

Larry Nesper

University of Wisconsin–Madison

Ordering Legal Plurality: Allocating Jurisdiction in State and Tribal Courts in Wisconsin

This article examines how a Wisconsin statute passed in 2009 that authorized state court judges to transfer cases to American Indian tribal courts unfolded as a political and legal process that was both informed by and produced by fundamental conceptions of cultural difference. It calls specific attention to jurisprudential differences in the form of jury trials and peacemaking in figuring the differences between conceptions of tribal membership and state citizenship. [concurrent jurisdiction, cultural difference, tribal courts, peacemaking, state-tribal relations, tribal sovereignty, neoliberalism]

Although a number of legal scholars have given some attention to ways in which cultural differences are manifest in American Indian tribal court jurisprudence (Barsh 1999; Cooter and Fikentscher 1998; Fletcher 2007; Pommersheim 1997; Valencia-Weber 1994), only a few cultural anthropologists (MacLachlan 1962; Miller 2001; Nesper 2007; Richland 2008) have undertaken ethnographic work in the tribal courts themselves. Herein I extend this latter ethnographic work into the domain of the relationship between the state of Wisconsin and the American Indian tribes within the state by examining the ways in which different representations of cultural practice shaped the process of legal codification in the development of Wisconsin Statute P.L. 280, section 801.54, Discretionary Transfer of Civil Actions to Tribal Court.

In his magisterial *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination*, McHugh (2004) meticulously traced the ways in which law has shaped relations between settler North American and Australasian polities and aboriginal peoples. He showed that when aboriginal peoples were threatened with termination of their special legal status, beginning shortly after World War II, they were able to mobilize a variety of resources and to propel these polities into legal regimes that recognized their special status; this turned liberalism on its head and demanded equality at the governmental level (354). In the United States, President Richard Nixon's address to Congress on July 8, 1970, acknowledged and advanced this movement when he declared that the goal of the new policy toward American Indians would be "to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal

group” (Getches et al. 1993:253). With this, a federal Indian policy sea change in the direction of self-determination commenced in earnest.

By the 1990s, English Common Law-descended legal systems had entered a phase of self-determination characterized by “questions surrounding the holding or the management of those rights” (McHugh 2004:360) won in the decades before by increasingly autonomous indigenous groups. By the end of the 1990s, “their affairs were becoming ‘juridified,’ in the sense of being surrounded by a new, pervasive and commodified legalism” (360).

In the late 1980s, the Conference of Chief Justices of the State Supreme Courts commissioned the State Justice Institute to the National Center for State Courts to undertake a study to “clarify civil jurisdictional concerns between tribal and state courts and to develop strategies for resolving jurisdictional disputes between these two sovereigns” (Hansen 1991:319). The initiative led to a series of “Common Ground” conferences between 1991 and 2005 that addressed issues of jurisdictional disputes between tribal, state, and federal courts. In McHugh’s terms, this was a process of reconciliation because recognition of indigenous sovereignty “entailed a form of intergovernmentality” with both state and tribal governmental bodies “reaching agreements and building structures for decision-making as an expression of their inherent authority in their respective spheres” (420). This “inherent authority” had manifest as internal institutional development over the course of the self-determination policy period.

Wisconsin contains 11 federally recognized tribes (Oneida, Menominee, Potawatomi, Stockbridge-Munsee, Ho-Chunk and six bands of Lake Superior Ojibwe). Though three states east of the Mississippi have more individual American Indian people, no other eastern state has “a greater variety of tribal and linguistic proveniences and administrative complications” (Lurie 2002:1). In the last 40 years, as they grow more state-like, all of these tribes have developed judicial systems. With the exception of the Menominee tribe, all the other tribal courts handle only civil cases. The Menominee tribe had its federal trust status terminated in 1954. The tribe was restored to federal status in 1973 but continued to prosecute the criminal cases it assumed when it became the poorest county in the state for nineteen years. All of the tribal members of all of these tribes are also citizens of the state of Wisconsin.

Wisconsin is a mandatory Public Law 280 state. A result of the aggressive post-World War II assimilative federal Indian policy, P.L. 280, in 1953, devolved the federal share of federal-tribal concurrent civil and criminal jurisdiction to five states (California, Minnesota, Nebraska, Oregon, and Wisconsin). It did so without funding and without tribal consent, and it was largely motivated by putative American Indian lawlessness (Goldberg 1997:1–44). More than half the tribes in the lower 48 states come under P.L. 280¹ (Champagne and Goldberg 2012:3). The initiative opened the courts to American Indian people, an aspect of “liberating the tribes from federal trust dependence” (Fixico 1986:111). One of the effects of P.L. 280 was to underdevelop tribal judiciaries (Goldberg 1997).

First in 1976, in a case contesting the state taxing a tribal member's mobile home on trust land (*Bryan v. Itasca*, 426 U.S. 373), and then again in 1987 in *California v. the Cabazon Band of Mission Indians* (480 U.S. 202), the U.S. Supreme Court found that P.L. 280 did not confer *regulatory* jurisdiction on these six states. The U.S. Congress fixed that disturbing anomaly with the Indian Gaming Regulatory Act of 1988 (P.L. 100–497), which initiated the most recent period of tribal effervescence. Now with viable economies for the first time in a very long time, a number of American Indian tribes reemerged as important actors on the political and economic landscape, and tribal judiciaries began to redevelop. For those tribes in P.L. 280 states that were becoming increasingly viable political and socioeconomic entities, and were determining for various reasons that they needed to develop courts, the post-Indian Gaming Regulatory Act landscape made the reality of concurrent tribal–state jurisdiction far more consequential. By the 1990s, for at least some of the tribal courts in Wisconsin, hundreds of cases were being filed in tribal courts that might have been filed in state courts from the 1950s to the 1980s. Add to this institutional development the fact that the U.S. Supreme Court supported tribal court jurisdiction in at least three important cases² that involved non-American Indian interests, the issue of competition and conflict between the state and tribes over jurisdiction is genuine.

In the late 1990s, Jerry Teague, the non-American Indian manager of the Bad River Band of Lake Superior Ojibwe was relieved of his job, and he filed a suit against the band in state court for breach of employment contract. The band responded with a countersuit in tribal court claiming that the contracts were invalid. A complicated and lengthy jurisdictional battle ensued, which reached the supreme court of Wisconsin three times.³ In finally settling the case, the court encouraged comity between the state and tribal judiciaries, and laid the groundwork for a protocol for allocating jurisdiction between state and tribal courts once a case was filed. Signed by state and tribal judges in two of the state's judicial districts, the protocol requires that the now-engaged state and tribal judges go through nine factors to determine where best a case should be heard. These include determining: (1) if the case involves a tribe's constitution, by-laws, ordinances, or resolutions; (2) if it involves traditional or cultural matters of the tribe, or an action in which a tribe is a party; (3) if a tribe's sovereignty, jurisdiction, or territory is an issue; (4) the membership status of the parties; (5) the cause from which the action arose; (6) if parties have chosen a forum to be applied in the case of dispute; (7) if the judges have looked at the timing of the motion to transfer in terms of courts' time and expenditures; (8) where the case can be decided most expeditiously and (9) such other factors that may be appropriate.

In 2007 the recently emerged Wisconsin's State–Tribal Justice Forum proposed to the state's supreme court a rule change that would empower state court judges to transfer cases to tribal courts on their own authority, effectively preempting the need to mobilize the "Teague protocol." This initiative reflected the goal of efficient use of judicial resources on the state's part in these neoliberal times, and the expansion of tribal judiciaries as a material realization of sovereignty on the tribes' part, well into the era of tribal self-determination. It was in evaluating whether or not this was

good public policy that the Wisconsin Supreme Court began to explore the issues swirling around the realities of legal pluralism and overlapping jurisdictions. The rule passed, and was tested when John Kroner, another non-American Indian head of a tribal corporate entity, contested the right of the state court to transfer his case to tribal court. The case was heard in the state's supreme court, and it further revealed the deep ambivalence about the jurisdictional complexity that developed during this reconciliation phase of self-determining federal Indian policy. At both the hearings regarding the proposed rule as well as in the *Kroner* case itself, the Wisconsin Supreme Court explored the significance of cultural differences in jurisprudential practice and constitutional rights that shape relations between the state and the tribes in Wisconsin and its tribal and nontribal citizens.

The State–Tribal Justice forum was constituted after the Walking on Common Ground conference in 2005. The U.S. Justice Department's Bureau of Justice Assistance sponsored the forum, which took place near Green Bay, Wisconsin, at the Oneida Radisson Hotel on the Oneida reservation. The forum's foundation began when the chief judges of the Stockbridge–Munsee tribe and the Forest County Potawatomi tribes separately invited their neighboring state court judges for breakfast. This became formal when the Wisconsin Tribal Judges Association⁴ joined with the Wisconsin Supreme Court, creating the forum (Tebben 2001:182). This origin in informality validates Withey's (1995) conclusion that the American Bar Association's recognition that "a lack of understanding and respect as one of the most prevalent impediments to the successful development of agreements" can be overcome with "effective personal relationships" (154). I have attended several of the five continuing-legal education seminars for tribal and state judges hosted by tribal judicial officials, and have noted that the story of the origin of the relationship between the local, state, and tribal courts is often told, and it serves to call attention to the personal relationships that made subsequent institutional developments possible. It is typically a story of vision, courage, and the genuine commitment on the parts of the officials to recognize and enhance the integrity of tribal communities.

Wisconsin's Chief Justice Abrahamson gave the opening speech at the Walking on Common Ground conference, saying that "cooperation among tribal, state, and federal judges is essential in the administration of justice," thus encouraging the institutional cooperation that would soon manifest in the discretionary transfer proposal (field notes, July 27, 2005). He said this to an audience of about 300 court commissioners; attorneys; lay advocates; justice system professionals; and tribal, federal, and state court judges. Tribal judges, federal officials, and Indian law professors spoke about the importance of integrating culture and traditions into judicial practice. And Wisconsin state court and tribal court judges ceremonially signed the aforementioned allocation of jurisdiction protocol, publicly endorsed as supporting "comity and sovereignty of each system," as Ann Bradley Walsh, a justice of the Wisconsin Supreme Court, said at the time. Hence, by the time the draft proposal of the discretionary transfer rule was presented at the first public hearing in January 2008 at the Wisconsin Supreme Court, the proponents were confident, anticipating that the supreme court would welcome

and support their effort. The advocates were surprised, therefore, when issues of cultural difference emerged and threatened failure of the initiative.

The Wisconsin Supreme Court justices meet in a room that is one of the most beautiful in the nation, or so the promotional literature on the state's court system website continues to attest. Though the text has since changed, it used to read:

A square room, forty-two feet by forty-three feet by thirty feet high, with more marble than any other room in the Capitol building. . . . [There are] four paintings that illustrate historical events that influenced Wisconsin law. . . . [One of] Caesar Augustus presiding over the trial of a soldier. . . . [The] signing of the Magna Carta . . . the 1787 signing of the United States Constitution in Philadelphia . . . [and] the trial of Chief Oshkosh of the Menominee tribe in 1830. . . . [A]ccused of killing a Pawnee⁵ Indian . . . brought to trial before federal judge James Duane Doty, [i]t was the first time a jury was used in Wisconsin history. [Former text on Wisconsin Court System website⁶]

Because this mural played a role in both the hearings and the first case under the rule to be appealed to the supreme court, it is useful to note that the jury found that Oshkosh did, indeed, kill the Pawnee, named Aukeewa. Appearing *pro se*, and aided by an interpreter, Oshkosh freely admitted the charge, but also asserted that “the laws of the White People, meaning the laws of this Territory, were of no validity in regard to the matter and not binding upon any Indian of the said tribe in this behalf” (Tenney 1933:145). Earlier, Aukeewa had killed Mushkeewet, a Menominee Indian tribal member, and—to quote from the decision—“that by the law and custom of the said Menominee tribe,” Aukeewa “in consequence of said killing . . . forfeited his life which might by that Indian law and usage be taken away at any time and in any place without guilt in the estimation of the said tribe of the Menominee Indians” (Brown 1965:356). The jury found that Oshkosh did “kill and slay” him “in pursuance of the said Indian law and usage.” But because they found Oshkosh to be “wholly Indian in his habits, character and education, and wholly uncivilized,” the jury found itself “ignorant” as to whether or not “the presumption of malice aforethought” (Brown 1965:356) could be attributed.

Judge Doty responded to the jury with his opinion, drawing on the third section of the Ordinance of 1787, famously summarized: “the utmost good faith shall always be observed toward the Indians.” He invoked “a mutual recognition of the sovereignty of *Indian rights*,” arguing that the ordinance demanded that the law protect the Indian “against the acts of whites alone,” as they are “*separate, subordinate, and dependent* . . . subdued Tribes of barbarians (Brown 1965:360).” Generally, Judge Doty found that for cultural, political, and racial reasons, Indians do not qualify for territorial jurisdiction: “I am unable to satisfy my mind that the prisoner has willfully and maliciously violated any statute of the Territory of Michigan. The motion for judgment is therefore refused, and the prisoner is discharged from custody.”⁷ The court agreed with Oshkosh that the territory had no jurisdiction in the matter, even

though the deed took place on Indian lands but *within* the territory. Oshkosh was “wholly acquitted and discharged” (Brown 1965:357–361), so concluded *The United States vs Oshkosh, An Indian, Chief of the Munnomonee Tribe*.⁸

This decision recognized that what was then Michigan Territory—and would soon become the state of Wisconsin—was a politically and legally plural social landscape. The court effectively exercised comity: respect for the decisions of another sovereign, albeit one it regarded as inferior. Nearly two centuries later, the Wisconsin Supreme Court sat to consider related questions. With the tribes still on the landscape, and in the interest of “effectively and efficiently allocat(ing) judicial resources” (Wisconsin Statute section 801.54), the court had to decide several questions. How comparable to the state’s procedures does “Indian law and usage” need to be in order to authorize state judges on their own discretion to transfer cases from a state court to a tribal court? Under what circumstances should judges be allowed to exercise a kind of comity in recognition of tribal members’ dual citizenship, as they are both citizens of Wisconsin and members of tribes? Because tribes can claim jurisdiction over nontribal members under certain conditions in civil cases, what is the state’s responsibility in guaranteeing that those nontribal members will receive justice in tribal courts?

At stake here was the extent of tribal sovereignty and the degree to which the state was willing to acquiesce, in anthropologist Biolsi’s (2004) words, a “heteronymous political space in which more than one sovereign may exercise jurisdiction in coterminous space” (247). It may be that all societies are and have always been legally plural (Pospisil 1978:52–60; Griffiths 1986), but when faced with a policy decision that recognizes and encourages more extensive plurality, those charged with protecting the rights of all of the citizens of a state debate the desirability of this condition and reveal their own ambivalence about cultural differences and its legal entailments in the process. The issue of the relationship between state and tribal courts then offers a window into what Duthu (2013) recently described as “determining the proper measure of autonomy that ought to be accorded to tribal sovereigns while also respecting our national commitments to liberal democracy and individual freedom” (162–163).

In January 2008 the Wisconsin Supreme Court held a public hearing in which the chair of the state–tribal judicial forum, Judge James Mohr, a former circuit court judge and now a tribal court judge, took the lead. He pointed out that 25 counties and nine tribes in the state come under the two protocols for allocating jurisdiction, but there was nothing for any of the other judges in the state. He argued that state judges needed guidance regarding comity, courtesy, and cooperation regarding their relationships with the tribal courts.⁹ The proposed rule would make for better case management. Tribal courts had been taking on more and more responsibility for their communities, and this was good, he argued.

The justices who supported the rule change offered Mohr the opportunity to sing the proposal’s virtues. Then the less supportive justices began: Could a Wisconsin state court judge transfer a case out west to, say, the Apaches? How do we know when concurrent jurisdiction is present? Do the tribes have the capacity? Do all the tribes offer jury trials? Does the state–tribal judicial committee discuss the constitutional

rights of nontribal members and of tribal members, who themselves are citizens of the state of Wisconsin? How are the procedures different in tribal court?

When the justices turned to the issue of the right to a jury trial, Judge Mohr attempted to answer and contextualize the concern:

There isn't any question that tribal courts may seek other methods to resolve disputes. No matter how you look at all our work to try to develop and promote these relationships, there will always be a tension between the adversarial process and a more consensual process. That will always be there. I understand what you are saying. For the most part its interesting to see a lot of these the tribal courts are picking the good from the adversarial and good [from] their cultural native processes to develop some kind of mechanism to resolve disputes. Without question you are going have situations in which tribes resolve disputes differently and that the importance of this process, because tribes are in a much better position to provide a long-lasting resolution of disputes through more culturally accepted methods than the adversarial process. So I understand what your saying. Maybe at some point in time that standard or degree will be left to someone else's decision.¹⁰

Judge White-Fish of the Forest County Potawatomi, at the time president of the National Tribal Court Judges Association, then addressed the court, first greeting them in the Potawatomi language. This may strike the reader as pro forma, but the decision to so greet the justices had been discussed by the state-tribal judicial forum judges, with one member of the Oneida judiciary suggesting that, "One of us should make an introduction with our language. No need to go overboard. It gives that difference" (field notes, October 8, 2010, Wisconsin Tribal Judges fall meeting, Ho-Chunk Judicial Center).

Judge White-Fish said his name, his clan, and where he was from, and greeted the justices as *Nakanis* (my siblings). His speaking Potawatomi to the supreme court enacted the reality that a sovereign—a prepolitical organic jurisdiction (Ford 1999)—already existed within the territory that the justices understood to be *their* jurisdiction. It effectively proclaimed that the jurisdiction was not isomorphic with the territory; it was heteronymous. "Sovereignty is the name of the appearance of a community, the expression of a decision to be in common," wrote legal philosopher Douzinas (2007:21). Language is a sign of sociality, mutuality, and community. Judge White-Fish spoke presumptively and for a "we" (not an "I") in addressing the court.

He then called attention to the painting of Chief Oshkosh's trial. "Chief Oshkosh is standing here for a reason," he said. "For cooperation, coordination, and communication."¹¹ He went on to call attention to cultural differences, noting that the state's Ho-Chunk traditional court¹² deliberates in the tribal language. He then spoke of the cedar in his own courtroom as representing healing, symbolic of the putative iconic difference between the tribal and state legal systems, with the former

placing value upon reparation, restitution, and peacemaking,¹³ and the latter on an adversarial demeanor and punishment. Finally, he complimented the justices of the court for its leadership in state-tribal cooperation, the state of Wisconsin being an acknowledged leader in this area.¹⁴

He was thanked for his comments by Justice Prosser, who appraised the initiative as generally positive, but then pointed out that the court must be concerned with the constitutional rights of *all* citizens in the state, tribal citizens included, and the right to a jury trial is paramount. Judge Prossner said:

I look at all of the tribal members of Wisconsin. They are also citizens of Wisconsin. They are entitled to all the constitutional rights that every other citizen enjoys. I can think of hypotheticals in which two tribal members on a matter of concurrent jurisdiction might file in circuit court because of certain rights afforded under the Wisconsin constitution. Under those circumstances, I don't think the circuit court ought be sending that back to the tribal court.

What I don't quite see in this petition is what Justice Rogensack asked for, some consideration of the views of the litigants. Because, frankly, if someone started a case in tribal court that should be considered. If someone picks a different forum, that is the circuit court, that ought to be considered as well.¹⁵

Judge White-Fish responded that a jury trial could¹⁶ get you in front of your relatives, implying strongly enough by his tone that this was not necessarily desirable. His remark produced spontaneous laughter in the courtroom, which was his apparent intention. The laughter was a definitive sign of an ironic consensus, a joke. And a joke, according to Douglas (1975) "is the image of the leveling of hierarchy, the triumph of intimacy over formality, of unofficial values over official ones" (98). The laughter in the courtroom became "a unique bodily eruption, which is always taken to be a communication" (86), and it indexed the simultaneous collective realization and consensus on several points: (1) American Indians do not really trust their relatives; (2) American Indian society is all about relatives; (3) the purpose of a hearing is to advocate for such a society; but (4) the difference between the tribal and the state legal systems and societies do not implicate the goal of doing justice.

Chase (2005) identifies the civil jury as the first element that constitutes what he calls American "procedural exceptionalism." Its importance to Americans is "unparalleled elsewhere in the world," (55-58), having been abandoned even in England where it originated. The mural in the courtroom depicting Oshkosh's trial makes the same point, effectively proclaiming that even a Menominee chief who was illiterate and spoke no English received justice from a jury. Chase argues that the civil jury trial is an icon of American egalitarianism, populism, antistatism, and individualism. The tribal world that Judge White-Fish evoked celebrates none of these values. If a tribal community is a society importantly organized by kinship, then rights

and obligations are allocated on the basis of age, gender, descent, and affinity.¹⁷ By contrast, citizenship presumes equivalence of an individual vis-à-vis the state. Kinship celebrates heterogeneity—persons have different rights and obligations to each other, and there are different *kinds* of relationships.¹⁸ Tribal communities have also been largely stateless social worlds, so neither populism nor antistatism have traction. Persons in American Indian tribal societies are far more oriented by their *obligations* to each other than they are by a conception of a set of *rights*.¹⁹ Barsh (1999) wrote that “tribal society is a network of complexly-interrelated groups, rather than a group of selfish, largely unrelated individuals. . . . Tribal law emphatically asserts that people are *not* equal in their relationships or responsibilities, but unique.”²⁰ Pommersheim (1997), in adopting Martha Minow’s privileging relationships over rights, noted that “most indigenous communities . . . define their existence in terms of relatedness among individuals and groups, not in terms of the rights of isolated, contingent individuals” (116–117) As a particular kind of dispute resolution then, jury trials do not have the cultural roots, as it were, to make them legitimate in a tribal context.

Addressing their concern about jury trials, Judge White-Fish effectively inverted the justices’ expectations. He undid the presumption of an association between anonymity and justice, even as he revealed that anonymity is unachievable in a tribal context, thus again rehearsing the putative difference between white society and tribal society. Finally, the presumption that one might benefit from familiarity was also inverted. He implied that relatives might not be fair. They might have grudges against you. They know you and all your shortcomings. And by implication, tribal court might be fairer to those who were not American Indian. So, there was laughter. Though it was clever and sincere, and speaks volumes of cultural difference, I read his joke as a diversionary tactic.

Juries decide who wins the contest between the lawyers, who meets or does not meet the standard of proof, and who tells the better story. Ideally, from the perspective of their practitioners and advocates, tribal courts do not host contests. They are sites of reconciliation. Places where “peacemaking” takes place. The exchange between Judge White-Fish and Justice Prosser drew attention away from a presumptive interest in what is referred to as “peacemaking” in the tribal communities. This peacemaking is achieved through *compromise* of individual interest and an interest for the rights of an individual, and justice is achieved through a *contest* that the adversarial method represents. According to Gross (1999), “peacemaking is a type of ‘restorative justice’ since its objective is conflict resolution through the *healing of relations between individuals* in conflict” (5, emphasis added). Peacemaking is also significant as a symbol of continuity between pre-and post-colonial polities, as well as a putative culturally distinctive means of finding truth that is explicitly opposed to the adversarial means of finding truth, and both function as part of the project of indigenous nation-building.

Peacemaking also solves a practical problem that the adversarial method creates. The power of the adversarial method is most palpably manifest in the anxiety felt among tribal court judges because most litigants and defendants appear without

counsel. Although there have been efforts to train law advocates and assist *pro se* litigants in defending themselves, the judges acknowledge that these efforts have been frustrating. They recognize that *pro se* litigants—what Galanter (1974) refers to as “one-shotters”—are no match for the “repeat-players”; that is, officials such as the tribal prosecutors, tribal heads of departments, and tribal game wardens who appear as plaintiffs on behalf of the tribe. This disparity damages the internal credibility of the tribal court among the general tribal membership. Peacemaking resolves the practical problem of defendants unable to afford an attorney, the tribes typically being unable or unwilling to fund public defenders, and the need to be credible to tribal litigants. With peacemaking, the tribes get to keep their courts as institutional symbols of their tribal nationhood and preserve the internal legitimacy of them by availing what is taken to be a culturally distinctive and therapeutic model of conflict resolution.

The exchange between Judge White-Fish and Justice Prosser opposed a communitarian and a liberal understanding of society and a person’s different places, rights, and responsibilities within each. These were fundamental cultural differences. In his style and rhetoric, Judge White-Fish was rehearsing and performing those cultural differences, with the goal of persuading the justices to assent to an authoritative rule that recognized and respected cultural difference generally, but at the same time minimized its importance in regard to due process insofar as personhood itself is different for a state citizen and for a member or citizen of a tribe. Tebben (2001) commented on this difference: “In some tribal cases the central goal for the court may be to preserve and strengthen the *family* or the *tribe*, yet the central value in a non-tribal court may be to preserve property or to punish” (188) an individual. It is another way of raising the issue of the relationship of the person to the collective and it implicates the point Duthu (2013) articulated: tribal autonomy versus individual liberty in discussing the appropriate relationship between tribes and the United States. Milward (2012) addressed the same issue directly in his effort to reconcile Canadian constitutional guarantees of individual rights with the implementation of an effective aboriginal system of justice.

This cultural difference, however, goes even deeper. The constitutions adopted by the tribes in the 1930s did not contain separation of powers, separation of church and state, or the power of judicial review, all fundamental elements in Anglo legal-political organizations, which were the reasons why “the non-tribal courts view tribal courts as less legitimate because tribal courts are based on different values and assumptions,” according to Thorington (2000:983).²¹ What is more, she added that “inclusion of these elements in tribal justice systems tends to undermine what is left of the traditional systems” (984). Tebben (2001:188) wrote that *ex parte* communication is hard to resist in a small community organized by kinship; that is, where relationships are characteristically multiplex, operating in several different social registers.

The courtroom breaking into laughter was significant in this forum, where silence had earlier been commanded by the bailiff, because it indirectly indexed the fundamental question and concern that underlay the proceedings: How different are these societies²²—Indian and non-Indian—and their conceptions of due process? And

although the justices expressed their solicitous concern for the ordering of citizenships for tribal members insofar as Wisconsin American Indians are both tribal and state citizens with different rights in each jurisdiction, subsequent developments indicated that the real concern was the new rule's recognition of tribal sovereignty and its implications for nontribal members who could come under the tribe's jurisdiction and be compelled to have their case heard in tribal court on the authority of a state court judge making a decision to transfer on the basis of the case's content, not on the litigant's choice of forum.

The Wisconsin Supreme Court postponed action on the proposal and asked the opinion of the U.S. Department of Justice and the University of Wisconsin (UW) Law School on several issues. The response offered by the university's Great Lakes Indian Law Center cut to the chase and directly addressed the issue of legal pluralism, cultural heterogeneity, and overlapping jurisdiction. It was authored by the law center's director, Richard Monette, and its deputy director, Huma Ahsan, who responded that a similar set of questions had been asked in Spain in the 1550s: "Are they [that is, Indians] like us? How can we ensure that what we value is valued by Indian nations? How do we know that our interpretations of due process are being applied in the Indian Nation located within Wisconsin?" (Monette and Ahsan 2008: 23).²³ The center, effectively speaking as the UW Law School, offered its support for the new rule as a step that would facilitate greater cooperation between the state and "the Indian nations located in Wisconsin [that] will seek to fully exercise their inherent sovereignty by creating criminal courts, appellate courts, and Tribal law enforcement" (28) in the years to come. They also called for attention to the larger issue of distinguishing more clearly between criminal and prohibitory, civil and adjudicatory, and civil and regulatory acts so that concurrent and exclusive jurisdiction would be clarified.

After another hearing in 2008, the supreme court voted in favor of the proposal, now designated as Wisconsin Statute section 801.54, putting it into effect January 1, 2009. In doing so, it tacitly affirmed tribal sovereignty, accepting and ratifying the reality of the plurality of Wisconsin's legal landscape and its different kinds of citizens. Significantly, the supreme court added a comment inviting judges contemplating transfers to also "give particular weight to the constitutional rights of the litigants and their rights to assert all available claims and defenses." Botsford and Stenzl (2012:676) remarked that the comment inhibits the use of the rule, creating fear in circuit court judges.

Supreme Court Justice Rogensack voted against adopting the rule, and wrote a strong dissent. She was joined by two other justices, who dissented on four grounds: (1) the rule is "inadequate and misleading" regarding the scope of concurrent jurisdiction, (2) the rule alters the rights of both tribal and nontribal members, (3) it undermines the constitutional and statutory rights of litigants, and (4) the supreme court had not been presented with information ("information" was underlined in original)²⁴ about the substantive rights and civil procedures that are available in tribal courts."²⁵ This last concern implicates the general issue of the legitimacy of these courts and the problems that the tribes face in developing institutions that are credible both within their communities and to the communities that surround them (Pommersheim

1995:66–75). This is a problem Jones (1988) commented on, noting “the resolution of a dispute in tribal court, however, must always be administered with a dose of Anglo due process because of the need to have tribal judgments respected and enforced by outside court systems” (475).

The first appellate test of the discretionary transfer rule came in June 2011, with the Third District Court of Appeals affirming a Brown County circuit court’s decision to transfer *Kroner v. Oneida Seven Generations Corporation*,²⁶ a civil suit, to the Oneida Tribal Judicial System. As a non-American Indian employee of a tribally chartered corporation, the court found that the *Montana v. United States* (450 U.S. at 565–566) exceptions settled the issue of tribal jurisdiction, as the appellant, John Kroner, had clearly “enter(ed) into a consensual relationship with the tribe.” (565–566). Although the appeals court found that “the better practice is for a circuit court to individually address each of the statutory factors”—and thereby earn a recommendation against “publication in the official reports” (*Kroner*, 14)—the circuit court did properly exercise its discretion, and the transfer stood. Kroner appealed his case to the Wisconsin Supreme Court, and the court accepted it.

A month later, Justice Rogensack reiterated and amplified her earlier dissent on the occasion of the reauthorization of section 801.54. In strident tones, she found that “Native American Tribes” sought to expand their jurisdiction, and that “this court has abandoned citizens to tribal courts that are not obliged to follow either the United States Constitution or the Wisconsin Constitution,” contravening “the oath of office each justice took” to protect the same. The “substantive rights of the litigants have been changed” with this legislation, and thus this court exceeded its authority. Not bound by either Constitution, “tribal courts impose their religious values as custom and tradition that informs the tribal courts’ view of the law,” and no U.S. court can review their decisions. Reading from the U.S. Supreme Court’s decision in the then-recently decided *Plains Commercial Bank v. Long* (491 F. 3d 878): “Tribal court concurrent subject matter jurisdiction is almost non-existent when a nonmember is a party to the lawsuit,” placing the burden of proof for concurrent jurisdiction on the tribal court; state court discretion in this matter is impermissible and “contrary to federal law.” Finally, she wrote that section 801.54 infringes the “substantive right of litigants to Wisconsin courts.”²⁷ She was joined by the same two other justices that supported her earlier dissent in this opinion, a dissent that evoked paternalistic nostalgia for the unitary liberal state in an era of political decentralization and increasing support for tribal sovereignty.

At oral arguments in *Kroner*, Justice Prosser linked the right to a jury trial to legal pluralism, and used Chief Oshkosh to make the point that state courts, with their jury trials, are competent to use tribal law. Here he effectively suggested that though the landscape might be legally plural, it did not need to be institutionally symmetrical: state courts could do it all. He did note that the Ho-Chunk tribe had recently made jury trials available.

The Wisconsin Supreme Court reversed the appellate court decision and remanded John Kroner’s case in July 2012. For this case to stand, the court wrote, the circuit

court was obliged “make a clear record of its findings and conclusions regarding concurrent jurisdiction, as well as provide an analysis of all the rule’s relevant factors on the facts presented” (*Kroner v. Oneida Seven Generations Corp.*, 342 Wis. 2d 626:650–51, 819 N.W. 2d 264:277 [2012]). Justice Rogensack penned a separate opinion that was a version of her earlier dissent to the reauthorization of the rule. Upon remand, the circuit court judge, who ruled that the case belonged in the Oneida tribal court, was replaced; the case was dismissed with prejudice by a new judge.

The outcome of *Kroner* makes it difficult to avoid the conclusion that the discretionary transfer rule is a weak “convention on tribal sovereignty” and a “structural framework for intergovernmental cooperation” (Duthu 2013:177). Although Duthu had in mind conventions agreed to by tribes and the federal government, because more than half the tribes in the lower 48 states come under P.L. 280, the most immediately relevant conventions are likely with states. Such conventions enable the state to accommodate the sovereign interests of the tribes—to a point. One cannot help but think that the confidence of state court judges to transfer cases will be weakened now that reluctant tribal litigants can order their citizenship and nontribal litigants can assert their right to the state’s due process guarantees. In fact, a Forest County circuit court judge refused to transfer a case²⁸ between two tribal members to the Potawatomi tribal court in early 2012, in the shadow of the Wisconsin Supreme Court’s acceptance of the *Kroner* case. Tribal law scholar Fletcher (2012) took a pessimistic view: “This case may be a harbinger of bad news for many parts of Indian country that may have thought they solved their intergovernmental disputes through negotiation, only to have that arrangement undercut by court decisions.” (Fletcher 2012).

Kroner notwithstanding, hundreds of cases, especially at Oneida,²⁹ have been transferred from state to tribal courts in Wisconsin, in no small part due to the personal relationships that have been cultivated between tribal and local state court judges. The movement clearly represents a growing consensus about the ascendancy of indigeneity as a fundamental principle of determining belonging and difference within this multicultural democracy. As long-standing cultural difference remains the intuitive criteria for recognizing tribes as politically distinct self-governing communities, differences continue to proliferate with this form of legal recognition.³⁰ In *High Stakes*, an ethnography of Seminole Indian gaming, Cattelino (2008) not only shows how Seminoles are using the proceeds of gaming to distinguish themselves and to enact sovereignty in several cultural registers, she also calls our attention to the ways in which tribes “realize their sovereignty in part through relations of interdependency” (161) with the state that surrounds them, for example. Wisconsin’s discretionary transfer rule is an important strand in the fabric that constitutes the relationship between the tribes and the state as politically separate. And it is in part because of the relationship that differences, as well as claims about differences, proliferate.

Tebben (2001) uses the term *trifederalism* to describe the relationship between the states, tribes—both of which have inherent and inferior powers—and the federal government, which has delegated and superior powers. In her endorsement of the work of tribal courts, especially in the area of culturally grounded alternative dispute resolution, no less than former Justice Sandra Day O’Connor titled her Remark in the

Tulsa Law Journal, “Lessons from the *Third Sovereign*: Indian Tribal courts” (emphasis added). Three years earlier, Valencia-Weber (1994) wrote of “the persisting third sovereign” (227–231), and more recently Bruyneel (2007) wrote of the “third space of sovereignty.” All three drew out the implications of recent federal Indian policy, especially the 1988 Indian Gaming Regulatory Act (Pub. L. 100–497, 25 U.S.C., section 2701). P.L. 100–497 requires states and tribes to compact, thus restructuring the relationship between the federal government, states, and tribes, notably by compromising the sovereignty of the latter two; this, incidentally, is an example of the kind of “internal reorganizations and new institutional arrangements” that are characteristic of neoliberal states” (Harvey 2005:65). Monette (1994) pointed out that in the Indian Gaming Regulatory Act, Congress recognized that: (1) both states and tribes are within the Union, (2) they relinquished those “age-old treaty-making powers,” (650) but (3) they could enter into compacts with each other, and (4) there is now mutuality of rights and responsibilities between them (650). Clearly Wisconsin’s discretionary transfer rule is an outcome of these transformed relations. The cooperation is a sign of the emergence of a reluctantly recognized formal equality of the two sovereigns.

So what of the putative, jurisprudential, cultural differences between the state and tribal courts, which so concerned the Wisconsin Supreme Court justices? Are the procedures in tribal court really as different as they are imagined by virtue of a general and pervasive expectation and presumption that Indians are culturally different in exchange for federal recognition of their separate legal and political status (Dombrowski 2004)? This is an empirical question, of course, though the published writings on peacemaking would surely indicate that tribal courts often aspire to be different from state courts. It becomes a matter of how often peacemaking is, in fact, actually used in the courts. Much that goes on in tribal courts is routine and looks a lot like what goes on in state courts, much to the dismay of tribal court advocates (Barsh 1999). Fletcher (2011) wrote that “tribal courts liberally construe civil procedure rules toward providing sufficient access to the court [and] routinely provide great leniency favoring the non-lawyer parties” (629). This may also be true in a lot of nontribal court settings, especially in rural areas.

Peacemaking, understood as a culturally specific form of mediation, can be credibly represented by both the tribes and the state as a culturally distinctive, jurisprudential practice, with its a generally holistic and alternative flavor. At the same time, it is less well-suited for resolving disputes between litigants of unequal power (Conley and O’Barr 1998: 39–59; Nader 2005: 124, 142–1–59); thus, having it has little potential to threaten structural disparities, either within or between polities. It is important here, however, to point out that although peacemaking may be an effective symbol of an aspiration, it is not the general jurisprudential style for most of the tribes in Wisconsin—not even for the Navajo, for that matter, among whom the movement originated (Richland and Deer 2004:323). It is on the increase, however, at Oneida, local judges have assured me. There is also widespread interest in the practice throughout the tribal judicial community in the Great Lakes region.

Above I suggested that there is a relationship between neoliberalism and indigenism that manifests as willingness on Wisconsin's part to accommodate tribal communities' jurisdictional self-determination aspirations, but also to protect its citizens from the consequences of involvement with the tribes. Neoliberalism "proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade" (Harvey 2005:2). Its legal framework seeks to protect "the sanctity of contracts" (64), the very issue over which Jerry Teague and John Kroner, neither one American Indian, engaged the tribes, and who consequently discovered cultural differences and ironically produced intergovernmental conventions.

Jean Comaroff and John Comaroff, theoreticians of neoliberalism's impact on culture, provocatively extended the implications of anthropologists' embrace of legal pluralism in their exploration of the ways in which law is fetishized. They made the point that "Native Americans are claiming ever more autonomy under the sign of exception," and that, generally, "most regimes have reduced their administrative reach, entrusting ever more to the market and devolving ever more responsibility to citizens as individuals, *communities* or classes of consumer" (2009a:29, emphasis added). So, a happy coincidence emerges when the claims of indigenous communities for more autonomy dovetails with neoliberal devolution. Now that the tribes, as political units, have been sufficiently bureaucratized and integrated into the administrative fabric of United States—first through the Indian Reorganization Act in the 1930s and then through the policy of self-determination initiated in late 1960s and early 1970s—tribal sovereignty and neoliberal governance are institutionally synergistic and ideologically complementary. Furthermore, the neoliberal exception (Ong 2006) that Indian gaming represents facilitates the goal of self-determination and neoliberal devolution. Here cultural difference is both cause and effect of this exceptionalism, as only federally recognized tribes qualify to compact with states under the Indian Gaming Regulatory Act, and having a casino gives tribal communities a leg up on the production and reproduction of cultural difference.³¹ The idea of *policulturalism*—"the political claim to the exercise of governance" by virtue of "culture and shared essence" (Comaroff and Comaroff 2009a:41)—describes the claims made for a separate justice and jurisprudence made real in some cases by a culturally distinctive form of mediation in peacemaking.

Nearly two centuries ago, the legal plurality of what was then the Michigan Territory was recognized and affirmed in the Chief Oshkosh murder case in 1830, a decision rendered in that liminal period *after* the tribes had been recognized in the Commerce Clause of the US Constitution but *before* the US Supreme Court defined these indigenous polities as "domestic dependent nations" in *Cherokee Nation v. Georgia* (30 U.S. 1 [1831]). A version of that legal plurality has reemerged in recent decades through recognition that indigenous societies and polities have endured the domination and centralization that the federal and state governments visited upon them since the early nineteenth century; therefore, tribes are better assimilated into the dominant society as total policultural systems.

In Wisconsin, a limited acceptance of the reality of legal pluralism has taken the form of tribes' interest, willingness, and governing capacity to work within the constraints of Public Law 280 and to transfer civil cases out of the state's and into the tribes' jurisdictions. On balance, Wisconsin has cooperated with this phase of reconciling itself to the reality of federal support for tribal self-determination. The personal relationships between local tribal court judges and state court judges have motivated this reconciliation. However, by insisting on the priority of individual rights, the state has officially and decisively ordered the emergent legal plurality, and tacitly encouraged divergent conceptions of the individual's relationship to the collective; that is, state and tribal citizenship. In so doing, it has also encouraged conceiving of civil jury trials and peacemaking in ethnic terms, as symbols of the difference between these orders of belonging. Here the neoliberal impulse that would both imagine and protect citizens as free agents, as well as off-load administrative functions by recognizing and transferring cases to tribal courts, has the effect of reproducing cultural difference.

Perhaps this is why Botsford and Stenzl (2012) were so upbeat in their appraisal of the comity between state and tribal courts. They even concluded their article with a section titled "Why is this working?" At the first meeting of the Wisconsin Tribal Judges Association after *Kroner* was decided, the case was discussed for only ten minutes on the second day, with two non-American Indian attorneys giving a summary. Overall, the discretionary transfer rule is doing what it is intended to do, even if it fails as a compelling symbol of tribal sovereignty.

Notes

1. For an extended discussion of the dimensions of concurrent jurisdiction under P. L. 280, see Jimenez and Song 1998
2. *Williams v. Lee*, 358 U.S. 217 (1959), which dealt with exclusive tribal jurisdiction for internal reservation affairs; *National Farmers Union v. the Crow Tribe*, 468 U.S. 13, (1984); and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987). The latter two both dealt with endorsing tribal forums for cases on the reservation.
3. *Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians*, Supreme Court of Wisconsin 230 Wis. 2d 271 (1999), 236 Wis. 2d 384 (2000), 265 Wis. 2d 64 (2003). For a more detailed account of the case, see Botsford and Stenzl 2012.
4. Established in 1991, the association grew out of the short-lived Great Lakes Indian Tribal Judges Association, which emerged after the federal recognition and tribal implementation of off-reservation treaty rights (Botsford and Stenzl 2012).
5. Aukeewa, was probably not, in fact, a Pawnee tribal member but a *pani* (slave), which was the term used at the time for Indian slave (Schneider and Schneider 2000:491).
6. Please note this particular text was removed, and new text appeared as of March 7, 2012. The new text is found on the Wisconsin Court

- System website on the “Hearing Room” webpage (<http://www.wicourts.gov/courts/supreme/hearingroom.htm>). Original text accessed October 14, 2011.
7. The *Oshkosh* decision was in 1830, a year before the U.S. Supreme Court designated tribes as “domestic dependent nations” (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1[1831]) and two years before the Court addressed the issue of state authority of Indian matters (*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 [1832]).
 8. Some later rulings were consistent with Judge Doty’s 1830 decision. For example, in *Ex Parte Crow Dog*, (109 U.S. 556 [1883]), the U.S. Supreme Court held 53 years later that the Sioux tribe retained jurisdiction over murder. Other rulings were not consistent. In 1879, for example, the Wisconsin Supreme Court, in *State v. Doxtater*, (47 Wis. 278), decided that the state criminal code extended to Indian reservations under the Tenth Amendment. However, the Major Crimes Act of 1885 (U.S. Statutes at Large 23:385) and the decision in *United States v. Kagama* (118 U.S. 375 [1886]) nullified *Doxtater*, even though “the reasoning in *Doxtater* endured” in Wisconsin courts (Vandervest 2003:379).
 9. Supreme Court of Wisconsin Hearing of 07–11, January 8, 2008. In re discretionary transfer of civil cases to tribal court filed July 24, 2007, by A. John Voelker, Director of State Courts. The full audio file of the hearing is available at http://wicourts.gov/supreme/petitions_audio.htm Accessed August 1, 2007.
 10. Supreme Court of Wisconsin Hearing of 07–11, January 8, 2008.
 11. The phrase originated during Walking on Common Ground: Cooperation, Collaboration, Communication, which was a conference sponsored by the National Judicial College in 2008.
 12. Though not inscribed in the tribe’s constitution, the traditional court “assist(s) the Judiciary whenever possible with the resolution of cases or controversies involving Tribal members” (Ho-Chunk Nation Establishment and Organization Act 2005).
 13. According to Gross 1999: “Peacemaking is a type of ‘restorative justice’ since its objective is conflict resolution through the *healing of relations between individuals* in conflict” (5; emphasis added). Note the implicit presumptions about and limitations of this form of dispute resolution. Similarly, the Grand Traverse Band of Ottawa and Chippewa Indians peacemaker courts, for example, mostly handle juvenile misdemeanors (Costello 1999).
 14. When developing the proposed rule, the state-tribal forum looked to other states and found that only Washington has a rule that permits such a transfer of jurisdiction.
 15. Supreme Court of Wisconsin Hearing of 07–11, January 8, 2008.
 16. The jury box at the Forest County Potawatomi court has never been used, according to Judge White-Fish (personal communication, January 12, 2012).
 17. Although the point is general, since Judge White-Fish used a Potawatomi kinship term in addressing the justices, it is well to point out that the indigenous kinship system, Omaha by name, is constituted of distinctions, categories, and behavioral components not present in the dominant society. For example, a person’s father and all of the father’s brothers, all the husbands in the mother’s lineage, and

- all the sons in the paternal grandmother's lineage are called the same term. Certain relationships are characterized by obligatory respect behavior bordering on avoidance and others by obligatory joking (Callendar 1978).
18. Quite apart from its genuine practical value in resolving disputes, peacemaking has become the symbol of the distinctiveness of tribal court jurisprudence in some sectors of the national tribal court legal community; and peacemaking is focused on healing relationships, implicitly recognizing their diversity, the obligations they entail, and the unimaginable notion of a satisfactory social existence if social relationships are in disharmony.
 19. For an extended critique of the ways in which American individualism impacts tribal jurisprudence, see Porter 1997. For attempts to reconcile the growing interest and pressure to accommodate individual rights with tribalism, see Goldberg 2003.
 20. For an extended discussion of the ways in which tribal jurisprudence reflects and reproduces fundamental social and cultural differences, see Atwood 2000. The current interest in peacemaking among the members of the Wisconsin Tribal Judges Association presumes the idiosyncratic circumstances in which conflicts arise and, therefore, the presumptive necessity of individualizing remedies.
 21. In Wisconsin, the Menominee and Oneida each separated the judicial and legislative branches in 1991; the Forest County Potawatomi created a separation in its Judiciary Act in 1994; the Ho-Chunk rewrote their constitution in 1995 and created four branches of government, separating the power of the judiciary; and the Lac du Flambeau band of Lake Superior Ojibwe amended its constitution to include separation of powers.
 22. Though there is not the room in this article to do a full archaeology of the ways in which state law in Wisconsin presumed, acknowledged, and produced differences between American Indians and non-American Indians, it is important to note that not only were the state's late nineteenth-century American Indian suffrage laws specific to the Chippewa Indians amended to require a prospective voter to swear an oath "that he was not a member of a tribe," but their exemption from state hunting and fishing laws required that the Indian be "uncivilized" (Vandervest 2003:281).
 23. The tribal legal community is quite aware of the fact that the non-American Indian community has these concerns. Asked what common misperceptions state court officials held about tribal courts, Jones (2009) listed "the mistaken belief that all decisions in tribal courts are driven by political factors or considerations," as the first, and "that tribal courts make decisions based upon some mystical, unwritten law that defies common sense or defies common understanding by non-Indians," as the second (370). McHugh (2005) wrote that studies of tribal court cases in the 1980s and 1990s revealed that tribal courts were "no less protective of civil rights than had federal courts" (450). Both Berger 2005 and Fletcher 2011 have documented the attention given to due process by tribal courts.
 24. Although the U.S. Supreme Court has upheld presumptive tribal court jurisdiction, it has also registered its suspicion about tribal court procedures in several cases (see Cruz 2010:9–10).

25. In the matter of the petition to create a rule governing the discretionary transfer of cases to tribal court, 2008 WI 114, filed in the Supreme Court of Wisconsin, July 31, 2008 (Rogensack, J., dissenting). For an extensive rebuttal to Rogensack's dissent, see Botsford and Stenzl 2012 (677–680).
26. Appeal No. 2010AP2533, *Kroner v. Oneida Seven Generations Corporation*.
27. In the matter of review of Wis. Stat. section 801.54, discretionary transfer of cases to tribal court. No. 07–11B, filed in the Supreme Court of Wisconsin, July 1, 2011 (Rogensack, J., dissenting).
28. *Steven Daniels v. Harold Frank*, 2010-CV-120 was filed in Forest County court.
29. Use of the rule has actually been rare, however, Brown County transferred about 1,500 child support cases to tribal court in 2009, though the action required that section 801.54 be amended to require notice to the parties of their right to object to the transfer of a postjudgment child support, custody, or placement provision of an action for good cause (Section 801.54 (2m) Tribal Child Support Programs).
30. For an extended analysis of identity and culture-constituting power of law, see French 2009.
31. Cattelino (2008) describes the synergy between culture, politics, and economy. For a discussion of how these relationships are changing among such tribal “ethno-preuners,” see Comaroff and Comaroff 2009b (60–85).

References Cited

- Atwood, Barbara
2000 Tribal Jurisprudence and Cultural Meanings of the Family. *Nebraska Law Review* 79:577–656.
- Barsh, Russel Lawrence
1999 Putting the Tribe in Tribal Courts: Possible? Desirable? *Kansas Journal of Law and Public Policy* 8:74–96.
- Berger, Bethany
2005 Justice and the Outsider: Jurisdiction Over Non-Members in Tribal Legal Systems. *Arizona State Law Journal* 37:1047–1125
- Biolsi, Thomas
2004 Imagined geographies: Sovereignty, indigenous space, and American Indian struggle. *American Ethnologist* 32 (2): 239–59.
- Botsford, James, and Paul Stenzl
2012 The Wisconsin Way Forward with Comity: A Legal Term for Respect. *Tulsa Law Review* 47(3):659–685.
- Brown, Elizabeth Gaspar
1965 Judge James Doty's Notes of Trials and Opinions: 1832–1832. *American Journal of Legal History* 9 (4):350–362.
- Bruyneel, Kevin
2007 *The Third Space of Sovereignty: The Post-Colonial Politics of U.S.–Indigenous Relations*. Minneapolis: University of Minnesota Press.

- Callendar, Charles
1978 Great Lakes-Riverine Sociopolitical Organization. *In Handbook of North American Indians*, Vol. 15: The Northeast. Bruce G. Trigger, ed. Pp. 610–621. Washington, DC: Smithsonian Institution
- Cattelino, Jessica
2008 *High Stakes: Florida Seminole Gaming and Sovereignty*. Durham, NC: Duke University Press.
- Champagne, Duane, and Carole Goldberg
2012 *Captured Justice: Native Nations and Public Law 280*. Durham, NC: Carolina Academic Press.
- Chase, Oscar
2005 *Law, Culture and Ritual: Disputing Systems in Cross-cultural Context*. New York: New York University Press.
- Comaroff, Jean, and Comaroff, John, eds.
2009a *Reflections on the Anthropology of Law, Governance and Sovereignty. In Rules of Law and Laws of Ruling: On the Governance of Law*. Benda-Beckmann, Benda-Beckmann, and Eckert, eds. Burlington, VT: Ashgate Publishers.
2009b *Ethnicity, Inc.* Chicago: University of Chicago Press.
- Conley, John M., and William M, O’Barr
1998 *Just Words: Law, Language and Power*. Chicago: University of Chicago Press.
- Cooter, Robert D., and Wolfgang Fikentscher
1998 Indian Common Law: The Role of Custom in American Indian Tribal Courts. *American Journal of Comparative Law* 46:509–580.
- Costello, Nancy A.
1999 Walking Together in a Good Way: Indian Peacemaker Courts in Michigan. *University of Detroit Mercy Law Review* 76:875–901.
- Cruz
2010 Shadow War Scholarship, Indigenous Legal Tradition, and Modern Law in Indian Country. *Tribal Law Journal* 9:1–19
- Dombrowski, Kirk
2004 The Politics of Native Culture. *In A Companion to the Anthropology of American Indians*. Thomas Biolsi, ed. Pp. 360–382. Oxford: Blackwell.
- Douglas, Mary
1975 *Implicit Meanings: Essays in Anthropology*. London: Routledge and Kegan Paul.
- Douzinis, Costas
2007 The Metaphysics of Jurisdiction. *In Jurisprudence of Jurisdiction*. Shaun McVeigh, ed. Pp. 21–32. London: Routledge-Cavendish.
- Duthu, Bruce
2013 *Shadow Nations: Tribal Sovereignty and the Limits of Legal Pluralism*. Oxford: Oxford University Press.
- Feldman, Stanley G., and Withey, David L.
1995 Resolving State-Tribal Jurisdictional Dilemmas. *Judicare* 79(3): 154–156.

Fixico, Donald

- 1986 Termination and Relocation: Federal Indian Policy, 1945–1960. Albuquerque: University of New Mexico Press.

Fletcher, Matthew

- 2007 Rethinking Customary Law in Tribal Court Jurisprudence. *Michigan Journal of Race and Law* 13:57–97.
- 2011 *American Indian Tribal Law*. New York: Aspen Publishers.
- 2012 Commentary on the Wisconsin Supreme Court's *Kroner* Decision. Turtle Talk, Indigenous Law and Policy Center Blog. Michigan State University College of Law. TurtleTalk.wordpress.com. Site visited July 15, 2012.

Ford, Richard T.

- 1999 Law's Territory (A History of Jurisdiction). *Michigan Law Review* 97:843–930.

French, Jan Hoffman

- 2009 *Legalizing Identities: Becoming Black or Indian in Brazil's Northeast*. Chapel Hill: University of North Carolina Press.

Galanter, Marc

- 1974 Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change. *Law and Society Review* 9:165–230.

Getches, David H., Charles F. Wilkinson, and Robert A. Williams Jr.

- 1993 *Federal Indian Law: Cases and Materials*. 3rd edition. St. Paul, MN: West Publishing Company.

Goldberg, Carol

- 1997 *Planting Tail Feathers: Tribal Survival and Public Law 280*. Berkeley: University of California Press.
- 2003 Individual Rights and Tribal Revitalization. *Arizona State Law Journal* 35:889–938

Griffiths, John

- 1986 What is Legal Pluralism? *Journal of Legal Pluralism* 24:1–55.

Gross, Eric Keith

- 1999 An Evaluation/Assessment of Navajo Peacemaking. Rockville, MD: National Criminal Justice Reference Service. <https://www.ncjrs.gov/app/publications/abstract.aspx?ID=187675>, accessed January 10, 2012.

Hansen, Sandra

- 1991 Survey of Civil Jurisdiction in Indian Country 1990. 16 *American Indian Law Review* 319–376.

Harvey, David

- 2005 *A Brief History of Neoliberalism*. London: Oxford University Press.

Jimenez, Vanessa and Soo C. Song

- 1998 Concurrent Tribal and State Jurisdiction Under Public Law 280. *American University Law Review*. 47:1628–1669.

Jones, B. J.

- 1998 Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State And Tribal-Federal Court Relations. *Wm. Mitchell Law Review* 24:457–514.

Lurie, Nancy Oestreich

- 2002 *Wisconsin Indians*. Rev. edition. Madison: Wisconsin Historical Society Press.

MacLachlan, Bruce

- 1962 *The Mescalero Apache Tribal Court: A Study of the Manifestation of the Adjudicative Function in a Concrete Judicial Institution*. Ph.D. dissertation, Department of Anthropology, University of Chicago.

McHugh, P. G.

- 2004 *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination*. New York: Oxford University Press.

Miller, Bruce

- 2001 *The Problem of Justice: Tradition and Law in the Coast Salish World*. Lincoln: University of Nebraska Press.

Milward, David

- 2012 *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights*. Vancouver: University of British Columbia Press.

Monette, Richard

- 1994 *A New Federalism for Indian Tribes: The Relationship between the United States and the Tribes in Light of Our Federalism and Republican Democracy*. *University of Toledo Law Review* 25:617–672.

Monette, Richard, and Huma Ahsan

- 2008 *The Great Lakes Indian Law Center Comments on Proposed Wisconsin Rule of Court 7–11: A Perspective on the “Schizophrenic” Approach to Our Legal Relationship with Wisconsin’s Indian Nations and a Modest Proposal to Give Clarity to the Federal Public Law 83–280 in Wisconsin*. Madison: University of Wisconsin Law School, Great Lakes Indian Law Center.

Nader, Laura

- 2002 *The Life of the Law: Anthropological Projects*. Berkeley: University of California Press.

Nesper, Larry

- 2007 *Negotiating Jurisprudence in Tribal Court and the Emergence of a Tribal State: The Ojibwe in Wisconsin*. *Current Anthropology* 48 (5):675–699.

Ong, Aihwa

- 2006 *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty*. Durham, NC: Duke University Press.

Pommersheim, Frank

- 1997 *Braid of Feathers: American Indian Law and Contemporary Tribal Life*. Berkeley: University of California Press.

Pospisil, Leopold J.

- 1978 *The Ethnology of Law*. Menlo Park, CA: Cummings Publishing Company.

Porter, Robert B.

- 1997 Strengthening Tribal Sovereignty through Peacemaking: How the Anglo-American Legal Tradition Destroys Indian Societies. *Columbia Human Rights Law Review* 28:235–305.

Richland, Justin

- 2008 *Arguing with Tradition: The Language of Law in Hopi Tribal Court*. Chicago: University of Chicago Press.

Richland, Justin, and Sarah Deer

- 2004 *Introduction to Tribal Legal Studies*. Walnut Creek: Alta Mira Press

Schneider, Dorothy, and Schneider, Carl J.

- 2000 *Slavery in America*. New York: Infobase Publishing.

Tebben, Carol

- 2001 Trifederalism in the Aftermath of Teague: The Interaction of State and Tribal Courts in Wisconsin. *American Indian Law Review* 26:186–201.

Tenney, Horace Kent

- 1933 A Case of *Lex Talionis*. *American Bar Association Journal* 19:145–148.

Thorington, Nancy

- 2000 Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction among Tribal, State and Federal Governments. *McGeorge Law Review* 31:973–1042.

Valencia-Weber, Gloria

- 1994 Tribal Courts: Customs and Innovative Law. *New Mexico Law Review* 24:225–264.

Vandervest, Brian

- 2003 The Wisconsin State Legal System and Indian Affairs in the Nineteenth Century: A Lost Chapter in Wisconsin's Legal History. *Marquette Law Review* 87:357–385.