Negotiating Jurisprudence in Tribal Court and the Emergence of a Tribal State

The Lac du Flambeau Ojibwe

by Larry Nesper

Examination of jurisprudence in a single Ojibwe tribal court and the trials that take place in it over alleged violations of recently codified tribal law on off-reservation hunting suggests that many of these communities are becoming statelike and that tribal courts are instrumental in producing this transformation. As instrumentalities of tribal sovereignty, tribal courts facilitate the ongoing stratification of local Indian societies as particular kin networks consolidate their hold on political power. Enmeshed with the federal and state government in the realization of their sovereignty in the federal Indian-policy era of self-determination, tribes typically default to trading off the institutional cultural distinctiveness that has survived colonization even as symbolic and rhetorical expressions of cultural difference flourish and proliferate.

The interaction between American Indian activism and changes in federal Indian policy since the 1960s has transformed American Indian tribes from largely powerless and impoverished kinship-based communities into neocolonial statelike entities (Wilkinson 2005).[1] Representing themselves as distinct nations, they are also part of and thoroughly articulated with the American multicultural state. The ambiguous and contradictory status that indigenous peoples have always had in U.S. law and policy has made the transformation possible, and "the contemporary regime of neo-liberalism" that encourages devolution and the subcontracting of governance (Biolsi 2004, 244–45) has accelerated it. With the widespread development of tribal courts, they are productively thought of as tribal states.

Indian tribes appear in the commerce clause of the Constitution (article 1, section 8) as distinct from both states and foreign nations. Though the United States employed treaties—an international mechanism—to deal with tribes for nearly a century, in its 1831 decision in *Cherokee Nation v. Georgia* the Supreme Court characterized their relationship to the United States as resembling that of "a ward to his guardian." Although the tribes are both preconstitutional and extraconstitutional (Wilkins and Lomawaima 2001), Congress has asserted plenary power over them without explicit constitutional authority. Federal Indian policy has swung between facilitating a measured separate corporate life for Indian groups (thus treating them as unique) and encouraging their assimilation into the mainstream (Biolsi 2001, 14).

Since the 1960s, when the Office of Economic Opportunity began to work directly with the rather weak tribal governments that had been created by the Indian Reorganization Act of 1934 (Castile 1998), and the 1970s, when a policy of self-determination was fully articulated, tribes have begun to resemble the states that Fortes and Evans-Pritchard (1940, 5) distinguished as possessing centralized authority, administrative machinery, and judicial institutions. Especially with the emergence and development of courts in reservation societies, it seems appropriate to speak of "tribal states."[2] I use this term to call attention to the maintenance and reproduction of the "politically organized subjection" that is legitimated and masked (Abrams 1988), 63) by the local term "the Tribe." Both "Tribe" and "tribal state" index and evoke the reality and the aura of kinship, because it is families that capture

1. If, as Phillips (1994, 63–66) argues, dependency can be taken as the condition for a neocolonial relationship, the Supreme Court's reaffirmation of the tribes' status as "domestic dependent nations," citing *Cherokee Nation v. Georgia,* U.S. Sup. Ct. (1831) in *U.S. v. Lara*, 541 US 193 (2005), justifies its use here, the recent economic independence of a handful of gaming tribes notwithstanding.

2. Max Gluckman used the term in his discussion of a series of African polities and detailed the dynamics of a central administration, notably first identifying "chieftainships endowed traditionally with *authoritative power to judge on disputes*, to execute judgments and other decisions" (1965, 155, italics added), as the type of polity he was interested in examining. He placed the historic Cheyenne, Kiowa, and Zuni in this class because they all legislated and had judicial institutions.

Larry Nesper is Associate Professor of Anthropology and American Indian Studies at the University of Wisconsin–Madison (Madison, WI 53706-1393 [lnesper@wisc.edu]). This paper was submitted 12 VIII 05 and accepted 6 II 07.

 0011-3204/2007/4805-00003$10.00. DOI: 10.1086/520132

both political office and jobs in the tribal administration and traditional values associated with kinship that inform the expectations members have for people in positions of power (see Fowler 2002, 184–219). I use "tribal state" heuristically and somewhat provocatively, with Clastres's 1987) extended argument for the fundamental opposition of tribal society and state in mind, and focus on "apparatuses—functions and personnel—in and through which [tribal] . . . power is located and exercised" (Abrams 1988, 74).

Indian and non-Indian intellectuals, activists, politicians and organizations, both competing and working together over a number of decades, were eventually able to achieve federal legislation that encouraged this transformation. The 1975 Indian Self-Determination and Educational Assistance Act permitted tribal governments to contract directly for services with federal agencies. The 1978 Indian Child Welfare Act largely returned jurisdiction over tribal children from the states to tribal communities. The Native American Graves Protection and Repatriation Act in 1990 facilitated the repatriation of several categories of tribal property. But it was the 1988 Indian Gaming Regulatory Act, requiring state and tribal governments to negotiate compacts in connection with the development of tribal casinos, that made possible the accumulation of political and economic power that is fueling this transformation. The cumulative effect of this legislation has been to produce the conditions for the development of extensive tribal bureaucracies deeply articulated with both federal and state agencies. Finally, disputes that arise pursuant to the activities within this nexus are first heard in tribal courts, which the Supreme Court[3] has found to be the primary forums for adjudicating civil disputes on the reservations (Pommersheim 1995, 57).

As a result of these congressional acts and court decisions, tribes are now legislating and adjudicating, supervising public health,[4] taxing and policing, managing health clinics and housing authorities, autonomously removing and placing children, certifying membership and marriages, establishing businesses, contracting for federal programs, negotiating with state agencies, exercising broad and exclusive territorial and personal jurisdiction, sponsoring expressive cultural productions, and placing monuments. Reservation governments made up of enrolled tribe members, nonmember Indians, and non-Indians are becoming statelike, that is, "dispersed ensemble(s) of institutional practices and techniques of governance" (Hansen and Stepputat 2001, 14). The process entails the codification of law and the development of courts, two of the ways in which "the state appears in everyday and localized forms" (p. 5).

3. See *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 468 US 1315 (1984), and *Iowa Mutual v. LaPlante*, 480 US 9 (1987).

4. The Sokoagon Band of Lake Superior Chippewa Indians has received treatment-as-state status from the Environmental Protection Agency for purposes of setting water-quality standards on the reservation. Lac du Flambeau's application is pending.

Both the development of tribal codes and the creation of tribal courts work to confer endowments as their most important "radiating effect" (Galanter 1983). Courts provide "a background of norms and procedures against which negotiations and procedures in both private and governmental settings take place." In addition, they provide models for regulatory activity and explicit and implicit authorizations and immunities (pp. 121–22). Courts also have both special effects on the convicted and general effects of deterrence, enculturation, mobilization, and demobilization on a large audience. They empower the institutional processes that make up the Tribe to the benefit of some member/citizens and at the expense of others.[5] In doing so, they do no small part of the cultural-hegemonic work of legitimating the state (Philips 1994, 65–66).

Joh (2000, 119) estimates that 260 American Indian communities have instituted tribal courts, and they vary on nearly all dimensions.[6] The Cherokees instituted Western-style courts in the early nineteenth century and again in the twentieth (Strickland 1975). The Navajo court system handles many tens of thousands of cases a year and is the center of an extensive peacemaking court movement that seeks to infuse law with custom (Zion 1988). Most tribal courts hear a range of case types, though some hear cases in only one subject matter area.[7] Tribal courts are more and less administrative, more and less committed to "traditional" dispute-resolution styles, procedures, and customs, and more and less independent of the rest of the tribal government (Cooter and Fikentscher 1998). They are also variously articulated with the courts of the states that surround them.

All courts are local theatrical sites (Ball 1975; Merry 1994) of legitimation and authoritative ordering, forums in which internal policies and external relations are debated and different orders of value and law confront each other (Merry 1990; Philips 1998, 1999). The proceedings in tribal courts constitute the processes by which tribal states are developing within and against their communities[8] (Goldberg-Ambrose 1994). Like most courts, tribal courts are the sites of "administrative processing, record-keeping, ceremonial changes of status, settlement negotiations, mediation, arbitration, and

5. See Christofferson's (1991) critique of tribal courts' failure to protect Native American women.

6. "Most of the 562 federally recognized tribes have created courts under their own constitutions" (Wilkinson 2005, 289).

7. The jurisdiction of tribal courts is the subject of many state and federal cases and the topic of many scholarly treatises. Both Congress and the Supreme Court have recognized, circumscribed, delegated, and limited it. Determining whether a tribal court has jurisdiction over a particular issue involves a multitiered analysis. Tribal courts never have criminal jurisdiction over non-Indians (see Pommersheim 1995).

8. The Mikmaq legal scholar Russel Barsh (1993, 303) articulates a blistering critique of contemporary tribal governments: "The separation of 'the tribe' from the people in contemporary American Indian political rhetoric is a disturbing development, which hails the emergence of the 'the state' as an entity with rights and privileges quite distinct from living, breathing human beings."

'warfare' (the threatening, overpowering, and disabling of opponents) as well as adjudication." Thus they "not only resolve disputes, they prevent them, mobilize them, displace them, and transform them" (Galanter 1983, 123). Because courts are "the least consensual and the most coercive of triadic conflict-resolving institutions" (Shapiro 1981, 8), modern courts are incompatible with a tribal social structure characterized by "multiplex, affective and enduring relationships" (Abel 1979, 170). In American Indian contexts, these relationships are also egalitarian, and therefore the emergence of courts in modern tribal societies is a significant development.

For the Ojibwe, as for many other Native American tribes, courts are alien institutions and are typically associated with colonial domination (Deloria and Lytle 1983; Hagan 1966) As a result, the importing or transplanting of law[9] complicates a condition of legal pluralism as tribal law joins the largely endogenous "semi-autonomous social field," with its own rules, sanctions, "regular reciprocities," and "binding obligations" (Moore 1978, 54–81), already in place. Sally Merry (1988, 889) argues that in recognizing multiple "forms of ordering and their interactions with state law" we can see how law works to make "certain forms of relations come to seem natural and taken for granted." I hope to reveal this by examining how the Lac du Flambeau Band of Lake Superior Chippewa Indians attempts to reorder the off-reservation hunting and fishing practices that occasioned the development of the tribal court. Here my interpretation is informed by Geertz's (1983) and Rosen's (1989) work on the cultural dimensions of practice. I will then focus on some of the trials involving alleged violations of recently codified tribal law in this domain, arguing that they are sites of display, contest, and reproduction both for a traditional model of community relations and for relations organized under the political ideology of sovereignty as a Tribe, or tribal state. In this I associate myself with Philips's (2004) project of analyzing the means by which intrasocietal ideological diversity is produced. I draw generally upon Bruce Miller's (1994, 1995, 1997) work on Salish justice by attending to the political and historical context in which the tribal court at Lac du Flambeau operates, especially with regard to the way in which traditionality and Indian ethnic identity are negotiated in a setting organized by overlapping sovereignties. Finally, I will focus on the discourse of the tribal court, bolstered by Justin Richland's (2005, 237–38) linguistic anthropological study of the face-to-face interaction that constitutes Hopi tribal court as a site for "the negotiation, articulation, and instantiation of . . . [the tribe's] . . . "unique (post)colonial nationhood" and by his "call for increased attention to the microdetails of the sociolegal processes in (post)colonial contexts."

9. The state of Wisconsin exercises civil and criminal jurisdiction on this reservation.

Lac du Flambeau Ojibwe Hunting and Fishing

Three townships (144 square miles) in the Highland Lake District in northern Wisconsin constitute the Lac du Flambeau Chippewa reservation. The reservation was established by the treaty of 1854, allotted in the late nineteenth and early twentieth century under the directorship of the Bureau of Indian Affairs (BIA), and reorganized under the Indian Reorganization Act in 1936, when its constitution was approved. The community joined scores of other Indian communities in becoming "instrumentalities of the Federal Government," in the words of then-Commissioner of Indian Affairs John Collier (Washburn 1984, 286). The community organized its first court in 1948 with the adoption of a law-and-order ordinance.[10] However, the passage of Public Law 280, which gave the federal government's share of concurrent federal-tribal jurisdiction over criminal and civil matters to five states, Wisconsin among them, had the effect of making the community's ordinance and court obsolete.[11]

The process of redeveloping a tribal court began with the passage of the Indian Child Welfare Act in 1978,[12] which gave federally recognized tribes exclusive jurisdiction over the placement of their children in foster care. The catalyst for the establishment of the court at Lac du Flambeau, however, was the Seventh Circuit Court's decision in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (1983), which held that tribal rights to hunt, fish, and gather throughout the lands in Wisconsin, Minnesota, and Michigan ceded by Ojibwe bands to the federal government in the treaties of 1837 and 1842 survived Wisconsin statehood. The decision was remanded to the western district court for determination of the extent of the rights, the permissible scope of state regulation, and the methods of harvest. The six Ojibwe bands that shared the rights decided to proceed with the case on a cooperative intertribal basis (Jannetta 1992, 10). A complicated process ensued whereby the six bands negotiated 40 interim seasonal-harvest agreements on ricing, spring fishing, fall fishing, hunting, and trapping with the state of Wisconsin over a period of six years while at the same time litigating the remanded matters in a series of nine trials in federal district court (see Silvern 1999, 2000). Because Lac du Flam-

10. Efforts to find records of this court have so far failed.

11. This law was a piece of termination-era (1945–61) legislation and had very deleterious effects on tribal judiciaries (Goldberg-Ambrose 1997) and Indian governments generally. The Menominee, however, retain civil and criminal jurisdiction, having been fully terminated and then restored in 1973.

12. In an interview at his home on August 15, 2003, Tom Maulson, the reservation's first judge, said, "The whole idea that the court system was set up to deal with was the stealing of our kids." The first clerk of court, interviewed at Lac du Flambeau on August 2, 2004, also remembered the Indian Child Welfare Act as the motivation for the establishment of the court. The proceedings on this reservation, however, are closed to all save court and tribal personnel and those related to the child.

beau's constitution requires that any regulatory changes in tribe members' hunting and fishing rights be passed by referendum,[13] each interim agreement was subject to a plebiscite before it was codified as tribal conservation code.

That constitutional stipulation is only one of the many indices of the importance of these traditional harvesting activities to the residents of this community despite the state's failure to recognize them and active prosecution of their exercise. The very name Lac du Flambeau (Torch Lake), a reference to the illumination of the waters and shorelines for hunting and fishing at night, is a further indication. François Mahliot (1910) spent three years in the first decade of the nineteenth century at the Northwest Company trading post at Lac du Flambeau observing subsistence and encouraging commercial hunting. Even well after the treaties were signed in the middle of the century, local people continued to live by hunting, fishing, gathering, and trapping throughout the region, with, in contrast to the bands living closer to Lake Superior (Shifferd 1976), little residence on the reservation until the 1870s. Men supplied the increasing number of lumber camps with meat (Barnouw 1950, 268), indirectly facilitating deforestation that had the ironic effect of improving the conditions for the deer population (Schorger 1953; Tornes, Valliere, and Gent 2004) and success for Ojibwe hunters. Toward the end of the century the federal Indian agent wrote, "Sugarmaking, berry-picking, and rice gathering continue to occupy the Indians during the proper season and afford them a considerable revenue. Fish and game supply a never-failing source of food" (Campbell 1898, 320). Much of the allotted lakeshore property was lost to resort development, though the clientele of these resorts hired Indian men as hunting and fishing guides and thus encouraged the reproduction of traditional skills and ecological knowledge.

The seasonal fluctuation of demand for labor that characterized both the lumbering economy of the last two decades of the nineteenth century and the first three of the twentieth and the tourist economy that was its successor required many of these mostly laboring poor people to complement their incomes with resources hunted, fished, and gathered.[14] The court dockets and state Department of Natural Resources (DNR) arrest records for the northern counties reveal that reliance (Oberly 1991, 95–123) and point to a process of oppositional ethnic-identity formation that would culminate in the conflict in the 1980s over the Flambeau band's spearing of spawning walleyed pike in the lakes throughout these ceded lands (Nesper 2002).

Before these subsistence activities became symbols of local Indian ethnic identity they were the basis of what is referred to as "traditional law" in some of the trials that would take place in the 1980s and '90s. At the root of this law were cosmological ideas about the reciprocal moral obligations entailed in the relationships between communities of human beings and animals and the reproductive consequences thereof, as well as the idea that the source of an individual's power, identity, and morality lay in a personal relationship with a spiritual source[15] (Brightman 1993; Hallowell 1960; Nelson, Brown, and Brightman 1988).

Contact-traditional Ojibwe society was segmentary, egalitarian, and consensually democratic. Leaders' authority was limited (Smith 1973, 7). Several coresidential hunting groups made up of several bilaterally related, patrifocal families constituted bands that were characteristically prone to fission. As among many of the northern Algonquian hunters, effective participation as an adult in society was evidence of and predicated upon regular access to spiritual power originally acquired in visionary experience as an adolescent and nurtured over the course of a lifetime. Interpersonal relations beyond immediate relatives were based upon a presumption of mutual access to potentially lethal spiritual power inhibiting overt aggression. This, combined with the reality that extended families were largely self-sufficient productive units and low population densities, provided the community with a small tool kit of dispute-resolution mechanisms. As a result, "potential or long-standing conflicts of any kind could have been resolved or at least avoided" (Dunning 1959, 86), and the ones that were engaged were characterized by self-help and the mediation of local leaders (pp. 186–98).

Social control would become a serious problem in the nineteenth century among the Wisconsin and Minnesota bands, but most conflicts were "still a matter of concern only to the individuals and kin groups involved" (Smith 1973, 19). Nevertheless, Kohl, writing of the Ojibwe of Lake Superior in the middle of the nineteenth century, points to their self-help system, noting that "chiefs, or civil authorities . . . usually play a less important part in the matter [of dispute] than the private revenge of the aggrieved by the culprit" (1985, 269). The families of murderer and murdered typically worked out a resolution or, having failed to, saw the death avenged by the latter by the killing or adoption of the murderer (Densmore 1979, 132; Smith 1973, 19) On the basis of his studies at Berens River in Canada and Lac du Flambeau in the 1940s, Hallowell (1955, 349) wrote that "from the standpoint of behavior one of the significant features of their culture was the absence of any institutionalized development which brought organized social sanctions to bear upon the individual. They were chiefless, courtless, jailless." This complex of ideas, practices, and dispositions lived out in the context of

13. Budget appropriations over $10,000, taxing, assessing, or licensing nonmembers doing business on the reservation, and pledging tribal assets as collateral for loans also require referendums.

14. In his study of poaching among the poor in England in the nineteenth century, Alun Howkins points out that the practice was indexed to the availability of other forms of work, having "a definite place in the village cycle of life and labor" (1979, 279).

15. Many other examples of Ojibwe traditional law could be cited here. For example, one should not eat freshly killed meat until the ghost feast given after one year after the death of a close relative, and menstruating women should not ceremonially smoke. Many stories and jokes are repositories of traditional law.

domination by the state produced a distinct society and culture plurally ordered, internally and normatively, largely by custom.[16]

The Contemporary Tribal Court and the Trials

When a court was established at Lac du Flambeau in 1983, the non-Indian lawyer who would eventually act as tribal prosecutor argued without success that it should reflect the values and methods of conflict resolution that were already being employed in Indian child welfare proceedings (James Jannetta, telephone interview, March 6, 2005). On the one hand, there was ambivalence within the community about the homegrown institutional development that affected the distribution of political power among the families in the community. On the other, there was a felt need to dispel the skepticism of the state and private non-Indian citizens of the tribes' capacity to enforce the law and adjudicate disputes over violation of the off-reservation resource code. In any event, because of its origin in the Tribe's exercise of its sovereignty in regulating Indian child welfare and off-reservation treaty rights and its acting as repeat plaintiff, the court conferred on the tribal government an array of "bargaining and regulatory endowments" (Galanter 1983) that accelerated its development.

Court policy was controlled by a committee of tribe members appointed by the tribal council and de facto chaired by the tribal prosecutor. Two tribe members who had been active in governmental affairs, a man and a woman, were appointed chief and associate judge, sent to the National Judicial College in Reno, Nevada, for a few weeks of training, and placed on the bench. A third, a woman, was selected as clerk of courts. It would take three years of cases before it would be established by an ad hoc tribal appellate court that the Flambeau court did not have the power of judicial review in *Lac du Flambeau Band v. One 200–250 Foot Small Mesh Gillnet and Edward Chosa*.[17] The case appealed had to do with netting fish on the reservation and solidified the court's place in the community as an arm of the tribal council, and the decision did not stop the court from subsequently entertaining extensive discussions about matters of law.

16. The traditional means of dispute resolution continue to be employed. When, for example, a very prominent spiritual leader kicked a fellow elder in an argument, the conflict was settled by four fellow elders, allies of each of the disputing parties, who heard from both and arbitrated. The litigants accepted the outcome ahead of time by accepting tobacco from intermediaries.

17. Two cases from this appellate court appear in the *Indian Law Reporter*, this one (vol. 16, pp. 6095–98) and *Lucille Helgeson v. Lac du Flambeau* (vol. 25, pp. 6045–54), which upheld the tribal court's conviction of a nonmember for possession of a gaming device on fee land in violation of the Tribe's gaming ordinance. In September 2005 the Tribe amended its constitution, establishing a two-tiered judiciary and granting the court the power of judicial review. For discussion of judicial review in tribal courts, see Lopach (1997) and Brandfon (1991).

Tribal court is informal, offering simplified procedures, reduced cost and delay, and the opportunity to defend oneself (Conley and O'Barr 1990, 24). The commitment to informality appears in the tribal code at 80.311: "The judge shall conduct the trial in an informal manner so as to do substantial justice between the parties," reflecting "a common feature of reservation politics" (Lopach, Brown, and Clow 1998, 179). The informality is more than practical: it is a measure of this reservation society's ambivalence about law and courts in general.

In the words of Judge Ernest St. Germaine, the long-sitting former chief judge from this reservation, "For the most part, Shinabe [the diminutive form of the traditional collective self-referential term] fears courts. Their only experiences with courts is to be punished. Shinabe is not good with punishment for the most part. It is a concept that was not understood very well" (telephone interview, March 23, 2005). Other Indian intellectuals have reflected on the contradiction of "past Indian customs and traditions with the dictates of contemporary jurisprudence" (Deloria and Lytle 1983, 120) and the failure of the tribes to develop a distinctive jurisprudence reflective of community values and conceptions of justice (Barsh 1999). Miller's (2001) research on Salish efforts to develop justice systems shows how political domination has fragmented and distorted sectors of Indian communities, making this synthesis very difficult.

Judge St. Germaine's comment also condenses the difference between social relations ordered by law and social relations ordered by custom, a distinction made by Maine (2002), Clastres (1987), and Fried (1967) and economically articulated by Stanley Diamond, who writes that "law is symptomatic of the emergence of the state" and that laws "arise in opposition to the customary order of the antecedent kin or kin-equivalent groups; they represent a new set of social goals pursued by a new and unanticipated power in society" (1974, 265). Building on the same theoretical point and writing about the legal colonization of Hawaii, notably a process facilitated by the indigenous elite, Merry concludes that "the law . . . is part of the violence of the incorporative process. . . . Perhaps its most important role is to enunciate the cultural principles of the new social order" (2000, 205–6). Indeed, Galanter (1983, 127) writes that "law is more capacious as system of cultural and symbolic meanings than as a set of operative controls . . . providing threats, promises, models, persuasion, legitimacy, stigma, and so on." That the symbolic violence of reordering social relations had as its focus the violence men visited upon animals is of particular interest and significance.

The tribal code at Lac du Flambeau now has sections on government conservation and natural resources, children and families, business relations, health, safety and welfare, land and land use, law and order, the court, housing, home ownership, and water and sewer authority. This code proclaims "a new social order," superseding an order at least in part organized by custom and characterized by a recognition of the particularity of tribal persons in favor of the creation of

citizens of a tribal nation. The appearance of this new legal order is the source of some considerable ambivalence and the focus of contestation that is most visible in trials over the practice of hunting.

The Method and the Study

Off-reservation hunting and fishing cases are coded as natural-resource cases and represent about 10% of the court's caseload (a percentage that is declining). Seventy-five to 80% of the cases deal with traffic and with children and families. For each case in which subject matter jurisdiction is found, the court at Lac du Flambeau keeps a written file. Between 1983 and 1992 this file was a one-page form. For natural-resource cases, the form identifies the defendant(s), the ordinance allegedly violated, the dates filed and disposed, the names of prosecutor and judge, and the final disposition and judgment, including the fine amount and the length of time for the payment. I recorded this information for these years. The court also audiotapes all of its proceedings, ostensibly to produce transcripts for appeal, and permanently stores the cassettes. In the summer of 2001 I was permitted to make audiotape copies of the hunting and fishing trials in exchange for organizing this archive. While making the copies, I wrote a summary of each trial. Subsequently, I transcribed most of them. The analysis and interpretation that follow draw upon these transcripts.

Between 1983 and 1999, an average of 38 defendants per year from Lac du Flambeau—almost all of them men—were cited by state or tribal wardens for violations of the band's off-reservation hunting and fishing code, a total of 1,014 violations being recorded. One hundred twenty-seven trials were conducted in these years. As there were often multiple citations and multiple defendants for each trial—Ojibwe men tending to hunt in small groups of related men—these routine violations were frequently contested. The way in which the court kept records during this period makes it impossible to determine the percentage of not-guilty pleas. Between 1983 and 1992, the years for which the court kept the most thorough data on this area of the law, 580 citations came to court. These represented 255 individuals bearing 85 different patronyms, though a full 200 of them were given to the male members of only 6 families. Defendants pled not guilty to 233 of these citations. On average, there were 7 trials per year, rising to a peak of 23 in 1988, and 67% of the defendants were found guilty. Accommodating an unemployment rate of over 50% in the years before gaming (1983–91), judges typically assessed fines between \$20 and \$100[18] for violations that would call for fines in excess of \$1,500 in the state court. Nonetheless, in the first two years of court's existence, and consistent with the high rate of not-guilty pleadings and default judgments, hearings to "show cause" for failure to pay the assessed fine were necessary in a third of the cases. Clearly, what are referred to by some tribal court personnel as "subsistence hunters" and "treaty hunters and fishermen" were resisting the new regime.

The trials involved routine violations such as hunting deer with an artificial light, discharging a firearm from a vehicle, failing to tag a deer carcass properly, transporting a deer hidden from view, and spearing fish in excess of the bag or size limit. Though the tribal deer-hunting season is longer than the state season, the regulations are essentially the same. And though no non-Indian can legally spear walleye and muskellunge, the regulations are extensive.[19] The substance of the regulations points to the legal and scientific resources of the state of Wisconsin when bargaining with the tribes in the shadow of the federal court.

Though this codified tribal law had been ratified by the membership, many hunters and fishermen were conducting themselves in the traditional way and resisting the new regulatory regime in practice. They also resisted it with regard to the court proceedings themselves. In the early years, resistance was mostly passive and diffuse after the fashion that James Scott (1985) describes in *Weapons of the Weak*, with defendants failing to appear, asking for delays, or coming to court unprepared. Later, after the peak of the major social conflict over spearfishing, as the Tribe was growing more powerful, resistance became more ideological. The evolution can be partially accounted for by changes in personnel. Both the first chief judge and two prosecutors lost their positions and became lay advocates.[20] They often worked in the courtroom of a chief judge favorably disposed toward the synthesis of administrative and traditional procedural and substantive law.

The Pragmatics of Court Practice

Tribal court commences in the ordinary formal fashion, with the clerk of courts commanding those present to rise on the entrance of the judge into the courtroom. The courtroom itself is distinctive, however, in having a tribal flag hanging

18. Between 1983 and 1992, when the court tabulated such data, the mean fine rose from \$25 to \$55, though nearly every year there were a few fines of over \$100 for second and third offenses. In 1992, after the first gaming compact (which created more jobs in the community) was signed, the mean fine rose to \$150, but by 1991 the chief judge had begun to suspend at least one-third of the fine on the condition that there were no further citations for natural-resource violations for the rest of the year. He continued the practice throughout the 1990s, with the result that by 1998 the mean fine was \$90.

19. The tribes negotiate with the state to determine which lakes will be harvested and at what levels, and this determines how many permits will be issued to tribe members for how many fish. All but two of the permitted fish must be less than 20 inches long—a concession made by non-spearfishing tribal negotiators to the state's interest in preserving large fish for the sports fishery (see Nesper 2002, 238).

20. In 1987 a county prosecutor challenged as a conflict of interest tribal lawyers' acting as both defense attorneys for tribe members in state court and prosecutors of tribe members in tribal court. The Tribe chose to deploy tribal lawyers to defend members in state court and hired two members as prosecutors. The first chief judge resigned at the request of the tribal council when he decided to run for tribal chairman in 1990.

on the wall behind the bench, fronted with an etching in glass of the same Indian male head as appears on the flag and flanked by an American flag and an eagle feather staff.[21] The judge typically wears a black robe decorated with traditional Ojibwe beadwork on the shoulders. An ordinary natural-resource case begins with a ritual of state, with the Tribe's non-Indian law-school-trained prosecutor announcing, "This is the matter of the Lac du Flambeau Band of Lake Superior Chippewa Indians versus———." Here the defendant's full formal name is spoken aloud and proclaimed in virtual opposition to the collective, followed by the recitation of the charges. Such moments in this space, dense with tribal symbols, index and constitute the tribal state.

On their first appearance, defendants are asked whether they have received copies of and understand the citation and how they plead and are told how to find an attorney should they desire one. In the first few years, a number of defendants who had pled not guilty returned a few weeks later for trial alleging either that they could not find or could not afford even the lawyers Wisconsin Judicare made available and therefore sought continuances. These efforts rehearsed in and for the court the generally antagonistic relationship between Indian residents of the reservation and non-Indians in the surrounding communities. In response to the perceived need for accessible representation in the context of the disinclination of local non-Indian attorneys to practice in the tribal courts (James Botsford, telephone interview, March 29, 2005), lay advocates were trained by Wisconsin Judicare to represent fellow tribe members in tribal court. The undertaking had the effect of creating a mediating class of legal practitioners who stood between the Tribe's law-school-trained prosecutors and defendants.

Following normal American court procedure, the prosecutor then presents his case, employing the sworn[22] testimony of the arresting warden (either a tribe member working for the Great Lakes Indian Fish and Wildlife Commission [GLIFWC][23] or a nontribal warden of the DNR, both empowered by the tribes to cite tribe members)[24] and sometimes experts. Guided by the prosecutor, the wardens present their testimony as evidence supporting the alleged violation in an oft-rehearsed standardized account that is notable for its putative reliability (Philips 1993, 256).

Invited to cross-examine the Tribe's witnesses, unrepresented tribe members often begin to testify instead, presenting the main point in their defense in a single sentence, no doubt also rehearsed in a version of the naming phase of Conley and O'Barr's (1998, 78–97) dispute model. The disposition to be so efficient recalls the traditional aesthetics of killing deer with a single shot to the head. Here, because the traditional conversational pragmatics inhibits conversation partners from interrupting each other, defendants often present the main point of their defense before they are gently interrupted by the judge, often in response to the prosecutor's objection that the defendants are effectively testifying while not under oath. Instructed that they are only to ask questions, defendants often decline to continue. Here, the informality of the court, permitting self-representation, works against the interests of the defendants in that they are the only people in the courtroom who must both interrogate others and give narrative testimony of their own. The existence of an indigenous set of discourse rules may mitigate that disadvantage somewhat by allowing the judge to make his decision as much on the basis of an instrumental rationality (that is, with a certain goal in mind) as according to the demands of rule-orientation (Tamanaha 1993).

Many of the defendants are speakers of an Ojibwe-English that transmits from the parent Ashinaabemowin such syntactic elements as the sentence-terminating particle *enah* to mark interrogatives and certain pragmatic dispositions. Most relevant in this context, speakers of American Indian English generally avoid asking direct questions (Leap 1993, 85–86), and Ojibwe-speakers in particular are inclined to use either imperatives or indirection when asking for things (Black 1973; Spielmann 1998, 76–79). Neither of these orientations facilitates the work of cross-examination, a technical skill requiring considerable practice (Matoesian 2001, 59). Furthermore, defendants' efforts to ask direct questions in Standard English are often complicated by nonstandard ordering of clauses, which obscures the "turn transition-relevant places" (Atkinson and Drew 1979 36–61) in dialogue and results in overlapping speech between defendants and their witnesses. This undermines the effectiveness of their cross-examinations and further risks their dignity as competent participants in the court process. Cross-examination by fellow tribe members acting as lay advocates is somewhat more effective.[25]

21. The court used the tribal council's chambers in the community building until 1995, when it moved into a former hardware store in the commercial section on the main street of town a quarter-mile away. The building houses the clerk of courts's office, the prosecutor's office, the child support agency, the local Great Lakes Indian Fish and Wildlife Commission (GLIFWC) warden's office, and the tribal police department. The feathers for the eagle staff were a gift to the court from a state warden.

22. The standard phrase "Do you promise to tell the truth, the whole truth, etc.?"—hand-printed on a card taped to the clerk of courts's desk—has been repeatedly modified to accommodate evolving political consciousness and the community's religious heterogeneity.

23. The GLIFWC is an intertribal comanagement agency that implements the off-reservation treaty rights on behalf of its 11 Ojibwe member tribes.

24. The state of Wisconsin has accepted tribal credentialization of state wardens to enforce tribal law. Tribal wardens who qualify for DNR warden credentials may enforce state law.

25. For example, in a trial in 1991, the first chief judge, with six years' experience on the bench, acting in his own defense, took 44 conversational turns in speaking with the Tribe's main witness, 38 of which were questions. Sometimes asking more than one question in a turn, he asked 11 yes-no questions that appeared to advance his case, 16 that provided an opportunity for the witness to rehearse or elaborate on testimony given in direct examination earlier and so did not, and 9 wh-questions (who, what, where, why, which, when, or how) that worked in much the same way as the 16 unsuccessful yes-no questions. Three of his questions

The tribe members working as lay advocates appear to be using the position as a means of advancing their social status and professional careers[26] and often seek to foreground political dimensions of the regulatory regime by explicitly identifying with their clients as fellow tribe members—referring to them as "tribal" or "treaty" hunters and fishermen and using "we" and "our" in describing customary hunting and fishing social and technical practices. They also explicitly allege racism on the wardens' part, suggesting racial profiling and entrapment as well as calling attention to the disparity in the regulatory regimes under which Indian subsistence and non-Indian sportsmen fish.[27] Throughout, defendants communicate the belief that regulation is legitimate to the extent to which enforcement officers display a willingness to educate tribe members instead of holding them strictly liable for their behavior and presuming that they know the law. Here they are contesting the distribution of power in the new regime.

Defendants seek to consolidate an alliance with tribe members who are officers of the court by referring to norms and conceptions of community that are credibly representable as customary and traditional. This tactic developed as the Tribe grew more powerful in the course of the 1980s and 1990s, gaming revenues permitting an increase in tribal services and the size of the tribal bureaucracy. Concurrently, the court assumed jurisdiction over more subject matter areas with each passing year.[28]

Jurisprudence

Typically, defendants receive judgment immediately upon the completion of closing arguments. When found guilty, they are fined at a lower rate than would be assessed by the state court, and in many cases involving multiple charges the court often drops one of the charges. After the regulatory phase of the federal court process had come to end in 1990, ending the season-by-season negotiations between the tribes and the state and resulting in a more permanent tribal natural-resource code, the chief judge began suspending large portions of the fines on the condition that there be no further violations of conservation code that year—a kind of probation. This was a routine means of mediating the conflict between the expectation from within the community that the court not be a "white man's court" and the expectation from without that it meet state standards (see Pommersheim 1995, 66–70).

The first two judges to be appointed by the court differed in judicial philosophy and style. The first, Tom Maulson, would simultaneously represent the bands interest among the other bands in negotiations with the state and actively encourage his fellow tribe members to exercise their off-reservation usufructuary rights. He had a much lower conviction rate in this domain of jurisdiction than his associate judge, Phyllis White. Whereas he acted with an eye toward "substantive justice" (James Jannetta, telephone interview, March 6, 2005) she strictly followed the tribal code (Duane Harpster, interview, Boulder, Wis., February 23, 2005) and levied the only fines for contempt issued by this court in the natural-resource domain. Judge Maulson's jurisprudence was informed by an instrumental rationality, a "focus on outcomes rather than rules . . . in which . . . norms are used to rationalize the decision" (Tamanaha 1993, 157)—in this case norms from within the community. This is epitomized in the aforementioned gillnet case.[29] At the end of the trial, when the prosecutor asked the judge the grounds for his dismissal of the case, he replied (italics added, all-capitals indicating volume emphasis):

> On Section 209 the Tribal Council had the authority by resolution to such-and-such all the way THROUGH. I believe that's very VAGUE. *I think we should go back to that particular Conservation Code committee [and] work out these here issues that are going to be affecting tribal members. Maybe we should take out the twenty-five-membership eligibility or whatever. I think we have to, this code is, was drafted in 1975.* It was basically done for, for NON-INDIANS. We implemented, we brought it back into effect for TRIBAL MEMBERS. [9-second pause] Like, like, like I, like you said Kathryn yourself, *things can be amended, I think that we have to start to do that, upgrade this here Conservation Code*, that we have those type of provisions.

In his understanding, cases presented the court with opportunities to shape the law for the benefit of the community.

In 1991, shortly after Maulson reluctantly resigned to run for a position on the council, Ernest H. St. Germaine, a former associate justice for the Lac Courte Oreilles band, was appointed to replace him. St. Germaine had been educated traditionally and held Bachelor's and Master's degrees from the University of Wisconsin–Eau Claire.[30] A grant-writer and educator, he was philosophically committed to cultural and jurisprudential syn-

elicited objections from the prosecutor, 2 for irrelevance and 1 for vagueness.

26. In 1993, James Botsford of Wisconsin Judicare organized the training of 30 lay advocates over a two-year period. Twenty-two completed the program, and nearly all of them took their newly acquired skill sets into more permanent and lucrative jobs in the tribal government.

27. Treaty and nontreaty hunters hunt deer under rules that are very similar, but spearfishermen participate in one of the most closely regulated fisheries in the world, with daily bag limits and size limits enforced by creel clerks who count, measure, and sex each fish taken by each tribal fishermen each night, working under the supervision of both state and tribal game wardens. By contrast, sportsfishermen, who take more than 95% of the estimated number of fish taken by both are not subject to having their fish routinely counted but operate on an honor system.

28. By the late 1990s the court had assumed jurisdiction over traffic, animal control, child welfare, domestic abuse, juvenile, truancy, housing land, and land use, as well as natural resources, both on and off the reservation.

29. See *Indian Law Reporter*, vol. 16, pp. 6095–98.

30. As a young man he had apprenticed himself to Bill Bineshi Baker, Thomas Vennum's sole informant for *The Ojibwe Dance Drum: Its History and Construction* (1982). Subsequently, he had cultivated relationships with Ojibwe elders throughout Wisconsin, Upper Michigan, and eastern Minnesota.

cretism. As a measure of his respect for the fact that the very act of judging others is a violation of appropriate social relations in the community, he often used the powerless form of speech characterized by hedges, hesitation forms, polite forms, question intonation, and intensifiers (Conley, O'Barr, and Lind 1979, 1380) in rendering his decisions. Consistent with this style, and in contrast to the judgments rendered in the informal courts Conley and O'Barr studied (which typically sequenced notice, decision, explanation, and advice [1990, 83–84]), the decisions of all three of these tribal judges were very often preceded by explanations. This accords with traditional Ojibwe indirection in having to say no, the preferred way of doing so being to offer an excuse (Spielmann 1998, 79). An extension of the way in which these judges conducted the trials themselves, it points to the contradictory demands of internal and external legitimacy.

In a number of these natural-resource cases, Judge St. Germaine seemed reluctant to assert all of the authority of his role. In the opinion of the DNR warden who appeared most frequently in tribal court, tribal judges were generally far less assertive than state judges, allowing the prosecutors to take most of the responsibility for the course of the trial. As a result, state wardens testifying for the Tribe had considerable latitude in attributing motives, speculating, or offering conjectures (Duane Harpster, interview, Boulder Junction, Wis., February 23, 2005). Generally, neither lay advocates nor defendants knew enough civil procedure to object.

This dynamic created the conditions for a display of authoritative non-Indian command of relatively precise Standard English on the part of the wardens, instantiating white ethnic identity within a local conflict-resolution forum. It also allowed for the detailed description of the contexts in which citations were generated. And because prosecutors, living as expatriate lawyers of a sort in the community,[31] were also concerned with the credibility of the court, they were reluctant to object as frequently as they might have to defendants' and lay advocates' lines of argument. Even when they did, however, the tribe-member judges' common sense about what was relevant often superseded procedural formalism, and they let the proceedings continue. The result occasionally turned the courtroom into a forum in which explicitly competing conceptions of law, both human and nonhuman "persons" (Hallowell 1960), and the nature of the community were dramatically rehearsed and extensively explored. In such circumstances, the court was functioning not chiefly an instrumentality of the tribal state but as a forum in which genuine debate took place and a distinctive communitarian ideology was given voice.

In the 1990s, several trials took place in Judge St. Germaine's courtroom that brought out the nature of the conflict between the values and practices that had come to organize the community over time and those of the emerging tribal state that, albeit with considerable ambivalence, he was helping to bring about. To illustrate, I will discuss three.

Case 1: The Borders of the Reservation

Case 92 NR 17[32] involved the alleged violation of the off-reservation code on the part of a rather typical hunting party made up agnates, two brothers and a nephew. They were cited for transporting a loaded firearm in a vehicle, transporting an uncased firearm in a vehicle, and "shining" (using a light to locate prey) while in possession of a firearm. They were also in possession of a makeshift spotlight: a Halogen lamp encased in a twelve-pack beer carton with a lens painted blue. Because they were stopped by a DNR warden on a road coextensive with part of the eastern border of the reservation, defense argued that they were hunting *on* the reservation, a practice that was governed by custom and beyond the reach of tribal law and the court. They would be represented by former judge Tom Maulson, now a candidate for tribal chairman.

Early in the trial, after establishing that the arresting warden was moved to act when he heard a rifle shot from the direction of a clear-cut where the regrowth attracts deer, the prosecutor unselfconsciously introduced a conception that resonated with a heretofore-unarticulated indigenous epistemological presumption. It would come to form the basis for the opposition between the tribal code and the emerging customary law (italics added):

> *Prosecutor:* In the situation that we are dealing with—as the result of what you observed, you *believed* that you should issue tickets to these three individuals. What was your *thinking* at the time you issued the tickets, then?
>
> *Defense counsel:* Objection, Judge: "Think."
>
> *Prosecutor:* No, I want him to *think*. I'm trying to make this as simple as possible to understand, if he *believes* that they were off the reservation when they were on the road, shining.
>
> *Defense counsel:* OK, I'll withdraw, Judge.

The withdrawal would form the basis for the question whether the defendants were on the reservation and who had the authority to say, but, more important, it also raised questions about the criterion for knowledge and how the court should evaluate the basis for the certainty of belief.

Defense counsel's cross-examination of the witness called attention to the warden's ignorance of treaty issues and raised

31. The current (2006) prosecutor took the position in 1989. He had previously worked for Indian Legal Services and been the district attorney of the county. He lives on fee land and is married to a tribe member, and he and his wife have raised their grandchildren, also tribe members, in their home.

32. Case-naming conventions code the year first, the domain of jurisdiction (Natural Resources), and the ordinal number within that domain.

the suspicion of racial profiling without explicitly contesting the facts. It did, however, succeed in establishing the great gulf between "our people"—the defendants and, implicitly, defense counsel and the judge—and "this man," the warden. Similarly, when he cross-examined the Tribe's second witness, an employee of the Wisconsin DNR's Land Control Division, he was able to problematize the very process of surveying the boundaries of the reservation and the way those boundaries were represented on the county plat maps that tribal hunters are encouraged to carry.[33] The lay advocate's work appeared to have the effect of predisposing the judge to listen to three of "our people" who would present expert testimony on what they *believed* and *thought* about the borders of the reservation, the treaties, and the sources of that knowledge.

If the appearance of the defense's first expert witness on behalf of his nephew and brothers-in-law—what Sally Falk Moore (1992, 35) refers to as "obligatory partisanship"—was not an explicit enough comment on modes of knowing the court recognized as legitimate, his testifying about what he *believed* to count as legal hunting and drawing on the authority of what was putatively tradition certainly was:

> *Defense counsel*: Is it your belief that in all your years of hunting, that you committed no crime or no violation when you hunted that area?
>
> *Witness*: That area that you're talking about there, where Mr. Hoyt is talking about, is probably one of the traditional deer drives on the reservation. It would have been hunted in parties for years, and there's a, where this man testified, where he stopped that car, there are two cement pillars there, they're tribal pillars, one on each side of the road. Used to be for a gate there. Tribe used to lock that up. That road used to be locked up years ago with a chain across there. Pillars, I think were made by the CC [Civilian Conservation Corps–Indian Division]. My dad used to tell me that. He worked that road. He made them pillars. It was locked up for fire, for safety. It was a tribal road. And when he learned me to hunt that area, he said, "Stand here by this pillar east of the road there." He said, "This is the reservation line." He said, "Don't go off that way, don't even walk four or five steps, 'cause you're off the reservation. You stand by the pillar, you're on the reservation. East of the road there, where that pillar's at."

According to this witness, who had been hunting his whole life and whose forebears had been hunting all theirs, as long as you were on the reservation—that is, as long as your feet were on the reservation or, for the matter, as long as one of the wheels of your car was on the reservation—you could shine a light and then shoot at what your light could reach. This was within the law because you were on "a traditional hunting road for our people," an emergent indigenous geographic category that trumped the totalizing definition of territory embraced by the state and now the Tribe in imitation of the state.

The community expert witness spoke of a border as a zone defined by human capabilities and action, not as a stretch of land that took its meaning from the alleged presence of survey markers somewhere beneath the surface of that road and subsequently represented as lines on a map. Indeed, defense counsel earlier had shown that maps vary. Things "look different in my eyes and much different in yours," he said. How could they be an objective basis for proscribing behavior? It is not surprising that "the reservation" meets "the state" in a liminal and contested zone, a threshold, where this and that intermingle, including different understandings of how it is that this turns into that. This is a very reservation-centric way of seeing. When I discussed this case with the judge, he wrote:

> Here's an issue I have questioned, as a result of this case. What happens when the defendant is two feet inside the reservation line and he is shining and his light projects off the reservation? Is it a violation?
>
> The telling info here is that he had a shining light that was obviously rigged as a violating light. A blue light supposedly does not project like a white light but it does light up the deer's eyes. He was obviously there, violating. Yet, was he?

The defendants understood the state's conception of the border: at some time in the past, the land was surveyed, and a line was drawn on a map, and it came to mean to those who drew it, among many other things, that Indians could shine on one side of it but not the other.[34] But it had been understood in the community that this was "a traditional hunting road for our people"—a place, a cultural possession, a sign of cultural difference—and that meant that people moving along it could hunt animals visible from it. Their use of the blue light was recognition of the conflict between community norms or folk law and the laws of the state and the tribal state. In this way of thinking, the border was somewhere out in the woods beyond the reach of light or shot.

This practice is consistent with the original motivation for the reservation in the 1854 treaty. After the debacle of 1850, when federal agents attempted to remove the Wisconsin bands to Minnesota (Clifton 1987; Satz 1991), the bands asserted their desire to stay put by requesting reservations including "a tract of land *lying about* [italics added] Lac De Flambeau . . . equal in extent to three townships" (10 Stats., 1109). It was intended by Indians and whites at the time not as a delimited geographic space in which Indians were to be contained but as a retreat where they were safe from the advance

33. The Tribe does not have jurisdiction over members cited for hunting on off-reservation *private* land. These cases are heard in state court.

34. At both Lac du Flambeau and Lac Courte Oreilles, reaching the border of the reservation with a poached deer was referred to as a "touchdown." At WOJB, the public radio station at Lac Courte Oreilles, some DJs announced "touchdowns" on the air.

of white interests insofar as they retained the stipulated rights. In that spirit, it would make no sense for a "traditional hunting road for our people" to be so compromised as to have two different jurisdictions meet, a place where one can shine in one direction not the other. What did not come up at trial but everyone knew was that the road had probably been made by non-Indians who used it to poach lumber from the reservation in the nineteenth century and had been appropriated by Indian people when they began to use cars for hunting.

Subsequent expert and defendant testimony from "tribal hunters" in this trial reiterated the grounds of the defendants' knowledge in feelings, beliefs, and thoughts about practices they had learned from senior related men. In his closing remarks—a lengthy dissertation, full of hypercorrections, malapropisms, and redundant deictic markers, that was oddly evocative of the heterogeneity of the border itself and the mark of a broker capable of moving between cultural realms—the lay advocate critiqued the new regulatory regime for its lack of respect. Referring to "our hunters," "our shining lights," "our reservation boundaries," "our hunting on our reservation," "our people," and "our common hunting grounds," he displayed his ability to represent his clients and, by implication, the sector of the community that operated by these understandings in a trial organized by imported rules and presided over by a judge he was attempting to include. The tribal prosecutor responded representing the interests of the rational and bureaucratic tribal state, arguing that the border of the reservation should be regarded in the same way as the border of the state. He was making the claim that two of the same kinds of political and legal entities happened to meet along that dusty dirt road. It was not a "traditional hunting road of our people," part of "our common hunting grounds," any longer. It was a border zone where formally identical jurisdictions met, the only difference being that they permitted different practices. The judge de facto endorsed the rational border model, justified his acceptance of it in terms of safety, and called for hunter education about this area. He was choosing to imagine the community in its statelike mode. In exchange for this exercise of power, he dropped two of the three charges against each of the defendants and found them guilty of one, fined them, and suspended their sentences in exchange for good behavior for the rest of the fishing and hunting season. Defense counsel went on to win the election, no doubt substantially assisted by the votes of those families at the margins of both the Tribe and the dominant economy and therefore dependent upon the extensive use of off-reservation resources.

Case 2: The Deer Decoy

In 1995, 11 years into the tribally administered off-reservation-deer-hunting regulatory regime, six defendants consolidated their cases into one trial that explicitly drew upon what the judge would refer to as "traditional" and "cultural law." It was an effort to challenge tribal wardens' practice of setting up full-scale models of deer in off-reservation places visible from the road with the goal of enticing "tribal hunters" to shoot, either from their vehicles or from within 50 feet of the centerline, in violation of tribal code. In the course of the trial, issues of social class, differential access to policy-making bodies, and the nature of the usufructuary rights as property were addressed. Among the six defendants, most of whom were marginalized underemployed working-class men (but including one woman), there was one who was a college-educated and increasingly bilingual spiritual leader. The group retained the services of Mike Chosa, an activist and a radical who had made his debut on the regional stage with the 1971 occupation of the Nike missile site at Montrose Harbor in Chicago (La Veen 1978) and had gone on to play different roles in treaty-rights conflict between 1983 and 1989 (Nesper 2002).

Repeatedly using forms of the word "conceal" (referring to wardens' hiding) in cross-examination of the Tribe's witness, a tribal warden, defense counsel sought dismissal because of entrapment but failed time after time to have admitted evidence that the court was persuaded by the prosecutor to regard as without foundation. He then put his expert witness on the stand: a widely respected local elder, fully fluent in Anishinaabemowin, who was involved in the revitalization of the Ojibwe language on the reservation and was regularly called upon to give the invocation at public events. He first asked the witness to describe "the type of training you received in the use of weapons in hunting," eliciting a discourse on traditional hunting education and technique. He then asked him if hunting from a vehicle could now be regarded as traditional. "Times have changed, and I imagine more people do that nowadays than they ever have in the past," the witness responded, and defense counsel took and later represented this as a yes. Then he asked the witness for his opinion, "as an elder and as a spiritual leader," on how he would regard "putting a decoy deer or a make-believe deer out in the woods." The witness answered:

> Well, I'm going to give you my OWN opinion, my honest opinion, the way I feel. I think that's wrong. Because I was taught to respect the animal itself, that deer. When we killed a deer we put tobacco down and made sure that the entrails were covered up and everything else. We didn't—I just can't see where a means of—I, I, I, couldn't understand that part, because if you have to force somebody to commit a crime—and that would be a crime, I think, if you shot at a deer that was a stuffed deer. In the first place, we were taught to respect an animal, and anything that you did contrary to that, like putting a stuffed deer out, that when I was trained, that would be what the Indian people would call *Ishaa-bap-nadoah-nadwah-wehsee*. Which would mean that you're, in our way of thinking, that you're poking FUN at that deer. That you're—and that isn't the way we did things. The fact that when we, when we, when we killed a deer, even when my grandfather was alive, when my grandfather

killed a deer, he did things in the traditional way. He put tobacco out. And every portion of that deer was used. The hooves, the hide, the neck, the, everything, the legs, the shanks, heart, liver. Everything was used. And when I heard about that—I'll give you MY opinion. I think that is wrong in the sense that I don't know what it's for, to teach safety or whatever it's for. I think that's wrong, because I think that if you have to resort to something to that extent, to make somebody commit a crime, so that you—then I think maybe somewhere along the line it's wrong and it's right that we have to create a crime or something that'll MAKE a person commit a crime.

There is so many things I have heard about hunting seasons where people cut the hindquarters off the deer, take the hindquarters or take the rest of the body, rib cage, they leave it out in the woods. Or I heard of people killing illegal deer, dragging them under the trees to hide them to a later date. Those are the kinds of things that I think that should be enforced.

Now that's my opinion. And some of the things that we held sacred, we held sacred, an animal is sacred to us. And we didn't, to me, that having a stuffed deer is, I don't know, just against everything I have ever been raised with or taught.

Defense counsel permitted the elder's words to ring in the silence for a full 30 seconds before he spoke.

In the traditional order, being hunters and killing animals who also possess spirits rather like one's own is the condition of the possibility of human life for Ojibwe people. The relationship between hunters and their prey is one of obligation, entailing honor and respect to the animal's spirit whose body sustains human beings. It is elaborated most extensively by Brightman (1993), writing generally about the Subarctic Algonquian religion. It is serious business to be undertaken with respect for the tragedy that it is. The emphatic incredulity with which the witness uttered the word "fun" made the point forcefully in his testimony. To simulate the spiritual encounter that successful hunting represents for the sake of the Tribe's purpose is disrespectful if not dangerous.

Asked if he had ever expressed his views on the use of decoy deer to the committee that develops policy for the GLIFWC, the witness said that he had "never had the occasion. I was never involved with it," implicitly impugning the committee's activities.

The college-educated defendant then took the stand. He was deeply committed to the maintenance of the local language and traditional values. He elaborated some of the themes introduced in the expert testimony of the elder, who was his teacher. He did not contest the fact that he had shot from his vehicle, but he testified that he thought he was shooting at a deer that he himself had wounded earlier in the day as a member of "an organized hunting party that had been making drives." Thus he implicitly ranked the orders of law that shape practice in this community. "I also seen an opportunity to take down a wounded animal. . . . My parents and others who were instrumental in my upbringing used automobiles and trucks for harvesting deer for purposes of feeding us, their children." He was rehearsing customary practice:

Defense counsel: I'm going to ask you one other question regarding, ah, you heard the testimony of Mr. Chosa, did you not, in regards to the hunting rights, that Mr. Hoyt asked? OK, what's your feeling about, are they tribal rights or are they individual rights?

Defendant: In parallel with what I just commented on, when I leave, when I leave to harvest, I'm aware of rights that this tribe has negotiated with the state. And my feeling is that when those agreements were made, that this Tribe lost great, a great amount of its privileges. I also feel that these rights are, are, are individual rights. I have the right to utilize the resources that the Great Spirit put on the earth, not DNR or GLIFWC, that the resources were put here by the Great Spirit. We were told how to use the Great Spirit's gifts. I go out and hunt deer. I don't have to ask GLIFWC or the Tribe or the DNR. I ask the Great Spirit. I use tobacco and the deer comes to me. That's what happens. The spirit puts the deer in front of me. I then I use a firearm to harvest the deer, and I try to use, as Joe had said, I also try to use all the parts of the deer. I tan hides, I use the buckskin. I use the hair off the deer. I use the insides of the deer. I use the brains in the deer. Try to use it all in a good way.

Defense counsel: Do you then feel it's more of an individual right or a tribal right or vice versa or?

Defendant: I believe it is an individual right.

I first note here the use of the word "feeling" by the defense counsel and the fact that the elder used the word "feeling" to preface his critique of the use of deer decoys above. I suggest that he was using the closest English term to a local conception that is rooted in traditional epistemology. Briefly stated, authoritative knowledge is the outcome of personal experience grounded in disciplined, spiritual connection (Hallowell 1934; 1955, 172–82; Nelson, Brown, and Brightman 1988). "To feel" communicates a certainty that "to know" does not.

The defendant's second answer reveals far more, however. The necessity to negotiate with the state at all represents a loss for Indian people but clearly represents a gain for the Tribe, and this appraisal is widely shared within the sector of the community that is not employed by the Tribe. Suspicion of written documents and writing runs deep and is part of this general concern. From the perspective of the court, as an instrumentality of the Tribe, what Indian people do with the "natural resources" off the reservation is a treaty right held by the Tribe. Individual members have "privileges" in relation to this right, and the privileges are typically suspended pending payment of fines by those found guilty of violations of the off-reservation conservation code. It is these rights that

make the Tribe the "self-governing political state" (Valencia-Weber 1994, 225) that proponents of sovereignty claim it to be. What is being explicitly contested here is the Tribe as a rights-bearing state.

The statement "I use tobacco and the deer comes to me. . . . The spirit puts the deer in front of me" condenses an orientation toward the reciprocity that characterizes relations not only among close kin but also between humans and the nonhumans upon which they depend. In addition to bearing witness to the presence of a small segment of this community that actually attempts to live these metaphysical commitments, it is a critique of the assumptions and institutions that have effectively betrayed this insight.

In a written decision that he read aloud a few days after the trial, the judge reviewed the course of the trial, explicitly repeating the Ashinaabemowin term used by the elder and using *awessi*, Ashinaabemowin for "animals," thus signaling his own social location and capacity to evaluate orders of law. But then he also gave the recent date and number of the tribal council resolution authorizing the use of decoys before he rendered a judgment of guilty for all the defendants and then suspended $100 of their $150 fines, implicitly acknowledging the morality of their practice.

Case 3: The Wasted Deer

Fifteen years after the first trials involving the violation of tribal code regulating deer hunting, *Lac du Flambeau v. Marc LaBelle*, 98 NR 69, explicitly foregrounded the reality that plural legal orders continued to organize both hunting and judicial practice in this community. Nearly 40 years old and a resident of suburban Milwaukee at the time of the trial, the defendant was alleged to have violated section 26.303 of the tribal code: "No member shall unreasonably waste, injure or destroy, or impair natural resources while engaging in the exercise of off-reservation treaty rights." A tribal warden had found and photographed a legally tagged rotting deer carcass hanging from a pole in the defendant's mother's yard. Testifying in his own defense and admitting to having left the deer there, he said that he had left it as a gift for a friend whom he had expected to "come up" from the city where they both resided but the friend had never arrived.

The facts were uncontested and established routinely. In his closing statement, the defendant opened the case to traditional law:

> Well, I did not intend to waste a deer. To me that's very valuable. I wouldn't do that. I've never done that. Just circumstances turned out it being wasted. And, ah, I have already apologized to the Great Spirit for that, and I just, I do feel badly about it, but it was not intentional.

After allowing ten seconds of silence, the judge responded to the mentioning of "the Great Spirit" and began an exploration of the depth of the defendant's understanding of what he was saying that would evolve into his decision via an exploration of traditional law (phrases within diagonals overlap):

> *Judge:* Mr. Labelle, given the testimony that has been presented, you know, it appears that there was a violation that took place, and including your own testimony, which basically it appears that you're admitting to the violation, what I'm really curious about is when you said that you have already apologized to the Great Spirit for what happened, how do you do that?
>
> *Defendant:* Look up and apologize.
>
> *Judge:* [Ten-second pause] What were you intending to have happen then? I guess that's what I'm trying to understand.
>
> *Defendant:* I was giving my friend some deer meat/(unclear)/
>
> *Judge:* /No, I'm not talking/about that, I'm talking about the apology. What did you expect to have happen? I need to understand that better from you.
>
> *Defendant:* I apologized to the Great Spirit for what happened, for wasting an animal. I don't waste animals, that's not/something that I do./
>
> *Judge:* /No, that's not/what I'm asking, Mark. I'm not even questioning that part. I'm trying to understand what you wanted to have happen or what did you expect.
>
> *Defendant:* I just apologized, that's, I didn't expect anything to happen. That animal went to waste and, except for the parts that I took, and, ah, I felt badly.
>
> *Judge:* I guess I don't want to put you on the spot, but I guess I want to understand that if that is something that we can expect to do, if something like that happens is that enough, or—
>
> *Defendant:* It isn't enough. I know it will never happen again. I don't waste meat.
>
> *Judge:* Except in this case.
>
> *Defendant:* That's not something I do.
>
> *Judge:* Except this one time.
>
> *Defendant:* Yeah. Well, he was, he told me he would be here for, to, you know, go out for the second part of the season.
> *Judge:* I understand that.

The judge was trying to probe the defendant's understanding of the quality of reciprocal relations in the traditional cosmology. Here, in contrast to the situation with the tribal code, intention was not relevant. The judge communicated

this in his responses to the defendant's attempts to separate his own acts from his understanding of his part in the exchange:

> *Defendant:* It isn't enough. I know it will never happen again. I don't waste meat.
>
> *Judge:* Except in this case.
>
> *Defendant:* That's not something I do.
>
> *Judge:* Except this one time.

The subtext might read: "You did this. Now you must do something to repair it. A sincere apology is inadequate, even irrelevant. The spirits do not respond to testimonies to the presence of a pure heart. They cannot read intentions." Indeed, this man was leaving a gift for a friend. We may assume that he had the very best of intentions. The spirits respond to actions: gifts of tobacco, the ritual consumption of food, gifts of the human voice in song and the human body in dance, that is, total prestations in a world organized by reciprocities (Black 1977, 145; Hallowell 1960, 384–85; Landes 1968, 22–41; Vecsey 1983, 106–10, 148–50). Such an orientation toward reciprocity is the currency of the historic and communitarian social order as well.

The judge continued:

> But I was very curious that you brought that aspect, more or less, of traditional law, brought that into the case, and since you did, then there is a higher penalty associated with that, because what you're suggesting then brings that traditional law into play [four-second pause] then not only you suffer for the penalty but we do, we all do.

Here is an elaboration of the theory of human action in an enchanted cosmos populated by both human and nonhuman persons. Even unintentional inappropriate actions can have consequences for the entire collective. This is the absolute liability in the areas of traditional criminal law that is criticized so thoroughly by Goldman (1993). The judge not only expressed the indigenous theory of reproduction ("that once we start to waste what's there, it's going to go away") but suggested that the effects of such inattention and disrespect proliferated in this particular local human realm as well:

> Our kids are killing each other. We are killing each other. We're beating each other up every day. We're drunk, we're using drugs, we're really struggling. We had a young girl that tried to kill herself here just this past week. Can we say, "that's not my problem?" Well, what you're suggesting, what you're bringing into court is that it is. It's a part of it. It's the way we live our life. It's the way we disrespect and forget everything around us, that we could let the life of that deer be wasted the way it was.

He went on: "If you are going to bring traditions into the courtroom, you better go find out what more you need to do to take care of what happened there, 'cause you're going to have misery, and the people around you are going to have misery." He recommended that the defendant consult an elder to be guided toward the sacrificial remedy ("You've got to take tobacco and you've got to take a gift in order to do that"). And after a ten-second silence that separated the two legal systems that intersect in this case—a silence that permitted the defendant to imagine himself seeking a remedy by mobilizing relationships governed by the reciprocity that still organized relations between people on the reservation—he found the defendant guilty, fined him $150 plus $75 natural-resource assessment plus $20 court costs, and did not suspend a penny of it.

For a moment, the power of the court was deployed with the aim of reproducing an indigenous "constellation of concepts . . . what might be termed environmental law" (Miller 2004, 98) in the discussion about the elements of spiritual reparation. This also happens when the court entertains arguments that are grounded in the traditional values of generosity, interdependence, and kinship. These are the "quasi-precedents" of which Philips (1999) writes: the principles, values, arguments, and motivations that organize certain realms of social life but do not typically count as defenses in courts of law. They are moments wherein the Ojibweness of this society is affirmed in the framework of an institutional process—court—that proclaims the society's statehood, its "nationhood" or "sovereignty" (see Philips 2004).

There is a final irony in this case. The severity of the judge's sentence resonates with the magnitude of the reparation that he suggests is necessary. As it turned out, the judge's action was a moment in the reproduction of the traditional order by modern institutional means. Asked about the case years later, he wrote:

> Mark came to me later with *asema* [tobacco] and asked for his Shinabe name. His mother, my cousin, hosted the naming ceremony at her place. As I spoke for the food, I noticed no venison. I asked her about it. She said, "We didn't have any." Shinabe justice takes too long, eh?

Having a name is the condition of the possibility of having a relationship with the spirits generally and the spirits of animals in particular. The absence of venison at the feast was "Shinabe justice" because Mark was now paying for having wasted the deer with his apparent current inability to hunt successfully. The case displays the attention to the dynamics of reciprocity that organizes relations between individual persons and between the groups that now constitute reservation society and manage the tribal state.

Discussion and Conclusion

Susan Philips (1994, 65) writes that "public court sessions are points of articulation between the state and civil society." In this locality, the proceedings in the tribal court are points of articulation between the Tribe and the community, two fun-

damentally different ways of imagining and living in contemporary reservation society. The Tribe is an increasingly powerful bureaucracy with extensive relations with other entities like it, among them agencies of the federal and state governments. It is also a mode of realizing the interests of the community. The community, however, is thought of as a "family of families" (in the provocative if slightly mystifying—given that some "family" members enjoy far more power than others—phrase of one tribe member). Like the Salish communities in which Miller (2001, 38) works, Ojibwe "communities are composed of competing but interconnected family networks," with certain networks being in control of the Tribe. The cases I have selected for analysis go some distance toward representing the nodes of conflict between practice organized by tribal law and the customary practice characteristic of the society imagined as community. They also reveal something of the range of interests served by this ideological diversity and legal pluralism.

In the deer-decoy case, whether the engagement between the tribal hunters and the deer is better understood primarily in culturally particular terms or in terms of "safety"—the touchstone of the judge's rationale in finding against the defendants[35]—was set in motion with a tribal policy decision. The Tribe "sees" deer as the state of Wisconsin does (see Scott 1998) and as a result is itself seen as acting like a state, emblematically indifferent to spiritual matters, perhaps in state-like recognition of the religious and cultural diversity within the reservation community. The policy precludes tribal endorsement or proclamation of cultural and ethnic difference in this domain in favor of the value of sovereignty. So, too with the wasted-deer case. Here the Tribe might decide as a matter of policy that, once reduced to a carcass, a legally harvested deer is of no interest to it and tacitly invite traditional law to occupy a field it is leaving open. But external homogenizing demands trump internal concerns and reveal the generative if also antagonistic relationship between official and indigenous law as the Tribe's interests advance into more and more domains of community life.[36]

By contrast, the border case engages the interests of both the tribal state and the state of Wisconsin and thereby even more clearly reveals the culturally homogenizing consequences of aspiring to statehood in the terms dictated by the federal government. Tribal officials have declared the off-reservation rights tribal property, and it is individuals in their capacities as identical tribal citizens who then possess "privileges." Here the reservation is represented by the Tribe to be the same kind of entity as the state of Wisconsin, and the relationship between the person and the collective is imagined analogously. This equivalence is what is engaged in the deer-decoy case, with the defendants deploying the authority of tradition to contest governmental practices drained of specific native cultural content. Each case is a lesson in the cost of domestic dependent sovereignty, which is that the Tribe will come to look rather like all of the other sovereigns (see Barsh 1993; 1999; and Biolsi's [2004, 241] conclusion that a number of tribes "have borrowed a modular form of the nation-state").

The tribal court is the instrumentality of the Tribe that is most actively and thoroughly constituting the tribal state by endowing the tribal departments with power and legitimacy, at least where there is code to govern relations, with representatives of each department appearing in court as "repeat players," typically facing a "one-shotter," in Galanter's (1974) terms.[37] Simultaneously, the court is a site for negotiating the significance of the cultural distinctiveness of the community that inheres in hunting and fishing and in other activities, though, as Fowler (2002, 252–75) points out, it is in the ritual context, dances and pow-wows, that such particularities are most effectively and explicitly reproduced. Defendants who offer a cultural defense may be listened to and even engaged in their own terms. Their forfeitures may be reduced, but they rarely win, so the effect is to order and rank the relationship between plural legal and ideological formations.

In the court at Lac du Flambeau, a small group of cultural brokers took the lead in articulating the concerns of the sector of the community that has always carried the burden of ethnic distinctiveness as subsistence and commercial hunters, as "violators," as speakers of Ojibwe-English, and as a group inclined and constrained to construct its cultural identities oppositionally—that is, the poorer and larger sector of the community. These cultural brokers are aspiring tribal politicians and bureaucrats working with clients who have weak ties to the people who control the apparatuses of the tribal state. The Tribe, however, must both socialize tribal persons in this sector into the new regime and encourage them to continue to use the land and its resources in what is repeatedly represented, for its ideological and rhetorical value, as the traditional Indian way. It is an example of the general necessity for tribes to produce the cultural distinctiveness that is the

35. In *LCO v. Wisconsin*, 668 F. Supp 1233 (1987), the state's power to regulate treaty usufructuary rights for health and safety was directly addressed for the first time.

36. This advance takes a gendered form. When men appear in tribal court they appear as defendants and respondents: in natural-resource cases, when their partners seek restraining orders, and in paternity and child support cases. It is tribal women who seek the restraining orders and the child support, and, because two-thirds of the tribal employees are women, it is often women who come into court as plaintiffs on behalf of the Tribe.

37. This would minimally include GLIFWC and DNR wardens, of course, as well as the tribal police force, enrollment department, child welfare office, child support agency, health center, conservation law department, natural resources department, forestry program, land management program, historic preservation office, housing authority, and water and sewer authority. With code for small claims and probate, power accrues to the Tribe as a guarantor of contracts. Galanter (1974) shows that most litigation pits a "repeat player" such as a state agency or a corporation against a "one-shotter," a defendant making a single appearance. Every natural-resource case on this reservation takes this form, as, indeed, does most of the court's business.

condition of their separate legal status within the multicultural American state (Dombrowski 2001, 12–13), this distinctiveness being the sign of tribal sovereignty (Dombrowski 2004). In addition to feeding their families, these treaty hunters and fishermen supply the traditional foods required for the naming ceremonies, marriages, and ghost feasts that reproduce the traditional order, thus making the ideological diversity that emerges in tribal court credible.

The internal structural symbiosis concords with jurisprudential practice. As in the proceedings in Roma *kris* studied by Weyrauch (2001, 79), conciliation is highly valued because people see themselves as "surrounded by a foreign and essentially hostile environment and dependent upon mutual assistance and good fellowship."[38] The court is lenient—keeping fines low (Fred Ackley, interview, Mole Lake, Wis., March 14, 2005) as "the price of doing business" (Duane Harpster, interview, Boulder Junction, Wis., February 23, 2005)—even as it generates convictions for display to external agencies as evidence of the workability of devolution and the outsourcing of regulatory authority in "the contemporary governmental regime of neo-liberalism" (see Biolsi 2004, 243–45). It gives a hearing to testimony that draws upon putative traditional values and dispositions, directly and indirectly indexing and reproducing an image of the community as a distinct and egalitarian indigenous enclave even as the tribal state consolidates governmental power and as class differences within the community increase.

Until the *Voigt* decision in 1983 and the establishment of the tribal court, the tribal government took no interest in tribe members' hunting and fishing off the reservation. Their "violating" (as it was called) was a matter for the state. It was an exercise of rights stipulated by the treaties of 1837 and 1842 (Nesper 2006) and effectively held by individual tribal members as members of families. The typically nocturnal and surreptitious practice was an elemental component of Lac du Flambeau Ojibwe identity, with all of its oppositional symbolic value, and was regulated by customs whose origins lay in contact-traditional culture.[39] As such, the practice was entirely separate from tribal government. At the time, the locus of the opposition between the "state and civil society"—the county court—was 40 miles from the reservation and culturally, ethnically, and racially different.

The "windfall" (as some indigenous intellectuals saw it) that was the *Voigt* decision changed everything. For a short period of time, a pre-allotment-era property regime appeared, with tribe members shooting deer from their cars in a radically egalitarian expression of Indian difference nearly as frightening to the tribal council as it was to the local non-Indians. Coming almost a century after the policies of the allotment era had fragmented their communities and constituted new Indian subjectivities (Biolsi 1995) and half a century after the Indian Reorganization Act had created dependent protostates, the federal court decision was an opportunity for the tribes to assume jurisdiction and instantiate sovereignty, federal law having created "a narrow and specific range of rights-claims that are actionable" (Biolsi 2001, 181). These evolving political formations of the signatories of the treaties of 1837, 1842, and 1854 would now confederate for purposes of the management of resources *and tribal persons* in the ceded territories and, in so doing, carry forward the transformation of those particular tribal persons into tribal citizens. The right to the violence that men visited upon animals as a moment in the reproduction of the traditional sociocultural order was now a tribal property accessible as privilege.

With courts, the tribes involved in the *Voigt* decision asserted legal title in their tribal code (26.301[1]) "to the custody and protection of all wild plants and wild animals within the ceded territory . . . for purposes of regulating members' use, disposition and conservation thereof." The nexus of civil society and state was now *within* the community, making the internal class differences that had developed over the generations far more consequential. As tribal code is written and natural-resource trial proceedings grow more routine, customary historical practices continue and are, in the context of this new regime of regulation, abstractly referred to as "traditional" or "customary" by defendants, lay advocates, the judge, and even the prosecutor. The Tribe depends upon this order of value, is defining itself in opposition to it, and risks entirely supplanting it but also acknowledges and affirms it in the court at the very heart of the emerging tribal state.

Though some important elements of the community's original commons have been reestablished in this process, there is a risk in transplanting any legal system (Kidder 1979; Tamanaha 1993). Accommodating the importation of constitutional government and a court to endow it with power and legitimacy engenders social changes that involve the capacity for and even an interest in reproducing the cultural distinctiveness that is the condition of the Tribe's separate legal status. This is one of the reasons that, for example, there is such anxiety about "the loss of the language" on this reservation, though only a few people in their eighties speak Ashinaabemowin as a first language. It is why the very few in their forties who have learned it as a second language enjoy such high status, the ability to speak the language and point to a domain of traditional knowledge and law being a source of power in this complex political economy of signs. It is also why references to "traditional law" began to emerge only in the 1990s, quite a few years after the importation of administrative law to regulate off-reservation usufruct and after a successful gaming operation had broadened and deepened the reach of the Tribe.

38. When speaking of such matters, Indian residents of the reservation contrast "here" with either "the surrounding community" or "the dominant society."

39. Whites hunt and fish during the day for sport and handicap themselves with minimally adequate mass-produced equipment. Indian people work at hunting and fishing, preferably at night, maximizing technological assistance with homemade lights and spears.

Acknowledgments

The Academy of Learned Societies/Mellon Foundation supported this research with a Junior Faculty Research Fellowship for 2004–5. The Graduate School of the University of Wisconsin–Madison and Ball State University have supported different phases of this research. I am grateful to Lawrence Rosen, Phyllis Morrow, Tom Biolsi, Neil Whitehead, Herb Lewis, Marc Galanter, Paul Nadasdy, Pauline Strong, Eric Olmanson, Justin Richland, Bruce Miller, and several anonymous reviewers for comments and suggestions on its various incarnations. I especially thank Jane Beeler, clerk of courts at Lac du Flambeau, former tribal judges Tom Maulson and Ernie St. Germaine, and prosecutor Terry Hoyt for their time and interest in discussing their court.

Comments

Russel Barsh
Center for the Historical Ecology of the Salish Sea, P.O. Box 415, Lopez Island, WA 98261, U.S.A. (rlbarsh@gmail.com).
10 V 07

Many years ago I served as a legal intern with a tribal government law reform commission in Montana, where I spent days in tribal courtrooms and evenings riding the roads with tribal policemen. Observing tribal court on Monday mornings—those Monday mornings when the one-room jail was relieved of Saturday-night revelers—I wondered why no one contested any of the charges. My Anglo-American sense of justice was offended. I asked some of the old men with whom I went to weekly sweats. Some of them said that it wasn't Indian to deny guilt; Indians accepted responsibility for their acts and what was owed. Others told me that the tribal court was utterly crooked (they called it a "kangaroo court") and that only a fool would argue with the police and judges. Then I asked the Monday-morning defendants. They had the best answer of all: "Bargain day," they said. Plead guilty on Monday morning, when there's a long line of pending prosecutions, and the judge will let you off easy: ten dollars "flat rate" and no record. Who was right? Was this a clash of cultures, the rotten edge of colonialism, or a matter of small-town common sense? Perhaps it was all of these things and more.

I am not suggesting that understanding local law systems is as endless a riddle as *Rashomon*. I am suggesting that hypotheses and methods need to be specified carefully. It is easy to find evidence for any conclusion you like and easy to overlook layers of meaning that are important to some if not all of the participants.

At the outset, I think we must identify the purportedly antagonistic worldviews so that we can tell them apart in the intricate dance of disputation. In his efforts to untangle tribal court discourse, Nesper relies chiefly on assumptions about Ojibwe and Western values and practices. He attributes the purported sentencing flexibility of tribal judges to Ojibwe culture, for example, but does not show how this attribute is absent among local non-Ojibwe judges. A comparative study would have more validity: how do neighboring tribal and other courts handle the same kinds of offenses?

Local law can be described through a linguistic and philosophical synthesis of the recorded opinions of local experts, such as judges and advocates (e.g., Ladd 1957; Gluckman 1963; Barsh 2005; Barsh and Marshall 1998), or through annotated compilations of representative case law (e.g., Llewellyn and Hoebel 1941; Pospisil 1958; Schlegel 1970; Barsh 1999). Nesper neither systematizes ethnographic data on historical or contemporary Ojibwe normative thinking nor presents a convincingly representative suite of case studies. He has access to hundreds of hunting cases but tells us about only three without showing how they are representative. Tribal judges appear to have been interviewed, but their interpretation of their own cases has been omitted.

It may be argued that a great scholar can squeeze a civilization out of a paragraph of text. I remain unconvinced. Nesper finds "traditional epistemology" in a dispute over the precise location of the tribal boundary because Ojibwe hunters testified about where they "believed" it was. With respect, this is a routine legal issue (going to specific intent) in mainstream American practice when boundaries are not clearly marked. In the second case Nesper describes, a "respected elder" gave his opinion that decoys "make fun" of the deer, and he attributes the light sentence given in this case to the judge's respect for tradition. But in the absence of the judge's sentencing statement or explicit interview data after the trial, it is just as plausible that the judge was motivated by sympathy for the defendant, who we are told was a well-educated and respected young man. Only in the third ("wasted deer") case is the judge quoted clearly discussing local customary law—not in opposition to otherwise applicable state or tribal rules but in the course of lecturing the defendant about what a bad man he was before sentencing him. This is a very thin foundation for concluding that Ojibwe are asserting traditional culture through violating hunting laws and defending their actions in tribal court.

American literature has long recognized courtrooms as theaters in which local and customary moralities clash with state authority or higher principles of justice. Courtroom dramas such as *To Kill a Mockingbird* and *Inherit the Wind* have enjoyed popularity for generations, alongside the work of generations of legal anthropologists beginning with Llewellen and Hoebel (1941). Against this backdrop of literature and scholarship, it is fair to ask if Nesper has identified a peculiarly Ojibwe (or North American) "flavor" to courtroom cultural power struggles from which we can gain better insight into the cosmopolitan phenomenon. It is impossible to discern this reliably in this study.

Thomas Biolsi
Department of Ethnic Studies, University of California at Berkeley, 506 Barrows Hall, Berkeley, CA 94720-2570, U.S.A. (biolsit@berkeley.edu). 11 V 07

This article is an important contribution to the anthropology of law and to Native American studies, and it draws on a remarkable archive (testimony to Nesper's good relations with the Lac du Flambeau people and their institutions). How often are we able to witness—actually listen in on—emerging modern legal processes within a contemporary indigenous group struggling for sovereignty and statehood, and in ostensibly native ways? Not often, and this article is of a piece with the noteworthy (both for quality and for rarity) work of Bruce Miller and Justin Richland on contemporary tribal courts.

Nesper argues that "modern courts are incompatible with . . . tribal social structure" and that both Ojibwe tradition and traditional Ojibwe almost always lose in the tribal court. It is "the interests of the rational and bureaucratic tribal state" and not those who "have weak ties to the people who control the apparatuses of the tribal state" that prevail. None of this will come as a surprise to scholars in anthropology or Native American studies or to many, if not most, members of federally recognized Indian tribes in the United States (especially those who are not elected tribal officials or tribal employees). But I think that Nesper's rich material and insightful analysis actually paint a more complicated (and politically hopeful) picture and that his central conclusions do not do justice to what he demonstrates with his deft handling of the ethnography. While it is true that a substantial number of subsistence hunters seem to be scofflaws when it comes to the tribal code, I cannot see a fundamental divide between the interests of the tribe as a collective and the interests of individual subsistence hunters. What is implicit in these court proceedings is the critical role of the tribe in protecting (against the state of Wisconsin) what individual rights to hunt tribe members do have under treaty law.

Take Case 1, concerning the reservation boundary: While the defense argued eloquently against a line-on-the-map understanding of the reservation boundary, the court rejected this argument and found the defendants not only subject to tribal law but also guilty. But abstract legal principles such as the concept of mutually exclusive jurisdictions divided by fixed, linear boundaries work for Native subsistence hunters at least as much as against them. The other side of the coin here is that if Native people cannot fudge boundary lines, neither can state DNR wardens. Wisconsin's jurisdiction stops abruptly at the reservation line, just as surely as, going in the opposite direction, the exemption of Ojibwe customary hunting from regulation by either the tribe or the state also stops at the line. It is clearly in the interest of subsistence hunters as a group that "the border of the reservation . . . be regarded in the same way as the border of the state."

In Case 2, the defendants again lost, and one of them insisted compellingly that his right to hunt was given by the Great Spirit and was an inherent individual Native right, not something legitimately under the control of the tribe, the DNR, or the GLIFWC. He insisted that the tribe lost—and lost for all members—a great deal in negotiating with the state over off-reservation hunting regulations, and Nesper himself concludes that "the necessity to negotiate with the state at all represents a loss for Indian people but clearly represents a gain for the Tribe." Again, I find myself wondering where individual tribe members would be without the tribe to defend their collective rights.

Furthermore, there was serious discussion of customary law in all three cases, and in Case 3 the judge actually ruled on the basis of customary law. That the defendants wished for different outcomes of these cases is obvious, but that does not mean that the tribal government systematically operates against the interests of subsistence hunters. That the Ojibwe have lost autonomy in the past two centuries and that hunting, fishing, and collecting are now in many ways out of their hands and in the hands of courts and bureaucrats is also obvious. And it is indubitable that tribes need to give careful attention to seeing like a state in this situation just to protect what Native people have left. But none of this means that the tribe is acting against the long-term collective interests of tribe members. It seems to me that it is a good thing that the "locus of the opposition between civil society and state [is] now *within* the [tribal] community." Indian people would be a lot worse off if state courts were trying Indians for violation of fish and game laws off-reservation or deciding what customary law is and when it applies.

Bruce Granville Miller
Department of Anthropology, University of British Columbia, 6303 N.W. Marine Dr., Vancouver, BC, Canada V6T 1Z1 (bgmiller@interchange.ubc.ca) 4 V 07

Nesper argues that an Ojibwe tribal court is instrumental in the creation of a contemporary tribal state, a claim that he supports through the presentation of three cases before this court. He further suggests that these tribal courts are incompatible with tribal social structure, that tribal law creates hegemony, that tribal courts fail to reflect community values, and that tribal law arises in opposition to the customary order and represents new social goals and a new social order. Here, the new order concerns the replacement of the particularity of "tribal persons" by "tribal citizens" and tribal universalism and, simultaneously, the consolidation of power by particular kin networks. Further, he shows that courts are a site for negotiating cultural distinctiveness (although ritual is more effective) but that this is more rhetorical than substantive. He concludes, "Defendants who offer a cultural defense may be listened to and even engaged in their own terms. Their [sentences] may be reduced, but they rarely win." I wonder, however, if winning a case is the appropriate measure of what

this court represents and if, as scholars of law point out, litigation offers a chance to reproduce one's viewpoint and air one's grievances.

My position is not inherently in conflict with that of Nesper, who is attuned to nuance, contradiction, emergent trends, and historical antecedents, but I look at his material slightly differently. His very fine paper provides intriguing data from which one might anticipate considerable movement in the court system away from the consolidation of power by the community elite and the trading away of cultural distinctiveness in the effort to establish the legitimacy of tribal courts in the face of skeptical non-aboriginal neighboring jurisdictions. This Ojibwe court system, established in 1983, is still in its very early stages, and the community will likely become more alert to ways of localizing the legal system, as I have found in my own studies of Coast Salish tribal courts. As Richard Daly (2005) has pointed out regarding Wit'sutwitin engagement with its own and outside legal systems, it is not necessarily the case that tribal societies and institutions, including courts, move evolutionarily in the direction of paralleling mainstream institutions. Instead, one might expect contradictory developments, as Loretta Fowler (2002) noted regarding Cheyenne-Arapaho politics. I will draw on data from Nesper's paper that are suggestive of the localization and perhaps indigenization of the tribal court even while it serves to promote the emergent tribal state.

Nesper notes that the chief judge of the tribal court renders decisions in Ojibwe style, with an explanation first. The judge suspends fines as a way of mediating between the standards of the community and the state. He allows ideas of the community to be aired, in, as Nesper terms it, "genuine debate." The judge draws on "traditional law," as in the second case, via an elder who is used as an expert and who notes the defendant's violation of the sacred by poking fun at a deer. Further, while the state undermines the generalized reciprocity between humans and animals, the trial judge does not, implicitly acknowledging the morality of the defendant's plea.

In the third case, Nesper describes a defendant who has shot a deer but wasted its meat and who invokes customary practices in court by arguing that he has already apologized to the Great Spirit. The judge fails in repeated attempts to get the defendant to clarify how, specifically, he has apologized. The subtext, writes Nesper, is "A sincere apology is inadequate, even irrelevant. The spirits do not respond to testimonies of the presence of a pure heart. . . . The spirits respond to actions: gifts of tobacco, the ritual consumption of food." The judge, in short, expresses an indigenous theory of reproduction which acknowledges the consequences of one hunter's disrespectful action for the entire collective.

Nesper observes the continuing use of traditional means of dispute resolution outside of the tribal courts, in particular the adjudication of a dispute by elders. He further points to the repeated modification of the standard phrase about telling the truth and the whole truth to accommodate "evolving political consciousness and the community's religious heterogeneity."

This paper makes clear the ways in which the tribal court and particularly the tribal judges have maneuvered between the demands and expectations of both external courts and internal ideology by reducing sentences, accommodating claims of tradition, and calling elders as experts. But it is not clear whether code writers or tribal judges have attempted to mitigate the power of dominant families (as have the producers of some Coast Salish codes). If they have not, one can argue that they may yet do so in the interest of tribal cohesion and, perhaps, economic development. If they have, their efforts will be important in considering Nesper's key claims.

Paul Nadasdy
Anthropology and American Indian Studies, University of Wisconsin–Madison, 5438 Social Science Bldg., 1180 Observatory Dr., Madison, WI 53706, U.S.A. (penadasdy@wisc.edu). I V 07

In this powerful and thought-provoking article, Nesper argues that we need to view American Indian tribes as "states" in Philip Abrams's sense of the term: "ideological artifact[s] attributing unity, morality, and independence to the disunited, amoral, and dependent workings of the practice of government" (1988, 81; see also Rée 1992, 10). Tribal courts, Nesper argues, are critical sites of state formation in this sense because the everyday practices of litigation in tribal courts contribute to the ongoing production of the "legitimizing illusion" (Abrams 1988, 77) that is the tribal state. This is sure to be a controversial position, but it creates new analytical space for interrogating the complex and contested nature of tribal sovereignty and nationhood. It virtually demands that we view tribal states—and associated ideas about tribal sovereignty and nationalism—through the same constructivist lens that has been brought to bear on nation-states and nationalism more generally. From this perspective, it is clear that the ideological and political-bureaucratic construction of tribal states, like the construction of all nation-states, is a powerful engine for social change that empowers some (tribal) citizens at the expense of others. The concept of "tribal sovereignty," then, as instantiated in the emerging political and legal apparatuses of nascent tribal states, cannot be viewed as necessarily empowering Indian people—at least not all of them. Rather, the social and ideological project of tribal state formation is as much about creating and controlling tribal subjects as it is about defending Indian peoples' rights and interests against those of federal and state governments.

The implications of Nesper's argument extend well beyond the realm of legal anthropology. As he himself notes, tribal courts are but one site—albeit an important one—of tribal state formation. Indeed, tribes are assuming ever more governmental functions; they now make policy, create legislation, and enforce as well as adjudicate laws. They also manage resources, provide social services, enter into intergovernmental agreements (e.g., gaming compacts), and perform a host

of other governmental functions. The political and bureaucratic infrastructures that enable them to carry out all these various functions simultaneously create and reinforce relations of inequality among tribal members. The new forms of tribal authority in which these relations of inequality are rooted must be legitimized, and this legitimization occurs (or does not) as various agents of the tribal state seek to enact tribal state power through their day-to-day practices and interactions with tribal citizens at multiple sites.

As the recent literature on the ethnography of the state has made clear, however, there is nothing simple or inevitable about processes of state formation; rather, the illusion of the state and its legitimacy is the product of negotiation and struggle. Nesper's fine-grained ethnographic analysis of the Lac du Flambeau tribal court builds on this insight by focusing on the tensions that are unique to the tribal state. In the context of tribes' status as "domestic dependent nations," claims to tribal sovereignty and the forms of authority and coercion associated with such claims have to be justified both externally (e.g., to agents of federal and state governments and nonnative residents) as well as internally (to the tribe's own citizens). As Nesper notes, these two legitimizing projects are in many ways incompatible with one another. The very legal and bureaucratic forms that are essential if tribal state institutions are to be accepted as legitimate by external governments (a legitimacy upon which the partial sovereignty of tribes depends) are often precisely the forms that undermine the tribal state's legitimacy in the eyes of its own citizens. It is the tension between these largely incompatible projects that animates Nesper's analysis, and he shows that the outcomes of the resulting struggles are by no means given. Indeed, he notes that the tribal court can function as a "forum" for "genuine debate" rather than simply as a site for the automatic production of tribal state authority, and tribal agents can even at times actively work to strengthen rather than erode "indigenous" beliefs and practices (as he shows, for example, in his analysis of the "wasted-deer" trial).

Nesper provides insights into the complexities of a political dynamic that likely exists in some form wherever indigenous people are struggling to gain or implement a measure of self-government within the nation-states that encompass them. His argument certainly has resonance in the Canadian North, where comprehensive land-claim and self-government agreements have created First Nation governments modeled explicitly on the European state form (and where the term "First Nation" itself draws attention to the nation-state-like form of aboriginal governments). I have no doubt that the dynamic Nesper has identified is currently playing itself out at multiple sites across the Canadian North. Nesper convincingly shows us why we need to move beyond an overly simplistic valorization of "indigenous self-government" and pay close ethnographic attention to the micro-political processes through which such indigenous state forms are actually being created and maintained.

Justin B. Richland
Department of Criminology, Law and Society, University of California, Irvine, 2361 Social Ecology II, Irvine, CA 92697-7080, U.S.A. (jbrich@uci.edu). 10 V 07

Nesper offers a rare consideration of what has been an overlooked context of contemporary indigenous cultural politics: the discourses and interactions of a Native American tribal court. The rise in the 1970s of the contested politics of indigenous representation, coupled with anthropological anxieties about its colonial history, conspired to make ethnographic fieldwork in contemporary Native American social institutions a delicate and difficult endeavor. The fact that these politics arose at nearly the same time that Native American tribes reached a high-water mark for exercising political-economic self-determination meant that anthropologists were nearly foreclosed from conducting research in Native American institutions at precisely the moment when they were gaining a semblance of statelike authority over their own peoples.

It is thus not entirely surprising that, despite the fact that there are 260 tribal courts operating among the 562 federally recognized tribal nations, Nesper's investigation of the Ojibwe tribal court is one of only a handful of anthropological studies of the contemporary operations of Native American jurisprudence in the United States (see, e.g., Miller 2001, Richland n.d.). Nesper has thus made a significant contribution to the literature simply by providing such a rich description of the history and current adjudicatory practices of the Ojibwe court.

But he has also accomplished much more. In suggesting that Ojibwe tribal jurisprudence instantiates what he calls the Ojibwe "tribal state," Nesper makes a novel move in the analysis of contemporary Native American governance that builds on and extends the recent work of other anthropologists (Biolsi 2005; Dombrowski 2001). Most important is his demonstration, by exploring the practices, persons, and discourses of tribal courtroom interactions, that Ojibwe jurisprudence is related to family, tribal-state, and nonnative-government agencies in ways that defy the easy binaries of resistance/hegemony.

At first glance, his analysis of the differences between the questioning pragmatics of courtroom cross-examination and Ojibwe "traditional conversational pragmatics" (which include a general avoidance of direct questioning and interruption) could have led Nesper to conclude that Ojibwe defendants representing themselves in natural-resource cases were at a disadvantage, particularly where their cases were prosecuted by nonnative legally trained prosecutors and wardens skilled in adversarial litigation practices. But his attention to the details and discourses of the three cases shows something rather different.

First, he describes how tribal lay advocates—tribe members

with semiprofessional legal advocacy training off-reservation but nonetheless committed to their Ojibwe identities—constitute a "mediating class of legal practitioners" who can often navigate the competing legitimacy demands of the "Anglo-style" legal praxis of the court and the discourses of Ojibwe custom and tradition that inform Ojibwe defenses. Then he shows that they emerge in the trial discourses and impact final judgments in ways that instantiate the tribal state and its actions as blurring the discursive and territorial "borders" between native and nonnative governance.

In one case, Ojibwe hunters were cited for violations of a tribal off-reservation-hunting code for hunting on a road lining one of the reservation borders. Nesper shows the lay advocate engaging in skillful litigation tactics that involve arguments about Ojibwe traditional epistemologies of place, which turn the tribal-state border into a "contested zone." The advocate—in claiming that Ojibwe hunting traditions hold that it is still on-reservation hunting to stand on tribal lands while shooting at targets off those lands—employs a complex assemblage of "Anglo" adversarial and Ojibwe cultural-identity discourses to argue that the defendants were not hunting off-reservation. Though the Ojibwe judge tacitly reinscribes the tribal-state border proposed by the prosecutor, he significantly reduces the defendant's charges. In so doing, says Nesper, the judge instantiates the bureaucratic tribal state by discursively figuring the rational statelike territorial border that defines it while also employing a non–rule-bound, more relational rationality in meting out sentences. Thus the legitimacy of the state and the authoritative positionalities of tribal legal actors in it are constituted in multiple ways that nonetheless share in integrating the discourses and logics of Anglo-style law with those of traditional Ojibwe epistemologies.

In showing how these seemingly macrocultural forces and effects operate in the microdetails of courtroom interaction, Nesper makes a truly unique contribution to the study of Native American governance. Indeed, his effort here "shoots beyond the boundaries" of our models of contemporary tribal governance in ways that I hope will continue to contest and unsettle the conceptual borders of anthropological representations of indigenous law and politics.

Adrian Tanner
Department of Anthropology, Memorial University of Newfoundland, P.O. Box 4200, St. John's, NL, Canada A1C 5S7 (atanner@mun.ca). 15 V 07

Nesper argues that the recent acquisition of federally designated powers by modern American Indian tribes requires that anthropology reassess the political and legal nature of these sub-state entities. To this end, he labels them "tribal states," a term that for me raises potential semantic issues. The term "tribe" has a long-standing usage for U.S. Indian groups but one that differs from the term's universalistic use in anthropological theory. For instance, as far as Nesper is concerned, the term "tribal" evokes the extended-family groupings on U.S. reservations that capture political offices and administrative jobs and certain local traditional values that are associated with kinship. If "tribal" has acquired these connotations in these contexts, I suspect that they derive more from the way individuals get elected on U.S. reservations than from the more general anthropological concept of "tribe."

Beyond the label, most of the new powers that Nesper lists look much like those of a municipality, a level of government not referred to in the paper. The paper focuses on powers not generally found at the municipal level in the tribal courts that adjudicate members' rights as Indians. In particular Nesper examines cases showing how the Lac du Flambeau Ojibwe of Wisconsin deal with tribe members who are accused of violations of the regulations negotiated with the government over their harvesting rights as treaty Indians. Although he says that the *Voigt* court case that occasioned recognition of these rights caused a major crisis in the 1980s, he neglects to note that the conflict was (and for all I know may continue to be) not only with the state of Wisconsin but also with organizations such as Protect Americans' Rights and Resources and with individuals who have attacked the Ojibwe over this issue in highly racist terms.

One wonders if this atmosphere of conflict and hostility has had any influence on how the court does its work. Nesper makes passing reference to the encapsulated situation of these "tribal states" as administrative entities that are "deeply articulated with both federal and state agencies" within the nation-state, but he does not follow this up in the ethnographic part of the paper that examines the court cases. In what ways do the courts reflect and react to the external public hostility to Ojibwe hunting rights? Do they ever come into conflict with biologists and wildlife managers over the ecological health of any of the species involved? What are the practical limits to the court's autonomy?

These kinds of questions relate back to the issue of labelling discussed above, since the term "state" and "nation," particularly in the combination "nation-state," suggest a political and administrative entity enjoying full autonomy in all matters within its territory. It is true that we also have concepts such as "failed states" and "client states," in which, for the time being at least, this autonomy is seen as compromised in some way. However, Indian tribes are not like this; they are permanently encapsulated within a nation-state. Terms like "self-government" and (in Canada) "First Nations" emphasize (one might say they strategically overemphasize) their autonomy to the exclusion of their subordination, and thus they play down this encapsulation. What seems missing from this paper is recognition of the emerging limits to the new powers and how these limits are being arrived at with federal and state agencies and with the non-Indian public.

Reply

I am grateful that my claim that the emergence of tribal courts in Native communities in the United States is a significant development and well worth the attention of ethnographers has been so thoughtfully engaged and nuanced by those invited to comment.

I agree with Barsh that it is always difficult to be certain and comprehensive about what is happening in situations that are organized by great power disparities—the lesson I take from his vignette about a Montana tribal court. I also agree with a number of his methodological criticisms. For example, his suggestion that a comparative study would have more validity is well taken, but I would assure readers, on the basis of conversations with tribal judges, that neighboring tribal courts deal with hunting and fishing violations rather similarly and, on the basis of conversations with defendants, that state courts deal with hunting and fishing violations rather differently (that is, severely). And true, the cases are not representative, for many of the trials in this jurisdictional domain are rather routine, but nearly every one of these trials expresses some of the aspects of the ones I have chosen for closer inspection. I followed Gluckman as well as Hoebel and Llewellyn in looking at exemplary cases. A book-length treatment might be better able to do justice to "Ojibwe normative thinking" and offer a more "representative suite of case studies." Finally, I do not aspire to offer insight into the "cosmopolitan phenomenon" of "local and customary moralities" clashing with "state authority or higher principles of justice." I merely sought to show how this general phenomenon plays out in this very particular context, given that context's history, the aspirations of the people involved, and the apparent trajectory of sociopolitical change. I would add that the practice of directly or indirectly indexing culture or tradition in the course of American Indian judicial proceedings is highly symbolically charged, as Richland has shown in his work on the Hopi court, because of the way in which native societies are distinguished from and "encapsulated" within the dominant society (see Sider 1993 and Dombrowski 2001).

I appreciate Miller's careful reading and summary of the points I made in this article. Extrapolating from the general thrust of his comment, I agree with him that there is much to be gained from exploring the sociology of both judicial appointments and code-writing with an eye to the way in which power is exercised and its exercise disguised by powerful families in the production of these political and bureaucratic forms and procedures. Regarding his point that the court may develop in the direction of contesting the power of the community elite, there may be hope; the Lac du Flambeau band has recently amended its constitution to give the court the power of judicial review of council action. This step in the direction of separation of powers may create just the condition for the development of greater tribal coherence and economic viability that Miller considers possible and desirable.

Nadasdy astutely identifies my concern with the way in which the ideology of tribal sovereignty is operationalized as government in the mundane production of the tribe, tribal citizens, and the relations between them. I am calling for that greater "ethnographic attention" to which he refers and specifically suggesting how it might be applied to tribal courts, given that they are relatively new and relatively open to the possibilities that Miller suggests here and identified in his own work on Salish tribal courts.

I value Richland's general appraisal of this effort to characterize the complexity of "contemporary tribal governance" and especially his pointing out that it rises above the "resistance/hegemony" binary— a theme he addresses provocatively in his fine-grained work on disputes adjudicated in the Hopi tribal court. It may be that it is the *bricolage* and dissembling entailed in the different kinds of exercises of power in tribal courtrooms and other instrumentalities of governance that foreclose such a simple binary characterization of action.

Tanner is quite right to suggest that the hostility of many local non-Indian citizens and the skepticism of the agents of the state of Wisconsin who were close to the treaty-rights struggle have played a role "in how the court does its work." Judges and prosecutors used the word "scrutiny" to describe the approach of both private non-Indian citizens and the state to the work of the tribal judiciaries. The result of attending to the real and imagined critical gaze of the powerful outside other, as it were, is that the court is rather conservative, acquiescing in the policies negotiated between tribal and state officials. I play this down in referring to "external legitimacy." Many tribal courts and certainly this one must also attend to the fact that tribal constitutions do not separate powers and therefore tend to see themselves as governmental instrumentalities serving at the pleasure of tribal councils.

It may be, as Tanner suggests, that the discourse of sovereignty disguises the "permanently encapsulated" condition within which tribes must operate. However, to the extent to which Biolsi (2004, 244–45) is correct that contemporary neoliberalism devolves power and subcontracts governance, Tanner's suggestion that we focus on how "the limits are being arrived at with federal and state agencies" may distract attention from the internal social and political effects of that devolution and subcontracting, thus mystifying the reproduction of inequalities within tribal communities and the ways in which they are changing as they articulate with the societies that encompass them.

—Larry Nesper

References Cited

Abel, Richard. 1979. Western courts in non-Western settings: Patterns of court use in colonial and neo-colonial Africa.

In *The imposition of law*, ed. Sandra B. Burman and Barbara E. Harrel-Bond, 167–200. New York: Academic Press.

Abrams, Philip. 1988. Notes on the difficulty of studying the state. *Journal of Historical Sociology* 1(1):58–89.

Atkinson, J. Maxwell, and Paul Drew. 1979. *Order in court: The organization of verbal interaction in judicial settings.* Atlantic Highlands: Humanities Press.

Ball, Milner S. 1975. The play's the thing: An unscientific reflection on courts under the rubric of theater. *Stanford Law Review* 28:81–115.

Barnouw, Victor. 1950. *Acculturation and personality among the Wisconsin Chippewa.* American Anthropological Association Memoir 72.

Barsh, Russel L. 1991. Navajo tribal courts, property, and probate law, 1940–1972. *Law & Anthropology [Internationales Jahrbuch für Rechtsanthropologie]* 6:169–95. [RB]

———. 1993. The challenge of indigenous self-determination. *University of Michigan Journal of Law Reform* 26: 277–312.

———. 1999. Putting the tribe in tribal courts: Possible? Desirable? *Kansas Journal of Law and Public Policy* 8:74–96.

———. 2005. Coast Salish property law: An alternative paradigm for environmental relationships. *Hastings West-Northwest Journal of Environmental Law* 12 (1):1–29. [RB]

Barsh, Russel L., and Joe B. Marshall. 1998. Mi'kmaw (Micmaq) constitutional law. In *Encyclopedia of Native American legal traditions,* ed. B. E. Johansen, 192–209. Westport, Conn.: Greenwood Press. [RB]

Biolsi, Thomas. 1995. Bringing the law back in: Legal rights and the regulation of Indian-white relations on Rosebud Reservation. *Current Anthropology* 36:543–71.

———. 2001. *"Deadliest enemies": Law and the making of race relations on and off Rosebud Reservation.* Berkeley: University of California Press.

. 2004. Political and legal status. In *A companion to the anthropology of American Indians*, ed. T. Biolsi, 231–47. Oxford: Blackwell.

———. 2005. Imagined geographies: Sovereignty, indigenous space, and American Indian struggle. *American Ethnologist* 32:239–59. [JBR]

Black, Mary. 1973. Ojibwa questioning etiquette and use of ambiguity. *Studies in Linguistics* 23:13–29.

———. 1977. Ojibwa power-belief system. In *The anthropology of power: Ethnographic studies from Asia, Oceania, and the New World*, ed. R. D. Fogelson and R. N. Adams, 142–52. New York: Academic Press.

Brandfon, Frederic. 1991. Tradition and judicial review in the American Indian tribal courts. *UCLA Law Review* 38: 991–1018.

Brightman, Robert Alain. 1993. *Grateful prey: Rock Cree human-animal relationships.* Berkeley: University of California Press.

Campbell, S. W. 1898. Report of the La Pointe Agency. In *Reports of the Commissioner of Indian Affairs to the Secretary of the Interior 1840–1906*, 314–20. Washington, D.C.: Government Printing Office.

Castile, George Pierre. 1998. *To show heart: Native American self-determination and federal Indian policy, 1960–1975.* Tucson: University of Arizona Press.

Christofferson, Carla. 1991. Tribal courts' failure to protect Native American women: A reevaluation of the Indian Civil Rights Act. *Yale Law Journal* 101:169–85.

Clastres, Pierre. 1987. *Society against the state: Essays in political anthropology.* New York: Zone Books.

Clifton, James. 1987. *Wisconsin death march: Explaining the extremes in Old Northwest Indian removal.* Transactions of the Wisconsin Academy of Sciences, Arts and Letters 75.

Conley, John M., and William M. O'Barr. 1990. *Rules versus relationships: The ethnography of legal discourse.* Chicago: University of Chicago Press.

———. 1998. *Just words: Law, language, and power.* Chicago: University of Chicago Press.

Conley, John M., William M. O'Barr, and Allan E. Lind. 1979. The power of language: Presentational style in the courtroom. *Duke Law Journal* 6:1375–99.

Cooter, Robert D., and Wolfgang Fikentscher. 1998. Indian common law: The role of custom in American Indian tribal courts. *American Journal of Comparative Law* 46:287–339, 509–80.

Daly, Richard. 2005. *Our box was full: An ethnography for the Delgamuukw plantiffs.* Vancouver: UBC Press. [BGM]

Deloria, Vine, and Clifford M. Lytle. 1983. *American Indians, American justice.* Austin: University of Texas Press.

Densmore, Frances. 1979. *Chippewa customs.* St. Paul: Minnesota Historical Society Press.

Diamond, Stanley. 1974. *In search of the primitive: A critique of civilization.* New Brunswick: Transaction Books.

Dombrowski, Kirk. 2001. *Against culture: Development, politics, and religion in Indian Alaska.* Lincoln: University of Nebraska Press.

———. 2004. The politics of native culture. In *A companion to the anthropology of American Indians*, ed. T. Biolsi, 360–82. Oxford: Blackwell.

Dunning, R. W. 1959. *Social and economic change among the Northern Ojibwe.* Toronto and Buffalo: University of Toronto Press.

Fortes, Meyer, and E. E. Evans-Pritchard. 1940. *African political systems.* London: Oxford University Press.

Fowler, Loretta. 2002. *Tribal sovereignty and the historical imagination: Cheyenne-Arapaho politics.* Lincoln: University of Nebraska Press.

Fried, Morton. 1967. *The evolution of political society: An essay in political anthropology.* New York: Random House.

Galanter, Marc. 1974. Why the "haves" come out ahead: Speculations on the limits of legal change. *Law and Society Review* 9:165–230.

———. 1983. The radiating effects of courts. In *Empirical theories about courts*, ed. K. Boyum and L. Mather, 117–42. New York and London: Longman.

Geertz, Clifford. 1983. *Local knowledge: Further essays in interpretive anthropology.* New York: Basic Books.

Gluckman, Max. 1963. *The ideas of Barotse jurisprudence.* New Haven: Yale University Press. [RB]

———. 1965. *Politics, law, and ritual in tribal society.* Chicago: Aldine.

Goldberg-Ambrose, Carole. 1997. *Planting tail feathers: Tribal survival and Public Law 280.* Los Angeles: American Indian Studies Center.

Goldman, Laurence. 1993. *The culture of coincidence: Accident and absolute liability in Huli.* Oxford and New York: Clarendon Press.

Hagan, William Thomas. 1966. *Indian police and judges: Experiments in acculturation and control.* New Haven: Yale University Press.

Hallowell, Alfred Irving. 1934. Some empirical aspects of Northern Saulteaux religion. *American Anthropologist* 36: 389–404.

———. 1955. *Culture and experience.* Philadelphia: University of Pennsylvania Press.

———. 1960. Ojibwa ontology, behavior, and world view. In *Contributions to anthropology: Selected papers of A. Irving Hallowell*, ed. Raymond D. Fogelson. Chicago: University of Chicago Press.

Hansen, Thomas Blom, and Finn Stepputat. 2001. *States of imagination: Ethnographic explorations of the postcolonial state.* Durham: Duke University Press.

Howkins, Alun. 1979. Economic crime and class law: Poaching and the game laws, 1840–1880. In *The imposition of law*, ed. Sandra B. Burman and Barbara E. Harrel-Bond, 273–87. New York: Academic Press.

Jannetta, James. 1992. Plaintiffs' joint brief in support of attorneys' fees. In *Lac Courte Oreilles v. State of Wisconsin, et al.*, United States District Court, Western District of Wisconsin.

Joh, Elizabeth. 2000. Custom, tribal court practice, and popular justice. *American Indian Law Review* 25:117–32.

Kidder, Robert L. 1979. Toward an integrated theory of imposed law. In *The imposition of law*, ed. Sandra B. Burman and Barbara E. Harrel-Bond, 289–306. New York: Academic Press.

Kohl, Johann Georg. 1985. *Kitchi-Gami: Life among the Lake Superior Ojibway.* St. Paul: Minnesota Historical Society Press.

Ladd, John. 1957. *Structure of a moral code: A philosophical analysis of ethical discourse applied to the ethics of the Navaho Indians.* Cambridge: Harvard University Press. [RB]

Landes, Ruth. 1968. *Ojibwa religion and the Midéwiwin.* Madison: University of Wisconsin Press.

LaVeen, Deborah Browning. 1978. Hustlers and heroes: Portrait and analysis of the Chicago Indian Village. Ph.D. diss., University of Chicago.

Leap, William. 1993. *American Indian English.* Salt Lake City: University of Utah Press.

Llewellyn, Karl N., and E. Adamson Hoebel. 1941. *The Cheyenne way: Conflict and case law in primitive jurisprudence.* Norman: University of Oklahoma Press. [RB]

Lopach, James J. 1997. The anomaly of judicial activism in Indian Country. *American Indian Cultural and Research Journal* 21:83–104.

Lopach, James J., Margery Hunter Brown, and Richard L. Clow. 1998. *Tribal government today: Politics on Montana Indian reservations.* Boulder: University Press of Colorado.

Mahliot, François. 1910. A Wisconsin fur trader's journal, 1804–05. In *Collections of the state Historical Society of Wisconsin* 19, ed. R. G. Thwaites, 163–233. Madison, Wis.

Maine, Henry Sumner. 2002. *Ancient law.* New Brunswick: Transaction Publishers.

Matoesian, Gregory M. 2001. *Law and the language of identity: Discourse in the William Kennedy Smith rape trial.* Oxford and New York: Oxford University Press.

Merry, Sally Engle. 1988. Legal pluralism. *Law and Society Review* 22:869–901.

———. 1990. *Getting justice and getting even: Legal consciousness among working-class Americans.* Chicago: University of Chicago Press.

———.1994. Courts as performances: Domestic violence hearings in a Hawaii family court. In *Contested states: Law, hegemony, and resistance*, ed. Mindie Lazarus-Black and Susan F. Hirsch, 35–58. New York: Routledge.

———. 2000. *Colonizing Hawaii: The cultural power of law.* Princeton: Princeton University Press.

Miller, Bruce G. 1994. Contemporary tribal codes and gender issues. *American Indian Culture and Research Journal* 18: 43–74.

———. 1995. Folk law and contemporary Coast Salish tribal code. *American Indian Culture and Research Journal* 19: 141–64.

———. 1997. The individual, the collective, and tribal code. *American Indian Culture and Research Journal* 21:107–29.

———. 2001. *The problem of justice: Tradition and law in the Coast Salish world, Fourth World rising.* Lincoln: University of Nebraska Press.

———. 2004. Tribal or native law. In *A companion to the anthropology of American Indian*, ed. T. Biolsi, 95–111. Oxford: Blackwell.

Moore, Sally Falk. 1978. *Law as process: An anthropological approach.* London and Boston: Routledge and Kegan Paul.

———. 1992. Treating law as knowledge: Telling colonial officers what to say to Africans about running "their own" native courts. *Law and Society Review* 26:11–46.

Nelson, George, Jennifer S. Brown, and Robert Brightman. 1988. "*The orders of the dreamed*": *George Nelson on Cree and northern Ojibwa religion and myth, 1823.* St. Paul: Minnesota Historical Society Press.

Nesper, Larry. 2002. *The walleye war: The struggle for Ojibwe spearfishing and treaty rights.* Lincoln and London: University of Nebraska Press.

———. 2006. Ironies of articulating continuity at Lac du Flambeau. In *New perspectives on Native North America:*

Cultures, histories, and representations, ed. Sergei Kan and Pauline T. Strong, 98–121. Lincoln and London: University of Nebraska Press.

Oberly, James. 1991. *The Lake Superior Chippewas and treaty rights in the ceded territory of Wisconsin: Population, prices, land, natural resources, and regulation, 1837–1983.* Odanah, Wis.: Great Lakes Indian Fish and Wildlife Commission.

Philips, Susan U. 1993. Evidentiary standards for American trials: Just the facts. In *Responsibility and evidence in oral discourse*, ed. Jane H. Hill and Judith T. Irvine, 248–59. Cambridge: Cambridge University Press.

———. 1994. Local legal hegemony in the Tongan magistrate's court: How sisters fare better than wives. In *Contested states: Law, hegemony, and resistance*, ed. Mindie Lazarus-Black and Susan Hirsch, 59–88. New York: Routledge.

———. 1998. *Ideology in the language of judges: How judge practice law, politics, and courtroom control.* New York: Oxford University Press.

———. 1999. Written law and *anga fakatonga* as historical/temporal sources of precedent and innovation in Tongan courts. MS.

———. 2004. The organization of ideological diversity in discourse: Modern and neotraditional visions of the Tongan state. *American Ethnologist* 31:231–50.

Pommersheim, Frank. 1995. *Braid of feathers: American Indian law and contemporary tribal life.* Berkeley: University of California Press.

Pospisil, Leopold. 1958. *Kapauku Papuans and their law.* Yale University Publications in Anthropology 54. [RB]

Rée, Jonathan. 1992. Internationality. *Radical Philosophy* 60: 3–11. [PN]

Richland, Justin. 2005. "What are you going to do with the village's knowledge?" Talking tradition, talking law in Hopi tribal court. *Law and Society Review* 39:235–72.

———. n.d. Pragmatic paradoxes and ironies of indigeneity at the "edge of Hopi sovereignty." *American Ethnologist* 34. In press. [JBR]

Rosen, Lawrence. 1989. *The anthropology of justice: Law as culture in Islamic society.* Cambridge and New York: Cambridge University Press.

Satz, Ronald N. 1991. *Chippewa treaty rights: The reserved rights of Wisconsin's Chippewa Indians in historical perspective.* Transactions of the Wisconsin Academy of Sciences Arts and Letters 79.

Schlegel, Stuart A. 1970. *Traditional Tiruray law and morality.* Berkeley: University of California Press. [RB]

Schorger, A. W. 1953. The white-tailed deer in early Wisconsin. *Transactions of the Wisconsin Academy of Sciences, Arts and Letters* 42:197–247.

Scott, James C. 1985. *Weapons of the weak: Everyday forms of peasant resistance* New Haven: Yale University Press.

———. 1998. *Seeing like a state: How certain schemes to improve the human condition have failed.* New Haven: Yale University Press.

Shapiro, Martin. 1981. *Courts: A comparative political analysis.* Chicago: University of Chicago Press.

Shifferd, Patricia. 1976. A study in economic change: The Chippewa of Northern Wisconsin, 1854–1900. *Western Canadian Journal of Anthropology* 6(4):16–41.

Silvern, Steven. 1999. Scale of justice: American Indian treaty rights and the political construction of scale. *Political Geography* 18:639–68.

———. 2000. Reclaiming the reservation: The geopolitics of Wisconsin Anishinaabe resource rights. *American Indian Culture and Research Journal* 24:131–53.

Smith, James F. 1973. *Leadership among the Southwestern Ojibwa.* National Museums of Canada Publications in Ethnology 7.

Spielmann, Roger Wilson. 1998. "*You're so fat": Exploring Ojibwe discourse.* Toronto and Buffalo: University of Toronto Press.

Strickland, Rennard. 1975. *Fire and the spirits: Cherokee law from clan to court.* Norman: University of Oklahoma Press.

Tamanaha, Brian Z. 1993. *Understanding law in Micronesia: An interpretive approach to transplanted law.* Leiden and New York: E. J. Brill.

Tornes, Elizabeth, Leon Valliere, and Greg Gent. 2004. *Memories of Lac du Flambeau elders.* Madison, Wis.: Center for the Study of Upper Midwestern Cultures.

Valencia-Weber, Gloria. Tribal courts: Custom and innovative law. *New Mexico Law Review* 24:225–63.

Vecsey, Christopher. 1983. *Traditional Ojibwa religion and its historical changes.* Philadelphia: American Philosophical Society.

Vennum, Thomas. 1982. *The Ojibwe dance drum: Its history and construction.* Smithsonian Folklife Studies 2.

Washburn, Wilcomb. 1984. A fifty-year perspective on the Indian Reorganization Act. *American Anthropologist* 86: 276–89.

Weyrauch, Walter O. 2001. *Gypsy law: Romani legal traditions and culture.* Berkeley: University of California Press.

Wilkins, David E., and K. Lomawaima. 2001. *Uneven ground: American Indian sovereignty and federal law.* Norman: University of Oklahoma Press.

Wilkinson, Charles. 2005. *Blood struggle: The rise of modern Indian nations.* New York: Norton.

Zion, James. 1988. Searching for Indian common law. In *Indigenous law and the state*, 121–50. Dordrecht and Providence: Foris Publications.