Making Law Intelligible in Comparative Context

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“Legal” historians start from the premise that the messiness of the world can in some meaningful way be tamed by legal precepts and procedures. We do so knowing that law, like any other facet of social life, is ultimately embedded within larger structures of human experience and meaning. To isolate law as an object of inquiry, then, simplifies so that we may discern subtleties of “legality” that might be lost to a coarser analytical resolution. In any given social context, the messiness of the world, and law’s capacity to bring some order to it, is difficult enough to tease out. Legal actors—claimants, defendants, prosecutors, advocates, judges, witnesses, treatise writers, legislators—come to legal encounters with varying motives and disparate levels of knowledge and expertise. Unraveling the tangle of intent, ability, language, and meaning must always be something of a quixotic pursuit. The challenge of making sense of law is magnified dramatically when questions of messiness and order are confronted in intercultural settings, i.e., when distinct cultures, each bearing its own legal precepts, meanings, and procedures, interact. This has been the lesson of recent studies examining how Europeans and indigenous people faced each other through law in the context of the New World encounter from the sixteenth to the eighteenth centuries. Such work has begun to stretch the boundaries of legal history by questioning law’s capacity to “tame” the unordered circumstances of cultural difference.

To date, the scholarship has tended to limit itself to specific imperial legal understandings—English and Iberian—as each came into contact with distinct indigenous conceptions of law and justice. In this vein, historians begin by assuming a culturally and historically bound legal framework—the common law and treaties between sovereigns for Anglo-America and a neo-Thomist casuistry for Latin America—and conduct their research and analysis largely within the confines of
that set of assumptions.\textsuperscript{1} For all their insights, such works are missing a deeper interrogation of underlying premises regarding what law is and how it works in any given encounter. Thus, to what extent and how does it matter that indigenous people and settlers in Ibero-America were considered part of a single social order, while in British America they were virtually always considered distinct nations? What difference does it make that in British America sovereignty and treaty law structured legal encounters between settlers and Natives, while in Ibero-America a specific Law of the Indies took shape to mediate this relationship? Did one approach promote a greater or lesser degree of mutual comprehension between Natives and settlers than did the other? Or does asking the question this way foreclose lines of inquiry? The only way to get at this set of concerns is to open our analytical gaze to a wider, comparative landscape. Doing so leads us away from the secure footing of grounding-assumptions regarding legality onto the slippery topography of context and antiformalism as baselines for analysis, a move made more difficult when intercultural legal encounters are themselves the subject of comparison. \textit{Justice in a New World: Negotiating Legal Intelligibility in British, Iberian, and Indigenous America} takes this next step.

As the essays in this volume demonstrate, colonialism in the English and Iberian Atlantic brought settlers, soldiers, imperial officials, and indigenous peoples into contact with different conceptions of law and justice. At a grand level, perhaps especially in Spanish America, those seeking to legitimate or restrain conquest, dispossession, and forced labor in the Americas made claims about justice. On the ground in daily life—and here will be our focus—various groups of Europeans and Natives appealed to imperfect understandings of their interlocutors’ notions of justice and advanced their own conceptions during workaday negotiations, disputes, and assertions of right. This was no easy matter. Settlers’ and indigenous peoples’ legal presuppositions shaped and sometimes misdirected their resort to each other’s law. Each misconstrued the other’s legal commitments while learning about them; and each strained to use the other’s law as a political, strategic, and moral resource. In so doing, each changed its own practice of law and dialogue about justice. At the heart of this process is the problem of “legal intelligibility”: How and to what extent did settler law and its associated notions of justice become intelligible—tactically, technically, and morally—to Natives, and
vice versa? To address this question, the volume extends the existing scholarship, which juxtaposes settlers’ and Natives’ understanding in empire-specific circumstances, by adding another axis of comparison, that between English and Iberian New World empires. Understanding the conflict and transformation of notions of justice and law through a dual comparative study of legal intelligibility is the objective of this volume.

I. Contrasting British and Iberian Legal Spaces

One of the most profound insights to haunt historical thinking about the “New World” over the last seventy years is Mexican historian Edmundo O’Gorman’s contention that “America,” rather than being “discovered,” had to be “invented.” For historians, the distinction between the two terms is crucial. “Discovery,” argues O’Gorman, implies the unveiling of a thing—always already present and fully realized as such but previously unseen. “Invention” implies the creation of something new that reconfigures reality. The intellectual operation attending discovery is to catalogue that which is revealed and refine the preexisting picture of the world to accommodate it. Invention, by contrast, first ruptures and then remakes established understandings of how the world looks and works. For O’Gorman, invention produces historical entities rather than merely discovers them. More concretely, O’Gorman’s point is that “America” should not be understood as a “merely physical discovery,” just one more accretion to the map of the world. Rather, “America” was “an invention of Western thought,” a fundamental rethinking of the world as a whole and how people were to live in it.

The novelty of “America”—its ontological originality—is the historiographical (and phenomenological) starting point for this volume. For just as “America” had to be invented, so law and justice had to be re-invented in relation to the radical newness of the encounter between indigenous people and Europeans. What is often forgotten, or at least obscured, in discussing law and justice in the New World is how enormous a challenge indigenous people and settlers represented for each other when they met in the legal crucible—and how disorienting it can be for scholars to think about law through the prism of difference.

The comparative approach advocated in this volume is premised on the idea that we must pay close attention to difference in two registers.
One focuses on the relationship between indigenous peoples and the settlers who intruded upon them. We know from the existing scholarship that legal encounters across this intercultural divide were fraught affairs. As discussed in section 2 of this chapter, we seek to capture the nuances and import of these interactions through the idea of *intelligibility*. The other register of difference—the subject of this section—demands attention to the distinct European legal regimes in the New World, Iberian and British, and the way they adapted to novel circumstances. While these regimes diverged in a variety of ways, we contend that two contrasts stand in sharp relief for their relevance to the essays in this volume. The first of these has to do with how indigenous people figured in colonial social orders. In Ibero-America, indigenous people were incorporated relatively early on into colonial society as vassals of the king. As a result, they acquired legal personality commensurate to their status. In Anglo-America, indigenous people remained on the outside of colonial society, to be treated with at arm’s length as circumstances demanded. The second, related contrast involved the discourse of law. Whereas in Iberian realms, strong notions of substantive justice, backed by a duty of royal protection, remained the backbone of legal relations between settlers and indigenous people, in British realms sovereignty played the central role in structuring their legal encounters. In what follows, we unpack these two points.

As O’Gorman and others have noted, indigenous people had no obvious place in the European cosmological imagination of the early sixteenth century. Cartographically, theologically, and politically, their place had to be invented. Thus, during much of the sixteenth century, it was not even clear whether “Indios,” as they came to be called, would be treated as fully human—able to receive the faith, govern themselves in their daily lives, be free of enslavement, and live as vassals of the king. This issue became a matter of deep debate within the Spanish empire. Dominican friar Antonio de Montesinos called attention to the plight of the native Taínos of Hispaniola in 1511, and by 1517 Dominican Bartolomé de Las Casas had taken up the cause of indigenous people, accepting appointment as protector of the Indians. In 1539, Francisco de Vitoria concluded that the Spanish crown lacked a legal basis for outright conquest of the Indians. Natural law granted indigenous people true *dominium* over their lands and persons. As such, neither the pope
nor the king could dispossess them without their consent, a consent they had not granted. This conclusion did not entirely close the door on Spanish activity in the New World. Natural law, insisted Vitoria, held that Spaniards had a right of unhindered travel and commerce among the Indians, a right that might be enforced by war, though it could not warrant dispossessing the Natives.

By 1550 the issue of the status of the New World’s indigenous people had become so sharp that Charles V suspended conquest activities until the matter could be hashed out in the Valladolid debate between Las Casas and court theologian Juan Ginés de Sepúlveda. Though the debate was officially unresolved, the decades following Valladolid gradually cemented the idea that the Indians were entitled to the rights and protections befitting vassals of the Spanish monarchy.4 As Jesuit José de Acosta stated in 1588, “[T]he multitude of Indians and Spaniards form one and the same political community. . . . They all have the same king, are subject to the same laws, are judged by a sole judiciary.”5 From that time forward, the chief challenge of Spanish law in the New World was to balance the acknowledged need to exploit the Indios against the legal and moral imperative to protect them as the vassals they were.6

In Spanish America, inclusion of the Indians within the New World’s social order led to the creation of a body of law—theological and philosophical statements, royal decrees and ordinances, indigenous customary law and practice, learned treatises and compendia—that historians have referred to as derecho indiano, or the Law of the Indies. Though the term is a historiographical artifact and almost surely connotes a greater degree of cohesion than was ever the case, this legal corpus and the jurisprudence that developed from it grounded ideas of justice and governed concrete legal relations in the Spanish New World from the sixteenth century to the early nineteenth century.7

The situation in Brazil was more equivocal from the point of view of Indians’ legal status. In the mid-sixteenth century, when in Mexico caciques and nobles were learning to litigate, the Indians of Brazil faced a condition of “absolute juridical inferiority, which made it impractical for them to have recourse to magistrates to secure their freedom.”8 In practice, they could be denied their liberty in order to save their lives from other Natives who might kill or eat them. At this point, the early 1550s, the Valladolid debates had only just concluded, and natural Indian liberty
as a widely agreed upon principle was at least a couple of decades off in Spanish America. In a letter of 1558, Jesuit Manuel da Nóbrega noted that in Brazil it was widely held that the Indians did not have full rights before the law because, lacking a soul, they were not fully human. In 1562, Lisbon issued a ruling allowing indigenous people who violated a 1559 law against anthropophagy to be enslaved by just war. After that, as attitudes hardened against Natives, many Portuguese came to the view that perhaps the entire Native population needed to be partitioned along the lines of the Spanish encomienda (which awarded to the conquerors the labor of particular groups of Indians). But this did not lead to the creation of a system of equal vassalage and separation into a Republic of Indians and a Republic of Spaniards, as in Spanish America. Rather, it implied a “mixed” social model premised on a measure of social integration, but rooted in a fundamental inequality of legal condition. In alliance with the governor of Salvador, the Jesuits responded by pushing for the aldeamentos, a village system under their own administration. Though supported by the crown, even this arrangement could not fully insulate indigenous groups from colonists’ incessant demands for labor. In the mid-1560s, the Conscience Board in Salvador ruled that parents could sell their children into slavery when in extremis and Indians older than twenty could exchange their liberty for money. Opportunities for abuse were rife and means to restrain it lacking.

And yet, the underlying theory of Portuguese law did not diverge sharply from Spanish conceptions. Indeed, in the early seventeenth century, Philip III of Spain, holder of the Portuguese crown as a consequence of the Iberian union in 1580, tried to extend Spanish principles to Brazil. Indians were not to be enslaved, and their land rights were to be recognized. A royal order of 1609 established a High Court in Salvador. Under its authority, enslaved Indians were to be freed and treated as vassals of the crown. In addition, a judicial system reaching to the village level was to be created, a structure quite similar to the one implanted in the Spanish New World. Two years later, the reforms had failed, and for most of the colonial period, law in Brazil remained distinctly “convoluted” and “particularistic, localist and multiform,” both in terms of jurisdiction and in terms of process. In the eighteenth century, Portuguese-American law converged with Spanish-American law, at least on paper, when all Indians were declared vassals of the king (which
technically had been true except for those taken in a “just war”) and their enslavement prohibited. Despite this, though we need much more research, indigenous people in Brazil appear to have had a more limited access to legal process throughout the colonial period, as compared to Spanish realms. Even so, they did not deal with the Portuguese at arms’ length, as did indigenous people in the northern New World and in remoter areas of the Spanish empire.14

No development parallel to the Spanish New World characterized British America. As Richard Ross has put it, legal historians have not conceptualized the English experience in terms of a “derecho británico indiano.”15 Whereas Spanish thinking about the New World was driven chiefly by the fact of direct encounter with its inhabitants, English thought aimed above all to assert sovereign claims to an area already presumptively under Spanish sway by the latter decades of the sixteenth century. Both Richard Hakluyts (cousins, one a geographer, the other a lawyer) and astrologer, mathematician, and geographer John Dee, none of whom ever visited America, argued strenuously that Spain had no claim to New World dominions. This position was bolstered in 1580 by Alberico Gentili, an Italian professor of Roman law at Oxford, who argued that the Indians’ “abominable lewdness”—especially cannibalism, incest, and sodomy—justified war against them “as against brutes.”16 Vitoria had insisted that the Indians’ sins, abominable though they might be, did not negate their “true dominion” in their territories before the arrival of Spaniards. War could be pursued against them only if they violated the duties and obligations of sovereigns vis-à-vis each other and not otherwise.17

The strong legal presence of indigenous people in Spanish America and their relative legal absence in British America set quite distinct baselines regarding struggles between settlers and Indians over land. As Tamar Herzog has pointed out, the idea that Europeans might be entitled to occupy territory belonging to Native people had its roots in Thomas More’s Utopia, which proposed that overpopulated communities could legitimately enter upon the territory of others “when anye people holdeth a piece of grounde voyde and vacant to no good nor profitable vfe.”18 Gentili, as we have seen, held to the view that Indians lacked true sovereignty, a fact that essentially created a rebuttable presumption of legitimacy to any occupation of territory by English colonists acting
with license from the king. From this it was a short step to the view that Indian territory was unoccupied precisely because, for Gentili, it was not under any prior sovereign control. For all intents and purposes, indigenous territories not covered by buildings or cultivated fields were by law constructively empty, *terra nullius*, available to any sovereign, or his agents, who might occupy them and *settle* or *improve* them (though, in practice, English colonists obtained most Indian land through purchase or cession, implicitly recognizing Native possessory rights). By contrast, Vitoria had insisted that indigenous princes were sovereign unless shown to be otherwise. On this view, they were entitled to hold their territories against would-be occupiers pending proof that they had failed to meet the obligations of sovereignty or had violated natural law in ways that would forfeit their exclusivity, such as by denying commerce and communication.

Though much more could be said about this issue, the bottom line for our purposes may be stated as follows. In Spanish America, the sixteenth century resulted in the (always contested and often violated) inclusion of indigenous people in the social and legal order. In Portuguese America—though we have little to go on—indigenous people appear to have had an uncertain legal status and remained marginal legal actors through most of the colonial period. In British America, “legally, the indigenous would remain on the other side of a westward advancing frontier” rather than be incorporated into the colonial social order. These distinctions are crucial to thinking about how law and justice mediated the relationship between indigenous people and settlers in different regions of America.

A second important contrast bears on our understanding of distinct legal regimes in the New World. Starting in the sixteenth century, the very idea of law underwent a deep transformation in Europe. German legal historian Matthew Stolleis has argued that the terrain on which European law had long been legitimated—God, history, tradition—began to shift during the late medieval period. Rather than theologically rooted truth (*veritas*), law was now coming to be seen as an expression of a secularized notion of sovereign will (*voluntas*). Put another way, where once law had been valid because God had ordained it so, on this new understanding law was valid because the ruler had decreed it so. English and Spanish law reacted very differently to this broad transformation.
As Portuguese historian Antônio Hespanha notes, medieval European juridical culture was rooted in the idea of an order established by God prior to human will. Spain’s thirteenth-century legal code, *Las Siete Partidas*, held that God had appointed the king “over the people to maintain them in justice and in truth in temporal matters,” ensuring thereby “rights to every individual.” The law of men answered to natural law and thus constrained the monarch to act justly. In Iberia, this understanding had produced a juridical theory in which law was subordinated to other spheres of normativity—love, morality, religion. Kings were under a legal duty to conserve a set of interwoven moral precepts that governed the world. Theologians, jurists, and others conversant with these precepts could in principle check potential excesses, both by the monarch and by his subjects.

This broad conception came under considerable pressure beginning in the sixteenth century. As warfare and struggles over religious convictions fragmented Christianity, the religious and theological foundations of law weakened. At the same time, Machiavelli’s attention to “the true nature of things,” rather than to an idealized understanding of how things should be, began to decouple politics from morality and in the process undermine the very idea of substantive justice. By the mid-seventeenth century, many worried that justice might no longer be able to assure “peace, which is the principle social good,” as Aquinas had put it. Jesuit Antônio Vieira, in a sermon delivered from Brazil, framed the problem this way: “[W]hat leads government and also the consciences and souls of princes astray is the idea that they may do anything because they can do anything. . . . The king may only do what is just; for the unjust he has no power whatever.” Vieira’s concern is clear: if the king was no longer bound to act justly, then law was rooted in nothing more than the will of men, with all the perils that implied.

This trend toward the primacy of will was staunchly resisted by Iberian jurists. Neo-Scholastics, many of them Jesuits, wrote anti-Machiavellian tracts in the sixteenth century and insisted on the continued relevance of substantive justice in grounding any legitimate legal regime. These writers asserted that law was the chief instrument for “conserving” society and assuring its unity. As a political imperative, this *conservation* was predicated on the love that grounded the cosmos as ordained by God, a love that bound all things into an organic net of hierarchically related
sympathies. Justice as conservation, thus, assured each thing a place in the constituted order. God had made human beings to live together, and so each and every person had a place in forming what Aquinas had called the “perfect society.” The just political order was one that achieved peace through dynamic conservation. And because society could be disrupted by changing circumstances, the just ruler responded to change through law to bring about the common good. This was the broad matrix of ideas regarding law and justice that ultimately authorized the inclusion of indigenous people within colonial society.

The problem was that the New World’s novelty flew in the face of the imperative to conservation. Indeed, during the earliest decades after contact it was not clear what it meant for the king to conserve or act justly vis-à-vis indigenous people. For their part, settlers, in their encounters with Indians, evinced little concern for questions of justice or the king’s law. Only after midcentury, as indigenous populations began to drop precipitously, did conservation of the Indians as a whole become one of the crown’s central preoccupations. Partly this was a recognition of their unique vulnerability to abuse by settlers.

It was in this context that the doctrine of personas miserables (wretched people) came to be applied to the indigenous people from the late sixteenth century forward. Traditionally, miserables were orphans, widows, and all others lacking paternal protection from abuse by the powerful. The need to protect such people was obvious, for as Juan de Mariana put it in 1599, “The rich are corrupted by power [and] to a man seeking power every poor man is a very great opportunity.” In the New World, this doctrine of protection was extended to “Indios” as a legal category. By 1593, the king had ordered that the Indians “be more protected as people who are more miserable and of less defense” against the powerful. From this point forward, “Indios” enjoyed a special claim at law to the king’s pastoral and judicial attention. Yet even when they had been afforded special legal recognition, indigenous litigants were often exposed to those who Juan Solórzano y Pereira noted were “less affected to the love and service of our kings and their commands.”

In concrete terms, the doctrine of miserables recognized that Indios were entitled to speedier process, free legal counsel, interpreters, diminished responsibility for truth telling, choice of judges under certain circumstances, lesser punishments, and a right to the king’s jurisdiction
in the first instance. These privileges might be unevenly available—the Andean highlands and the South American lowlands were not the Central Valley of Mexico—or unevenly honored in the breach. But they were, broadly speaking, part of the legal structure for indigenous people who appealed to the king and his judges for justicia in the face of mistreatment. In this way, substantive justice remained a touchstone in Spanish America, perhaps more so for indigenous people than for Spanish colonists themselves—a critical part of the story about how law mediated their relationships.

In England, substantive justice had been less central to understandings of law. Jurists primarily conceived of law in terms of immemorial custom, what historians have called the “ancient constitution.” Through the Middle Ages, the truth of ordinances had been rooted less in precepts of nature than in the timelessness and antiquity of English common law, which jurists assumed was in accordance with the law of nature. And because common law had originated prior to any sovereign act, the monarch could make no special claim on it. From this vantage point, law was an artifact of custom (not inconsistent with the demands of nature) rather than a product of will. In the mid-seventeenth century, Hobbes and others challenged this idea, asserting instead that sovereignty alone authorized law as it pertained to men: “auctoritas non veritas facit legem”—authority, not truth, makes the laws. Law had not originated in antiquity, said Hobbes, but in an act of will transmitted through time as sovereign authority and subject to such authority thereafter. In the century after the English Civil War, sovereignty became a progressively more salient foundation for law. Or, as Pocock argued long ago, the “medieval concept of universal unmade law collapsed” and a new theory rooted in sovereignty came to legitimize law.

This shift had important consequences for the legal encounter between English settlers and indigenous people in the New World. The English sovereign, as the “fountain” of law, could choose to make ordinances and grant them to indigenous people. But he was under no binding obligation to enact particular provisions of law determined by an objective standard of justice standing outside and above his will. The law that European invaders extended to Native inhabitants remained ungrounded in any particular principle of justice beyond that of the sovereignty Britain claimed over New World territory.
Indeed, where Spanish jurists of the sixteenth century treated *justice* in great depth and at great length, English documents from the period emphasized *freedom* and *rights*.38 Because both imperial administrators and colonists disagreed among themselves over whether indigenous people were true sovereigns, freedoms and rights had little bearing on them as such. As some of the essays in this volume show, indigenous litigants learned to deploy the language of freedom and rights, much as in Spanish realms litigants referred to *libertad* (liberty) and *derecho* (law, right). But lacking any clearly defined place in the English legal imagination, the Indians neither posed an insuperable legal obstacle to settler designs nor presented a particular incentive for the crown to broaden the reach of law or justice, as royal letters patent authorizing conquest and discovery made clear by their silence on the matter.39 This had deep repercussions: indigenous people, quite simply, were legally relevant only insofar as English advance might provoke an encounter requiring resolution. How law was to operate at these moments was left to be worked out in practice.

This does not imply the absence of an English legal corpus applicable to the New World. Parliament produced statutory law and the colonies themselves produced abundant police regulations.40 London, as well as colonial governments, entered into “treaties” with Indian nations. But the absence of guiding principles of justice applicable to the Indians and the decentralized qualities of the common law made British colonial law highly variable. Thus, between settlers or traders and Indians, legal arrangements seem to have been a loose admixture of law and legal procedure, negotiation and contractual haggling, and diplomacy and saber rattling.41 Law’s role was not, even in principle, to check settler power so much as to sort out relationships and, ideally, keep the peace. The irony here is that while settlers, traders, and other colonists constantly sought to expand their ability to make and enforce law locally—often to enhance their power to draft local inhabitants into labor relations, to secure land, or press agreements—indigenous people found it harder and harder to reach the ear of the king even as the king found it more difficult to restrain his English subjects in America. This legal diversity and the growing attenuation of a link to the crown through law is a crucial background condition for all legal encounters between indigenous people and English settlers described in the essays that follow.
II. Legal Intelligibility: Trajectories

Europeans and Natives, who often found themselves on opposite sides of legal conflicts, needed to comprehend the words, concepts, and forms of evidence (writing, pictograms, knotted cords) used by each other. As Yanna Yannakakis has shown, translation was the foundation of intelligibility. But more broadly, law became intelligible as historical actors began to appreciate the values and history behind a legal idea, the concepts to which it was tacitly linked, its range of uses in a given culture, its limitations, and the meanings attached to it by different groups. Only with this deeper understanding did conceptions of justice approach, if seldom fully reach, mutual intelligibility. Imagine a gradient stretching from a high degree of intelligibility to almost complete incomprehensibility. We might situate historical actors along this gradient by focusing on (1) the extent to which they appropriated and cultivated the values and history behind legal ideas (2) while responding to the specific circumstances of a given conflict by (3) adapting legal concepts to concrete strategies (4) across a range of uses and limitations determined by the meanings attached to it by different groups. The further that settlers and Natives moved along this gradient towards intelligibility, the better they could meaningfully learn from, outmaneuver, resist, or accommodate each other. At least some degree of intelligibility was a precondition for what historians call “jurisdictional politics,” “legal resistance,” “popular justice,” and “strategic engagement with law.”

At the outset, we must acknowledge the limits of our claims for the importance of legal intelligibility. There is little doubt that settlers and Indians alike learned to use the law in navigating their complex relationships. In many instances, they faced each other across a fog of legal misunderstanding, as several essays in this volume attest. But in other cases, misunderstanding may not have been a product of law at all, but of how interests and mistrust played out in intercultural legal settings. In Juan Pomar-Zurita’s report from the mid-sixteenth century, a local Mexican cacique argued that Indians had become so litigious since conquest “because you do not understand us, nor do we understand you or know what you want.” Here, the cacique seemed to suggest that in the face of a broader failure of understanding, law might be the basis for some kind of mutual intelligibility. Two and a half centuries later,
the reaction of two farm laborers reminds us that legal intelligibility is perfectly consistent with sharp tensions between parties. In 1799, the tithe collector showed up in the town of Tule, Oaxaca, to collect for the cathedral from the local indigenous community. On the outskirts of the village, he came across a couple of sharecroppers and told them that it was time to pay up. They refused. According to this official’s report, one of the men responded “insolently,” insisting that they were exempt from payment, and, much to the collector’s surprise, quoted chapter and verse of the *Recopilación* of 1680 to back up his point. Doubtless, the legal knowledge and confidence expressed by these men was uneven across the vast Spanish empire, and probably no less so in English realms. Perhaps it was laced with bravado, a bluff betting on mutual ignorance of the law. But the blustery, even arrogant confidence they expressed suggests how much and how little things had changed since the sixteenth century for such people. Because they understood the law, they had put the tithe collector off this time. And yet, that understanding could not prevent him from coming back and trying again, better armed this time with his own legal arguments. In short, failures of legal intelligibility may have been at once a cause and a result of social tensions and clashing interests.

Adjusting one’s angle of vision on the past in this way can produce either an account of settlers and Natives gradually improving their understanding of each other’s legal commitments and concepts of justice, or an account stressing persisting incomprehension. Each of these accounts is stylized and necessarily partial. Developing them will be a useful first step toward framing the approach of this volume. We will emphasize the profound variability in how different groups of Natives and settlers understood elements of the other’s notions of justice—a variability that was not merely an initial challenge that faded after contact but a perennial challenge, endlessly taking on new complexions.

First Perspective—Improving Understanding: Much scholarship tacitly assumes that, over time, settlers and indigenous peoples gradually came to a better, though never full, appreciation of each other’s legal principles. For instance, in British America, Natives and settlers fairly quickly grasped their contrary approaches to handling murder—colonists expected a public trial of the guilty, while Indians demanded compensation to the victim’s family to stave off retaliatory killing. Diplomats
and treaty negotiators spent much time working out which of these approaches would prevail in which circumstances. Colonists and indigenous people did not misunderstand each other so much as they strove to mediate between conflicting, deeply held notions about what constituted justice when a life had been taken. By contrast, early sales of Indian land to colonists tended to produce confusion, for settlers believed they had purchased full, exclusive ownership, while Natives assumed they had merely given the English the privilege to use land alongside themselves. Within a few years, certainly within a few decades, each side grasped the other's position and bargained accordingly. This appears to have been the general trend: settlers' understanding of Indian government improved over time, and vice versa. Many settler accounts written in the first generation after contact misrepresented indigenous societies as nearly without law and public authority or, alternatively, as monarchies ruled by will and custom. By the late seventeenth- and early eighteenth centuries, some colonists showed greater awareness of how Indian rulers relied on kinship ties and extensive consultation with leading families to enforce norms of justice through mobilized public opinion rather than through coercive authority.

The practicalities involved in trade, land sales, and preventing occasional murders from provoking war encouraged settlers and Natives to work at better comprehending the other's law. Colonists seeking to buy land, for example, benefited from learning who among the Natives could legitimately alienate tribal property and who could usefully feign such powers. Indian norms helped structure trade not only in obvious but also in unexpected ways. Carolina settlers, for example, contended that Indian slaves bought from the Cherokee were prisoners taken in "legitimate" wars, a point established by Native—not English—law.

Trials and treaty negotiations led to conversations between Natives and settlers about conflicting legal norms. Indians revealed that, when hungry and in haste on a military expedition, they did not regard as "theft" the removal of food from a colonist's house despite protests. Settlers explained how their legal culture distinguished between manslaughter (killing "through heat of blood") and premeditated murder, and between rape and fornication. Treaties often granted Indians the right to attend colonial trials to ensure that justice was done to members of their nation and that settlers did not escape punishment for offenses against Natives. In cases involving Indians as defendants, Natives on
occasion served as jurors alongside settlers, either on regular panels or on specially convened “mixed juries.” Colonies varied in the extent to which they would accept Indian testimony—sometimes allowing it, sometimes restricting it to certain classes of cases or to proceedings involving other Natives. Within these limitations, Natives gained experience in giving depositions and recounting events before tribunals.

Settlers and Natives in Spanish America also learned about each other’s law over time. Spanish jurisprudence specifically recognized local custom as a source of authority in legal disputes, so long as it did not conflict with divine or natural law. This principle, forged in Iberia’s highly fragmented medieval political and legal landscape, was critical to indigenous communities, because it meant that even in contests between Spaniards and Indians, costumbre (custom) carried an important weight. This was entirely consistent with the broader principle that the law’s role—and the king’s responsibility—was to conserve the social order, rather than innovate. Recognition of costumbre, thus, was a means of doing so, one that indigenous litigants leaned on heavily in their encounters with Spaniards. Of course, there was still ample room for disagreement and misunderstanding; Spanish and indigenous customs might conflict, or custom might be at odds with natural law or the law of God. Nevertheless, the fact that costumbre had a recognized place in Spanish jurisprudence as a legitimate source of law was critical to Natives’ capacity to enter legal conversations on their own terms, which forced Spanish litigants to confront the legitimacy of Native custom in legal encounters. Thus, even as indigenous litigants gradually came to accept Spanish notions of land use and property, customary understandings of usufruct, community rights, productive use, and possession ensured the continued relevance of Native principles throughout the colonial period.

Second Perspective—Persisting Incomprehension: We can, however, shift perspective and sketch a contrary picture—a colonial encounter where, for a variety of structural and ideological reasons, many colonists and Natives understood each other’s notions of justice at little better than surface levels. The charters issued by the English crown to authorize the colonization of North America said little if anything about the status of indigenous law, leaving unexplained the terms of its interaction with crown and settler ordinances. Above all, the English did not acknowledge indigenous law as
binding in any way, giving them little reason to look beneath the surface of what appeared to be strange and even senseless ideas. They did not treat the Indians’ law as one of the various colonial, imperial, and transnational legalities whose complicated interaction governed affairs within English settlements. The reach of indigenous law became a question for diplomacy rather than a “choice of law” problem within the core areas of European colonization. The English erased the claims of Indian law over land acquired from Natives, subjecting it only to English principles and regulations.52 Treaties that specified the circumstances under which Indian offenders would be tried under English law exempted settlers from Indian justice.53 Indigenous law mattered politically in relations with Natives but exerted almost no claim over colonists as law.

This largely dismissive approach to Native law set the North American English colonies apart from other contemporaneous British imperial areas no less than from Spanish realms. East India Company (EIC) settlements in Madras and Calcutta, for example, operated not only under crown and parliamentary permissions but also under grants and contracts from South Asian sovereigns, which authorized jurisdiction over Native residents and shaped the concepts and techniques through which the English governed. In a region where South Asians allowed late-seventeenth-century Calcutta to exercise the jurisdictional privileges of a landholding zamindar, and where the EIC expanded effective control of territory in Bengal by assuming the office of a diwan (a Mughal revenue collector and administrator), the English needed to deploy South Asian legal concepts in order to rule. In certain classes of cases, EIC and English tribunals reached or ratified decisions based on what they imagined to be Hindu and Muslim law for adherents of those religions.54 For all of their critiques of Hindu and Muslim law, Englishmen acknowledged these legal traditions as sophisticated and impressive. In the eighteenth century, some EIC administrators tried to reconstruct an “ancient Mughal constitution” and to establish “authentic” written accounts of Hindu and Muslim law in order to break free of reliance on Native interpreters.55 The contrast of all of this to North America is striking. Amerindian grants and contracts did not provide permission for English settlement or suggest techniques of government. Settler tribunals did not pronounce or ratify decisions made under Seneca or Cherokee law. Colonists wondered to what extent “barbarous” Natives actually
had law (as opposed to custom, will, and public opinion). They did not inquire into and respect Pequot or Powhatan law as longstanding traditions of high intellectual accomplishment.

Comparison to the Spanish empire further illuminates the reasons for and implications of the limited English interest in Native law. Sixteenth- and seventeenth-century Castilians established themselves, greatly outnumbered, among millions of Indians. The Spanish expected most Natives to be enveloped within their empire while settlers lived off indigenous labor and tribute, evangelized Indians, reordered their towns, invited or drove them into imperial tribunals, and tried to partially “Hispanicize” their customs and governance. By contrast, the English did not rely on Indian labor and tribute. The colonial legal system did not calibrate and enforce the extraction of work, money, and goods from indigenous peoples, nor did it coordinate large-scale economic enterprises (such as the mining and shipment of South American bullion) that drew on Indians from numerous local jurisdictions. Settlers made no systematic effort to anglicize the legal systems of Native American communities on the model of the (ambivalent) campaign of Christianization. Nor did the English follow the Spanish policy of treating Indians as subjects or “vassals” of the crown. Unless naturalized, the Indians remained foreigners. Colonial officials, therefore, typically knew less of indigenous legal principles than their counterparts in British India and in Spanish America. The practicalities of trade and land transfer created only limited incentives for colonists to learn Indian concepts of justice in any depth. The foundation of colonial government in crown rather than Native permission, the lack of respect for indigenous law as an intellectual system, and the lack of interest in “reforming” that law or in manipulating it to coordinate labor and tribute all combined to offer settlers very little reason to acquire a working knowledge of Native legality as anything other than an obstacle to be overcome.

By the same token, Natives often had limited reasons and means to understand English law in great detail. One very practical barrier was linguistic. Few Natives and settlers knew each other’s languages, and interpreters were never plentiful enough. By 1700, New England tribunals no longer felt obliged to provide a translator to Indians living within their borders. In Spanish realms by the seventeenth century, the law demanded the presence of an interpreter in all legal proceedings, and indigenous litigants often insisted on having them, even when
they spoke perfectly adequate Spanish. But the divide between Indian and English settler legal cultures was deeper—not just linguistic (failure to understand words) but conceptual (as indicated by continual Native complaints that “they could not understand the way of our proceedings”).57 Core ideas of the English legal system, such as corroboration of evidence and adversary procedure, grated on Indians. Under the direction of Pennsylvania judge and councilor James Logan, English representatives investigating a 1722 murder by settlers took depositions from Indian witnesses. After one Native testified, others steadfastly refused to discuss the same matter and wondered why they were expected to repeat what had already been said. Their norms contradicted the English practice of cross-checking accounts and obtaining corroboration from multiple sources. Algonquian notions of reciprocity expected disputes to end, as Katherine Hermes observes, with exchanges by both sides so that each obtained “a material and psychological ‘gift.’” English tribunals irritated Indians by declaring a “winner” at trial and demanding that the “loser” pay in a one-way transaction. In many instances, Natives asked for arbitration by a governor, councilor, or local magistrate rather than litigation under unfamiliar law and irritating adversary procedure.58

In British America, Natives may also have resisted engaging English law for reasons of cultural unpalatability. Within a few decades of contact, settlers came to appreciate that indigenous peoples in North America lacked a state in the European sense, where rulers could set policy and punish offenders according to a detailed set of established laws. In at least some nations, Indians might ignore sachems or headmen who tried to push beyond what public opinion would accept. Indian leaders relied on kinship networks, charisma, gift exchange, and, above all, on their power to persuade. Tribal public opinion served simultaneously as their greatest ally and their most profound constraint.59 Thomas Pownall, when serving as lieutenant governor of New Jersey, observed that the indigenous peoples of the middle and northern colonies “know no such thing as an administrative or executive power, properly so called. They allow the authority of advice, a kind of legislative authority. But there is no civil coercion. They never had any one collective actuating power of the whole, nor any magistrate or magistrates to execute such.”60

More acute European observers went further and contended that Indian political organization fostered a distaste for the well-articulated,
precise, and technical ordinances that Europeans thought necessary to
a “government of law, not of men.” Such ordinances appeared to Natives
not as limitations on potentially overreaching rulers—Indians restrained
them through family and social pressure—nor as necessary foundations
for property rights and trade. Instead, these convoluted “quibbles of
art” seemed to set traps ensnaring ordinary people. Indian trader James
Adair reported on the difficulty of impressing Natives

with a favorable opinion of the wisdom and justice of our voluminous
laws—They say, if our laws were honest, or wisely framed, they would
be plain and few, that the poor people might understand and remember
them, as well as the rich—That right and wrong, an honest man and a
rogue, with as many other names as our large crabbèd books could con-
tain, are only two contraries; that simple nature enables every person to
be a proper judge of promoting good, and preventing evil, either by de-
terminations, rewards, or punishments; and that people cannot in justice
be accused of violating any laws, when it is out of their power to have a
proper knowledge of them.61

Even those Indians inclined to master European law faced difficul-
ties since the colonists’ law emerged in societies relying on skills and
ideas absent or less evident in indigenous societies—a specialized legal
profession devoted to analysis and application of law; the routine use of
writing to record ordinances and precedents; the existence of judicial
tribunals conceived of as separate from clans and tribal councils; and
the maintenance of conceptual distinctions between criminal and civil,
legislation and execution, and public and private.

In Ibero-America, situations varied, depending on Native structures.
In central Mexico and in Incaic Peru, the idea of an authority that could
order, dispose, and punish was well understood before European arrival.
There, indigenous people, especially Native nobility, took to litigation
quite readily. Even so, local communities often sought to reestablish a
disrupted harmony by encouraging compromise, something to which
Spanish law itself was open in many circumstances. Tribal peoples, such
as those in the Amazon and South American lowlands, often operated
much more like those of North America, resistant to “state”-like under-
standings of authority and inclined to settle disputes through kinship
networks and gift exchanges (or warfare and anthropophagy in extreme cases). The differences in British America between European and Native orientations to law became important evidence for eighteenth-century Scottish Enlightenment thinkers articulating sweeping four-stage theories of evolutionary development. These theories were stories that Europeans told themselves rather than accurate depictions of Indian behavior. Lord Kames, Adam Smith, Adam Ferguson, William Robertson, and John Millar contended that much of humanity, at different times and rates, became more mature and civilized as it progressed through four developmental epochs—hunting, pastoral, agricultural, and commercial. The common impulse among these writers was to look at a society’s “mode of subsistence. Accordingly, as that varies, their laws and policy must be different.” Indians played an important role in these accounts. Relying on deeply misleading accounts of Indian society, evolutionary theorists saw Natives, inaccurately, as stuck in an early stage as hunters and fishermen with rudimentary agriculture, living with little sense of property rights and scarcely any government. None of these writers believed that Natives’ trade with each other and with settlers had advanced them into the civilized and polished commercial stage of Europeans and their overseas colonists. Commercial societies produced “a regular administration of justice,” a predictable, specific set of “written and formal laws” of contract, debt, inheritance, and criminal procedure articulated and enforced by a state. By contrast, Native hunters and simple agriculturalists had “occasion for very few regulations” as they lived with “imperfect conceptions of property,” little of the social inequality that encouraged repression by the rich and envy by the poor, and a largely privatized response to violence through compensation and vengeance. Reading the Scottish Enlightenment stadial theorists leaves the impression that Indians’ awkwardness with formal, technical law was a normal consequence of the relatively early stage they occupied in a global, progressive evolutionary scheme, a stage that European and Middle Eastern civilizations had long ago surpassed and that had once produced similar political and legal practices—and limitations. We need not accept the four-stage model of evolutionary development as “true” nor countenance its dismissive and condescending account of Indian societies to extract a more limited point. Europeans told themselves that
the economy and politics characteristic of Indian life gave Natives little experience in manipulating complex, technical law and created a distaste that discouraged the work of mastering it. From the fashionable thinkers of the Scottish Enlightenment came the most sweeping structuralist explanation of why Natives strained to find English law intelligible.68

For Natives and settlers alike, then, there were both encouragements and impediments to making the law intelligible. In the historiography, accounts tend to vary by the extent to which practical obstacles to engagement and cultural distinctions between Natives and Europeans are placed in the foreground or left in the background. This volume proposes to bring all of these considerations as much as possible front and center. That is, rather than accept the idea that law was either intelligible or unintelligible, we emphasize the extraordinary variability in how, why, and under what circumstances different groups of Indians and colonists came to understand or failed to understand specific features of each other’s conceptions of justice. We see not so much a middle ground, implying a place upon which a solid stance was possible, as a terrain of tricky and always unreliable footing. It is a story, thus, not of ever-growing familiarity or persisting minimal comprehension, or even of an agreement to disagree, possibilities that presume some kind of endpoint, but of ebbs and flows, reversible gains, and a kind of permanent tenuousness.

Of course, historical actors did not intend such an outcome. People acting from their own understandings rarely strive to produce uncertainty. Our point is that historical analysis of New World legal encounters, written without a comparative perspective, has produced an overly sharp but simultaneously underconceptualized sense of legal (un)intelligibility. We see this volume as a corrective to this position and a spur for scholars to be more explicitly comparative in their outlook. Doing so, we contend, will open up new vistas on issues of jurisdiction, sovereignty, legal inclusion and exclusion, the quality and role of intermediation in structuring legal encounters and producing legal outcomes, and the intellectual foundations of justice as a guiding idea for legal engagement.

Our Perspective—Local Variability and Ebb and Flow: In Spanish America, jurisdictional and institutional changes had profound effects. In the central valley of Mexico, for instance, indigenous people very quickly
began to litigate in reaction to threats to their lands and autonomy and in response to new political fissures within Native communities. Within a decade of the fall of Tenochtitlán to Cortés, caciques had begun to file lawsuits with the Audiencia (high court) in Mexico City. Legal process and dispute was hardly a novelty among the Aztecs. Bernardino de Sahagún had noted early on that the Aztecs had been known for the rigor and prudence of their system of justice. Few distinctions, informants told Sahagún, had been made between people “important or common, rich or poor.” One crucial change resulting from the irruption of Spanish imperial law into indigenous lives, thus, is that legality initially became more oriented to status. Native caciques often could bring a case to the Audiencia where commoners—“macehaules” in Nahuatl—could not. And while local leaders might once have done so on behalf of their communities, now, as one commentator noted, litigious caciques were dispossessing ordinary Indians in order to afford litigation for self-interested ends. At the same time, Alonso de Zurita reported a complaint by an Indian noble that the conquerors had forced indigenous people into litigation just to defend themselves against unscrupulous Spaniards. And these lawsuits, stated Zurita’s informant, were rarely successful, “because you [the Spanish] are the law and the judges and the parties, and you cut into us wherever you want, and whenever and however you like,” making it difficult for Indians to get justice.69

The issue in these instances was not just a lack of understanding on the part of indigenous litigants; it was also a failure of law to be readily available to all those who sought justice in response to the disruptions of conquest. In other words, what the law could be understood to do, what role it could play in everyday life, was also a function of hierarchy and power relations—between Natives and colonists, but among Natives as well—that were themselves being transformed. By the late sixteenth century, complaints from New Spain that ordinary people could not reach the king’s justice became a crisis that resulted in the creation of the General Court of the Indians in the 1590s. The Juzgado, as it was known, was charged to hear cases between indigenous litigants and cases in which indigenous litigants complained of misdeeds by Spanish officials.70 In essence, the court lodged such cases within the viceroy’s mixed administrative and judicial powers, an innovation that created a new kind of legality for all manner of intercultural judicial disputes.
The creation of the Juzgado opened the floodgates to indigenous litigation in Mexico, with deep implications for individual and corporate land disputes, individual claims for liberty, labor relations, rights of movement, and community rights to self-government. Any given individual might know little about the workings of law, but communities became repositories of legal knowledge and practice. Community archives contained the paper trails of earlier lawsuits, and local leaders were rarely without some legal experience to draw on. Moreover, royal decrees gave litigants a right to free legal counsel. In terms of incentives to “know” the law, this could cut both ways. On the one hand, the presence of a legal adviser could mean that even a completely uninformed complainant might retain counsel. On the other hand, advocates rarely prepared cases without closely consulting with their clients, whose input was crucial to establishing the facts and determining legal strategies. In Peru, concerns similar to those that prompted creation of the Juzgado led to a series of reforms by the viceroy in Lima. These reforms established indigenous rights to justice but did so in ways that made Indian access to the judicial system somewhat narrower and more tenuous than in Mexico, which speaks to the centrality of circumstance in thinking about legal intelligibility.

Natives in English America maintained a variety of relationships to the colonists’ law depending on geography and on whether they belonged to an independent or tributary Indian nation or lived in an English settlement without tribal ties. To begin with, nations beyond the frontier of settlement that were independent or under merely nominal allegiance to the English (“foreign Indians”) exercised nearly unqualified sovereignty. They might turn over offenders for trial or accept the conclusions of the colonists’ law in particular cases, but only as a result of diplomatic negotiations. Second, nations that acknowledged English sovereignty but lived collectively in an Indian community near or within colonial borders maintained selective, ad hoc connection to the settlers’ law. “Tributary” and reservation Indians in the Chesapeake seldom took their disputes to English courts. Crimes and breakdowns in trade would more readily be treated as communal problems to be handled politically than as individual offenses to be litigated. Indian sachems and colonial leaders accepted responsibility for the offenses of their people and made amends by punishing miscreants, offering compensation to victims, and
restoring relationships through diplomacy accompanied by gift giving. Within New England, Indians who had submitted to colonial authority were expected to enforce selected Puritan morals regulations as well as their own laws. Over the course of the seventeenth century, an increasing percentage of Natives remaining within the core areas of settlement lived collectively as “praying” or “plantation” Indians in towns at first governed by mixed English/indigenous tribunals and, later, overseen by colonial guardians or commissioners. Finally, Natives who resided not in Indian towns but in English ones submitted to the settlers’ legal system directly, without special jurisdictions or procedures.71

From the middle of the seventeenth century forward, Natives in the British New World suffered a relative decline in political and legal autonomy because of reductions in population and curtailment of military power. Fewer Natives within settled areas of colonies lived in independent nations. Among the shrinking overall indigenous population, more lived as plantation or tributary Indians or as unattached individuals. English law had scant impact on the lives of Natives in independent nations in the backcountry or beyond the frontier. They had little contact with English legal concepts outside of occasional diplomatic negotiations. The shift towards tributary, plantation, or unattached individual status encouraged relatively greater Indian use and understanding, if not approval, of English law—albeit among a declining population. This is especially true of residents in designated Indian towns and among Christianized Indians. Our claim is modest. Such Indians did not become legal adepts. But, over time, they found settlers’ law somewhat more intelligible, at least in comparison to the experience of previous generations and of Natives in independent nations.

Sometimes Indians within colonial borders were the audience for programs of legal education; sometimes they observed settlers’ tribunals or negotiated about what justice demanded in particular cases; and sometimes they used English legal forms in their own affairs. Several New England colonies published or yearly read aloud to Natives criminal laws and regulations against immorality.72 A few Christianized Indians worked as lay attorneys.73 By the eighteenth century, there is increasing evidence of Natives memorializing rights and obligations not only through oral tradition but in the written documents—the letters, deeds, and treaties—that settler authorities preferred, often demanded,
as proof. Slowly at first, and increasingly in the eighteenth century, Indians brought suits in English courts and became more skilled at petitioning.

Above all, Natives gained experience with the law by being involved in actual proceedings. In the English colonies, Indians served alongside settlers in the governance of Indian towns and in mixed tribunals devoted to mediating disputes. North Carolina provided that trade disputes with an Indian village might be resolved by its “head man” sitting with commissioners appointed by the governor. Massachusetts similarly established an elaborate system of mixed Native and settler governance for the Indian towns within their borders—from “praying towns” for Christianized Indians to treaties between Algonquian nations and the colony regarding Native rendition for murder of a colonist. King Philip’s War (1675–1678) set in motion two contrary trends. Native officials lost some of their governing authority while Indians became more enmeshed in English law, with progressively less ability to escape it. Indeed, after the war, the colony confined all of the greatly reduced Indian population within its jurisdiction to a handful of plantations. The pre-1676 praying towns, designed to “civilize” Indians, had prohibited “barbarous” practices while teaching colonial criminal law and morals regulation. By the eighteenth century, the colony spoke less of civilizing but expected plantation Indians to conform to almost all colonial legal precepts, civil as well as criminal. Massachusetts also became more willing to seize Indians for trial without, as in the seventeenth century, an interpreter and a sachem present as intermediary. From the late seventeenth century forward, Natives kept their laws increasingly at English sufferance and were under closer supervision by settlers. Because Indians found it much harder to escape English law, learning about it became more important to the reduced number who remained within colonial borders after war and population loss. In effect, they were experiencing a kind of forced program of legal intelligibility.

Some of the strongest evidence that English law was becoming more intelligible to plantation Indians from the late seventeenth century forward was that, among themselves, they occasionally used settler legal ideas and techniques. Natives in Indian towns who traditionally assumed that communities controlled land came to understand the rights and duties of individuals who owned land in the English fashion. By doing so
they became better able to deploy English legal forms—such as written deeds, a recording system, surveying, and descriptions of plots as rectangles rather than by natural boundaries—in order to extend their landholdings vis-à-vis other Indians, raise capital through sales, and define and defend their property from settlers. By the late seventeenth century, Natives in New England, particularly women, were writing wills to ensure that property passed as they wished.

The distinction among independent nations, plantation/tributary nations, and individuals living without tribal ties only begins to suggest the degree of variation in the way indigenous peoples used and understood English laws. Within each of these categories, Natives in certain colonies and towns invested more (or less) effort in familiarizing themselves with English concepts of justice. Consider, as a proxy, the rate of Indian participation in civil litigation in English-controlled tribunals. Tributary Indians in Virginia, who tended to live on the outskirts or frontier of the colony, brought or defended fewer lawsuits than their counterparts in New England. Within Massachusetts and Plymouth, most Indian litigants emerged from a particular social context: they came “from areas where there was a heavy concentration of Indians, most of them plantation Indians, who not only either owned land or had the right to utilize it but also were under the supervision of white guardians who could serve them—defendants as well as plaintiffs—as informal legal advisors and even attorneys.” Natives were particularly active in the English courts of Martha’s Vineyard and Nantucket. In many years between 1677 and 1686, well over 50 percent of court actions and orders involved Indians. Here, too, a particular social setting encouraged participation—a sizable, concentrated Native population, early and extensive Christianization, and an outnumbered group of settlers who “may have worked harder here than elsewhere to integrate Indians into the English court system as a way of earning Native allegiance and forestalling violent resistance.”

In Spanish America, the quality of legal experience had less to do with independence or tributary status as such. In principle, all indigenous people were vassals of the Spanish king and therefore entitled to the king’s justice. Instead, law tended to vary by geographical distance from viceregal capitals—initially Mexico City and Lima. In Mexico, the Audiencia’s effective (rather than de jure) jurisdiction extended as far as
indigenous litigants were willing to travel to have their cases heard. For the most part, this appears to have been within a five-hundred-kilometer radius of Mexico City (a trip that could take several weeks on foot), beyond which the number of cases being heard dropped off considerably. In more distant reaches, such as northern New Spain where travel to the capital was all but impractical, law remained the same in principle, while in practice depending far more heavily on the local judiciary, from which appeal was much harder. Something similar may have been the case in the viceroyalty of Peru, for reasons of geography rather than raw distance. In Lima and Quito, law appears to have been a central part of life among colonists and indigenous people. Outside of urban centers, however, communities further up into the rugged highlands, separated from each other and from Spanish communities by mountain ranges and severe changes in altitude, may have been less likely to engage in legal proceedings beyond their local arena. In such places, Spanish law and procedure still applied, but, as in northern Mexico, many of the niceties may not have been observed quite so punctiliously as in more central locations. During the eighteenth century, in areas at the very edges of empire populated by unconquered indigenous groups—such as the Apaches, Utes, and Pawnee in northern New Spain, the peoples of the Chaco in the Bolivian lowlands, and the Araucanians in southern Chile—legal relations remained much more improvised and negotiated, a subject of trading, gifting, treatyng, and warfare. In these areas, there was little sense that an appeal to the Audiencia would resolve matters, and encounters tended to be improvised, much as they were in English realms in the northern New World.

Making our focus more precise as we look from one to another of these highly variable social settings sharpens our picture, but still not enough. Within each local context, intermediaries and brokers between indigenous and settler cultures developed vastly better understandings of contrasting notions of justice than the average settler or Indian. At a general level in English America, intermarriage, longstanding trade relations, and Indian apprenticeship and enrollment in colonial colleges created partially or fully bilingual Natives and settlers who could explain cultural commitments, including legal ones. More particularly, certain intermediaries paid special attention to law. In Spanish America, intermarriage, commercial dealings, patronage, and local politics created
a whole class of individuals who operated in a “mestizo” or intermediary space between Spaniards and indigenous people. In both imperial realms, interpreters at trials and in negotiations sometimes served as lay attorneys and advisers. In New England and the middle colonies, Christianized Indians did much of this work, with the Delaware Indians being particularly active in Pennsylvania. Through the seventeenth century and fading slowly in the eighteenth century, sachems and headmen mediated Natives’ experience of colonial justice—whether in a formal tribunal, arbitration, or negotiation. They advised Indians behind the scenes, conveyed or received payments of damages, represented specific litigants or defendants or spoke for their nation as a whole, and observed proceedings, reporting back on what the English thought justice meant. A handful of Natives served as judges, selectmen, and constables in Indian towns within colonial borders. They acquired a deeper understanding of English justice that they variously enforced, melded with traditional Indian norms, or quietly subverted. In New Spain, caciques and local leaders would meet in cabildo to discuss matters of legal moment, drawing on collective memory and practice. Earlier successes seem to have encouraged later attempts to have grievances heard or to seek protection against prospective harms and also did much to sustain communities through years and even decades of legal jousting.

Colonists too were deeply involved in legal processes. The English judges and commissioners who worked with Natives to govern seventeenth-century Indian towns and the “guardians” that colonies appointed over Indian communities in the eighteenth century came to better appreciate indigenous norms of justice even as they compromised with or ignored them.

Spanish vecinos, especially in more remote areas, were expected to serve as judges in local cases, and were presumed to know the rudiments of legal proceedings. Some Indian nations hired English attorneys as their long-term representatives to colonial governments. Likewise, Indian towns in the Spanish empire might develop long and intimate relationships with the local procuradores de indios who sat outside the courts and whose job it was to represent Native claims before judges. These men, some of whom spoke Native languages, very often spared no effort to ensure indigenous litigants were heard and handled according to law. English colonies appointed ad hoc and standing groups
of commissioners to manage trade and settle disputes with Natives. The British empire in the middle of the eighteenth century named superintendents of Indian affairs to oversee conflicting colonial approaches to trade regulation and the management of disputes. Brokers at the village, colonial, and imperial levels who mediated between conflicting notions of justice stand out from the majority of settlers and Natives with scant understanding. To ask to what extent a “community” found others’ law intelligible is to pose an indiscriminate question.

Indeed, particularly in the British context, the term “community” implies a misleading stability. Up and down the Atlantic seaboard, war and disease decimated first one, then another Indian nation. Survivors integrated into more stable neighboring tribes or formed polyglot villages mixing families from several nations. The refugees brought different levels of knowledge about English justice, dissimilar experiences with it, and various strategies for engaging with it. Among settlers, ongoing large-scale European immigration and transportation of Africans continually introduced colonists with little understanding of Indian norms of justice. Europeans moved among towns and colonies. One is tempted to find trends that bring order to the past. And there were some. The shrinking population of tributary/plantation Indians in the eighteenth century deepened their understanding of English justice as they lived among settlers more willing to override indigenous law, force Natives into court without translators and without sachems as intermediaries, and erode Indian towns’ (partial) rights of self-government. But we must be cautious. The continual reconstitution of indigenous and European communities introduced new sources of confusion amid ever-altering configurations of settlers and Natives straining to understand each other’s notions of justice. The pursuit of legal intelligibility was not a challenge for only the first generation after contact, a problem that faded. It was a persistent challenge, always present and never overcome, met to varying degrees by different people and groups in British America.

The situation appears to have been both similar and somewhat different in Iberian America, at least after the Native hecatomb of the sixteenth century finally bottomed out in the early seventeenth century. The first several decades of Spanish presence had deep and irreversible effects on Native social organization. In the central valley of Mexico, a series of epidemics wiped out communities, opening up lands and exposing
survivors to a raw struggle for individual and collective survival, a challenge communities responded to in part through litigation. Villages emptied out and reconstituted, or constituted anew with a novel configuration of partialities. By the late sixteenth century, the viceregal government responded by creating “congregations” to concentrate dispersed people into single communities that could sustain themselves but also be available as a pool of labor. Native caciques, initially favored by Spaniards, found that rotation in office, as specified by Spanish law, eroded their authority and created opportunities for commoners to assume positions previously closed to them. Similar processes played out in the Andes. Legal relations that obtained closer to Lima or Quito were broadly similar to those in the Central Valley of Mexico. In more out-of-the-way places, whether highlands communities in Peru or remoter parts of New Spain, such as Yucatán and the far north, and perhaps as well in Brazil, communities were able to isolate themselves to a greater extent than was possible for more central communities. Of course, the other side of this coin was that such communities could also suffer more from legal isolation than they would have liked, making it harder for them to seek redress. This suggests that a critical variable was neither geography nor culture, but relative degree of remoteness from an administrative and judicial center, as defined by ease of access, for both potential indigenous litigants and local Spanish officials. By the seventeenth century, community life in most places had begun to settle down again somewhat. Many towns, even quite remote ones, were perhaps more permeable to outsiders than they had been before the arrival of Europeans, and movement in and out of them may have become more common. Many communities did manage to retain a strong sense of identity as a bulwark against the pressures that bore upon them. For them, the law, however clouded its meaning might at times be and however uncertain its outcomes, represented a resource against disorder, abuse, and bewilderment.

As historians, we strain to find broad patterns and trends that will make sense of the past. It is a cliché that we must be cautious in doing so. But the reminder is perhaps especially a propos in talking about legal (un)intelligibility, since law as a subject matter embodies a presumption in favor of order and regularity. In other words, there is no such thing as chaotic law.90 Thus, we do not deny the possibility of meaningful configurations of evidence and interpretation extending beyond specific
instances. We do insist that any patterns or trends be qualified by the variabilities in legal (un)intelligibility revealed by the comparative framework we have proposed here. That being said, if there is a large conclusion to be drawn from the cases that make up this volume, it is that the distinct legal cultures of Spain and England mattered profoundly to the shape ultimately taken by relationships between settlers and indigenous peoples in each realm. We cannot truly understand one except in explicit comparison to the other. As a corollary, the variability in legal (un)intelligibility counsels against easy generalities about the effects of “European” law on Native lives, whether for ill or good. The term “European” simply hides too much to be very useful in making sense of complex realities. Finally, we maintain that focusing on intelligibility as a relation between actors, individual and collective, rather than as a metric—i.e., how “much” intelligibility there was—makes clear that the burden of “misunderstanding,” so long attributed to some Native deficiency, cultural or otherwise, was shared between settlers and Natives, even as the consequences of that misunderstanding tended to fall disproportionately on the latter.

III. Architecture of the Volume

A. Mis-dialogues, Code Switching, and Mixing Languages of Law

In the beginning—and not just in the beginning—was misunderstanding. Natives and settlers brought disparate concepts of law and justice to their negotiations and conflicts. Through translators, each side may have more or less grasped the words exchanged back and forth. But the concepts and presuppositions animating those words, the assumed implications and limitations, proved more elusive. From this deeper level of tacit meanings and associations rather than from the surface level of words came the most interesting and consequential challenges of legal intelligibility. Tamar Herzog provides a glimpse of one such misaligned conversation in “Dialoguing with Barbarians: What Natives Said and How Europeans Responded in Late-Seventeenth- and Eighteenth-Century Portuguese America” (chapter 2). Hers is a case study of what she terms “mis-dialogues” between Portuguese and “not-yet-domesticated” Natives in the Amazon basin. She aims to uncover the “legal structures that gave words and actions a particular meaning” and guided what
each side expected would result from their agreements. Indigenous negotiators intended their accords with the Portuguese to bring trade and, sometimes, protection, while preserving independence. The Portuguese, interpreting the agreements with reference to their own legal traditions, expected conversion and pacification through vassalage. Europeans and Natives spoke across one another because of “disagreements regarding the precise consequences of pacts.” The crucial point for Herzog, however, is that despite the one-sidedness of available accounts of these encounters—all were produced by Portuguese officials and missionaries—indigenous understandings of justice can be glimpsed and can even be seen to have changed in the heat of their “mis-dialogues” with Europeans, who were sluggish in investigating precisely what the Natives were saying and why.

After sustained contact, some Natives and settlers—typically brokers and intermediaries of various sorts—became better able to understand each other’s legal commitments and interventions. To serve their community and to manipulate or to ingratiate themselves with interlocutors, they learned to code switch, moving back and forth between their culture’s and their interlocutors’ notions of law and justice. As Jenny Pulsipher recounts, the mid-seventeenth-century Nipmuc Indian John Wompas familiarized himself with both Native and settler concepts of land tenure, distribution, and sales, becoming adept at switching opportunistically between them in his career as a speculator and (untrustworthy) intermediary (“Defending and Defrauding the Indians: John Wompas, Legal Hybridity, and the Sale of Indian Land” [chapter 3]). Wompas emerged out of a world where Natives used English law to defend their land rights, while colonists deployed Indian law to deny those rights. He outstripped his contemporaries in his skill at drawing on his Native identity to obtain land, then manipulating English law to sell and record this land, and later switching to Indian norms to evade obstacles put in his way by colonial authorities. By “simultaneously or interchangeably drawing from Native and English land ways,” Wompas aimed to make “land transactions . . . intelligible to both English and Indians, thus increasing the likelihood that land sales would be accepted by both peoples.”

Code switching also proved useful to treaty negotiators, another type of intermediary. At first, English no less than Iberian America was the
site for mis-dialogues. The 1621 treaty that the Wampanoag sachem Massasoit made with Plymouth Colony created, he thought, an alliance against the Narragansetts. By contrast, the Pilgrims viewed the agreement as a Native submission to King James I and English sovereignty. Over time, Natives and settlers not only came to appreciate the political implications of treaties but learned to manipulate each other’s legal concepts. Craig Yirush shows the Iroquois’ skill at sequentially deploying indigenous and English concepts during negotiations with delegates from Pennsylvania, Virginia, and Maryland in 1744 (“Since We Came out of This Ground’: Iroquois Legal Arguments at the Treaty of Lancaster” [chapter 4]). The Iroquois defended their claims to land in Maryland and Virginia by invoking their conquest of it and their long possession (prescription). Arguments from conquest and prescription, familiar in European colonial discourses, constituted part of the settlers’ case at the treaty negotiations. The Iroquois reworked these arguments to their own advantage, mixing them with appeals rooted in Native legal and rhetorical traditions. Code switching was at once a mechanism for gaining advantages in negotiations, defending interests, outmaneuvering rivals, and enriching intermediaries.

Some Natives and settlers became adept at more than code switching, at moving back and forth between two cultures’ already established legal ideas; they engaged in something deeper, an innovative mixing of legal languages that fused elements of each to create new legal devices and strategies. The ingenuity of Andean indigenous communities at this work is the subject of Karen Graubart’s “‘Ynuvaciones malas e reproduadas’: Seeking Justice in Early Colonial Pueblos de Indios” (chapter 5). Natives near the city of Lima around the late sixteenth and early seventeenth centuries tried to preserve their notions of justice amid the pressures of colonization. Customary practices, which as noted above enjoyed legitimacy as a source of law, became “interdependent with decisions made by Spanish jurists.” Indian leaders grew skilled at the “active management of heterogeneous norms” in the zone of discretion allowed them by the Spanish empire’s tolerance for (constrained) indigenous self-government and legal pluralism. Indian wills, for example, “reveal multiple conceptualizations of labor, property and resource management, drawing upon a variety of Spanish and pre-conquest Andean practices.” This “entanglement” could also be found in indigenous regulation of
agricultural leases, private urban residences, and wage labor. Each was a site where Andeans who found Spanish law intelligible creatively mixed legal languages to preserve as best they could their notions of justice under colonial rule.

Scholars who have looked at how law became intelligible have commonly limited their analytic focus to one or the other of the Iberian or English realms. Peering simultaneously through the lenses of both gives a three-dimensionality to themes and insights flattened or ignored by viewing each empire in isolation. This section of the volume consequently mixes two essays on North America (Pulsipher and Yirush) and two on South America (Herzog and Graubart). Throughout the New World, mis-dialogues, code switching, and mixing legal languages were components of the larger challenge of legal intelligibility. But these shared components did not play out the same way under the dissimilar social and political conditions of English and Iberian America, as a comparative approach reveals.

Consider the difference between code switching and mixing legal languages. In English America, code switching aided Natives in the interactions they most commonly had with settlers: land sales, trade, treaty negotiations. Compared to code switching, mixing legal languages was an act implying far greater familiarity between parties and an orientation to ongoing relationship within a shared social order. It required a much deeper level of understanding of the two sides’ legal commitments and the ability to fuse them in order to form new devices and strategies. Perhaps, as in Graubart’s essay, the Spanish “empire of inclusion” provided the sustained, intertwined social relations necessary for mixing legal languages far more thoroughly than did the northern “empire of exclusion.” The more distant, episodic Native-settler relations of English America favored code switching over mixing legal languages. But the encouragement to mixing legal languages that benefited the indigenous peoples of Spanish America came with a price. Once Natives were “included” as vassals within the empire, it became harder for them to stand apart, both practically and ideologically. The Spanish promised Indians a form of “justice” in their interactions with settlers but at the cost of surrendering the right to maintain arms-length distance on the grounds of “sovereignty.” To the extent that mixing legal languages was more likely in Spanish America, was it more likely for all of the king’s vassals? It would
be worth exploring how settlers and Natives in Spanish America differed in the rate and way they mixed legal languages.

Broadly speaking, these four essays suggest that the deep cultural differences of the New World encounter had the capacity to destabilize established understandings of law and justice on both sides of any given encounter, and not just in some initial period, but persistently. This is what accounts for mis-dialogues, code switching, and mixed legal languages wherever settlers and indigenous peoples have faced each other through law. This is not to say there was no basis for mutual understanding—what we call “intelligibility”—across lines of cultural difference. Rather, the point is that analysis of such encounters may not begin from an assumption of intelligibility. Intelligibility must be shown in every given circumstance and in some cases simply may not obtain. Unintelligibility is as much part of the story, therefore, as intelligibility. This realization underlies one of the crucial findings of the recent legal history of the New World: the operations of law can in some circumstances not only fail to tame the world’s messiness, because they are unintelligible to one or all parties to an encounter, but may even contribute to it, perhaps especially in intercultural situations. As uncomfortable as this insight may be for certain notions of legal history, it represents a crucial intervention, for it unsettles the background notion that ultimately law may be understood monotonically as an ordering phenomenon.

B. At the Boundaries of Differing Conceptions of Justice

One way to study comparatively settler and Native notions of justice and problems of legal intelligibility is to group together case studies on the English and Iberian Atlantic, as we did in the previous section. Another way is to conduct comparisons not between but within essays. Each of the chapters discussed in this section uses the practices of one empire to highlight distinctive features of another, features whose full significance might be misconstrued or simply missed if each empire is viewed in isolation.

Might the Spanish empire’s simultaneously protective and limiting notion of corporate Indian rights help identify trends in early Virginia’s policies toward tributary Natives? Such is the agenda of Bradly Dixon’s
“Darling Indians’ and ‘Natural Lords’: Virginia’s Tributary Regime and Florida’s Republic of Indians in the Seventeenth Century” (chapter 6). Dixon contends that between the 1640s and Bacon’s Rebellion (1676), only Massachusetts exceeded Virginia in realizing the “Spanish ideal of incorporating Natives into the colonial polity.” Reminiscent of the Spanish empire’s “republic of Indians,” the tributary Natives lived in “semi-autonomous communities, subject to but separate from the English for their better exploitation and protection.” Virginia law granted tributary “kings and queens” a “privileged standing” to enhance their rule over potentially dangerous Indians. The colony (in theory) viewed Indians, particularly poorer ones, as “miserable persons with a special claim upon English justice.” Indeed, comparing Virginia’s to Spanish America’s (more elaborate and theoretically developed) notions of corporate Indian rights suggests a model for grouping together early Virginia initiatives whose collective significance might otherwise be overlooked. The Spanish experience also highlights how Virginia’s tributary system, like the “republic of Indians,” claimed to uphold a particular vision of justice—one that purported to safeguard Natives against the worst “abuses of grasping colonists” in return for loyalty to the king. Did Virginia’s limited recognition of Native corporate rights represent a “might have been” in American history—offering not only a method for managing the practicalities of communal interaction but a particular (if one-sided) vision of justice?

To pose this question is to invite us not only to rethink early Virginia history but to reflect more deeply on the difference between English and Spanish notions of justice in respect to Natives. The English version of the “republic of the Indians” and the accompanying notion of “miserables” seem especially fragile. Virginia’s framework rested on an insecure foundation, not least because it lacked the theological and legal infrastructure built up in Spanish America. The colony could proclaim that Indians deserved “English justice,” but would settlers have known what that meant when applied to Natives? The reason for their confusion was not only the novelty of the colonial encounter. More deeply, settlers found it difficult to restrain themselves in the service of justice owed to Natives when they viewed law as a product of the king’s will and conceived of themselves as extensions of the crown’s sovereignty.

By contrast, the governing ideology of Spanish America insisted that justice was a substantive standard independent of the king and his will,
a standard implanted in the universe by God’s command and natural law. Under this conception, the crown and colonists acted legitimately only when they remained within the bounds of objective justice, however much their interests and greed tempted them to redefine it in their favor. Justice was not something they devised, enacted through their sovereign will, and then extended to Natives; rather, justice was an independent constraint to which they were supposed to submit. The Spanish vision of justice empowered indigenous people to take up the law because its stated purpose was to limit the actions of those who acted unjustly. In Spanish law, therefore, the doctrine of “miserables” created a kind of rebuttable presumption against those who had greatest power in local circumstances—settlers. This is why Virginia’s tentative efforts to define a doctrine of “miserables” never quite took: Natives might oppose English pressure and overreaching, but not from a position of presumed injury, as Indians in Spanish realms could. By comparison to the Spanish, the thin, self-generated English conception of justice not only made Virginia promises of justice to Natives a weak instrument for restraining the “abuses of grasping colonists”; it also gave those promises little staying power. As Dixon observes, Indians’ corporate rights and legal status declined along with their numbers and military power in the late seventeenth and eighteenth centuries, making them more vulnerable to predations by settlers. If the “miserables” principle had held, growing Native vulnerability should have resulted in greater legal protection, not less. In sum, Virginia’s limited recognition of Native corporate rights appears from one perspective as a “might have been” in American history; from another, it reveals how distinct the two empires’ notions of justice were from one another.

Native and settler notions of justice diverged especially sharply in the aftermath of murders, with Europeans expecting state-run trials and Indians preferring compensation to the victim’s family to forestall retaliatory violence. Nancy Gallman and Alan Taylor show how in both Spanish and English America, conflicts over which system would dominate made more salient the norms of justice underlying each (“Covering Blood and Graves: Murder and Law on Imperial Margins” [chapter 7]). In the latter half of the eighteenth century, the British needed to preserve peace with the Iroquois; the Spanish in East Florida valued the Lower Creeks and Seminoles as potential allies against the Americans.
Despite pressure from imperial superiors to insist on public trials of killers, local officials understood that pressing the issue would alienate Natives, straining alliances or provoking war. Europeans’ need to sustain alliances and Indians’ determination to protect their autonomy created pressures for each side to investigate and make intelligible the other’s deeper assumptions about justice as revealed in their different ways of responding to murder. To the Spanish, an investigation of homicide by the governor reinforced the structured, hierarchical vision of society that the empire favored, one in which an elaborate system of law for the New World (derecho indiano) paternalistically gave settlers and Natives their due and protected them as it kept them in their assigned place. By contrast, the Lower Creeks and Seminoles assumed that “covering the grave” through compensation to the victim’s kin signaled their aversion to coercive authority and upheld their ideal of social harmony achieved through negotiation and consent (albeit with the threat of private retaliation in the background). Meanwhile, the Iroquois opposed English execution of settlers who killed Natives lest that set a precedent for the trial of Indians who killed settlers. The more that imperial officials pressed upon the Iroquois the European system of state-supervised punishment of offenders, the more they insisted that “covering the grave” should prevail even for cross-communal murders in settler jurisdictions.

The implications of Gallman and Taylor’s work stand out more clearly when placed besides Dixon’s study. Dixon’s reconstruction of a partial and relatively short-lived “republic of the Indians” in early Virginia draws attention to the profound differences in the way the Spanish and English empires conceived of justice for Natives. One is likewise tempted, upon first reading Gallman and Taylor, to note points of dissimilarity between the empires. The Spanish colonial legal system in East Florida was part of the civil law family and employed inquisitorial procedure with final decisions about guilt made by the governor and imperial officials. This form of justice grew out of and reinforced what the crown idealized as a paternal, hierarchical society. By contrast, the English common law system of the colonies entrusted the jury with the power to convict offenders. The jury symbolized the importance of communal self-government and the liberties of Englishmen. And yet Gallman and Taylor’s British and Spanish American case studies suggest that despite the ideological and juridical differences between the empires, and despite
the dissimilarities between the political organization of the Iroquois in the North and of the Lower Creeks and Seminoles in the South, common themes predominate over divergences. First, disputes over murders became proxies for contests over imperial primacy and Native autonomy. And second, local officials acquiesced in Native practices of covering the grave, even against contrary imperial pressure, because of diplomatic and military exigencies.

Conflicts between Native and settler conceptions of justice—in particular about the status of Indian corporate rights—emerged from 1810 onwards in the late stages of the Spanish empire and in the wars of independence. As Marcela Echeverri shows in her study of the viceroyalty of New Granada, indigenous people resisted anticolonial creole programs to reduce Indian corporate privileges and burdens in the service of liberal ideals of equal citizenship (“Sovereignty Has Lost Its Rights”: Liberal Experiments and Indigenous Citizenship in New Granada, 1810–1819” [chapter 8]). Liberals in newly independent Colombia championed a notion of justice resting on a particular conception of equality and inclusion of all communities (under creole leadership). But it was a vision rooted in the idea that indigenous people had no rights other than those of individual citizens. In this they diverged from the solution proposed by the Cádiz Constitution of 1812, which had made room for Indians’ defense of communal rights. Of course, at the time Spain was trying to gain the allegiance of indigenous people against independence-seeking creoles. But the fact remains that the imperial liberalism of the Cádiz Constitution was, at least in principle, willing to uphold a right that liberals struggling for national independence were not. This is one reason indigenous people so often sided with royalist forces, at least early in the wars of independence. Against the creoles’ vision, some indigenous people advanced a contrary vision of justice—one accepting their obligation to pay tribute as a foundation of their inherited privileges of special protection, legal representation by the protector de indios, communal land ownership, and partially autonomous self-government. Liberals who wanted to turn the Indians into citizens were met by indigenous suspicion of a program to “subsume them into a polity that granted sovereignty effectively to the creoles,” as Echeverri puts it.

Liberals’ invocation of sovereignty marked a critical change. Under viceregal law, settlers and Indians alike were vassals of the Spanish king;
neither group could make a privileged claim to sovereign right. Creole pretensions to sovereignty disrupted this rough parity, with adverse consequences for effective Native access to law. In principle, citizenship cloaked all *individuals* in the same legal protections. In practice, indigenous people were rarely recognized as full citizens even as the liberal insistence on equality refused to acknowledge that some citizens might be more vulnerable to arbitrary exercises of power than others. Where once the king bore a positive duty to shelter his most vulnerable subjects from the arbitrariness of the powerful, under the liberal regime, powerful and powerless alike were citizens, equal before the law and not otherwise to be distinguished, regardless of their actual positions and chances in society. Moreover, indigenous people quickly came to understand that individual citizenship, enshrined in constitutions, had no place for corporate rights, including those to land. From this perspective, nineteenth-century debates over whether to preserve or reduce Indian corporate status therefore represented not only a sustained effort to change the letter of the law but also an assault on a legal culture centuries in the making. By adopting sovereignty as the baseline for their efforts to remake law along liberal lines, creoles sought to replace the principle of substantive justice, rooted in a notion of moral truth and protection of the vulnerable, in favor of a conception of law emerging from the will of the sovereign. As founders of new nations, the creoles claimed the role of this newly empowered sovereign. For their part, indigenous people who might once have sought the king’s justice against the powerful now had to face the will of those who had enshrined themselves constitutionally as holders of a sovereign power from which there was no appeal. In Latin America, it has been common to point out that the grounding premises of liberal individualism were at odds with colonial recognition of corporate rights. Echeverri’s argument suggests another point of difference as well, a subtler and more easily missed one: the creole assumption of sovereignty fundamentally redistributed power within the legal system in a way that made it far more difficult for indigenous people to defend communal lands and rights other than by rebellion.

Echeverri asks how the situation in the newly born United States was different. Heir to the British empire of exclusion, the new American republic viewed Indians beyond the frontier as “foreign nations” entitled to no more protections than other nations might be. Americans did not
think that their revolution or liberalism “entailed the integration of indigeneous peoples as citizens.” In legal encounters, indigenous peoples in English America had always faced Europeans through the prism of sovereignty. To this extent, the early United States continued the policy of its colonial predecessor, while the basic premises underlying Native-creole relations in Spanish America were being fundamentally renegotiated through disputes over the place and meaning of sovereignty.

The contested place of Native corporate rights ties Echeverri’s essay to Dixon’s and Gallman/Taylor’s. Where Echeverri charts creole initiatives to reduce Indian corporate status in the name of liberal equality at the end of a colonial era, Dixon reconstructs the beginning of a colonial era—where settlers devised Native corporate protections in the interest of averting war and achieving sustainable levels of exploitation. Gallman and Taylor reveal how Iroquois leaders in the middle eighteenth century favored Indian “covering the grave” with compensation rather than public trials for killings of Natives upon English land, even if a settler committed the murder. Against colonists’ notions of personal and territorial jurisdiction (we should hold a trial because our subject committed murder within our boundaries), Indians involved corporate rights (the presence of a Native in a homicide as either killer or victim required covering the grave). All three essays show Natives deploying notions of corporate status to best preserve autonomy and communal life and identities, and doing so fully exposed the tensions and contradictions of the legal spaces they occupied.

IV. Future Lines of Research

While we are certain that the discerning reader will find her own path through and beyond these essays, we would like to conclude by identifying some areas for further inquiry that grow quite naturally from the ideas at the core of this volume. An important issue for future scholarship emerges from the two “concluding perspectives” essays by Lauren Benton (“In Defense of Ignorance: Frameworks for Legal Politics in the Atlantic World” [chapter 9]) and Daniel Richter (“Intelligibility or Incommensurability?” [chapter 10]). How shall we negotiate the tension between related but analytically distinct conceptualizations of law? In different ways, Richter and Benton present interest-driven accounts of law.
Richter treats intelligibility as a less pressing challenge than “incommensurability,” the “fundamentally incompatible aims that indigenous and colonizing peoples often sought through their legal systems, [and] the profoundly different scales of value they assigned to otherwise mutually intelligible terms like ‘justice’ and ‘rights.’” Benton counsels scholars to reconstruct “patterned strategic behavior” rather than inquire into Natives’ and settlers’ “understanding” of law—“what historical actors believed, thought, perceived, or knew.” Their “ability to act strategically in a shifting legal field” is the better object of study than their “capacity to grasp legal concepts,” which she contends was not a “precondition or accompaniment” to negotiation and manipulation of law.

Both make important points. Cunning and tactical maneuver figured importantly in disputes ignited by profoundly different definitions of justice and proper relationships among the wide array of New World Natives and settlers, a matter by now well settled. But legal cunning was not independent of the broader challenge of intelligibility. To what extent can a historian reconstruct how Natives and settlers pursued their at times incommensurate aims through strategic behavior without probing how they comprehended or misconstrued the rules, ideas, and practices assumed by their interlocutors? Determining which principles and customs were relevant to a given dispute and figuring out how far these could be pushed by oneself or an adversary were crucial to deciding how to litigate and when to negotiate. We do not suppose such efforts necessarily resulted in mutual understanding between parties. Sometimes they did. At other times, a party seemed to have a relatively clear sense of its own goals, but a limited sense of an adversary’s legal arguments and assumptions. At other times still, parties’ views were essentially opaque to one another. There was no generally linear movement from perplexity toward comprehension but rather ebbs and flows and reversible gains in a colonial encounter featuring new immigration, contacts of previously separated peoples, deaths and replacements of trusted brokers, and the continual reconstitution of communities. Parties were given to mistakes and overconfidence as surface acquaintance with an interlocutor’s law masked deeper ignorance or uncertainty about the values and history behind a legal idea and its range of uses and assumed limits. Intelligibility was always in play. It was never complete or completely lacking, for law, especially under New World circumstances, was not a
static set of ideas, norms, and procedures capable of straightforward application. Behind every judgment about intelligibility are the implied questions who, what, where, when, for what purposes, and pursuant to what understanding of a just and proper outcome? The wide range of such possibilities is precisely what we have referred to as the challenge of “intelligibility.”

The essays by Richter and Benton remind us that the next step is to develop concepts capacious and flexible enough to synthesize the challenge of intelligibility with interest-driven accounts of law. Thus, we agree that recognizing “different scales of values” (Richter) and focusing on “strategic behavior” (Benton) and “creative . . . misunderstandings” (Benton, quoting Richard White) are critical parts of a larger framework. So too are ever-shifting notions of what law means and what it can be made to say. Attending to the perennial challenge of intelligibility does not displace but rather enriches the study of negotiation and strategic manipulation of law. Finding a way to bring these views into a shared analytical frame is a critical task for legal historians.

Descending from the conceptual heights, the essays here point toward a number of important paths for future scholarship. The first of these involves stretching, spatially and temporally, the comparative framework and the concern for intelligibility. In spatial terms, our focus has been on English and Iberian America. But what of French realms, Canada and St. Domingue? What of the Danish and Dutch Caribbean, or Surinam? And what of the Caribbean more broadly, that cauldron of empires and peoples? Indeed, the Caribbean, in particular, seems a place almost ready-made for the comparative legal perspective we advocate here. St. Croix, for example, was successively controlled by Spain, the Netherlands, the Knights of Malta, Great Britain, and France up to 1733. At that point it was sold to the kingdom of Norway-Denmark, was later invaded by Great Britain in the early nineteenth century, and subsequently returned to Denmark in 1815, until finally being sold to the United States in 1917. At each step, new administrations and new legal norms had to be layered on top of existing principles and practices, creating a legal palimpsest of extraordinary complexity just in relation to European legalities. But as the essays in this volume suggest, we would also want to ask whether and to what extent Taíno notions of justice and West African legal sensibilities impinged upon legal intelligibility. It suffices to name
Trinidad and Tobago, Dominica and St. Domingue to know that opportunities for such research abound in the Caribbean.93

Scholars could also expand our approach temporally. We have concentrated on the “early-modern” period between the seventeenth and nineteenth centuries, with only one essay crossing the “boundary” beyond 1800. That frontier is a historiographical artifact corresponding to the period of independence movements between 1776 and roughly 1830 that reoriented the fates of almost the entire hemisphere. The gauntlet thrown to future researchers is to think through this boundary in order to connect the earlier period emphasized in these essays to issues of legal intelligibility in the nineteenth century, and perhaps later. No less than in the earlier period, the comparative lens would be indispensable in order to make sense of the continuities and disjunctures between what came before and what came after. Echeverri’s essay points the way. Thus, in Colombia, where indigenous people had achieved a considerable understanding and broad acceptance of colonial law and justice, the decision by liberal creoles to supplant colonial law in favor a new legal order can only have been disorienting and threatening for indigenous people. In other words, legal (un)intelligibility was as much an issue after independence in Spanish America as it had been before, though in a new register. The self-conscious project of independence-era elites to dismantle colonial legal structures, so critical to an indigenous “politics” up to 1810, dramatically restricted litigation as a recourse in a political system oriented not to justice as a principle but to representation. As in many other places in Latin America, Indians continued to seek the king’s justice even after it was no longer in force. They did so because at that point it was the law they knew best. They continued to appeal to royal law, and to the principle of justice it embodied, because the alternative offered by liberal constitutions seemed to limit rather than expand their capacity for meaningful action regarding the conditions of their lives. For their part, new elites saw only a senseless, baseless refusal to adopt modern legal mores, a conclusion that almost surely contributed to the growing sense among these elites that Indian resistance was proof positive of their racial inferiority. In the United States, the situation was quite different. There, the newly independent government, intent on territorial expansion, took up the approach pioneered by the British—treating the Indians as sovereign nations rather than as integral
parts of a new society. Indigenous people saw little change in their fundamental relationship to the government. In the nineteenth century, as in the eighteenth and earlier, legal encounters remained negotiated matters that eluded and even defied systematization. Some version of systematic law only came to pass as Indian sovereignty collapsed under the assault of the nineteenth century and as Indian nations became, in effect, wards of the United States government. Here, too, intelligibility remained an unfinished project, one best approached with explicit comparisons to other places, laws, and times. Much of this remains speculative, especially for Latin America, a matter ripe for scholarly energy and innovation.

The study of legal intelligibility is, in part, about the acquisition, transmission, and interpretation of a specific form of knowledge. As such, it can contribute to ongoing comparative research about the communication of legal knowledge in empires and in indigenous societies exposed to colonialism. Scholars have looked at the relationship between the way empires communicated law and the way they governed and at the ways in which settlers and imperial officials reshaped legal principles as they preserved and transmitted them.94 Such work implicitly treats New World Europeans as the (active and innovative rather than passive and retentive) periphery of a metropolitan core. By extension, Natives come to figure in such narratives as a periphery of the settlers, that is, as a subperiphery, the last link of a chain originating elsewhere. Against this tendency, researchers working comparatively might ask how different groups of indigenous peoples in the New World preserved and understood legal ideas obtained through a variety of channels from settlers, military officers, merchants, and imperial administrators who were themselves in the process of reshaping and ignoring metropolitan legal concepts. Moving away from a European core/New World periphery model invites perspectives that emphasize Native ingenuity. We might ask how Indian creativity in law—strategies for code shifting and devices generated from mixing legal languages—traveled and were reworked as they passed among different communities of Natives. In what ways did the political, trade, and diplomatic structures of Native life and European empires together shape Indian communication circuits? Alternatively, reversing the core-periphery model, we might treat European settlers as the periphery. How, across British and Iberian America, did
various groups of settlers learn of Indian ideas about justice and discover Natives’ imaginative mixing of legal languages?

A third broad area for future research would involve a methodological and conceptual effort to bring the anthropology of law to bear more systematically on legal history. This is especially important in order to raise indigenous ideas regarding law and justice into sharper relief. The weight of “written” European law can be almost crushing at times when layered over the top of Native legalities. Such sources, so concretely available as printed materials and in archives, so voluminous and detailed, can make efforts to spell out the nuances of Native understandings seem thin and reaching by comparison. Here, anthropologists have shown the way by looking deeply into indigenous cultures for evidence of attitudes toward law and justice. This approach can reveal that even something so basic as a “fact” may hardly be a transparent concept, or indicate how an ideology of “harmony” can represent a theory of justice to redress a breach of social order.95 Pursuing this line requires a leap for most historians, but as Tamar Herzog’s essay in this volume forcefully argues, it is essential if we are to recover whatever we can of the legal understandings of indigenous people, even when the sources might seem to suggest the impossibility of doing so. If we fail in this, we will have less than half a story.

Attending to Native legalities in the service of a deeper sense of the possibilities and limits of legal intelligibility can contribute to the effort already discussed to rethink the default “instrumental” treatment of legal encounters. Much of the extant literature on jurisdictional politics, legal resistance, and strategic engagement tacitly presumes that people pursue legal remedies much as they might any other “interest”-oriented activity—for the advantage doing so will bring. That people have concrete interests when they enter into legal encounters is undeniable. But precisely because law is explicitly about how societies bind themselves together, establish relationships among members, secure social order, and repair or at least respond to harms, it has a deeper moral valence than does other interest-seeking conduct. This is why justice, as a concept, is never separable from law.

In this regard, close attention to indigenous slavery may yield rich dividends. There is a scholarship on law and African slavery, demonstrating the extent to which even the unfree could mobilize legal systems
on their own behalf. Much less has been done to explore the related story of indigenous slaves. Partly this is the case because indigenous slavery is presumed to have been short-lived, a phenomenon of the sixteenth century that supposedly faded with the introduction of African slavery and the acceptance of the broad general principle that Indians in Spanish America were free. But as Nancy Van Deusen has shown, enslaved Indians had to struggle for justice on their own behalf through legal process, in the New World, but also in Spain itself, a story both “locally and imperially relevant.” Nor did the broad prohibition against enslave Indians stop encomenderos and others, from Mexico to Peru to Paraguay, from subjecting Indians to conditions that were at times all but indistinguishable from slavery—forced labor, restricted movement, abusive tribute arrangements, and various forms of enclosure. Indigenous litigants fought back against such impositions by insisting over and over again that they were not slaves, could not be treated as though they were slaves, and were entitled to their natural “liberty.” Recent scholarship suggests that similar sorts of issues may have been far more common across the length and breadth of the New World than we have generally imagined.

That we can see indigenous litigants take not only customary law but European law seriously in a wide variety of situations is a crucial reminder of this fact. Indeed, one way to think about the legal encounters in these essays is as early examples of a “cosmopolitan legality” rooted not in the presumption of a shared moral community but in the unavoidable fact of cultural difference. It is in these sorts of contests and contexts that distinct legal sensibilities came face to face and had to struggle toward mutual intelligibility in concrete circumstances. Success was ambivalent, at best, and never permanent, as we have argued. Accordingly, these cases, and many more as yet to be discovered, have much to tell us about the possibilities and limits of an intercultural history of law and justice.

Notes


3 O’Gorman, La invención, 9.

4 The critical background for this development is Lewis Hanke’s work, especially Spanish Struggle for Justice in the Conquest of America (Philadelphia: University of Pennsylvania Press, 1949); All Mankind Is One: A Study of the Disputation between Bartolomé de Las Casas and Juan Gines de Sepúlveda in 1550 on the Intellectual Capacity of the American Indians (Dekalb: Northern Illinois University Press, 1974).

5 José de Acosta, De procuranda indorum salute (Madrid: Consejo Superior de Investigaciones Científicas, 1984–87), 516.

6 Owensby, Empire of Law. Because the Indios’ status was so manifestly a product of legal argumentation, one historian famously argued that America had been born under “the inspiration of law.” Javier Malagón Barceló, “Una colonización de gente de leyes,” Estudios de historia y derecho (Xalapa: Universidad Veracruzana, 1966), 99.

7 One of the seminal studies of this process is Victor Tau Anzoatégui’s Casuismo y Sistema.


9 Marcocci, A Consciência, 437.

10 Marcocci, A Consciência, 440–41.

11 Marcocci, A Consciência, 441–42.

12 Marcocci, A Consciência, 448.


14 Stuart Schwartz, Sovereignty and Society in Colonial Brazil (Berkeley: University of California Press, 1973), 254. “Convoluted” is from Herzog, Frontiers, 125. The “particularistic” quotation comes from Antonio Manuel Hespanha, “O direito de Índias no contexto de historiografia das colonizações ibéricas” (2017, unpublished paper, with permission). Herzog notes that while Spain recognized Native land rights de facto and Portugal and England did not, “it is possible” that actual differences “were not particularly great.” Herzog, Frontiers, 125. We need more research to test this proposition.

15 Richard J. Ross, “Spanish American and British American Law as Mirrors to Each Other: Implications of the Missing Derecho Británico Indiano,” in Thomas Duvé


20 Herzog has shown that in certain circumstances—territorial disputes in interimperial zones, such as the one between Spain and Portugal in South America—bringing indigenous peoples under the protective framework of social inclusion accelerated their dispossession. Herzog, *Frontiers*, 245.


26 Hespanha, “Las categorías.”


As Charles Cutter’s work shows, these principles were the common point of reference for legal interactions even in an area remote from the center, though distance and lack of personnel might lead to a relaxation of rigorous adherence to procedural and substantive requirements. The Legal Culture of Northern New Spain, 1700–1810 (Abuquerque: University of New Mexico Press, 1995).

For example, “The Agreement of the People” (1647, 1649) did not mention justice once, portraying law as negative restraint. “The Instrument of Government” (1653) did refer to justice once in passing.


John Phillip Reid, A Better Kind of Hatchet: Law, Trade, and Diplomacy in the Cherokee Nation during the Early Years of European Contact (University Park: Pennsylvania State University Press, 1976).


For one of many discussions of such matters, see John Bulkley, “An Inquiry into the Right of the Aboriginal Natives to the Lands of America,” in *Poetical Meditations*, ed. Peter Wolcott (New London, 1725), xlv–xlix.


A few (among many) examples include Treaty Concluded by Virginia Lt. Gov. Alexander Spotswood and Representatives of the Nottoway Nation, February 27, 1713, in Vaughan, Indian Documents, 4:221; Articles of Friendship and Commerce between South Carolina and the Lower and Upper Creeks, June 14, 1732, in ibid., 13:151.

To be sure, much of this went on in special institutions by different procedures, among community and caste representatives, in personal rather than public law, and through a version of Hindu and Muslim law that the English could recognize by reshaping it in their image. Still, Hindu and Muslim judges were invited onto the early-eighteenth-century court of judicature in Bombay and were asked to pay “due regard to caste customs” as well as EIC and English ordinances. The court solicited preliminary investigations from Muslim qadi magistrates and Hindu caste headmen.


Vaughan, New England Frontier, 193. Indians in Teticut in Massachusetts complained to an early-eighteenth-century court that they lacked “a true Understanding of the English laws.” Mandell, Behind the Frontier, 73.


Thomas Pownall, Considerations towards a General Plan of Measures for the English Provinces. Laid before the Board of Commissioners at Albany (Edinburgh, 1756), 18. One after another European writer pointed to the lack of “coercive power” in Indian nations to explain their treatment of crimes—the absence of fines and imprisonment and the preference for restoration of harmony over punishment, expressed most famously in the instance that a killer’s relatives or clan pay compensation to the relatives or clan of a victim lest the injured parties resort to private vengeance. James Adair, The History of the American Indians (New York: Johnson Reprint Corporation, 1968 [1775]), 429–30; Anonymous, Voyage to Georgia, 58 [“coercive power”]; Joseph-François Lafitau, Customs of the American Indians Compared with the Customs of Primitive Times, trans. William N. Fenton and Elizabeth L. Moore (Toronto: Champlain Society, 1974–77 [1724]), 1:300–305; Reid, Law of Blood, 75–76, 92; W. A. Young, The History of North and South America (London, 1776), 1:63–64.


Pierre Clastres has famously argued that among such groups, the very essence of the social order sought to preclude the emergence of a centralized “state”-like apparatus. Pierre Clastres, Society against the State: Essays in Political Anthropology (New York: Zone Books, 1987).


64 Robertson, History, 1:301.
65 Kames, Sketches, 2:362, 561, 565; Ferguson, Essay, 75, 81–84; Robertson, History, 1:305; Smith, Lectures, 15, 459.
66 Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, ed. R. H. Campbell and A. S. Skinner (Indianapolis: Liberty Fund, 1981 [1776]), 910; Smith, Lectures, 203, 213; Ferguson, Essay, 247; Robertson, History, 1:4. “The more improved any society is and the greater length the several means of supporting the inhabitants are carried,” wrote Adam Smith, “the greater will be the number of their laws and regulations necessary to maintain justice, and prevent infringements of property.” Smith, Lectures, 16; see also Millar, Origin, 84–85.
67 Robertson, History, 1:315; Smith, Lectures, 202; Smith, Wealth, 709–10.
68 For a detailed discussion of how Spanish and Spanish-American authors responded to stadial theory and conjectural histories, see Jorge Cañizares Esguerra’s How to Write the History of the New World: Histories, Espistemologies, and Identities in the Eighteenth-Century Atlantic World (Stanford, CA: Stanford University Press, 2001).
69 Owensby, Empire of Law, 42–43.
70 This arrangement took the pressures of such cases off the Audiencia, which continued to hear lawsuits between Indians and Spaniards as private citizens.
of Death; or, The Laws, by Which the Magistrates Are to Punish Offences, among the Indians, as well as among the English (Boston, 1705).


A will could direct property to women or distant relatives disfavored or excluded by English intestate succession. Indians served alongside settlers as estate


83 Owensby, *Empire of Law*, 57.

84 Cutter, *Legal Culture of Northern New Spain*.


88 See Cutter, *Legal Culture of Northern New Spain*.

89 This was true even within established Massachusetts Indian settlements such as Mashpee, Stockbridge, and Martha’s Vineyard, which mixed Natives from different tribes. Yasuhide Kawashima, “Legal Origins of the Indian Reservation in Colonial Massachusetts,” *American Journal of Legal History* 13 (1969): 54.

90 An ordered legality can, of course, fall into chaos on its own terms under certain circumstances. At that point it would be a legal system in chaos. But that chaos could not be referred to as law per se, unless the terms of what constituted the law in the first place were changed to somehow reconceptualize what appeared to be chaos as some sort of ordered arrangement.


92 White, *Middle Ground*, x.


Kant long ago argued for a “cosmopolitan law” premised on the notion that all rational beings shared a single moral community. More recently, Portuguese sociologist Boaventura de Sousa Santos has argued for a subaltern “cosmopolitan legality” to redress the imbalances of power in a globalized world. See Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (Cambridge: Cambridge University Press, 2002); with César A. Rodríguez-Garavito, *Law and Globalization from Below: Toward a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005). For our purposes, “cosmopolitan legality” may be understood as the recognition that in the encounter between very different legal worlds, no one system, however obvious and self-explanatory its premises may seem to those who hold them, may be taken as dispositive or foundational vis-à-vis another.