operating in Alaska. Where the Directory does not include information for a Tribe, the fault is ours for failing to make contact with the Tribe to collect that information. A Tribe may be operating a court and hearing cases whether or not that information is in this Directory, and anyone

of Alaska tribal justice systems.[149]

The Alaska Tribal Court Directory includes information on the justice systems of almost sixty percent of all federally recognized tribal governments in Alaska (135 of 229). Over half, fifty-four percent, of those providing information, reported having an active judicial system (73/135).[150] ALSC and its partners collected information on the following: the community or village (including contact information), its tribal

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wishing to use a tribal court should contact the Tribe for the most up-to-date information.

ALASKA LEGAL SERVS. CORP., *supra* note 147, at 2. The directory builds on two earlier tribal court surveys done by ALSC in 2011 and 2018. *Id.* Richard Garcia, Kelsey Potdevin, and Jeffrey Egoak at the Alaska Native Justice Center and Denise Nerby and Andrea Wuya at the Association of Village Council Presidents collected the information. The methods of data collection are not described in detail in the Directory, but efforts appear to have been made to contact every federally recognized tribal government in Alaska and have them provide answers to a structured questionnaire or survey.

The information in the Directory was converted into an Excel file. The information was copied into a text file and extra spaces and line breaks were removed using a text editor. Then Python was used to strip out the data using row headers and input it into an excel file. Documentation of the process is available upon request.

This process generated an excel file with 221 Alaska Native communities. I compared the Excel file to the Directory to identify any missing data. I found that the process had omitted the Village of Anaktuvuk Pass. I added the information into the Excel file by hand. That increased the number of federally recognized tribes to 222. I compared the entries in the Excel file to the Bureau of Indian Affairs List of Native Entities Within the State of Alaska Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFS., Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 86 Fed. Reg. 944 (Jan. 29, 2021). I identified the following six (6) Alaska Native governments missing from the Excel file (and Directory): Chuloonawick Native Village, Douglas Indian Association, Native Village of False Pass, Pribilof Islands Aleut Communities of St. Paul and St. George Islands, Village of Clarks Point, and Village of Kalskag. I have included these Alaska Native villages with the other ones that the ALS team did not have information on.

I cleaned the data, which often included slight variations in similar responses, to make the responses consistent. As discussed in the text, some Alaska Native villages reported having a justice system even if they did not have a court. They appear to use their village council to resolve disputes. Once aggregated, I analyzed the data to provide basic, descriptive statistics on Alaska Native justice systems.

149. I use the term "justice systems" rather than "court systems" because the survey includes information from Alaska Native villages that resolve disputes through their councils and peacemaking processes as well as those with adversarial style courts. ALASKA LEGAL SERVS. CORP., *supra* note 147, at 2.

150. This number is roughly consistent with the number of Alaska Native tribal courts in the Indian Law and Order Commission Report. INDIAN L. & ORD. COMM'N, *supra* note 12, at 39 (reporting that as of 2012, 78 Tribes in Alaska had tribal courts with 17 more in the process of developing one).

corporation, its regional corporation, its non-profit corporation, law enforcement in the village, the existence of an active judicial system or court, the type of justice system, the years active (for the judicial system), the number of judges, the method of judicial selection, the judges' terms in office, judicial compensation, judicial selection, kinds of cases heard, number of cases per year, existence of a court administrator, existence of a court clerk, existence of a tribal constitution, tribal code, and tribal court forms, existence of a referral agreement with the state, participation in an inter-tribal court, existence of an ICWA worker, and the existence of tribal social services.[151] Not all Alaska Native justice systems provided data in response to all the questions asked, but some preliminary insights can be drawn about Alaska Native justice systems from the limited data available.

The data from the ALSC Tribal Court Directory confirm the youth and continually-evolving nature of many modern Alaska Native justice systems.[152] It only includes information on one year, 2021, but it provides insights into the development of these systems. Almost half of the Alaska Native villages providing information reported not having a justice system, which suggests that they are incrementally adopting justice systems over time.[153] Further evidence of the evolutionary nature of Alaska Native justice systems emerges in the high percentage—almost seventy percent—of these villages that indicated an interest in developing a tribal court.[154]

Variations in the length of time that Alaska Native justice systems have operated also shows the trajectory of these systems over time.[155] It

151. *See* ALASKA LEGAL SERVS. CORP., *supra* note 147 *passim*.

152. Consistent with Rieger's description, the data indicates that the trajectory of Alaska Native justice system development is different from the one in the continental United States. *See* Rieger, *supra* note 134.

153. I calculated these numbers based on the data in the ALSC Tribal Courts Directory. *See* ALASKA LEGAL SERVS. CORP., *supra* note 147. I divided the number of Alaska Native villages reporting that they did not have a justice system by the total number of tribal governments providing information (62 divided by 135 equals 46). Alaska Native villages that were unresponsive to the survey were excluded from the analysis.

154. I calculated these numbers based on the data in the ALSC Tribal Courts Directory. *See* ALASKA LEGAL SERVS. CORP., *supra* note 147. I divided the number of Alaska Native villages interested in developing a tribal court by the total number reporting that they did not have an active justice system (43 divided by 62 is 70 percent).

155. Alaska Native justice systems appear to also vary in terms of legal development, but the ALSC included only three questions about legal development and the answers do not generate much information. The three questions asked covered whether the Alaska Native village had a tribal constitution, a tribal code, or tribal court forms. My analysis indicates that almost three-quarters reported having a tribal constitution (54 out of 73), 63 percent

confirms that many Alaska Native justice systems have struggled to develop, with few appearing to have high levels of institutional development.[156] Figure 1 shows that over a quarter of Alaska Native justice systems reported that they had been in operation for more than twenty years, but almost as many had only developed in the past ten years.[157] The data suggests that Alaska Native justice systems may have developed in waves over time, with some Alaska Native villages adopting justice systems early on and others following their lead.[158]

Justice system evolution, however, has not always been linear. Some Alaska Native villages reported that their justice systems had operated on and off over time.[159] Their inability to operate consistently over time may indicate the acute lack of funding for tribal courts emphasized by practitioners and judges.[160]

reported having a tribal code (46 out of 73), and 41 percent reported having tribal court forms (30 out of 73). *See generally* ALASKA LEGAL SERVS. CORP., *supra* note 147. Further studies should investigate the substance of tribal constitutions and codes as well as their interpretation by Alaska Native justice systems.

156. *See* Samuel Gottstein, *An Era of Continued Neglect: Assessing the Impact of Congressional Exemptions for Alaska Natives*, 55 B.C. L. REV. 1253, 1267 (2014) (noting that Alaska Native tribal courts tend to be underdeveloped, especially when compared to tribal courts in the continental United States).

157. I calculated these numbers based on the data in the ALSC Tribal Courts Directory. *See* ALASKA LEGAL SERVS. CORP., *supra* note 147. I divided the number of Alaska Native justice systems operating for over 20 years by the total number of systems reported (20 divided by 73 equals 27 percent). My analysis suggests that under ten percent of Alaska Native villages (20/229) have had a court for twenty years or more (a total of 229 tribal governments divided by 20 reporting that they have had a court system for twenty years or more is 10 percent). *See generally id.*

158. Alaska Native villages that developed justice systems early on may have done so in response to ICWA and a desire to keep their children in the community. JAEGER, *supra* note 26, at 19.

159. *See* ALASKA LEGAL SERVS. CORP., *supra* note 147, at 41, 192, 239 (providing examples of villages that report their tribal court as being active on and off over the years).

160. *See* Andrea V. W. Wan, *The Indian Child Welfare Act and Iñupiat Customs: A Case Study of Conflicting Values, with Suggestions for Change*, 21 ALASKA L. REV. 43, 47, 73 (2004) (calling for increased funding for tribal courts); *See also* NAT'L JUD. COLL., *supra* note 143, at 27 ("Many tribes receive grants that allow for full court staffing, but when the grant ends the staff is gone and the program is no longer running."); Voluck, *supra* note 137, at 22 (explaining that Alaska Native governments are holding their courts "together with duct tape and blue tarps" and that they need resources to exercise jurisdiction).

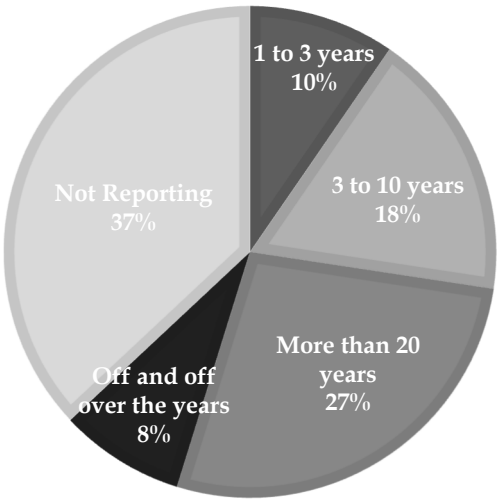

Figure 1. Reported duration of operations for 73 Alaska Native justice systems in 2021. *Source*: Alaska Legal Services Corporation Tribal Court Directory.

The varying levels of institutional development among Native Alaska justice systems also emerge in the data on their staffing, caseloads, and court forms. Table 1 shows that only a third of the Alaska Native justice systems reported paying their judges at all.[161] Compensation structures varied greatly and only a few reported having full time, paid judges.[162] Similarly, only a third reported having a court clerk or a court administrator. Among those with court staff, many had either a full-time court clerk or a full-time court administrator; only about half had both. Caseloads reported by Alaska Native justice systems ranged tremendously, from one case a year to over 150,[163] but these differences did not appear to be related to staffing.[164] Less than half of Alaska Native

161. I calculated these numbers based on the data in the ALSC Tribal Courts Directory, see ALASKA LEGAL SERVS. CORP., *supra* note 147. I divided the number of Alaska Native justice systems reporting paying their judges by the total number reporting (33 divided by 73 is 45 percent).

162. Many reported that they paid judges by the hour or by the case. *See generally id.* (showing tribal justice systems reporting how judges are paid).

163. Many Alaska Native governments reported a range of cases per year. *Id.* As a result, I did not calculate an average.

164. The justice systems reporting that they heard more cases did not necessarily have more staff than those hearing fewer cases. For example, the Gwichyaa Zhee Gwich'in Tribal Government (Fort Yukon) reported hearing 30-35 cases a year and had a court clerk but no court administrator while the Native

justice systems reported that they had developed court forms.[165]

	Total No. Reporting
Paid Judge(s)	33
Court Clerk	32
Court Administrator	27
Court clerk and administrator	14

Table 1. Staffing of 73 Alaska Native justice systems in 2021, as measured by the number of systems reporting having a paid judge, court administrator, or a court clerk. *Source*: Alaska Legal Services Corporation Tribal Court Directory.

The data confirms that Alaska Native governments have asserted their own inherent sovereignty to create access to justice in their communities—even when the federal and state governments have refused to recognize the full authority that Alaska Native governments have traditionally exercised. Figure 2 displays the wide range of subject matters that Alaska Native justice systems reported exercising jurisdiction over in 2021. It corroborates reports from the villages "that Alaska's tribal courts divert and reduce some of the crushing weight of the civil docket . . . from an already overburdened Alaska Court System."[166]

The data also show that some Alaska Native governments have exercised jurisdiction beyond that recognized by the state and federal governments as within their authority. For example, some exercised jurisdiction over cases that could be considered criminal matters (including driving under the influence, assault, juvenile delinquency, and drug and alcohol offenses) even though the federal and state governments have yet to recognize the criminal jurisdiction of Alaska Native governments.[167] A few, like the Native Village of Kake, resolve

Village of Chignik Lagoon reported hearing only five cases a year yet had both a part-time court administrator and a part-time court clerk. Several justice systems reported that they did not currently have a tribal court clerk or administrator (Native Village of Eyak, Sitka Tribe of Alaska). *Id.* at 120–21, 322–23, 396–97, 478–79.

165. The availability of court forms to the public was not clear from the data. *See generally id.* (showing tribal justice systems reporting whether or not they have court forms).

166. Voluck, *supra* note 137, at 3.

167. *See* Fortson, *supra* note 131, at 102 ("[T]hese tribal courts are largely excluded from exercising jurisdiction over criminal cases."). Another example

some criminal matters through Circle Peacemaking when all parties consent.[168] Many of the subject matters that Alaska Native justice systems have assumed jurisdiction over are those in which the state has struggled to provide access to justice. For example, thirteen villages reported hearing alcohol and drug offences while eleven reported hearing divorce cases.[169]

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demonstrating that Alaska Native governments lack certain criminal jurisidiction is as follows:

> It is well established that Alaska Native tribal courts do not have criminal jurisdiction over non-member defendants without express authority from either Congress or the Alaska State Legislature. If courts tried to assert this type of criminal jurisdiction in Alaska Native courts, they would directly conflict with the U.S. Supreme Court's holding that Alaska Native land is not considered Indian country, and therefore cannot be under tribal territorial sovereignty. Furthermore, the State of Alaska retains exclusive criminal jurisdiction within its boundaries as a P.L. 280 State.

Gottstein, *supra* note 156, at 1268.
The ALSC data does not provide any information on whether the Alaska Native villages were asserting criminal or civil jurisdiction in these cases. *See* ALASKA LEGAL SERVS. CORP., *supra* note 147. Often tribal courts in the continental United States rely on their civil jurisdiction to assert authority over subject matters that may also be considered criminal because the United States only recognizes tribal criminal jurisdiction over non-Natives in certain kinds of cases. *See e.g.*, United States v. Cooley, 593 U.S. 345 (2021) (upholding tribal police search and detention of non-Indian suspected of state drug offenses under tribal civil regulatory jurisdiction).

168. *See* Gottstein, *supra* note 156, at 1268–69 (describing 'circle peacemaking' as implemented in the Alaska Native village of Kake); Lisa Rieger, *Circle Peacemaking*, 17 ALASKA JUST. F. 1, 6–7 (2001) (providing an overview of 'circle peacemaking'); NEIL NESHEIM, EVALUATING RESTORATIVE JUSTICE IN ALASKA: THE KAKE CIRCLE, (National Center for State Courts 2010) (describing a study of 'circle peacemaking' in the Alaska Native village of Kake).

169. These numbers do not include the two Alaska Native governments that reported that they heard any kind of case (Tlingit and Haida Tribes of Alaska and Venetie Tribal Government). The thirteen villages hearing alcohol and drug cases were: Native Village of Kiana, Native Village of Dot Lake, Kasigluk Traditional Elders Council, Native Village of Kipnuk, Native Village of Kongiganak, Native Village of Kwigillingok, Curyung Tribal Council, Village of Iliamna, Saint Paul Island, Native Village of Eyak, Native Village of Port Graham, Sun'. . .ôaq Tribe of Kodiak, and Metlakatla Indian Community. Seven of these also heard cases relating to alcohol and drug regulations (Native Village of Dot Lake, Kasigluk Traditional Elders Council, Native Village of Kongiganak, Curyung Tribal Council, Village of Iliamna, and Metlakatla Indian Community). The eleven villages hearing divorce cases were: Alatna Village, Anvik Tribal Council, Native Village of Minto, Native Village of Tanana, Native Village of Emmonak, Native Village of Paimiut, Curyung Tribal Council, New Stuyahok Village, Qagan Tayagungin Tribe of Sand Point, Saint Paul Island, and Kenaitze Indian Tribe. *See* ALASKA LEGAL SERVS. CORP., *supra* note 147 (showing the reported types of cases each village hears).

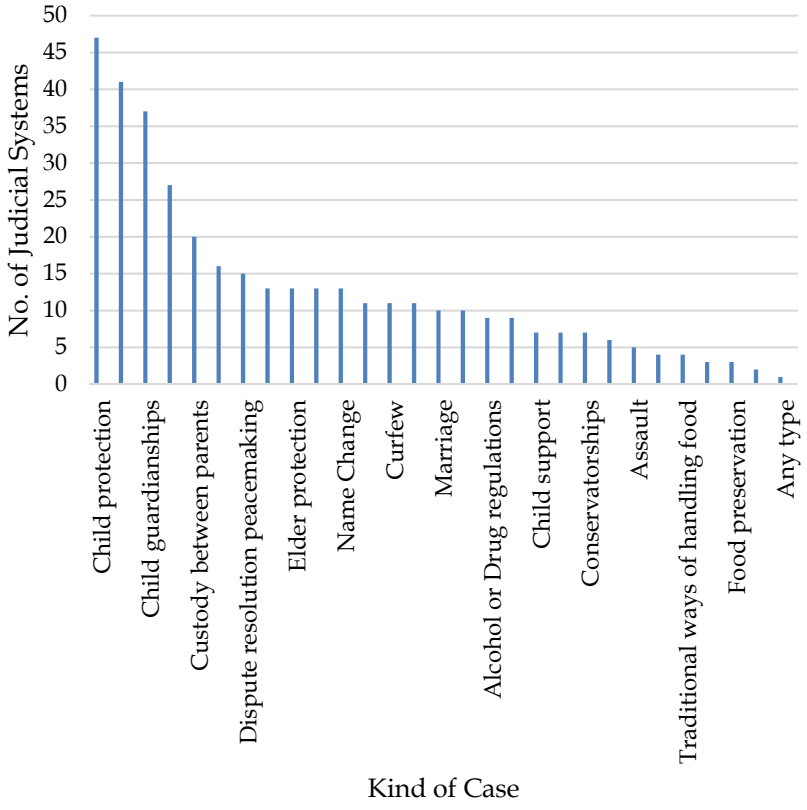

Figure 2. Kinds of cases heard by 52 Alaska Native Judicial Systems reporting information in 2021. *Source*: Alaska Legal Services Corporation Tribal Court Directory.

Consistent with anecdotal reports, many Alaska Native justice systems also hear cases that state and federal courts have recognized they have jurisdiction over, including family law and child protection cases.[170] Almost every Alaska Native government included in the report stated that it adjudicated child protection cases. As Figure 2 shows, more Alaska Native justice systems reported hearing child protection cases than any other kind of case.[171]

170. Fortson & Carbaugh, *supra* note 12, at 1.

171. A majority, 52 percent, of Alaska Native governments, including 21 without an active court or justice system, reported that they had an ICWA worker, suggesting that they were exercising their authority in child welfare cases (dividing Alaska Native governments reporting that they had an ICWA worker by the total number reporting (70 divided by 135)). *See* ALASKA LEGAL SERVS.

Many Alaska Native justice systems heard multiple kinds of cases. On average, these systems reported hearing an average of seven kinds of cases, but this number varied greatly.[172] Some only heard child protection or adoption cases.[173] Others exercised jurisdiction over family law matters, including adoptions, child guardianships, child protection cases, divorces, marriages, custody between parents, child support, and paternity issues.[174] Still others heard a variety of kinds of cases. One reported hearing every kind of case listed in Figure 2.[175] Another, the Venetie Tribal Government, reported that its tribal court would hear any type of case.[176]

The data from the ALSC Directory also confirms the innovative nature of Alaska Native justice systems as they utilize various forms of dispute resolution.[177] As Figure 3 shows, Alaska Native villages used various kinds of justice forums, including courts, councils, and peacemaking processes. Fifty-three Alaska Native villages reported having an active court, while twenty-six indicated that the village council served as the tribal court.[178] A few used a forum that included tribal

CORP., *supra* note 147. The majority, 91 percent, of Alaska Native villages reporting that they had an ICWA worker stated that they were involved in state cases (dividing 64 villages with ICWA workers involved in state courts by 70 villages reporting that they had an ICWA worker). *See id.* The ICWA worker handled both tribal and state cases for half of the Alaska Native villages (dividing 36 villages with ICWA workers in both state and tribal cases by 70 villages with ICWA workers). *See id.*

172. I calculated the average number of kinds of cases heard by justice systems from the data in the ALSC Tribal Courts Directory. *See id.* The average number of kinds of cases heard was 7.24. *See id.* A justice system cannot hear 0.24 of a case so I rounded down to 7. The standard deviation for the number of kinds of cases heard was 5.74. *See id.* The median number of kinds of cases heard was 6. *See id.* The mean and median may be low because the notes indicated that two Alaska Native governments (Tlingit and Haida Tribes of Alaska and Venetie Tribal Government) may actually hear more kinds of cases than those listed. *See id.*

173. Four reported only hearing child protection cases (Native Village of Barrow Inupiat Traditional Government, Huslia Village, Northway Village, and Native Village of Port Heiden). *Id.* at 20, 126, 170, 348. Nome Eskimo Community reported only hearing adoption cases. *Id.* at 76.

174. *See id.* (showing the reported types of cases each village hears).

175. Tlingit and Haida Tribes of Alaska simply reported that their justice system hears a "wide range" of cases without offering specifics. *Id.* at 475.

176. The note accompanying the list of cases heard states, "[t]his tribal court expressed that it is possible it will hear any type of case." *Id.* at 160.

177. *See* Rieger, *supra* note 134, at 131 (explaining that tribal courts implement both traditional Alaska Native systems as well as borrow from the western model).

178. *See* ALASKA LEGAL SERVS. CORP., *supra* note 147 (showing the types of courts present in each village). The data does not specify whether village council members sat on a court or whether the village council served as the court. Six villages reported that council members served as judges (Alatna Village, Allakaket Village, Anvik Tribal Council, Hughes Village, Nenana Native

council members as judges. Ten Alaska Native villages had adopted wellness courts, which replace traditional punitive approaches to criminal infractions with integrated mental health and substance abuse treatment for offenders to aid community re-integration.[179] Two more reported that they were in the process of developing wellness courts.[180] Fifteen reported engaging in peacemaking and other forms of dispute resolution.[181] This variation in approaches shows an openness to experimentation among Alaska Native villages in finding solutions to access to justice issues. It also demonstrates the variety of justice fora currently used to serve the needs of Alaska Native villages. Not all Alaska Native villages rely on adversarial style courts to resolve disputes.

Association, and Chickaloon Native Village). *Id.* at 100, 102, 104, 124, 140, 383.

179. The ten justice systems reporting a Wellness court were the Village of Alakanuk, Asa'carsarmiut Tribe, . . .ôs Slough Village of Bill Moore, Chevak Native Village, Akiachak Native Community, Village of Chefornak, Kasigluk Traditional Elders Council, Native Village of Kongiganak, Native Village of Nunapitchuk, and Tlingit & Haida Indian Tribes of Alaska. *Id.* at 180, 184, 186, 188, 217, 225, 235, 239, 265, 475.

In comparison, the Tribal Healing to Wellness Courts website only lists four Alaska Native villages with Healing to Wellness Courts. Tribal L. & Pol'y Inst., *Tribal Wellness Courts*, TRIBAL HEALING TO WELLNESS COURTS, https://wellnesscourts.org/state-resources/?state=AK&type=tribal-wellness-courts (last visited Oct. 26, 2024).

For a description of the key components and operation of wellness courts, see Joseph Thomas Flies-Away & Carrie E. Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence*, 2013 MICH. ST. L. REV. 403, 412–13 (2013).

180. The Native Village of Paimiut and the Native Village of Scammon Bay reported that they were developing Wellness Courts. ALASKA LEGAL SERVS. CORP., *supra* note 147, at 208, 214.

181. The fifteen justice systems engaged in peacemaking or other forms of dispute resolution were the Anvik Tribal Council, Native Village of Minto, Native Village of Paimiut, Kasigluk Traditional Elders Council, Native Village of Kipnuk, Native Village of Kwigillingok, Native Village of Nunapitchuk, Curyung Tribal Council, Village of Iliamna, Qagan Tayagungin Tribe of Sand Point, Saint Paul Island, Chickaloon Native Village, Native Village of Eyak, Native Village of Port Graham, and Native Village of Karluk. *See* ALASKA LEGAL SERVS. CORP., *supra* note 147 (showing the reported types of cases each village hears).

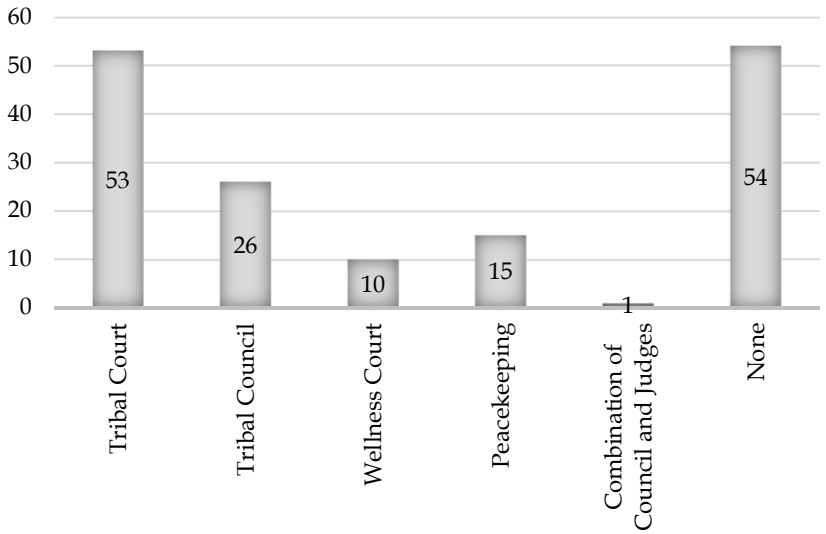

Figure 3. Kinds of Dispute Resolution Fora Used by 135 Alaska Native Justice Systems in 2021. These numbers reflect both active and inactive justice systems. *Source*: Alaska Legal Services Corporation Tribal Court Directory.

The existing literature on justice systems and tribal courts in Alaska Native villages adds texture and richness to the data gleaned from the ALSC Alaska Tribal Court Directory. As the ALSC data indicate, Alaska Native justice systems operate distinctly from state courts. Unlike tribal courts in the Lower 48, which tend to more closely reflect state court structures due to the imposition of Courts of Indian Offenses by the Bureau of Indian Affairs in the 1880s, modern Alaska Native justice systems developed later and with more awareness of traditional models of dispute resolution.[182] Some Alaska Native justice systems may "bear

182. *See* Rieger, *supra* note 134, at 123 ("In contrast, in Alaska, tribal courts have had a different evolution—from more traditional methods of social control to more western models."). Anglo-American models of courts have informed the development of Alaska Native justice systems even if the BIA did not mandate them in Alaska like it did elsewhere. For example, "[o]ne tribal court manual widely used in Alaska, Tanana Chiefs Council Tribal Court Handbook (Jaeger, 1991), tracks the western model quite closely, although it also describes the peacekeeping system of the Navajo Nation." *Id.* at 130–31. Alaska Native villages appear to have had more choice, however, than some tribal governments in the continental United States about whether and to what extent they wanted to adopt Anglo-American adversarial style courts, which Rieger explains as follows:

> Alaska Native communities have the advantage of being small and more

only superficial resemblance to their western counterparts."[183]

Each Alaska Native justice system functions differently, but they are often described as less formal and less confrontational than state courts and more focused on solving problems and maintaining relationships.[184] Some Alaska Native villages do not use adversarial style courts at all but rely on their village council to resolve disputes.[185] In villages with courts, judges often sit with, rather than above, the parties,[186] and many are not law-trained.[187] Lawyers are usually not required because the judges prefer to hear from the people themselves.[188] Some Alaska Native justice

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> isolated from western influences. A wide range of decision-making activity has occurred through village councils and tribal courts, and the activity is increasing. Although western labels for tribal peacekeeping may be necessary for state recognition of their authority, Alaska village councils and courts are less likely to follow western models as closely as those of the larger Indian nations to the south.

Id. at 131.

As Part II shows, federal and state laws have influenced that "choice" even if they have not dictated Anglo-American adversarial style courts. *See supra* Part II.

183. Rieger, *supra* note 134, at 131. Alaska Native justice systems may use the word "courts" more liberally than most non-Natives. *See id.* at 124 ("[I]n Alaska Native village tribal 'courts,' western labels overlay Native operations and value systems in the daily work of peacemaking.").

184. Voluck, *supra* note 137, at 16–17, 20; Parry, *supra* note 26, at 90. *See also Paper #7*, *supra* note 145 (describing Athabascan law ways and contrasting them with the experiences of Athabascans in the Alaska state system); *Paper #10*, *supra* note 145, at 20 (investigating Inupiat law ways in relation to the Alaska state system and emphasizing Inupiat values of noninterference in the lives of others and conflict avoidance).

185. *See* Rieger, *supra* note 134, at 131 (explaining that village councils act as courts in certain child welfare cases). Rieger explains that village councils vary greatly in their methods, but in general "are more investigative and far less formal than state courts." *See id.* ("Parties represent themselves, records are sporadic, and legal training is not required.").

Some have questioned the fairness and impartiality of village councils. Rieger, *supra* note 134, at 127**.** Others note that Alaska Native villages have long used their councils in this way and that it may be more reflective of some traditional law ways. *See* ALASKA LEGAL SERVS. CORP., *supra* note 39, at 28 ("To varying degrees, traditional councils still address civil matters in many rural Alaska Native villages. Many communities have realized that there are substantial benefits to using traditional tribal justice models that reflect more respectful, healing approaches to behavior modification.").

186. Voluck, *supra* note 137, at 16 ("[W]hen I sit on the bench, I am not higher than my parties. We sit down . . . there in a roundtable situation . . . .").

187. NAT'L JUD. COLL., *supra* note 143, at 30 ("Not many tribal judges are law-trained.").

188. *See* Rieger, *supra* note 134, at 131 (explaining that parties represent themselves in some some villages in relation to child welfare cases); *See* Voluck, *supra* note 137, at 17 (including comments by a Kenaitze tribal judge, who stated, "We don't care if you bring your lawyer in, and bring as many as you want, but I don't wanna hear about it, I don't want to hear from them. I want to hear from the

systems even limit the ability of a lawyer to speak for a party.[189] The judge is not there to reprimand the parties but to work with the parties to resolve the situation.[190] As a Kenaitze tribal judge explained, "Basically, if something's happened, we're there to fix it, not to find a winner and a loser. It's more to get things worked out . . . ."[191] This perspective suggests a very different experience in Alaska Native justice systems than in adversarial state courts. It also often enables Alaska Native justice systems to solve problems in culturally sensitive ways.[192]

The existing data suggests that Alaska Native justice systems are evolving and that many Alaska Native governments may be interested in further development, including acquiring more courts and more jurisdiction. It shows that Alaska Native justice systems use several different kinds of fora in problem solving, including processes that diverge from Anglo-American adversarial style courts. The data do not, however, provide many insights into the effectiveness of Alaska Native justice systems. It leaves open the question: how can Alaska Native villages build justice systems that help them find workable solutions to the access to justice issues in their communities?

IV. BUILDING JUSTICE SYSTEMS TO RESOLVE THE ACCESS TO JUSTICE CRISIS IN RURAL ALASKA

Alaska Native villages must develop effective justice systems of their own to exercise sovereignty successfully and to provide access to justice in their communities.[193] This Part considers what this process entails. It identifies cultural match as a major barrier to building effective Alaska Native justice systems. Further, it explains how a lack of cultural match may lead to a different kind of justice gap—one in which the community's perception of justice does not align with the standards and processes of justice mandated by state and federal governments.

The challenge for Alaska Natives is to develop justice systems with a high degree of cultural match. They have to do this within settler-

parties").

189. *See* Simmonds v. Parks, 329 P.3d 995, 1003 (Alaska 2014) (describing Minto Tribal Court policy permitting attorneys to appear and advise clients at hearings but not to speak directly to the judges).

190. *See* Voluck, *supra* note 137, at 16 (describing his role as a judge as being a facilitator).

191. *Id.* at 17.

192. Geoffry Wildridge, *Access to Justice: The Continuing Debate Over the Role of Tribal Courts in Rural Alaska*, 38 ALASKA B. RAG 2, 3 (2014) (describing Alaska Native tribal courts as more effective at addressing social ills, in part because they "do so in more culturally sensitive ways than State courts").

193. Cornell & Kalt, *supra* note 20, at 196.

colonialism, which adds to the complexity and difficulty of the task at hand.[194] The United States has yet to acknowledge tribal jurisdiction without placing conditions on it.[195] State courts in Alaska continue to contest Alaska Native jurisdiction.[196] The United States and the state of Alaska place conditions on tribal justice systems because they fear that enabling tribal justice systems to apply their own traditions and standards independently might undermine the individual rights embodied in state and federal laws.[197] These conditional restorations of jurisdiction can

194. *See id.* at 205 ("The trick is to invent governments that are capable of operating effectively in the contemporary world, but that also match people's ideas—traditional or not—about what is appropriate and fair.").

195. *See supra* Part II.A. (describing the influence of U.S. colonialism on the development of Alaska Native law).

196. *See id.*

197. An example of the U.S. concern regarding tribal justice systems applying their own traditions and standards and the impact it may have on individual rights is as follows:

> Following passage of the Senate bill, Senator Jon Kyl of Arizona released a statement claiming that 'by subjecting individuals to the criminal jurisdiction of a government from which they are excluded on account of race,' the tribal jurisdiction provision 'would quite plainly violate the Constitution's guarantees of Equal Protection and Due Process.'

Caroline P. Mayhew, *VAWA Tribal Provisions and Race Discrimination Arguments*, INDIAN COUNTRY TODAY (May 29, 2012), https://ictnews.org/archive/vawa-tribal-provisions-and-race-discrimination-arguments.

Letter from the Nat'l Ass'n of Criminal Def. Lawyers & the Nat'l Ass'n of Fed. Defenders, to Sen. Harry Reid, Majority Leader, Sen. Patrick Leahy, Chairman, Comm. on the Judiciary, Sen. Mitch McConnell, Minority Leader, and Sen. Charles Grassley, Ranking Member, Comm. on the Judiciary, on the Violence Against Women Reauthorization Act of 2012 (S. 1925) (Apr. 23, 2012) [hereinafter *Criminal Defense Letter*], https://www.nacdl.org/getattachment/4838b4b2-e232-42ec-8284-56045a0de681/nacdl-nafd-letter-to-senators-on-tribal-cases-in-reauthorizing-the-violence-against-women-act-april-2012-.pdf (arguing that enactment of the bill to reauthorize VAWA would deprive non-Indian defendants of basic constitutional rights with no effective remedy).

Professor Rosen describes the concern in terms of the Indian Civil Rights Act as one of underprotection because allowing tribal courts unfettered discretion and no federal court oversight in interpreting ICRA may "subvert the very protections that the ICRA was intended to provide in the first place." Mark D. Rosen, *Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY 282 (Kristen A. Carpenter et al. eds., 2012).

Underlying many of these criticisms is the assumption that tribal citizens have the same relationship with their tribal government as they do with the state government. Van Schilfgaarde, *supra* note 58, at 126 ("ICRA envisions only adversarial Tribal justice systems, and presumes that, like states, Tribal courts are vulnerable to oppressive tendencies."). Scholars have questioned this assumption because it ignores the kinship relations among Native people. *See* Larry Nesper, *Negotiating Jurisprudence in Tribal Court and the Emergence of a Tribal State: The Lac du Flambeau Ojibwe*, 48 CURRENT ANTHROPOLOGY 675, 675–76 (2007) (observing that traditional values associated with family and kinship inform the expectations that tribal citizens have for tribal governments); Bruce G. Miller, THE PROBLEM OF

create tension, or cultural mismatch, with Native Nations.[198]

Cultural match "refers to the match between governing institutions and the prevailing ideas in the community about how authority should be organized and exercised."[199] It occurs when the community supports and respects a governing authority because it has exercised authority consistent with the community's expectations of how and when it should be exercised.[200] In contrast, cultural mismatch exists when governing institutions do not conform to the prevailing norms and expectations about authority in the community.[201] Empirical studies have found that cultural mismatch undermines governmental stability and thwarts economic development in Native communities.[202] Tribal government instability interrupts tribal governance and jeopardizes claims for greater tribal authority, including tribal court jurisdiction.[203] Similarly, tribal justice systems will not have legitimacy or respect if they do not reflect the prevailing norms and expectations of the community.

Native communities cannot provide effective access to justice in their communities when extensive federal and state oversight of tribal courts and their procedures leads to a mismatch between the practices and policies that are culturally appropriate and work well for a Native

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JUSTICE: TRADITION AND LAW IN THE COAST SALISH WORLD 11 (2000).

To my knowledge, no one has investigated the extent to which this is true or more broadly, the expectations that tribal citizens have of their tribal governments. Vine Deloria, Jr., noted the irony of the situation that tribal governments find themselves in: "We're being asked to import institutions and procedures that are wholly foreign to Indian communities and that are not working in white communities either." Vine Deloria, Jr., Keynote Address at the 9th National Indian Nations: Justice for Victims of Crime Conference, Palm Springs, Cal. (Dec. 10, 2004).

198. Carlson, *supra* note 24, at 108–09; Goldberg, *supra* note 62, at 914–15.

199. *See* Cornell & Kalt, *supra* note 20, at 201–02 (demonstrating that effective tribal institutions have a high degree of cultural match and suggesting several other characteristics common to effective tribal governments, including stable institutions and policies, fair and effective dispute resolution, separation of politics from business management, and a competent bureaucracy).

200. The impact of cultural match is explained as follows:

> Governing institutions 'match' a society's culture when governing authority is exercised when, where, and by whom the society's norms—often unspoken and informal—regard as legitimate. Where cultural match is high, the institutions of governance tend to have a high degree of support in the community, commanding allegiance and respect. Where cultural match is low, legitimacy is low, and governing institutions are more likely to be toothless, ignored, disrespected, and/or turned into vehicles for personal enrichment.

Id.

201. *Id.*

202. *Id.* at 202–03; Goldberg, *supra* note 62, at 919.

203. Goldberg, *supra* note 62, at 921.

community and the ones a tribal government can adopt in the shadow of federal and state laws.[204] Cultural mismatch can undermine Native justice systems if they can only exercise their jurisdiction as long as they comply with Anglo-American standards of justice.

The existing literature on Alaska Native courts recognizes the potential problem of cultural mismatch but few scholars have considered how it may undermine restorations of jurisdiction as a solution to access to justice issues.[205] The tension between culturally appropriate justice practices and the imposition of Anglo-American standards implicates a core question for Alaska Natives, other Indigenous peoples, the United States legal system, and the access to justice community: who defines what justice is?

This question remains contested when it comes to Alaska Natives and other Native peoples in the United States. In Alaska, cultural mismatch could undermine restoring local authority as a solution to the access to justice crisis facing Alaska Natives.[206] Their geographic isolation

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

205. *See* Rieger, *supra* note 134, at 124 ("Many issues that characterize the tension in most of Indian country between traditional dispute resolution techniques and the necessity for recognition by the dominant system appear in microcosm in Alaska."); Schafer & Moras, *supra* note 9 ("Alaska Native cultures tend to subjugate individual rights to the good of the whole community, an inclination which sometimes places Native groups in conflict with provisions of the U.S. and Alaska constitutions."). Another example of the cultural mismatch between the Alaska Native legal needs and the American legal system is as follows:

> Just as the United States Supreme Court wanted to see a Navajo system of civil law which looked like the one it was used to seeing when it heard *Williams v. Lee* (1959), so, also, do Alaskan legal professionals seem to want the image of an American system of law in the bush, whether or not it serves the needs of the people who live there.

CONN, *supra* note 116, at 14.

206. Scholars have long documented how the dispute resolution processes traditionally used by Alaska Natives do not match the adversarial processes used by Anglo-American courts. *See* Parry, *supra* note 26, at 90 (describing "a lack of fit between the legal system and traditional Native lifestyles"); Floersheimer, *supra* note 71, at 45 (documenting concerns that "Native traditions and village conditions were incompatible with state justice" in the 1970s). The rich literature describing Alaska's Native peoples and their customs demonstrates a wide variety of governmental forms and law ways among the Aleut, Inipuit, and American Indian cultures within the state. Researchers agree, however, that "all were fundamentally different from and, to the extent that issue is addressed, incompatible with the methods of law enforcement, dispute resolution and corrections which characterize contemporary American justice systems." *See* Parry, *supra* note 26.

and history have allowed Alaska Native villages to retain many of their traditions.[207] Alaska Native villages were not forced to adopt or rely on Anglo-American institutions, rules, and processes in the same way as many tribal court systems in the continental United States.[208] Many tribal courts in the continental United States are trying to "indigenize," or incorporate their traditions into Anglo-American style judicial systems.[209] In Alaska, many Native villages lack a similar institutional dependency on Anglo-American style judicial systems, and thus, have an opportunity to design their justice systems from the ground up so that they reflect their culture.[210]

Their ability to retain their own legal traditions, however, may make it harder for them to conform to the adversarial processes and due process standards required by state and federal laws. As discussed above, federal and state laws continue to incentivize tribal governments, including those in Alaska, to adopt or adapt Anglo-American justice practices.[211]

207. The extent to which Alaska Native villages retain their traditions varies by village.

208. Rieger, *supra* note 134, at 124. The BIA did not push Courts of Indian Offenses on Alaska Native villages like it did on tribes in the lower forty-eight. Rieger, *supra* note 134, at 123. Rather, the State of Alaska has asserted exclusive jurisdiction over Alaska Native villages. Jaeger, *supra* note 26, at 12**.** For decades after statehood, the state adopted a program of lay magistrates in rural Alaska Native villages. *Id.* These magistrates operated like justices of the peace. *Id.* at 125. They handle a range of civil and criminal cases, including misdemeanor offenses, arrest and search warrants, preliminary hearings on felonies, small claims, marriages, divorces, temporary restraining orders in domestic violence cases, coroner's duties, and birth and death certifications. *Id.* The magistrates often came from the community and adapted state laws and procedures to reflect Native traditions. *See id.* at 124 ("With Native lay magistrates working in the Alaska court system, western legal structures are filtered through the lens of Native culture to provide more culturally appropriate resolutions to conflicts within the community."); Floersheimer, *supra* note 71, at 33 (Native lay magistrates working in the Alaska state court system "often filtered the state court system through a Native lens, consulted with village councils, and resolved disputes through traditional means.").

209. Scholars debate how effectively and how frequently tribal courts in the continental United States try to "indigenize." Pommersheim, *supra* note 62, at 105–17 (discussing the debate over whether tribal courts have accepted due process or view it as an imposition). For example, some tribal courts have applied their own customs and traditions in interpreting rights under the ICRA. High Elk v. Veit, No. 05-008-A, 2006 WL 5940784 (Cheyenne River Sioux Ct. App. Feb. 10, 2006); Fletcher, *Mamengwaa, supra* note 62, at 4; Spruhan, *supra* note 62, at 119. Studies of tribal courts, however, find that their "interpretations of the Act are remarkably consistent with federal court interpretations." Goldberg, *supra* note 62, at 900.

210. For a discussion of institutional dependency, see Cornell & Kalt, *supra* note 20, at 195–96.

211. *See, e.g.*, Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction*, 112 CAL. L. REV. 103 (2023); Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 COLUM. J. RACE & L. 681 (2021).

For example, Alaska Natives and their allies advocated for inclusion in the restorations of inherent tribal criminal jurisdiction in the Violence Against Women Act (VAWA).[212] VAWA, however, requires that tribal governments provide specific procedural protections to a defendant in order to investigate, prosecute, convict, and sentence non-Native offenders for specific crimes.[213] These protections are meant to ensure justice and fairness in an adversarial system,[214] but they limit the ability of the tribal government to handle domestic violence situations in any other way.[215] The protections required by the statute include: effective assistance of counsel; appointed, licensed attorneys for indigent defendants; law-trained judges who are licensed to practice law; publicly available tribal criminal laws and rules; and recorded criminal proceedings.[216] Many Alaska Native justice systems do not currently provide these protections, and some may view them as contrary to their cultural practices.[217]

Under VAWA, the federal government exercises oversight over tribal governments to ensure that defendants receive these procedural protections.[218] The Department of Justice has to approve tribal governments so they can opt in to exercising the jurisdiction restored under these statutes.[219] This oversight conditions the exercise of a tribal government's inherent authority on its willingness or ability to meet the federal government's standards of justice.[220] Tribal courts cannot exercise

212. Gottstein, *supra* note 156, at 1278; Watson, *supra* note 121, at 15–16, 20–21.

213. 25 U.S.C. §§ 1302(c), 1304(d)–(e) (2022).

214. SARAH DEER, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA, 103 (2015) (discussing the limits on tribal jurisdiction under VAWA as safeguards for non-Native defendants).

215. *Id.* at 134-35 (explaining how federal laws limit tribal responses to violence).

216. 25 U.S.C. §§ 1302(c), 1304(d) (2022). Other requirements include that defendants are also entitled to a fair cross-section of the community in a jury pool that does not systematically exclude non-Indians, as in § 1304(d), and must be informed of their right to file a federal habeas corpus petition if they are ordered to be detained by a tribal court, as in § 1304(e).

217. For example, the Minto Tribal Court and the Kenaitze Tribal Court allow representation by an attorney but prefer to have the parties speak for themselves. In *Simmonds*, the Minto Tribal Court explained that it was culturally appropriate to have the parties speak rather than the attorneys. Simmonds v. Parks, 329 P.3d 995, 1011 (Alaska 2014).

218. U.S. Dep't Just., *Violence Against Women Act 2022 Reauthorization - Alaska Pilot Program* (Aug. 9, 2024), https://www.justice.gov/tribal/vawa-2022-alaska-pilot-program.

219. *Id.*

220. *See* DEER, *supra* note 214, at 134-35 ("Tribal nations have been coerced to adopt the legal methodology and philosophy of the colonial state in responding to violence. Taiaike Alfred and Jeff Corntassel explain that indigenous peoples have been put in the untenable position of mimicking coercive practices of the

their inherent criminal jurisdiction without meeting these requirements—even if they are contrary to the Native Nation's own law ways or cultural practices.

Cultural match problems may also arise because, as Part III indicates, not all Alaska Native villages have adopted Anglo-American adversarial style court systems. My analysis of the ALSC data shows that almost twenty percent of the Alaska Native villages report that they use their village council as their court.[221] It further demonstrates that another sixty-two Alaska Native villages report that they do not currently have an active justice system at all, but two-thirds of these indicated an interest in developing one.[222] The ALSC data does not specify whether these Alaska Native villages perceive a "court" as an Anglo-American adversarial style court or some other kind of judicial fora.[223] Various kinds of fora currently exist and not all of them operate like adversarial courts.[224] Yet Alaska Native villages must adopt Anglo-American adversarial style courts to exercise their inherent criminal jurisdiction under VAWA.

Problems of cultural match also emerge in civil cases. They tend to arise when Alaska state courts and others claim that Alaska Native justice systems violate Anglo-American standards of due process.[225] These concerns merit careful consideration to protect individual rights but also to ensure that Alaska Native villages can provide justice on their own

colonial government, which result in 'disconnection, dependency, and dispossession.'").

221. I calculated these numbers based on the data in the ALSC Tribal Courts Directory, see ALASKA LEGAL SERVS. CORP., *supra* note 147. I divided the number of villages reporting use of a tribal council by the total number (26 divided by 135 equals 19). The percentage of Alaska Native villages using a tribal council increases to 36 percent if only villages with an active justice system are considered (26 divided by 73 equals 36).

222. I calculated these numbers based on the data in the ALSC Tribal Courts Directory. *Id*. I determined that two-thirds of Alaska Native villages without a justice system are interested in developing one because forty-two out of sixty-two Alaska Native villages without a justice system indicated that they wanted one (42 divided by 62 is 68).

223. *See* Rieger, *supra* note 134, at 123–24 (explaining that Alaska Native "courts" do not always resemble Anglo-American adversarial courts).

224. *See supra* Part III (discussing how Alaska Native justice systems use adversarial style courts, peacemaking circles, wellness courts, and tribal councils in resolving disputes).

225. *See, e.g.*, Richman ex rel. C.R. v. Native Village of Selawik, No. 3:22-cv-00280-JMK, 2023 U.S. Dist. LEXIS 95888, at *4 (D. Alaska June 1, 2023) (moving to dismiss proceedings based on alleged due process violations by Alaska Native court); Peidlow v. Williams, 459 P.3d 1136, 1142 (Alaska 2020) (explaining that Alaska Native court orders do not merit enforcement if the court violates due process); State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska, 371 P.3d 255, 261 (Alaska 2016) (noting that in some cases, "the tribal court may well violate due process."); *Simmonds*, 329 P.3d at 995.

terms. As previous scholars have argued, some of these claims reflect racist misunderstandings of tribal governments and courts rather than valid concerns about the fairness of tribal processes.[226]

Consider, for example, *Simmonds v. Parks*.[227] Mr. Parks, a father, challenged the Minto Tribal Court's jurisdiction over a child protection case, alleging that the Native Village of Minto was not a federally recognized tribe.[228] When the federal court affirmed that it was and that the Minto Tribal Court and Alaska state courts had concurrent jurisdiction,[229] the father then tried to attack the Minto Tribal Court's jurisdiction in Alaska state court.[230] Mr. Parks argued that the Minto Tribal Court had violated his due process rights because his attorney was prohibited from presenting oral argument on his behalf in the tribal court.[231] The Alaska Superior Court refused to afford the Minto Tribal Court's order full faith and credit because it found that the father's due process rights had been violated.[232] On appeal, the Alaska Supreme Court deferred to the Minto Tribal Court, finding that Mr. Parks had to exhaust his tribal court remedies before he could bring suit in state court.[233]

The Alaska Supreme Court upheld the Minto Tribal Court's jurisdiction, but it side-stepped an important question about the applicability of Anglo-American standards of due process in Alaska Native courts.[234] The Minto Tribal Court argued that it had provided the father with due process according to its own traditions.[235] In its briefing, it defined due process in Anglo-American terms as making sure that the

226. Matthew L.M. Fletcher, *Due Process and Equal Protection in Michigan Anishinaabe Courts*, MICH. ST. L. REV. 1, 2 (Jan. 22, 2023), https://www.michiganstatelawreview.org/vol-20222023/2023/1/22/due-process-and-equal-protection-in-michigan-anishinaabe-courts.

227. *Simmonds*, 329 P.3d at 995.

228. *See id*. at 1001 (arguing that "the Athabascan residents of the Native Village of Minto . . . are members of a 'federally recognized tribe' that possesses governmental authority of any kind . . . .").

229. S.P. v. Native Village of Minto, No. 3:09-cv-0092 HRH, 2009 U.S. Dist. LEXIS 130738, at *20 (D. Alaska Dec. 2, 2009), aff'd, 443 Fed.Appx. 264 (9th Cir. 2011) ("This court concludes that the Native Village of Minto, through its tribal court, has concurrent jurisdiction with the State of Alaska.").

230. *Id.*

231. Brief for Respondent, Edward Parks at 24–25, *Simmonds*, 329 P.3d 995 (Alaska 2014) (No. S-14103), 2013 WL 5757970 (stating that "while the Minto tribal court may not like lawyers, and appears to feel that they intrude upon the proceedings this is not sufficient to allow the Minto Tribal Court to violate state and federal law and Alaska and United States constitutional law . . . .").

232. *Simmonds*, 329 P.3d at 998.

233. *Id.* at 1008.

234. *Id.* (adopting an exhaustion of tribal court remedies doctrine and dismissing the case for failure to exhaust tribal remedies rather than hearing the due process claims).

235. *Id.* at 1003.

parties received notice of the proceeding and an opportunity to be heard.[236] The Minto Tribal Court argued that Mr. Parks had a meaningful opportunity to be heard because he presented a great deal of information himself and did not make a due process objection at any time.[237] It explained why it did not allow attorneys to speak directly to judges:

> First, this is our tradition, our way of solving disputes, and we have always done things this way. Our judges solve problems by speaking directly to the people involved. Second, professional attorneys have an approach that is aggressive and confrontational and is not appropriate for our court; we do not permit our judges to be spoken to in this way. Third, our judges are elders or other respected people in the Tribe, but none of them are trained lawyers so they do not understand legal terminology. Instead, our judges implement traditional law and make decisions based on our laws and values.[238]

Even though the Minto Tribal Court was working within the language and structure of Anglo-American standards of due process, the Alaska Superior Court found that the Minto Tribal Court needed to comply with its version of due process even if that conflicted with the tribe's traditions.[239] It seemed to foreclose the possibility that a fair process may look different in Alaska Native villages or that Alaska Native villages could have their own ways of ensuring a fair process.[240] The case highlights potential problems of cultural mismatch.[241] If Alaska Native

236. Bessie Stearman's Brief at 22, Simmonds v. Parks, 329 P.3d 995 (Alaska 2014) (No. S-14103), 2013 WL 5757971; for a similar definition, see Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970) ("[A] recipient [must] have timely and adequate notice . . . and an effective opportunity to defend . . . .").

237. Bessie Stearman's Brief, *supra* note 236, at 23–24.

238. *Simmonds*, 329 P.3d at 1003.

239. *See id.* at 998, 1004–05.

240. *See id.* at 1004–05 (describing the Alaska Superior Court's interpretation of due process).

241. Due process is a particularly interesting site for cultural mismatch. As a long-term Navajo Nation attorney, Paul Spruhan explains, "the term due process itself has no self-evident meaning. Whether a person has an interest that requires the protection of due process, and what process is due for that interest, depends upon the norms and values of the particular jurisdiction." Spruhan, *supra* note 62, at 119; *see also* Pommersheim, *supra* note 62, at 110 (describing due process as "likely the most flexible of the guarantees in the Indian Civil Rights Act."). Yet, federal and state courts and legislators often raise concerns about tribal governments and courts ability to treat people fairly. In *Simmonds*, the concern had to do with whether the father had a right to representation by an attorney in a civil case in the Minto Tribal Court. Yet, no federal court has upheld the right to representation by an attorney in a civil case as an essential element of due process. *See* Lassiter v. Dep't. of Soc. Servs. of Durham Cnty., N.C., 452 U.S. 18, 26 (1981) (holding there is no right to appointed counsel in a civil case that does not threaten

courts have to comply with Anglo-American standards of due process as defined by state or federal courts, then they may not be able to build effective justice systems, consistent with community values and needs.

The Alaska Supreme Court's invocation of an exhaustion doctrine provides only limited recognition of the Minto Tribal Court's authority to define due process based on its own traditions. Like the Supreme Court's adoption of the tribal exhaustion doctrine in *National Farmers Union Ins. Cos. v. Crow Tribe*, it leaves open the door for state court review of the tribal court's jurisdiction later.[242] The decision allows Alaska Superior courts to continue to contest Alaska Native court jurisdiction and to subject them to Alaska Superior courts' interpretations and standards of justice rather than accept the validity of Native traditions.[243] It leaves Alaska Native villages in a paradox. If they want to exercise jurisdiction and have their orders enforced in Alaska, they have to conform to the Alaska court's standards rather than implement the ones they identify as best suited to serving their community. The *Simmonds* case exemplifies how allowing federal and state court oversight over jurisdiction in tribal courts may undermine the ability of tribal courts to provide justice on their own terms in their communities.

Proposals for more courts and greater jurisdiction need to take potential problems of cultural mismatch seriously. Recent studies suggest that adopting adversarial style courts may not serve all Alaska Native villages well. For example, a case study on ICWA and Inupiat customs documented unfamiliarity among Alaska Natives with the American court system.[244] The study identified language barriers and

a person's liberty); *Goldberg*, 397 U.S. 254 (1970) (omitting representation by an attorney as a fundamental element of due process). The Alaska Superior Court's decision suggested that Alaska Native courts be held to higher standards of due process than other courts in the United States. Congress took a similar position in VAWA 2013 and VAWA 2022 when it established greater procedural protections for non-Native criminal defendants in tribal court than it mandates for criminal defendants in state courts. *See* van Schilfgaarde, *supra* note 211, at 126 (noting that the ICRA "imposes more limitations on Tribal courts than on state courts under the Court's Fourteenth Amendment jurisprudence.").

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

243. A better approach would have been to limit state court oversight of tribal court jurisdiction and to encourage broader understandings of due process. As Wan explained, "in deciding whether a party was denied *due process*, superior courts should strive to respect the cultural differences that influence tribal jurisprudence, as well as to recognize the practical limits experienced by smaller court systems." Wan, *supra* note 160, at 68.

244. *See id.* at 70 (providing an in-depth description of Inupiat traditional law

adversarialism as particularly problematic.[245] Another study described Western legal concepts and criminal justice practices as "incompatible with and ineffective at confronting village crime" and as depriving the villages of the ability to respond to justice issues.[246] Similarly, an investigation into high rates of confessions and guilty pleas among Yup'ik individuals revealed "significant differences between prevailing legal and Yup'ik sociolinguistic norms" and cautioned that these differences lead to unequal justice when Yup'iks find themselves subject to Anglo-American legal conventions.[247] It found that Yup'iks often confessed in court to ensure smooth social relations and to reintegrate both parties into the normal functioning of Yup'ik society—which makes sense in a world dependent on reciprocity, but not one governed by Anglo-American legal norms.[248] These studies suggest that the processes that make sense for Alaska Natives may not match the adversarial process used by Anglo-American courts.

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245. *See id.* ("Traditionally, disputes in Iñupiat society were resolved informally where possible and adversarial confrontations occurred only in the most extreme circumstances. Moreover, coercive control was largely absent, and thus, the concept of a court that can enter orders regarding interpersonal relationships and obligations is foreign, even if familiar.").

246. Parry, *supra* note 26, at 91.

247. Phyllis Morrow, *A Sociolinguistic Mismatch: Central Alaska Yup'iks and the Legal System*, 10 ALASKA JUST. F., 1, 1 (1993), https://scholarworks.alaska.edu/handle/11122/3277. The difference in sociolinguistic norms reflected cultural differences and expectations about speaking and the management of interpersonal relations. Yup'ik perceptions of courts and social interactions do not match Anglo-American ones. *See id.* (explaining that in Yup'ik the court is called "a place . . . to talk" rather than "a place where one brings problems for resolution" or "a place where justice is administered to wrongdoers."). The researcher explained, "Instead of asking others to tell about themselves or to do things, social relationships among Yup'iks are largely managed by anticipating each others' interests, offering indirect indications of one's needs and/or intentions, and allowing others a range of interpretations of meaning in any situation." *Id.* at 5. The researcher added, "[I]n contrast with western interactional norms, the primary flow of information in Yup'ik society is not through direct questions and answers. Requests and questions are generally avoided because they put others in a position where they are expected to comply (even if this might be difficult or impossible due to unforeseen conditions)." *Id.* Morrow's research confirms concerns raised by Alaska Native leaders about language barriers at a conference on tribal justice systems in 2008. *See* NAT'L JUD. COLL., *supra* note 143, at 30 ("For many people, their Native language is their first language, not English. The Native language may be spoken in the tribal courts, but Native people appearing in state court do not always receive interpreters.").

248. Morrow, *supra* note 247, at 6–7 (observing that the legal system "unwittingly undercuts basic Yup'ik cultural assumptions about human relations to the degree that it rewards 'lying' and direct, unqualified statements about the motivations of others.").

Other studies suggest that justice initiatives in Alaska Native villages flounder when cultural mismatch exists. Professor Conn describes a history of village level experiments failing in Alaska, including conciliation boards in Emmonak, because the state measured the project "against the wrong standards—its own, and not those of the traditional process."[249] More recently, Jarrot and Hyslop found that the Kake Circle Peacemaking thrived while the Upper Tanana Wellness Program did not because the Upper Tanana Program did not make local cultural connections or include local traditional practices.[250] They found that "[i]t is evident from the stark difference in effectiveness between the two programs that sustainable solutions in Alaska Native communities will likely only come from the communities themselves rather than from outsiders."[251] Jarrett and Hyslop's findings confirmed the importance of cultural match to the development of Alaska Native justice systems. They recommended that "[e]very community or village [] have the opportunity to define the type of restorative program it wishes to implement as this is the best way to empower local community participation and to ensure program effectiveness."[252] These studies indicate that proposals for more courts and more jurisdiction that overlook or understate the potential for cultural mismatch may be doomed to fail.

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If restoring local control is the answer to access to justice issues in rural Alaska, how can Alaska Native villages build effective justice systems without encountering problems of cultural mismatch? The evidence shows that some Alaska Native justice systems are trying to tackle the access to justice issues in their communities and others are ready and willing to do so. It also indicates that Alaska Native justice systems do not always rely on adversarial style courts or that they would be the best option to resolve the justice issues in their communities.[253]

This reality suggests that more Anglo-American, adversarial courts may not be the right answer; in fact, an increase in these courts could lead

249. CONN, *supra* note 116, at 7.

250. Jarrett & Hyslop, *supra* note 30, at 254.

251. *Id.* at 254–56 (praising the community-based nature of the Native Village of Kake's Circle Peacemaking, as "emphasiz[ing] interests over power or rights, [and] modifying the standard legal process when appropriate," and indicating that the Upper Tanana Wellness Program may have been more successful if it had "consulted with local Elders about traditional Athabascan (Dineh) practices").

252. *Id.* at 257.

253. *See, e.g.*, Colleen F. Shanahan et al., *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471 (2022) (noting the limits of state courts in addressing access to justice issues).

to problems of cultural mismatch. Similarly, if greater jurisdiction comes with a mandate for more adversarial style courts, it may undercut justice by requiring a culturally inappropriate solution for many communities. Often overlooked in proposals arguing for local control in rural Alaska Native villages, cultural mismatch remains a potential barrier to addressing access to justice problems. Empirical studies have demonstrated that local control improves the effectiveness of justice initiatives in Alaska Native villages.[254] They also suggest that cultural mismatch undermines justice initiatives.[255] The evidence indicates that proposals for more courts and extended jurisdiction should not simply assume that adopting Anglo-American adversarial style courts will resolve the access to justice crisis in rural Alaska. Rather, it suggests that the potential for cultural mismatch should be carefully considered to prevent a different kind of justice gap, one in which community perceptions of justice do not align with the justice provided.[256]

254. Jarrett & Hyslop, *supra* note 30, at 254–57.

255. *Id*.

256. Solutions to potential cultural mismatch problems are beyond the scope of this article. Its purpose is to raise awareness of the cultural match issues and advocate for their acknowledgment as a barrier to access to justice in proposals for more courts and more jurisdiction. Other scholars have documented how tribal governments in the continental United States have adapted and integrated their traditions into Anglo-American adversarial systems. Pommersheim, *supra* note 62, at 105–14. For example, the Navajo Nation has shifted its judiciary over time from a CFR court to an independent judiciary that frequently incorporates its own customs and traditions. For a discussion of how the Navajo Nation has done this, see Spruhan, *supra* note 62, at 119–28. To some extent, the Minto Tribal Court argued for this approach in *Simmonds* when it defined due process in Anglo-American terms and then tried to demonstrate how it complied with it. *See* Petitioners' Reply Brief at 14, Simmonds v. Parks, 329 P.3d 995 (Alaska 2014) (No. S-14103) ("in deciding whether tribal court proceedings complied with due process, courts should consider whether the parties received notice of the proceedings and whether they were granted a full and fair opportunity to be heard. That is the beginning and end of the inquiry.").

The Indian Law and Order Commission recommended that state and federal governments adjust and recognize culturally distinct ways of defining and implementing justice. INDIAN L. & ORD. COMM'N., *supra* note 12, at 49–56. They picked up on the idea of cultural accommodation originally adopted by the Supreme Court in *Santa Clara Pueblo*, when it held that ICRA only allowed a federal cause of action to challenge detention through habeas corpus relief. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 70 (1978) ("[T]he ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303."). This interpretation of ICRA provides tribal courts with some leeway to incorporate tribal traditions and values into their ICRA jurisprudence. It suggests that federal courts should respect tribal courts as the primary interpreters of the ICRA. The Supreme Court backtracked on this shift towards cultural accommodation when it created a cause of action for federal courts to review tribal court jurisdiction. *See, e.g.*, Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853, 857 (1985). The ability of federal courts to determine tribal court jurisdiction constrains tribal courts and their ability to

V. CONCLUSION

At the heart of the access to justice crisis in rural Alaska is a simple question: Who gets to decide what justice means and how it is accessed? In any community, the question of justice is messy and complicated. Many agree that justice is a normative concept, its meaning dependent on the people talking about it.[257] In many places in the United States, justice is "legal," meaning that justice is defined legally by Anglo-American standards and traditions.

But Anglo-American law has a unique relationship with rural Alaska Native villages. The United States and the state of Alaska continue to impose it. They define issues as legal, thus creating justiciable problems. But many Alaska Native villages lack legal enforcement mechanisms provided by the state. Alaska has defined social problems (for example, alcoholism and substance abuse) as legal issues, yet the state itself does not necessarily represent Alaska Native communities, nor does it provide them with access to justice. State law evolved in response to the needs of communities other than Alaska Natives.

Many scholars and advocates have argued that restoring local authority will improve access to justice in rural Alaska villages. This often means developing more courts and restoring jurisdiction to those courts. Strengthening tribal justice systems through restoring jurisdiction can help address access to justice issues in Alaska Native villages. These efforts must take into consideration problems of cultural mismatch, which arise when federal and state laws require Alaska Native villages to replace their traditions and law ways with adversarial processes and values. Restoring jurisdiction will only work if Alaska Natives can define justice for themselves.

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implement the justice practices best suited to their communities. *See* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 COLO. L. REV. 973, 976 (2010) (critiquing the exhaustion doctrine). The Indian Law and Order Commission's recommendations suggest the need for (even though they do not expressly call for) reconsideration of the federal approach. *See* INDIAN L. & ORD. COMM'N, *supra* note 12, at 51–56.

Adaptation and accommodation of cultural difference seems especially appropriate in a place like rural Alaska. *See* Wildridge, *supra* note 192, at 2 ("Insuring access to justice requires different approaches, depending on the circumstances. The need for adaptation is especially apparent in rural Alaska, with its very serious social problems, their proportionately greater impact on small isolated communities, and the nearly complete unavailability of resources to combat them."). Adaptation by all governments could prevent cultural mismatch and ensure that restoring local control to Alaska Native communities enables them to find viable solutions to the access to justice crises.

257. Sandefur, *supra* note 2, at 340; Page & Farrell, *supra* note 23, at 853.