

Tribal Wisconsin's Indigenous Judicial Systems and the Emergence of Tribal States

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For three days, between July 27th and 29th 2005, nearly 300 tribal, federal and state court judges, court commissioners, court administrators, peacemakers, mediators, traditional forum practitioners, attorneys, lay advocates and other justice system professionals, met at a national conference entitled *Walking On Common Ground: Pathways to Equal Justice*, sponsored by the U.S. Department of Justice's Bureau of Justice Assistance. The 133 tribal, state, and federal judges constituted the overwhelming plurality at the conference, which discussed issues such as judicial leadership, choice of forum, judicial review, recognition of each other's judgments and orders, judicial independence, and the Indian Child Welfare Act. All levels of judiciaries, save the United States Supreme Court, were represented.

The centerpiece of the conference, which was held at the Radisson Hotel and Conference Center operated by the Oneida Nation near Green Bay, Wisconsin, was the ceremonial signing of a protocol by state and tribal judges from the 9th Wisconsin Judicial District. The second such protocol signed in Wisconsin in the previous four years, it established procedures for the determining jurisdiction in causes of action in states where tribes and states have concurrent jurisdiction.¹ The former chief judge of the Lac du Flambeau Ojibwe reservation and current Wisconsin tribal appeals court judge, the Honorable Ernest St. Germaine, conducted the ceremony, smudging the signatories and the docu-

ments, and offering each a ceremonial pipe he had loaded with tobacco. The conference marked, advanced, and celebrated the commitment of a growing national community of tribal, state, and federal judges to on-going institutional relationships among sovereigns.² The segment of that community within the state of Wisconsin is the spearhead of this movement. Indeed, increasing use of the term “trifederalism”³ in Wisconsin is a measure of the emerging state-like status of tribes within its borders.⁴

One of the reasons a conference of this magnitude is important is because it encourages and facilitates the development of tribal courts, of which at least 260 exist today in Indian communities throughout the country (Joh 2000, 119). Courts are important institutions of self-determination because they are the mundane mechanisms and manifestations of sovereignty wherein the nation appears as state in everyday life. Courts are productively thought of as theatrical sites (Ball 1975; Merry 1994) where the official model of the society is authoritatively expressed and displayed. It is where the society putatively exercises its will in and on the lives of its individual member-citizens. It is also where internal policies and external relations are publicly debated and where different orders of value and law confront each other (Merry 1990; Philips 1998).

Most critically, as Mark Galanter has argued, courts are also important because they provide “a background of norms and procedures, against which negotiations and procedures in both private and governmental settings takes place,” and they explicitly and implicitly authorize and immunize actors in regulatory settings (1983, 121-122). Furthermore, courts affect not only the individuals who are brought before them, but they also have the general effect of communicating “information by or about the forum’s action and of the response to that information” (1983, 124). For tribes this means that tribal agencies and departments that make up these emergent tribal states—the institutions that realize and implement tribal sovereignty—gain powers of governance over tribal members on the reservations; the very presence of courts reconfigures the landscape of strategic options, resources, and goals. Tribal appropriation of these institutions, then, should cause us to re-imagine reservation communities as emergent states.

Though many reservation agents had established Courts of Indian Offenses in the late-nineteenth century as a technology of governance (Hagan 1966), it was not until the passage of the Indian Organization Act in 1934 that permitted tribes to draft constitutions and re-establish self-governing institutions that the modern tribal courts appeared. Like tribal sovereignty, the powers of tribal courts today, however, are simultaneously extensive and limited. In 1959, in *Williams v. Lee*, the Supreme Court asserted that contracts made in Indian country are to be heard in tribal courts in order to protect tribal sovereignty (Wilkinson 1987). Consistent with this, in the 1980s, the Court in *National Farmers Union Insurance Cos. v. the Crow Tribe of Indians* (1984) and *Iowa Mutual Insurance v. LaPlante* (1987) has also ruled that civil disputes arising on the reservations will be first heard in tribal court (Pommersheim 1995).

On the other hand, the Supreme Court has ruled that tribal courts have no criminal jurisdiction over non-Indians,⁵ and three separate acts of Congress have limited Indian criminal jurisdiction.⁶ Though ambiguously designated as “domestic dependent nations” in the early nineteenth century, with extensive powers of self-governance,⁷ the Court also defers to the will of Congress, which began to assert plenary power over the tribes in the late eighteenth century even as the Executive treated with tribes as foreign nations. Acting on this ratification of its own authority in this domain, Congress passed the Indian Civil Rights Act in 1968, which unilaterally capped tribal court sentences at \$5,000 and/or a year in jail and extended most of the provisions of the Bill of Rights to tribal members.

There are also internal constraints on the power of the courts. Tribal court judges are most often appointed rather than elected so they do not have the judicial independence that many of them would like to have, especially when tribal council members or members of their families appear in court. Furthermore, they do not often have the power of judicial review of actions of the tribal legislatures. Though there is considerable variability even in the area of the Great Lakes, most of these courts have not built their own case-law traditions nor do they commonly cite cases from other tribal courts.⁸

It is with these caveats that I proceed to analyze how reservation societies are changing by virtue of the addition of courts to reservation governments. First, I offer an overview of tribal Wisconsin's political and legal landscape. I will then focus on the experience of the Lac du Flambeau Band of Lake Superior Chippewa Indians as it struggles with the contradictions of simultaneously coming to be imagined by its member-citizens both as a state-like sovereign structure committed to the rule of law, and as a community organized by kinship and custom, a “family of families,” in the words of a former tribal councilman.⁹

Wisconsin Indian Nations

Indian country in Wisconsin is a complicated matter because there are more tribes—now more often referred to as “Indian nations”—within its borders than any other state east of the Mississippi. Furthermore, these reservation-based indigenous nations have different histories. Both the Menominee, the indigenous Algonquian-speaking people, and the Ho-Chunk (formerly the Winnebago), the indigenous Siouan-speakers, were present in the early seventeenth century when the first Europeans arrived, and it is clear from the archaeological record that they had been in the region much longer. In the late nineteenth century the former avoided the allotment of their lands but in the 1950s had their government-to-government relationship with the federal government terminated, though that was reinstated in the 1970s. The Ho-Chunk were removed from the state, though they later returned, and now hold multiple parcels of non-contiguous land. The Ojibwe—now organized into six federally recognized bands with reservation land bases within the borders of the state—

and the Potawatomi began to settle into what would become Wisconsin from north of Lake Superior and east of Lake Michigan, respectively, in the mid-seventeenth century, a consequence of the diaspora created by Iroquois expansion (White 1991, 1-49). In turn, the Iroquoian Oneidas migrated from New York in the 1820s and 1830s, treating with both the Menominee and Ho-Chunk for rights to land. Stockbridge-Munsee and Brothertowns also migrated from the east at the same time. Most of these groups adopted Indian Reorganization Act constitutions in the 1930s, and all but the Oneida drew upon the authority of those constitutions to establish formal tribal courts¹⁰ in the federal Indian policy era of self-determination that began in 1970 and continues to the present.

During the two-decade period (1954-1973) in which they experienced the disastrous effects of termination, the Menominee reservation became a county—admittedly Wisconsin’s smallest and poorest, and the reservation was effectively assimilated to the body of the state, for better, but mostly for worse. When they were restored to tribal status in 1973, the tribe re-instituted its Court of Indian Offenses for a six-year period, and then established a new court system in 1979 shortly after adopting a new constitution ordaining an independent judiciary. Today the Menominee tribe has a vast bureaucracy administering a \$55 million year budget for the benefit of its 8,000 member-citizens. The forty-one tribal departments, which encompass more than 300 programs, are administered by a team of three officers—two financial and one human resources officer—and report to a three-member management team, who in turn take direction from the chairman and the tribal legislature. The tribe employs 700 people (Delabreau 2004) and another 500 to 1,000 in the casino. Additionally, tribal sawmills employ 250 to 500 (Advisors 2004). Because the reservation was transformed into a county for a period of twenty years, and therefore had the full jurisdictional responsibilities of any other state court, upon restoration to tribal status it retained that jurisdiction. The judicial system, which claims to be “a separate and equal branch of the tribal government” (Anonymous 1999), includes a Supreme Court and two lower courts and has assumed jurisdiction over the areas of criminal, civil, juvenile, probate, family, traffic, conservation, and small claims (Anonymous 2005). Since 1991, Menominee court orders and judgments are respected by the state of Wisconsin as it would those of any other court in the state system.¹¹

The Ho-Chunk Nation has eleven departments with an average of ten offices, programs, or businesses within each.¹² Because of the success of their casino complex in the tourist mecca of Wisconsin Dells, it can afford an annual per capita payment of \$13,000 for each of its 6,000 tribal members, a yearly allocation of \$77 million (Kozlowicz 2005). This is quite apart from other expenditures, one of which is a \$30 million annual payment to the state of Wisconsin (Lewis 2004) that is currently being contested.¹³ The Nation employs about 3,600 people in the state of Wisconsin (Lewis 2005).

The court system of the Ho-Chunk Nation, which is housed in a new, state-of-the-art court building, includes a trial court, a supreme court, and a tradi-

tional court, the latter comprised of the clan leaders who provide “guidance and assistance to the Judiciary” (Anonymous 1999). Unlike any other tribal court in the state, the Ho-Chunk Supreme Court has the power of judicial review. The trial court has assumed general civil jurisdiction in the area of child protection, collection of child support, elections, housing, employment, gaming, torts, contracts, etc., and is taking personal jurisdiction over “[t]hose with tribal interactions” (Anonymous 2005). Importantly, approximately 70 percent of the cases filed in this court are garnishments or civil cases¹⁴ where an agency is attempting to collect money owed by a tribal member. The Ho-Chunk Nation has published all of its Supreme Court decisions since 1995 and all of its trial court decisions since 1997. The Court also has published a monthly bulletin on the judiciary’s and other court’s activities since 1998.¹⁵

With just over 1,000 members, the Forest County Potawatomi tribe is the state’s smallest. However, it is also the state’s wealthiest tribe, the result primarily of its \$120 million-casino complex in Milwaukee. This gaming complex anchors an economy that includes a heavy equipment excavating and construction company, a logging cooperative, and other small businesses. The tribe has instituted and administers a number of educational, social service, and health programs for its members (Loew 2001, 98). In 1998, it established a court that hears cases in probate, truancy, child welfare, guardianships, small claims, name changes, paternity, employment, and housing (Anonymous 1999).

The 1,500-member Mohican Nation/Stockbridge-Munsee Band, with a reservation in two townships of Shawano County, has a government that is made up of more than forty offices and educational, social service, and health programs. Also operating a gaming facility, its casino employs 600 people, half of whom are non-Indian. The community has had a court since the mid-1990s, and it has adopted sixty-five chapters of tribal ordinances governing family law, hunting and fishing, public peace and order, juvenile law, adoptions, contracts, employment, probate and administrative appeals (Anonymous 2005). The court hears between 300 and 350 cases per year, the majority of which involve a tribal agency acting as plaintiff seeking money from a tribal member.¹⁶

The Oneidas, whose land base is near Green Bay, have 13,000 citizen-members and are the largest of Wisconsin’s indigenous nations. The nation has six “divisions of operations” with about seventy-five programs or offices within those operations. It employs 3,500 people and has an annual budget of \$150 million. Unlike the other tribes in the state, Oneida uses an Appeals Commission constituted of eleven elected officials and “asserts original jurisdiction over contract law, limited environmental issues, garnishments, and probate matters” (Anonymous 1999), thus bringing most of its child welfare, domestic, and civil cases to Brown County court.

The 15,000 Ojibwes are member-citizens of one of the six bands of Lake Superior Chippewa Indians located in the northernmost tier of counties in the state. Each band possesses a reservation that historically has had mixed economies that include timber industries, tourism, and subsistence hunting, fishing,

and gathering. All six began developing social service delivery systems through Office of Economic Opportunity programs in the 1960s that permitted tribes to bypass the Bureau of Indian Affairs and work directly with the federal agencies. Later tribal government functions expanded with the Indian Education and Self-determination Act of 1975, which extended contracting opportunities between the tribes and the federal government. The Ojibwe bands further benefited from bingo in the 1980s, and later, casino gaming to different degrees, with most operating casino/hotel conference centers.

With their increased economic and governmental powers, the state's Ojibwe bands have had a significant impact on the economies of surrounding non-Indian communities. The 700-member St. Croix Band is the largest employer in Burnett County. With a proposed \$17.5 million 2006 budget (Wenzl 2005), the Lac du Flambeau Band is the largest employer in Vilas county. The Lac Courte Oreilles Band is the largest and the Bad River Band is the third largest employer in Sawyer County. Though the Sokoagon and Red Cliff Bands are located in sparsely populated areas of the state, with concomitant implications for the force of their economic and social presence,¹⁷ they join the other Ojibwe communities in having courts that assume general civil jurisdiction.

Lac du Flambeau as an Exemplary Case

The Lac du Flambeau Band—which is also referred to by its member-citizens as the Lac du Flambeau Ojibwe Nation¹⁸—leads all the other bands of Ojibwe in the breadth of its courts' jurisdiction. In addition to child welfare, its legal code covers traffic, child support, paternity, housing, truancy, domestic abuse, juvenile drinking, landlord/tenant, conservation, natural resources on and off reservation, small claims, probate, and divorce. The tribe has begun to exercise criminal jurisdiction, though it is constrained because implementation of criminal justice is so expensive. It has a police force and keeps its tribal prisoners in the county jail. The band sells and retains the proceeds from tribal automobile, fishing, and All Terrain Vehicle licenses usable throughout the state.

Because of the Supreme Court's 1978 *Oliphant* decision held that tribes do not have criminal jurisdiction over non-members, the prosecutor at Lac du Flambeau now offers non-member Indians stopped on the reservation by law enforcement authorities the option of accepting the tribe's jurisdiction or swearing in open court that they don't belong on the reservation. Tribal police do not ask for tribal IDs when they ticket and so presume jurisdiction, offering non-members the option of transferring cases to county court at their initial appearance in tribal court. In sum, the tribe has adopted a self-conscious strategy of duplicating the procedures used by other sovereigns, presuming jurisdiction, thus acting in a sovereign state-like manner.

As a result of these decisions and developments, the Lac du Flambeau Band—like other tribes in the state—are no longer best thought of as egalitarian communities of people all descended from common ancestors, related by

blood and marriage and governed by custom and tradition. Managing health clinics and housing authorities, zoning and taxing, autonomously removing and placing children in private homes, certifying membership and marriages, exercising extensive exclusive territorial and personal jurisdiction, sponsoring expressive cultural productions and placing monuments, and generally cultivating government-to-government relationships with federal and state governments, tribes now “wield a genuinely creative, quasi-divine power” (Bourdieu 1999, 67) over their citizens.¹⁹ Not unlike other nation-states, tribes are becoming “dispersed ensemble(s) of institutional practices and techniques of governance” (Hansen and Stepputat 2001, 14). These communities, to greater and lesser degrees depending on geographic location and proximity to markets for their suite of resources and services, are better thought of and certainly experienced by their members as “centralized, institutionalized, authoritative system(s) of political rule” (Ferguson and Whitehead 1992, 6), that is, as states. This is what sovereignty looks like on the ground.

“It is now becoming clear that there are multiple roads to statehood,” writes Ronald Cohen in 1979 in an introduction to *Origins of the State: The Anthropology of Political Evolution*, though the book does not address these transformations within American Indian tribes. Nonetheless, the world-wide revitalization of non-state, so-called “tribal” or “peripheral peoples” (Niezen 2003), is manifested in the United States as a sovereignty movement that asserts the legal status of the tribes as self-governing “domestic dependent nations” that are simultaneously subject to the plenary power of Congress. It should be recalled that in one of its very first treaties, before it drafted its present constitution, the United States encouraged the Delaware in a 1778 treaty “to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head” (Kappler 1972, 5). So the notion that tribes might become states actually has a long history.

Local Roots of Tribal Statehood

An argument can be made that these developments in the direction of greater local sovereignty can be accounted for entirely by appealing to exogenous causes. Beginning in the 1970s, a flurry of federal legislation supportive of Indian sovereignty and a few Supreme Court decisions, all taking place in a global context of the revitalization of so-called peripheral and indigenous peoples, might give the impression that the changes that have taken place among the tribes of Wisconsin are best understood as outcomes of actions taken in Washington D.C. Because home-grown change will not only challenge this presumption, but also because it implicates some fundamental problems of legal pluralism that emerge when reservation communities tacitly embrace the idea that the state is the realization of the nation—first articulated by Leopold Senghor, first president of

Senegal—I now want to discuss one of the historical strands that has produced this renaissance and its implications for tribal statehood.

In Wisconsin, these self-determinative and regulatory projects and developments were given impetus by the *Voigt* decision, the watershed federal appeals court decision in 1983 that nullified the state's jurisdiction over Ojibwe Indian hunting and fishing on the lands—the entire northern third of the state—ceded to the federal government in the treaties of 1837 and 1842 (Nesper 2002). The major issue in *Voigt* was whether the state of Wisconsin could extend its jurisdiction to regulate the off-reservation hunting, fishing and gathering rights explicitly guaranteed to the Ojibwe in the those treaties. And though the state had been exercising these powers for over a century, much to everyone's shock, the court found that the state did not have this power.

The *Voigt* decision first refigured the relationships among the bands of Lake Superior Chippewa Indians because the reserved treaty rights were a property right that was shared by the bands collectively, thus requiring an unprecedented administrative engagement with each other. Then it refigured the relationships between those bands and the other tribes in the state, because it foregrounded differences between tribes that did and did not have such rights. Finally, it changed relations between all of the tribes and the state as the decision and its consequences laid the groundwork for the negotiations that were soon to take place over gaming.²⁰ It also motivated the development of tribal conservation law and catalyzed the emergence of tribal courts on Ojibwe reservations that did not already have them.²¹ Motivated by both the desire to fully implement the Indian Child Welfare Act and to administer tribal off-reservation natural resource law, the court soon assumed jurisdiction in other areas noted earlier.

Mark Galanter has argued that courts confer endowments as their most important “radiating effect” (Galanter 1981, 1983), on both the member-citizens as well as the institutions that constitute the communities within which they operate. With a court, the tribe now possessed an instrumentality for realizing policy decisions in the daily lives of reservation community members. The institutional developments that should cause us to re-imagine reservation communities as emergent states, then, are importantly tied up in the development of courts of law.

Among the Ojibwe themselves, there is considerable ambivalence about this emergent transformation of reservation societies to tribal states, and I contend that the courts represent an arena in which these ambivalences become visible. This occurs not only because courts are inherently sites of contestation, but because all tribal courts have the problem that Pommersheim (1995) refers to as contextual legitimacy: to what extent should local traditions and culture inform the organization and procedures of courts and how should these issues be debated and decided?

As noted earlier, the federal government gave its share of civil and criminal jurisdiction to the state in 1953 in Public Law 280, which was an aspect of the termination legislation. This meant that for much of the second half of the twen-

tieth century, Indian people have had to leave their reservations and go into what they perceive to be hostile territory in an effort to receive justice, an outcome that most will say they never achieved because they tended to go as defendants rather than as plaintiffs. Thus many Indian people are suspicious of the local non-Indian courts.

Not only have Ojibwe people tended to lose in court, but because of the cultural differences that separate them from the broader society, they tend to be suspicious of the kinds of social relations that organize the very process of court. Former chief judge at Lac du Flambeau, the Honorable Ernest St. Germaine, has told me that Anishinaabe people fear courts and are generally averse to both receiving and making judgments.²² The consequence of this perception of courts as alien and imported institutions, with the potential to restructure customary social relations within the community, is that they are encountered with considerable trepidation and ambivalence.

As a result of this ambivalence, in order to establish and reinforce their legitimacy, tribal courts repeatedly and routinely function with several audiences in mind. On the one hand, courts need to recognize, consider, and even embrace the traditional local community values to which Judge St. Germaine alluded, so that they will be credible in the sectors of the reservation that are most responsible for the maintenance of the entire community's distinct historical and cultural identity. Courts must then incorporate some elements of tradition, though tradition itself is a contested domain. On the other hand, in order to have its judgments given full faith and credit by the state of Wisconsin, so that its orders are enforced beyond the borders of the reservation—a value that is often also important to the tribal member-citizens who use the court as plaintiffs—the tribal court must look a lot like a state court and not appear to be too Indian.

This is the local version of a general dilemma that has been identified and articulated by the likes of Henry Sumner Maine (2002), Morton Fried (1967) and Stanley Diamond (1974) all of whom, in different ways, distinguish between social relations organized by custom and social relations organized by law and the implications of that difference for social order. Diamond summarizes the issue succinctly: the appearance of laws (and presumably a court to administer them) "... represent a new set of social goals pursued by a new and unanticipated power in society" (Diamond 1974, 265). For reservation communities, this "unanticipated power" is the tribe. The tribes are political entities originally consolidated in relationships with the federal government (Cornell 1988; Goldberg-Ambrose 1994) or, as John Collier, the Commissioner of Indian Affairs who was instrumental in the creation of many tribal constitutions, characterized them, as the "instrumentalities of the Federal Government" (quoted in Washburn 1984, 286).

The challenge of reconciling the law/custom dichotomy was noted by legal and political scholars Vine Deloria, Jr. and Clifford Lytle at the same time that the court at Lac du Flambeau emerged:

The greatest challenge faced by the modern tribal court system is in the harmonizing of past Indian customs and traditions with the dictates of contemporary jurisprudence. Tribes are reluctant to abandon their past traditions by placing too much reliance on the whites' legal procedures and practices. While borrowing some Anglo-American notions about the system of justice, tribal courts are struggling to preserve much of the wisdom of their past experiences (1983, 120).

More recently, Russell Lawrence Barsh (1999) concluded that in their efforts to be respected by the larger society, tribal courts at times have resolved this tension by compromising their credibility in their own communities by failing to develop a distinctive jurisprudence reflective of community values and conceptions of justice. I argue that it is unlikely that the tension will soon be resolved but, given the persistence and revitalization of tribal cultural traditions within the context of a broader society with marked differences, it will be a permanent, on-going condition.

The push and pull of these contradictory forces and expectations is shaping a distinctive Indian jurisprudence none-the-less because, even as they evolve, Indian communities are all in the same formal or structural situation. The internal desire and external pressures to remain culturally distinct—a requirement for participating in American society as “natives,” (Dombrowski 2001, 11-12)—conflicts with the largely external expectation that justice systems be recognizable or “legible” (Scott 1998) to larger and more powerful sovereigns in many of the cases that are brought to trial in tribal court. At Lac du Flambeau, this conflict is most readily apparent in off-reservation hunting and fishing cases.²³

Hunting and Fishing Trials in Tribal Court at Lac du Flambeau

The Lac du Flambeau Band created a court in response to the *Voigt* decision though it had been moving in this direction since the passage of the Indian Child Welfare Act gave the tribes exclusive jurisdiction over tribal children in 1978. The fact that it was a federal court decision over off-reservation hunting, fishing, and gathering and not an act of the federal legislature that catalyzed the emergence of the court is a measure of the importance of hunting and fishing to this community. I have extensively rehearsed the history and depth of commitment to those activities and the way of life they entail elsewhere (Nesper 2002, 2006). Suffice to briefly repeat here that the very name of the reservation, translatable as “Torch Lake,” refers to hunting and fishing at night; cars were effectively assimilated as terrestrial canoes in the early twentieth century, useful for hunting the logging roads. Thus, when this single band of 2,500 people were offered the equivalent of \$5 million a year for ten years in 1989 by the state of Wisconsin to forebear spearing a few thousand fish during a two-week period in

the spring, they turned it down, tacitly proclaiming that each fourteen-inch fish was worth more than \$700 to them, a rather emphatic and dramatic statement of the practice's local value.

Prior to the state's failure to lease these rights from the tribes in 1989, and while the tribes and the state were involved in federal court litigation over the scope of the rights and the permissible bounds of state regulations, these sovereigns sat down with each other and negotiated forty interim agreements regarding hunting, fishing, and gathering, out of which emerged a body of codified tribal off-reservation conservation law. When it came time to adjudicate disputes that arose over alleged violations of this tribal conservation code, it was clear that a plural legal order had come to exist. One was that body of customary practices that organized the harvests in a context of state domination. The other was the force of newly codified tribal law. Once called "violating," that is, exercising one's stipulated treaty rights in the absence of state recognition, the mores that governed the use of off-reservation resources had been matters of custom. Now they were matters of law.

Resistance to the new order of tribal law and tribal courts came from members of the sector of Ojibwe society who were occasionally referred to by court personnel as "subsistence hunters," "fishing families," or "treaty hunters"—often with unpredictable results. Because the tribal court had adopted the standard rules of civil procedure current in the state system, defendants in hunting and fishing cases were unfamiliar with what they perceived to be strict rules for speaking in tribal court. Ostensibly informal, defendants can appear without an attorney, but, given the great disadvantage this represents, the tribes have undertaken efforts to develop a cadre of lay advocates, minimally trained in law to the point of some parity with their law-school trained and often non-Indian tribal prosecutor opponents. The initiative supplied a few score tribal member-citizens with skills that qualified them for more lucrative careers in the tribal bureaucracy, into which nearly all migrated.

Defendants also passively resisted the authority of the court and the emerging tribal state in the ways described by James Scott in *Weapons of the Weak* (1985) by not showing up at court; by not bringing an advocate after asking for a continuance in order to procure one; by failing to pay fines; but most of all by pleading not guilty and offering defenses that drew upon the values of the reservation society imagined in its custom-governed communitarian mode, thus implicitly contesting the apparatus of the state in which they had to make their arguments. I offer a summary of cases that will be more extensively discussed in another venue²⁴ and present one in greater detail.

Nocturnal road hunting for deer off the reservation had become traditional over the course of the twentieth century as automobiles became more affordable. The methods and size of harvests were subject to the customary regulation exercised by families. Since the *Voigt* decision, however, tribal law now regulates hunting off the reservation as well as spearing spawning fish²⁵ at night in the spring. Cited for using an artificial light, or having a loaded and uncased

rifle in one's vehicle, or shooting from less than fifty feet from the center line of a paved road—the most common of the deer hunting violations—or spearing too many fish of a certain size, those cited for such violations and their lay advocates explicitly and implicitly allege racism on the parts of both state²⁶ and tribal wardens who write those citations. In doing so they remind the professionalizing, salaried, tribal court personnel and law enforcement sector of the community of the long history of race relations between the reservation and “the surrounding community,” as it is called, and evoke a conception of reservation society as an egalitarian kinship-based “family of families” as it has been credibly imagined for generations. Defendants have brought expert witnesses into such trials—often elders—who rehearse the history of hunting and fishing. The very presence of these icons of historical and cultural continuity can cause the court to lose confidence in the adversarial model of truth-finding it has adopted and set its alien speaking conventions aside.²⁷

As another measure of the strength of the customs and values that still undergird many of the hunting practices in this community, few cases of wasting natural resources are prosecuted, despite allegations made by neighboring non-Indians that these “treaty hunters” and members of “fishing families”²⁸ had exceeded legal limits: they will point to deer gut piles and the voluminous piles of scrap left from filleting fish, the preferred method of butchering in this community. In one of the rare cases, the defendant had left a deer hanging in his friend's mother's yard intending that his non-resident friend retrieve it on an expected visit to the reservation from the city in which he resided. The prospective recipient never made the trip. The carcass rotted, gained the attention of a tribal warden, and resulted in a citation to the defendant who had tagged the deer.²⁹ Not contesting the facts, the defendant testified that he had apologized to the “Great Spirit”—(had he used the Ojibwemowin *Gizhay Manitou*, it might have given him more credibility to his claim)—then pantomimed the momentary private apology he offered. The judge, educated in “the traditional law of our people,” interrogated him closely on his understanding of these rather esoteric matters of spiritual repair and discerned an egregious ignorance on the part of the defendant, which was best remedied with a charge that he seek the advice of an elder and pay a \$150 fine, which was a steep one at the time.

Several cases had to address whether or not the alleged hunting violation took place on or off the reservation because the tribe regulates hunting and fishing far less strictly *on* the reservation, where custom still obtains.³⁰ In offering opportunities for the recitation of oral histories of the community's view of federal policy and the meaning of the legally guaranteed physical separation tribes suffer and enjoy, such cases also set in motion discourses about what constitutes local Indian identity, especially since custom still governs in some domains within the borders of the reservation.

Physical borders are not the only kinds of borders that generate extensive discussions in court about just what kind of community this community is going

to be, to paraphrase Clifford Geertz's characterization of what, in the end, is always being debated inside of courtrooms (1983, 230). Issues about social borders and the authority to constitute and patrol them have also emerged. Under formal tribal laws, tribal members may not be assisted in their off-reservation hunting, fishing, and gathering by non-tribal members. As a result, men have been cited for fishing with their sons and their common-law brothers-in-law. Here a social order organized by the complexities, irregularities, flexibilities, and improvisations of custom and the vicissitudes of history conflicts with the simplicity of abstract law.

The tribe, via the Tribal Code in this area of the law, establishes the parameters for a division of labor within a potentially, and even likely, heterogeneous social group centered on tribal members' harvesting rights. But such constraints are a violation of customary practices. The provision of the tribal legal code that prevents all but spouses and children from assisting in the exercise of the rights orchestrates the code's valorizing both marriage³¹ and nuclear families, both concepts imported from the dominant society and generally on the ascendancy for at least the last century. In trials contesting such concepts, the defense has invoked the rules about the rules, as it were, quoting provisions of the Tribal Code that permit tribal courts to apply "any custom of the Chippewa Tribe not prohibited by the laws of the United States," arguing for the customary right of tribal members to have relationships of production with whomever they choose to associate, and thus constitute their families in traditional ways. Defendants have presented those customs and contend that "the sharing process" is "one of the customary things that Indian people have done in the past, and will continue to do, and will continue to get them in trouble," emphasizing in their very discourse characteristics that they maintain distinguish Indian and non-Indian people: Indians are invariably generous, while non-Indians are greedy.

In a trial that found the defendant guilty of receiving assistance from a non-tribal member, the judge elicited from the defendant the assertion that "I consider him as a family member, as an Ojibwe person." The judge then went on to address what he called "the long-range ramifications" in giving his decision. "If I said 'OK, Hank [the non-tribal member] is member of your family,' then I'm saying he's a member of mine too." Here the judge was evoking the very conception of community and traditional means of constituting it that the tribal state is slowly displacing even as he was facilitating the process of that transformation.

Conclusions

These hunting and fishing trials reveal the tension within this reservation society between the community and the tribe. Those same tensions may appear in Ho-Chunk tribal court in the trials over the oft-contested elections, or at Stockbridge-Munsee in their many civil cases, having to do with "money owed," in the stark terms offered by its clerk of courts,³² or in any number of other

jurisdictional domains these tribal courts are taking on. While endowing tribal members with certain rights—two score or more Flambeau women seek restraining orders on their violent mates every year, far more seek court-ordered child support from the fathers of their children—most of the endowments that the courts have conferred have benefited tribal members acting in the capacity of agents of the tribal state. Child welfare department personnel appear in court seeking orders to remove and place tribal children, housing personnel come seeking judgments on delinquent rent, and managers of tribal businesses sue tribal members for other monetary claims. And among the Ojibwe, as I have shown, the tribes as arbiters of the proper use of the off-reservation wildlife are often plaintiffs in cases against tribal member-citizens.

There is ambivalence about this social evolution that would set aside the norms that govern individual morality in a society understood to be organized by “diffuse enduring solidarity,” or generalized reciprocity, which obtains between those who see themselves as related “by blood”—or, at least, descended from the same ancestors, and the morality that obtains in a society imagined as an organization of citizens each in a fundamental way the same as every other whose affection for each other is more abstract, calculated, and restricted. At the same time, as sovereign communities, it is necessary and mostly desirable for reservation communities to evolve into tribal states. It is also necessary and desirable for them to maintain the cultural distinctiveness that is rooted in their historic forms of socio-political organization. The course has been set, and it requires steering between the tribes fully assimilating as annexes of the states within which they live, and the neo-traditionalist rejection of all imported institutions. The communities have shown that they have resilience, patience, and leadership to navigate these dangers, but the waters are not smooth and the outcomes are not certain. They are most worthy of our attention.

Notes

Research for this article has been supported by an ACLS/Mellon Fellowship, as well as the Graduate School of the University of Wisconsin-Madison, and Ball State University.

1. Along with Alaska, California, Minnesota, Nebraska, and Oregon, the state of Wisconsin was given the federal government’s share of tribal-federal concurrent civil and criminal jurisdiction over Indians in 1953 in what is widely referred to as Public Law 280. The legislation was an aspect of the federal policy of termination.

2. Two U.S. Supreme Court cases in the 1980s—*National Farmers Union Insurance Companies v. Crow Tribe of Indians* (468 US 1315) in 1984 and *Iowa Mutual v. LaPlante* (480 US 9) in 1987—affirmed the sovereignty of the tribes, holding that “tribal courts are the primary forums for adjudicating civil disputes on the reservations” (Pommersheim 1995, 57).

3. See Tebben (2001).

4. A well-placed, long-tenured state employee who shall remain anonymous has informed me that in discussions of state policy a bi-polar presumption—that is, state-local (the latter referring to towns, villages, county boards) opposition has given way to a tri-polar model—“state-local-tribal”—in recent years. Executive Order #39, “Relating to an Affirmation of the Government-to-Government Relationship Between the State of Wisconsin and Indian Tribal Governments Located Within the State of Wisconsin,” signed by Governor Jim Doyle on June 28, 2005 authorizes this sea change.

5. *Oliphant v. Suquamish Indian Tribe*, 435 US 191 (1978).
6. Although there are numerous laws vesting criminal jurisdiction in the United States, the most important and general are Indian Country Crimes Act, originating in 1790 and amended several times since, which extended federal enclave law to interracial crimes in Indian country. The Major Crimes Act (1885) established jurisdiction over 13 felonies, and the Assimilative Crimes Act (1948) allowed federal prosecution for state law violations (Getches 1993, 553).
7. *Worcester v. Georgia*, 31 US 515 (1832).
8. There is a means to cite from decisions made in other tribal courts as *The Indian Law Reporter* is published monthly and collects cases from tribal courts throughout the country.
9. Gregg Guthrie used this expression in an interview that took place on July 5, 1999 at his home in Lac du Flambeau while I was doing historical research on the community's museum.
10. The Oneidas had a court in the 1860s (Hauptman 1993) and the Menominees had a Court of Indian Offenses from the late nineteenth century (Keesing 1987, 176) until they were terminated in 1954. Lac du Flambeau had a "law and order ordinance" and a court between 1948 and 1953 (LdF Tribal Code, Chapter 70, History Note).
11. This is to say that the "full faith and credit" the federal constitution requires the states to extend to each other's public acts, records, and judicial proceedings (Gifis 1996, 215) are also extended to the tribes with which the state has such a relationship.
12. See the Organizational Chart: Executive Branch of the Ho-Chunk Nation at http://www.ho-chunknation.com/government/executive/org_chart.htm.
13. The currently unresolved *Dairyland Greyhound Park, Inc. v. James P. Doyle* (03-0421) in the Wisconsin Supreme Court has cast a shadow over the legality of both tribal-state compacts and casino gaming in the state, with the plaintiff holding that a 1993 amendment to the state constitution prohibits casino gaming.
14. Telephone interview with Marcella Cloud, Clerk of Courts Ho-Chunk Nation, August 15, 2005.
15. See Judicial Branch of the Ho-Chunk Nation at <http://www.ho-chunknation.com/government/courts.htm>.
16. Telephone interview with Wayne Malone, Sr., Clerk of Courts Stockbridge-Munsee, August 15, 2005.
17. Patty Loew (2001, 99) notes that in recognition of the gaming market disparity, the Potawatomis share their profits with the Red Cliff Band, a kind of foreign aid program.
18. Like other sovereigns, the tribe has a flag that hangs in the tribal council room, where tribal laws are made, and in the court, where they are enforced.
19. Tribal "citizenship" is beginning to replace "membership" in both professional literature about and elite discourse within Indian country. The "quasi-divine power" of which Bourdieu (1999, 67) speaks, refers to the state's ability to "state what a being is in truth . . . what he or she is authorized to be, what he has a right to be." The extent to which tribes wield this power can be assessed by reading letters written by disaffected tribal member-citizens to the editors of newspapers published in the non-Indian towns near the reservations complaining about the power of tribal governments. The newspapers operated by the tribes, though an important means of imagining the nation (see Anderson 1983), tend to be uncritical of the tribal governments.
20. It was the Lac du Flambeau and Mole Lake Bands that sued the governor in federal court over provisions of the Indian Gaming Regulatory Act twice while the treaty rights litigation was proceeding.
21. Red Cliff had established a court in 1978 to adjudicate disputes arising out of *State of Wisconsin v. Gurnoe* (53 Wis. 2d 390) that affirmed treaty-fishing rights in Lake Superior (Anonymous 1999) The Lac Courte Oreilles Band established a court at the same time as a response to the Indian Child Welfare Act.
22. Telephone interview with Ernest St. Germaine, March 23, 2005.
23. Because it is most accessible. In principle, trials contesting domestic abuse, divorce, and child welfare hearings would be as revealing of the ways in which custom and law are negotiated but the first two are rare and Indian Child Welfare proceedings in this court are not open to parties without a direct interest in the case, a policy that I was not willing to contest for the sake of this study. Instead, I was permitted to make copies of the audio-taped records of natural resource trials that took place between 1983 and 2000 which form the basis of this research.
24. "Tribal courts and tribal states in the era of self-determination: Ojibwe in Wisconsin," will appear in the *Beyond Red Power: New Perspectives on Twentieth-Century American Indian Politics*, Daniel M. Cobb and Loretta Fowler, eds. Santa Fe, NM: SAR Press. Forthcoming.
25. Ojibwes spear walleyed pike and muskellunge, a practice prohibited by Wisconsin of all its other citizens, though there is a short sturgeon-spearing season on Lake Winnebago in the east-central part of the state.
26. Recognizing that they did not possess the law enforcement capacity to police the entire northern third of the state of Wisconsin, the tribes collectively credentialized state game wardens to enforce tribal law, the state accepting the burden in the interest of conservation.

27. The deference to elders in court has included not swearing them in, and reportedly inviting them to speak Ojibwemowin if they would prefer.

28. The non-Indians who make such allegations do not use these terms. They often use pejorative terms when discussing such matters.

29. In the negotiations the tribes agreed to adopt many of the state's deer hunting management practices.

30. The Tribe has separate code for use of resources on the reservation but does not regulate deer hunting on the reservation at all.

31. The tribal code adopted in 1948 recognized all extant "Indian marriages," as they were called, but it also sought to end the practice by refusing to recognize such subsequent unions.

32. Telephone interview with Wayne Malone, Sr., Clerk of Courts Stockbridge-Munsee, August 15, 2005.

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