The Recognition Dimensions of Environmental Justice in Indian Country

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ABSTRACT

Environmental justice theories that incorporate recognition justice will be best suited to evaluating the fairness of government-to-government relations, tribal institutions, and the provision of funds. I will make the case for a recognition-based conception of environmental justice. Though recognition is important to environmental justice in Indian country, there are three principle challenges that it faces: the sheer particularity of the situations of different tribes, disagreements over what counts as traditional, and decisions by tribal governments that do not accord with many of the values of the environmental and environmental justice movements.

TRIBAL GOVERNMENTS HAVE ENORMOUS—historic—responsibilities to ensure members can safely practice their relationships with the environment (Creation). Environmental bads like pollution and the destruction of sacred sites impede tribal members’ lifeways. Tribal governments will be more capable of preventing environmental injustices the more they contest federal policies and programs that impinge on their sovereignty. If we assume the acceptance of this last claim, then one part of environmental justice in Indian country hinges on the structure of government-to-government relations (statutory language, regulatory rules, etc.), the strength of tribal institutions, and the adequate provision of funds for tribal programs through business revenues and grants. But what standards should be used to evaluate whether such political arrangements, institutional structures, and program guidelines promote environmental justice?

Different views exist on the moral basis of standards of environmental justice in Indian country. Consider, very briefly, the 1987 amendments to the Clean Water Act, under which tribal governments may apply to the Environmental Protection Agency (EPA) for Treatment as State (TAS) status. Tribes with TAS status may set water quality standards that are enforceable by EPA and more stringent than those of neighboring states. Here, TAS status implies a type of government-to-government relation and a structure of tribal institutions to which EPA will delegate some authority. Do the 1987 amendments promote or discourage environmental justice in Indian country? Some might judge TAS status according to the standard that any program that distributes more powers to tribes is fair. Tribes with TAS status can control a greater amount of the environmental decisions that affect their members than they could previously. Despite the appeal of this argument, others might disagree with it because of the kind of power being delegated. With TAS status, disputes between tribes and states would be settled by EPA; in other words, the program subordinates tribes to EPA. The program recognizes tribal sovereignty as long as it remains subject to EPA, leaving tribes open to EPA’s judgments about tribal values, history, and knowledge.

1Dean Suagee, “Turtle’s War Party: An Indian Allegory on Environmental Justice,” Journal of Environmental Law and Litigation 9 (1994); James M. Grijalva, Closing the Circle: Environmental Justice in Indian Country (Durham, NC: Carolina Academic Press, 2008). U.S. citizens and tribal members also have a responsibility to press U.S. elected officials to change federal policies toward tribes. In cases where tribal governments are unresponsive to injustices suffered by its members, activism is needed to give voice to tribal members’ situations.

which tribal sovereignty is defined and represented in relation to non-tribal institutions may leave tribes open to injustice. Each view assumes certain standards of justice. The first view evaluates TAS status according to whether the program increases the amount of authority delegated to tribes. The second view evaluates the program according to whether the meaning of sovereignty is acceptable.

In this essay, I will argue that deliberations about how to evaluate government-to-government relations, tribal institutions, and the provision of funds should ultimately be guided by the standard of recognition justice. Recognition justice requires that policies and programs must meet the standard of fairly considering and representing the cultures, values, and situations of all affected parties. Such a standard is not used enough in current environmental policy discussions nor does it gain sufficient coverage in natural resources and agricultural curricula at undergraduate, graduate, and professional levels. I will unpack the concept of recognition justice by comparing it to other conceptions of justice. I aim to describe the concept in ways suggestive of how it could be employed better in policy and educational contexts.

To begin with, distributive standards of environmental justice concern whether environmental risks, like a community’s proximity to a commercial hazardous waste facility, and bads, like exposure to dirty air, are allocated fairly. They also concern whether opportunities to take advantage of environmental goods, like access to green technologies and green spaces, are open to all fairly. Distributive justice can also concern how powers are allocated across members and groups in a society, such as voting and authority. Greater distributive justice calls for the reduction of risks and bads when some communities bear them disproportionately.3 Distributive injustice is an issue in Indian country. An example is a study in the 1990s showing that 1,100 open dumps existed on Indian reservations.4 In terms of the distribution of powers, by 2008, 38 tribes have TAS status under the Clean Water Act, which means there are nearly 300 reservations without water quality standards.5

Different from distributive justice, standards of procedural justice have to do with the fairness of who gets to participate, and to what extent, in the decision-making processes used to allocate risks and goods. Free informed consent,6 meaningful public participation activities, and community based participatory research (CBPR) exemplify standards of procedural justice in many contexts. Often times tribes are not consulted by decision makers even when impacts are known to affect areas relevant to tribes. The harms caused by such ignorance have recently been acknowledged officially by Executive Order 13715 (Consultation and Coordination with Tribal Governments) and a Presidential Memorandum on “Tribal Consultation” (November 5, 2009). Yet cases remain where tribal officials and members are not adequately consulted.

Standards of corrective justice determine whether penalties, deterrents, and restorative measures for actions that impact the environment are fair with respect to communities who suffer or are more likely to suffer environmental injustices.7 This is an important issue for Indian tribes. A set of cases in the nineteenth and early twentieth centuries involved non-Indian people outside of reservations who used upstream water sources in ways that depleted the amount of water that Indians could use. The Winters Doctrine of 1908 restored water rights to tribes because the express purpose for a reservation was to promote Indian agricultural development.8 This purpose, of course, was forced on tribes and does not represent all their water needs, which raises concern over the degree to which the Winters Doctrine realizes corrective justice.

Distributive, procedural, and corrective standards of justice, however, cannot be integrated into laws, programs, policies, and institutions without respect for tribal values and genuine acknowledgement of tribes’ particular situations. Situational particularity refers to the differences in tribes’ cultures, experiences with colonization, governing capacities, and political statuses; it also refers to the fact that tribal environmental struggles are neither reducible to class conflicts nor to frustrated economic aspirations that are consistent with the economic values of the dominant society; rather, these struggles reflect historical, cultural, social, and political issues that are experienced locally.9 These standards must also account for the sui generis nature of tribes; that is, tribal sovereignty and lifeways pre-exist the presence of the U.S. and other dominant societies.

The following examples express the importance of tribal values and the genuine acknowledgement of tribes’ particular situations for justice. Part of the reason why 1,100 open dumps existed in Indian country was that the Resource Conservation and Recovery Act (RCRA) labeled tribes as municipalities, not sovereign governments, which left open a jurisdictional gap over the regulation of municipal solid waste on reservations. RCRA did not respect the value of tribal sovereignty nor the historically specific reasons why tribes have that status. Policies that reflect standards of procedural justice.


RECOGNITION-BASED ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY

procedural justice like Executive Order 13715 will only be actionable fairly if they are sensitive to tribal cultures and capacities to participate in negotiations, participatory activities, and assessments (e.g., environmental impact assessments). The Winters Doctrine excludes tribal values for land development and ignores the possibility that the agricultural origins of the reservations may be insulting to many tribes who have different visions of food systems. It is also invoked primarily in the West and applies only to federally recognized tribes. Though it has been used on behalf of tribes historically, tribal water rights may be better served by a different policy framework.

Further illustrations of the importance of considering tribal values and tribes’ particular situations abound. Consider the example of pollution that affects the fish consumed by tribal members. In the spirit of distributive justice, the degree of contamination gets measured and an advisory is sent out not to eat fish. To tribal members, the advisors may also indicate that they can no longer eat their traditional diets, which can lead to other health and cultural harms. In such cases, distributive justice is only possible if due consideration is given to tribal values on food and to the uniqueness of the food system.

In another example, the Navajo Nation has struggled with uranium mining during part of the twentieth century. Tribal members who worked in the mines and who lived near them have been physically harmed from the contamination. Uranium, however, does not exist in the Navajo language. Policy and programming efforts to remedy the harms will only be acceptable if such cultural unfamiliarity is acknowledged. Finally, there are also cases where a policy or program has given due consideration to tribes, but insufficient funds are allocated for it in terms of what tribes would actually need. The work of Dean Suagee has pointed out various cases where a policy or program has given due consideration to tribes, but insufficient funds are allocated for it. The work of Dean Suagee has pointed out various cases where a policy or program has given due consideration to tribes, but insufficient funds are allocated for it. The work of Dean Suagee has pointed out various cases where a policy or program has given due consideration to tribes, but insufficient funds are allocated for it. The work of Dean Suagee has pointed out various cases where a policy or program has given due consideration to tribes, but insufficient funds are allocated for it. The work of Dean Suagee has pointed out various cases where a policy or program has given due consideration to tribes, but insufficient funds are allocated for it.

In terms of the examples just touched on, tribal values and situational particularity should be part of the standards used to design, implement, and evaluate policies, institutions, and programs seeking to achieve distributive, procedural, and corrective justice. This is where recognition justice comes in. Recognition justice requires that policies and programs must meet the standard of fairly considering and representing the cultures, values, and situations of all affected parties. For example, a policy satisfies recognition justice to a small degree or not at all when it is designed in such a way as to fail to reflect any influence from the values of the tribes who will be affected; or, a program may be insensitive to recognition justice when it can be implemented by other entities such as states but not tribes because tribal governmental status is not acknowledged or the obstacles that impede the development of tribes’ governing capacities are not respected in terms of their historical origins. Recognition justice must acknowledge that there are also situations where the constraints on tribal governments render them ineffective representatives of the interests of their constituencies. In this sense, recognition justice does not advocate for what Winona LaDuke calls “cheapened” conceptions of sovereignty that ignore tribal governments’ responsibilities toward their citizens.

The recognition dimensions of environmental justice (EJ) continue to be explored by EJ scholars in relation to Indigenous and non-Indigenous peoples, including Hunold and Young (1998), Penna (2005), Cole and Foster (2001), Figueroa (2001, 2006), Turner (2006), McGregor (2009), Schlosberg (2009), and Whyte (2010). Of these scholars, I will explore the ideas of Robert Melchior Figueroa and Deborah McGregor in relation to environmental justice in Indian country.


13Ezra Rosser’s work on tribal governments and environmental organizations captures well some of the importance of looking at tribes’ particular situations and the contours and historical origins of particular tribe’s governing capacities in order to assess the justice of various solutions to environmental problems in Indian country, from supporting federal primacy to Indian nation state status. See “Ahistorical Indians and Reservation Resources,” Environmental Law 40 (2010).

Following Nancy Fraser, Figueroa sees justice as requiring the achievement of recognition. That is, presuming communities threatened by environmental injustices are owed fair proportions of environmental goods and bads, the recognition dimension includes the idea that standards of proportionality can only be determined if the community members have been able to represent their views consistently with their values and local and historical situations in the places where they live, work and play. Recognition is realized or neglected in participatory processes where affected parties come together, which may range from traditional public participation activities like public hearings and comment periods to more creative forms of engagement such as reconciliation through citizen science and eco-tourism. That is to say, it is within participatory processes that recognition justice is affirmed or denied to various parties.

Efforts to improve recognition justice should focus on how best to structure new participatory processes and reform the structures of traditional processes. In the context of Indian country, Figueroa would evaluate policies, institutions, and programs according to the standard of whether they impose the environmental heritages of dominant groups onto tribal environmental heritages in ways that are harmful to Native communities. Figueroa defines environmental heritage in relation to environmental identity, where the latter refers to “the amalgamation of cultural identities, ways of life, and self-perceptions that are connected to a given group’s physical environment”; it encompasses values, practices, and places. Tribal traditional diets are examples of environmental identity because they embody a community’s ecological, religious and nutritional beliefs, the practices humans engage in within the food systems, and the ultimate significance felt by tribal members of belonging to a place from which they derive sustenance.

Environmental heritage refers to the meanings and symbols of the past that frame values, practices, and places peoples wish to preserve as members of a community. “Environmental heritage,” Figueroa describes, “is the expression of an environmental identity in relation to the community viewed over time.” Environmental heritage plays a large role in how tribal members understand environmental justice because they frame current challenges with their memories of hundreds of years of struggles against private citizens, U.S. federal, state and local governments, and foreign powers.

Figueroa and Gordon Waitt describe how standards of justice relate to heritage in the case of jointly managed tourism at Uluru (the monolithic rock) in Australia’s Uluru-Kata Tjuta National Park. The rock is more than a significant attraction to the tourists, having historical and contemporary cultural significance to the Anangu people, the legally recognized traditional owners. One of the issues covered in their research concerns how non-Aboriginal Australians and foreign tourists respect the wishes and the law of the Anangu to avoid climbing the rock.

Yet, the most prominent car park locates the visitor at the foot of the climb. The path, created with chain linked rail-supports in 1958 by the park’s first chief ranger, Bill Harney, remains open and highly trafficked. Indeed, any visitor passing the foot of the climb is confronted with a moral contradiction. In the foreground stands an unmistakable billboard, conveying in many languages the Tjurkurpa law against climbing; in the background stretches the evidence of colonial habits sketched across the spine of Uluru in the form of a singular scar, a moral pathway for future climbers to endeavor. The park must also commit resources to rescue climbers in danger, and ward off would-be climbers during inclement weather conditions of extreme heat and/or high winds.

Many tourists continue to climb despite the Anangu’s prohibition against doing so. The Anangu do not pursue any policing style of enforcement to prohibit climbing because it is not seen as culturally appropriate. First, the Anangu see acts of respect as genuine and reconciliatory only if tourists do so out of their own accord. Second, the Anangu see potential enforcement of the prohibition as a replication of colonial tactics they have long suffered, and the strongest rhetoric of the Park’s Management Plan is that Tjurkurpa (Anangu law) directs the intentions of park policies and management. Allowing the Australian government to enforce an Anangu law would be problematic because it potentially perpetuates the harsh legacy of paternalistic colonial tactics.

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17Figueroa, Ibid., 371–72.
Figueroa and Waitt claim that the fact that many tourists ignore the prohibition is “detrimental to promoting reconciliation underpinned by a relational vision of environmental justice.” They argue that the failure of tourists and non-Aboriginal tourism operators and officials to hold themselves accountable to the Aboriginal version of the landscape is harmful because it makes it harder for Aboriginal and non-Aboriginal citizens of Australia to reconcile the environmental injustices of the past and present. The way in which colonial expectations of the landscape are privileged in the Park serves to limit the possibilities for pursuing a more peaceful coexistence between Aboriginal and dominant societies in Australia.

One way of understanding Figueroa and Waitt’s point is that the tourists, as members of the dominant society, privilege their environmental heritage of the rock over against the environmental heritage of the host Aboriginal communities. For instance, they also challenge management realists who justify the designated climb as a way of restricting a free-for-all of climbers on the rock. Environmental heritage is particularly important to communities because it is part of education, family and interpersonal relationships, religion, subsistence and economics, and making plans for the future.

Environmental heritage also includes the experiences of having to adapt to conditions of domination. In the case of members of the dominant society, it includes the way of framing landscapes and Indigenous peoples through a colonial framework. For example, forests in the environmental heritage of some Indian tribes may be understood as places that need to be actively maintained for growing food, hunting, and engaging in cultural traditions. For a member of the society that colonized the region, the same forested area may be a wild, untamed place where people go to get away from their culture and society. Each of these heritages is deeply felt and important. Yet, in this example, the chances for establishing collaboration on environmental issues are diminished if the members of the dominant society cannot learn to see the forest as a place of environmental heritage for the tribes.

It is likely, though, that the tribal members are well aware of the other’s environmental heritage since they have to put up with backpackers, sightseers, construction and logging workers, and park rangers. The concept of environmental heritage resonates with some of the examples of why environmental justice occurs in Indian country. Some fish advisories reflect the environmental heritage of the dominant society. The same can be said about uranium mining and inadequate program funding.

One area where the environmental heritage of the dominant society imposes itself on tribes is in the very definition of environmental justice. There is often an assumption that tribal concerns and issues need to be pulled into environmental justice discourse. McGregor strongly resists this idea, and writes that

Environmental justice is most certainly about power relationships among people and between people and various institutions of colonization...But environmental justice from an Aboriginal perspective is more than all of these. It is about justice for all beings of Creation, not only because threats to their existence threaten ours but because from an Aboriginal perspective justice among beings of creation is life-affirming...Environmental justice is frequently presented as a relatively new concept, both in North American and internationally. Aboriginal people, however, hold ancient and highly developed ideas of justice that have significant applicability in this area.

Tribal cultures can have their own conceptions of environmental justice that pre-exist non-tribal discussions. Recognition justice, then, does not concern the incorporation of tribal values and particular situations into environmental justice; rather, there are diverse, sui generis traditions of justice in Indian country. Justice is part of the environmental heritage of many Native peoples. These traditions of justice may differ greatly from those codified in U.S. federal and state environmental policy, especially as non-human beings and ecosystems are concerned.

McGregor’s work helps to clarify the idea of recognition justice that tribal values and situational particularity should be part of the standards used to design, implement, and evaluate policies in Indian country. Recognition justice does not privilege non-tribal discourses of environmental justice and seek to find ways to fit tribes in. Rather, recognition justice gives priority to the host of radically different ideas of justice that arise from different cultures and memories. That environmental justice starts in the 1970s, or even the idea that Native people’s struggles started before that, still suggests the primacy of one particular timeline. Tribal communities have their own traditional ways of interpreting fairness in relation to actions and practices that impact the environment. These interpretations have been shaped by forms of life and histories that are distinct from other communities for whom environmental justice also has meaning.

A recognition-based standard of environmental justice requires that policies stemming from tribal or federal governments will be harmful when they subvert environmental heritage. Thinking of these issues in terms of environmental heritage does not suggest that any heritage should overtake the other. Rather, the heritages should be blended to the benefit of all affected parties. This can serve as an important guide for planning tribal institutions, government-to-government relations, and participatory processes that will reduce disproportionate burdens, increase environmental goods, and enhance the quality of tribal participation in environmental decision-making.

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22"Cracks in the Mirror," 346.
23Ibid.
24For a recently published example of disagreements over heritages in North America, see Anne Ross et al., Indigenous Peoples and the Collaborative Stewardship of Nature: Knowledge Binds and Institutional Conflicts (Walnut Creek, CA: Left Coast Press, 2010).
Currently a recognition-based standard of environmental justice that considers Figueroa’s, Figueroa and Waitt’s, and McGregor’s ideas is not discussed actively enough in policy or educational venues. In some cases people may see themselves to be giving due consideration to recognition justice. However, I think it is important that we remain very critical. Consider, for example, David Schlosberg’s recent book, Defining Environmental Justice (2007). While he is careful to consider the many communities who have articulated environmental justice concerns, he nonetheless writes that “their concern is most often (though not exclusively) for people and communities facing environmental risks, rather than on doing justice to an external, nonhuman nature.”26 Schlosberg then goes on to discuss justice to nonhuman nature by relying entirely on academic theories. But as McGregor argues, doing justice to all of Creation is rooted in tribal traditions and there is no sense in which non-Native, especially academic, discussions should be privileged over the contributions of members of tribal communities. Simply acknowledging that local movements’ concerns are not “exclusively” about humans and communities is not a strong enough commitment to a recognition standard of environmental justice.

The concepts of recognition and heritage are critical for environmental justice in Indian country; however, three important challenges remain for those who use and teach them. First, recognition justice fairly considers and represents the unique situations of tribes; however, the degree of uniqueness is quite high, especially with respect to environmental heritages. There are 565 federally recognized tribes. Though some are culturally similar, they can be politically distinct and face different environmental circumstances owing to history (e.g., Forest Country Potawatomi in Wisconsin, Prairie Band Potawatomi of Kansas, Citizen Potawatomi Nation in Oklahoma). There are also further distinctions within the 565 federally recognized tribes. Alaska Natives, for example, are subject to the Alaska Native Claims Settlement Act (1971), whereas many tribes in the lower 48 states base their governments of the Indian Reorganization Act (1934) or state acts like the Oklahoma Indian Welfare Act (1936).

Second, there are often disagreements between non-Indians and tribal members and within tribal constituencies on what practices count as expressions of tribal values. This occurs frequently in the case of traditions. For example, non-Natives may embrace policies and programs that integrate tribal traditions, yet disagree with how tribes express their traditions. Controversies have broken out over fishing and whaling,27 where non-Natives did not think that tribal members should be able to take advantage of technologies like rifles and outboard motors. In other cases, tribes act in ways that are considered to be entirely non-traditional, such as when tribes site landfills on their reservations.28 Though there may be intentions to respect tribal values in policies and programs, in specific cases there may be quite a bit of disagreement and insensitivity about how tribes should express their values within policies and programs. Advocates of recognition and environmental heritage should be prepared for these challenges and the implicit biases against tribes that are often factored into them.

Third, there will be cases when tribal governments enact policies that favor or develop enterprises and technologies in ways that clash with the views of environmental and environmental justice movements. The development of coal energy on reservations is one example. These governments may be at odds with many tribal members as well as other stakeholders such as state politicians and local non-Indian communities. Recognition justice must include theories of tribal accountability appropriate to tribal governments, which include public participation, checks and balances, and as well as other governance mechanisms. It is key that a theory of tribal accountability is not articulated at the expense of erasing the colonial circumstances and history that tribes face. In this spirit, Ezra Rosser’s work maps out many of the difficulties of creating mechanisms of accountability in Indian country, and discusses the different theoretical arguments supporting different possibilities, which include federal administrative primacy, Indian trust doctrine, cooperative regulation, tribal determination and international sovereignty, and international human rights law.29 Like Rosser, further work on recognition justice and heritage in Indian country must engage the debates over which mechanisms best promote environmental justice.

These challenges suggest a critique of recognition justice that has been leveled in the literature outside of EJ.30 Though we can often clearly identify when tribal values and particular situations are not given due consideration, that does not mean that there are stable and straightforward expressions of tribal values, heritages, and understandings of situations that can be extended across all tribes in every EJ relevant case. Tribes are constantly changing, adapting, revising, and transforming themselves to respond to external challenges. Achieving recognition justice cannot rest on identifying “one size fits all” conceptions of values, practices, and places. Rather, recognition justice requires the development of creative participatory processes that will be employed in various cases and that aim as much as possible for the inclusion of

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26 Schlosberg, 130.
tribal values and tribes’ particular situations into policy and programs with implications for EJ.

But these participatory processes cannot be successful unless (especially) non-Native participants are open intellectually and emotionally to the three challenges that were just described. Though when some people are faced with working with those of different cultures and memories, the first impulse is to grasp, perhaps too hastily, for common threads, recognition justice demands people to be vigilant of the tenuousness of their understanding of people and communities at any given point in time. Improving people’s collaborative and deliberative abilities are as important as determining the structure of participatory processes. Tribal officials, environmental professionals, environmental and social scientists, and humanities scholars who seek to design and improve dialogue in Indian country and cultivate good deliberative and collaborative attitudes and skills are leading crucial efforts toward achieving environmental justice in Indian country.

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