IDENTITY AS IDIOM: *MASHPEE* RECONSIDERED

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INTRODUCTION

In the late 1970s, at the height of the American Indian rights movement, the Mashpee Wampanoag tribe filed a lawsuit in federal court asking for return of ancestral land.[1] Before the Mashpee land claim could be adjudicated, however, the tribe had to prove that it was (just as its ancestral predecessor had been) the sort of American Indian tribe with which the United States could establish and maintain a government-to-government relationship. The *Mashpee* litigation was remarkable. For one thing, it raised profound and lingering questions about identity, assimilation, and American Indian nationhood. For another, it illustrated, in ways that become starker and starker as time goes on, the injustice that the Mashpee Wampanoag Tribe has endured.

The Mashpee had survived disease, forced conversion, forced education; they had maneuvered through passages of history in which well-meaning and not-so-well-meaning non-Indians "freed" them from their Indian status, thereby exposing Mashpee land to market forces; they had survived the loss of their language. In spite of it all, the Mashpee maintained their cultural identity, only later to be pronounced "assimilated," and therefore ineligible for federal protection as an American Indian tribe. What the Mashpee tried to characterize as syncretic adaptations to the harsh realities of colonialism, others called the inevitable and wholehearted embrace by the Indians of "superior, rational, ordered" white ways. Hence when the Mashpee prayed with their own Indian Baptist ministers, non-Indian commentators claimed they had embraced an African-American version of Protestantism; when they spoke English, they were said to have benefitted from white education; when they used legal forms like deeds, it was cited as evidence of their preference for American law.

Despite all of the politicized and colonialist commentary about the degree of assimilation the Mashpee had or had not attained, by the late 1970s it was still apparent, even to those who hoped to defeat the Mashpee claim, that the Mashpee Wampanoag plaintiffs did in fact represent an American Indian tribe. Indeed, the defendants who forced the issue of tribal status in the first place, took the position that the Mashpee were "more" African American than American Indian, a stance they maintained even after two of their representatives traveled to Montana to confer with Montanans Opposing Discrimination (MOD),[2] a group today known as All Citizens Equal (ACE), and based in

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1. Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass 1977); Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass 1978), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F. 2d 575 (1st Cir. 1979), *cert denied*, 444 U.S. 866 (1979).

2. RONA SUE MAZER, TOWN AND TRIBE IN CONFLICT: A STUDY OF LOCAL-LEVEL POLITICS IN MASHPEE, MASSACHUSETTS 233-48 (1980) (unpublished Ph.D. dissertation, Columbia University) (noting that Selectmen George Benway and Kevin O'Connell's 1976 trip cost the Town of Mashpee $832; documenting that Selectman Robert Maxim, a Mashpee Wampanoag tribal member, was not invited on the trip and hence did not

Polson, Montana, on the Flathead Indian Reservation.[3] In the late 1970s, MOD was affiliated with the Interstate Congress of Equal Rights and Responsibilities (ICERR), a group whose anti-Indian rhetoric echoed the complaints of non-Indian settlers who chose to live in Indian Country, but then bitterly resented being subject to Indian governmental jurisdiction.[4] This self-styled congress, at least at the time of *Mashpee*, was an

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travel to Montana with Benway and O'Connell; detailing the involvement of Benway and O'Connell in the local anti-Indian organization called the Mashpee Action Committee).

3. The Flathead Reservation, like many western reservations, is populated predominantly by non-Indians. According to Ken Toole, of the Montana Human Rights Network, a group that monitors white supremacist groups in the Northwest, although ACE is not organizationally linked to militia organizations in Montana, it has many "interpersonal connections." For instance, said Toole, there was an anti-Indian rally in Polson, Montana within weeks of the April 19, 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, an act which killed 167 people and for which two suspected right-wing extremists have been charged as of this time. Toole noted that the Montana Human Rights Network has evidence that white supremacists, in an effort to exploit jurisdictionally charged situations on the Reservation, disseminate anti-semitic and other white supremacist tracts to crowds at anti-Indian rallies. Toole further noted that while non-Indians living on reservations may have legitimate concerns about property rights and values, right-wing hate groups, who flock to areas where there is racial polarization, distort those concerns beyond recognition. He also noted the existence of non-Indian groups like HONOR, which support Native American identity through the continued recognition of Indian treaty rights. Telephone interview with Ken Toole, President, Montana Human Rights Network (May 8, 1995).

The eastern land claims cases, of which *Mashpee* was one, are part of this overall social tension in Indian Country. For a thorough discussion of the legal issues raised in the eastern land claims cases, *see Symposium on Indian Law: The Eastern Land Claims*, 31 ME. L. REV. 1 (1979). For a journalistic discussion of these cases, *see* PAUL BRODEUR, RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AND PENOBSCOT INDIANS OF NEW ENGLAND (1985).

4. Detailed evidence from such sources as local papers, town meeting records, and the like suggests that while the Mashpee were in fact living as the Native American tribe that they are, the defendants recognized them as such. One of the defendants' first steps in planning its litigation strategy was to accept an invitation to fly to Montana to work with Montanans Opposing Discrimination (MOD), then an affiliate of the Interstate Congress of Equal Rights and Responsibilities, but now an affiliate of Citizens Equal Rights Alliance (CERA), which is headed by William Covey of Big Arm, Montana.

The ICERR and CERA are anti-Indian organizations. They espouse equal rights for all Americans by opposing what they call "special rights" for any group, particularly Native Americans. Since 1975 ICERR has strongly opposed and worked to defeat Indian claims of all sorts, including the Mashpee tribe's claim. It has also promoted anti-Indian legislation. *See A Backlash Stalks the Indians*, BUS. WK., Sept. 11, 1978, at 153; Richard Boethe et al., *A Paleface Uprising*, NEWSWEEK, Apr. 10, 1978, at 39; MAZER, *supra* note 2, at 233-36, 352.

One infamous ICERR bill was the "Native American Equal Opportunity Act," which was introduced by Rep. Jack Cunningham (R-Wash.). This bill would have abrogated all treaty rights between Indian tribes and the United States; closed all Indian hospitals, schools, and housing projects; done away with Indian fishing and hunting rights; shut down the Bureau of Indian Affairs; and ended U.S. trust responsibilities toward Native American tribes. Rep. Cunningham introduced his bill by announcing: "My bill would restore the independence and dignity of the native American by freeing him from the socially destructive paternalism of the federal government." Bill Peterson, *Behind the Walk: A Protest Against 'Backlash' Bills*, WASH. POST, July 12, 1978,

organization whose aim was to help "free" American Indians from any "special rights" they might have or acquire under federal law. ICERR carried out its aim by promoting anti-Indian litigation and legislation under the banner that recognizing special rights for American Indians would only prevent them from shouldering their "responsibilities" under state law.

One month before trial, the Mashpee asked the court to delay the legal process so that the Bureau of Indian Affairs (BIA) could determine the tribe's status according to its administrative expertise. The Mashpee trial court judge denied this request on the theory that the issue of tribal status was well within a lay jury's decisionmaking power since it concerned the human condition.[5] But while the all-white jury decided against the tribe in a trial at which the defendants racialized the Mashpee claim for tribal status,[6] the case

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at A1. *See also* Dennis A Williams et al., *Teepees on the Mall*, NEWSWEEK, July 31, 1978, at 27.

Another ICERR bill, the "Omnibus Indian Jurisdiction Bill," was introduced by Rep. Lloyd Meeds (D-Wash.). This bill would have limited, if not eliminated, tribal criminal jurisdiction over non-Indians and non-member Indians on the reservation, and it would have limited tribal jurisdiction over member Indians on the reservation. Rep. Meeds said about this bill: "In today's chaotic setting, . . . if you resided on an Indian reservation, as do thousands of non-Indian Americans, your land would probably be subject to zoning, taxation and other regulations by tribal authority for which you have no rights to representation." Peterson, *supra*.

Ironically, one of the defendant's representatives (an unnamed selectman from Mashpee, Massachusetts), who claimed the Mashpee were not an Indian tribe, started an east coast ICERR chapter. William Chapman, *Indian Tribes Arise; Indian Tribal Nationalism is Reborn,* WASH. POST, Jan. 31, 1977, at A1.

Thus, in a sense, the defendants acknowledged the plaintiff's Native American-ness, but only in non-legal, non-public fora. In the town of Mashpee, the defendants ridiculed plaintiff's claims to Indian status, but in fighting the lawsuit gave it serious consideration by requesting the advice of established anti-Indian organizations. In addition, the eastern landclaim cases, a group of cases which eventually included *Mashpee*, were cited by ICERR as the reason for the Congressional movement away from Indian support. *See, e.g.*, Bill Curry, *Indians Seek to Guard Special Rights Against White Backlash*, WASH. POST, Apr. 16, 1978, at A6; Bill Richards, *Hill Cools in Attitude on Indians*, WASH. POST, Oct. 9, 1977, at A1.

5. *See* JACK CAMPISI, THE MASHPEE INDIANS: TRIBE ON TRIAL 57 (1991) for a description of Judge Skinner's insistence that deciding the issue of tribal status was within the purview of the jury. This discussion came to the fore because the Mashpee had filed for a BIA determination of tribal status at the time of trial. The petition was originally filed on July 7, 1995, as recorded in 44 Fed. Reg. 116 (1979). Hence, the tribe moved that the trial be postponed pending the BIA's determination; their motion was denied. They brought another petition before the BIA after the Supreme Court denied certiorari on their claim. That petition is still pending. See *infra* note 93 and accompanying text.

6. The defendants argued that because the Mashpee had intermarried with African Americans, they could not be an American Indian tribe; that is, the defendants tried to convince the jury that the Mashpee's Indian blood quantum had been diluted by their intermarriage with non-Indians, and particularly with African Americans. While all of the commentators cited in this Article remarked on the racialized aspect of the trial, Rona Sue Mazer, then a graduate student who dutifully attended every day of the trial, best described this aspect of the trial as follows:

> It is significant that the defense focused for the most part on intermarriage with Blacks and not with Whites. Such an interest in the amount of Black intermarriage specifically can be interpreted as an emotional appeal to latent racial prejudices which may have existed among members of the jury. It is important to note here that in addition to determining the substantive issues addressed

is still not over. In 1990, the Mashpee Wampanoag tribe of Mashpee, Massachusetts completed its resubmitted petition for federal recognition before the BIA; but that petition, which was postponed for obvious deficiencies, is still pending.[7] While the BIA has recognized two other tribes with histories similar to the Mashpee—the Narragansett Indian Tribe of Rhode Island, and the Wampanoag Tribal Council of Gay Head, Massachusetts—and Congress has recognized one other—the Western (Mashantucket) Pequot Tribe of Connecticut[8]—the long delay in the Mashpee case has meant that the land and resources that the Mashpee sued to regain and protect have been inalterably developed, and the racial tensions that the defendants helped to foment continue on.[9]

This Article reconsiders the case of the Mashpee. Part One details the law on federal tribal recognition that the jury was asked to apply. I argue that this law, which was first fashioned in the late nineteenth century, continues to confuse tribal adaptations to colonial society with tribal assimilation into the mainstream on the theory that the "primitive" will inevitably give way to the "modern." Part Two analyzes the scholarly views that emerged to propose solutions for counteracting this evolutionist assumption in the law. One view argued that the law ought to presume American Indian views of property to be irreconcilably different from non-Indian views, regardless of any factual evidence to the contrary.[10] The other warned against the use of rigid either-or categories by suggesting that *Mashpee* was primarily about a community's right to define its own cultural identity, and that this issue was unrelated to questions about the future use of land. Despite their differences, both views agreed that law and the legal process prevented the Mashpee from telling their story, hence Part Three of this Article looks briefly at how such a disarticulation might have taken place. In this Part, I argue that had the Mashpee been able to tell their story, land use would have figured prominently as a theme, especially given that the tribe regarded the shore and its resources as a commons whereas the non-Indian sector of Mashpee regarded the same area as private property to which the record owner ought to have exclusive access. Part Four examines the particulars of how the waterfront areas of Mashpee moved out of Mashpee hands, and later out of Mashpee political control, but never out of Mashpee hearts. And the conclusion highlights

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> by the defense during the trial, this concern with race at times seemed to affect St. Clair's personal perceptions. At one point in the trial, attorney St. Clair reminded a witness that he was dealing with "white man's law." The witness responded by saying that he had thought it was "American law." This incident provoked an outburst in the courtroom and almost resulted in the exclusion of all observers. Such an occurrence deserves note in that it was witnessed by the jury and the observers and was an integral part of the trial proceedings.

MAZER, *supra* note 2, at 287.

7. BRANCH OF ACKNOWLEDGMENT AND RESEARCH, BUREAU OF INDIAN AFFAIRS, SUMMARY STATUS OF ACKNOWLEDGMENT CASES (as of Mar. 1, 1995) [hereinafter SUMMARY].

8. *Id.*

9. Patricia Smith, *Gentle Bear was Warrior*, BOSTON GLOBE, Sept. 16, 1994, at 33 (noting that in the post-trial atmosphere of Mashpee, Native people in Mashpee are often referred to as "monig," for "more n---- than anything").

10. Ironically, this view comported with Judge Skinner's idea that distinct Indian communities were those that had never integrated into the American mainstream: a standard impossible even for the least "integrated" federally recognized tribes to meet.

similarities between what happened in *Mashpee* and what happens in Indian Country generally.

I. AMERICAN INDIAN OR NOT?: THE DOCTRINAL VIEW OF MASHPEE

In the 1913 case of *United States v. Sandoval*,[11] the Supreme Court was faced with the question of whether Congress had the power to prohibit the transport of liquor onto Pueblo Indian lands. Before the Court could decide if Congress's action fell within its broad power over Indian tribes, however, it had to decide whether the Pueblos were "Indians" in the legal sense of the word. The Court was challenged by this problem because there was conflicting precedent on the Pueblos' status. On the one hand, the Pueblos, who are the Keresan and Tewan peoples of the Rio Grande Valley, owned their land in fee simple absolute. This ownership distinguished them from so-called "reservation Indians" who held aboriginal title to land ultimately owned by the United States.[12] In addition, a prior case, *United States v. Joseph*, had held that the Pueblos were not a tribe for federal Nonintercourse Act purposes.[13] This holding was based on what the Court regarded as "the degree of civilization [the Pueblos] had attained," as well as on "their absorption into the general mass of the population."[14] On the other hand, even though the Pueblos were described as possessing important characteristics regarded at the

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11. 231 U.S. 28 (1913). The Commissioner of Indian Affairs at the time *Sandoval* was decided was Cato Sells, who served from 1913 to 1921. Although Sells assumed that it was his administrative mandate to destroy tribal governments and "bring about the speedy individualization of the Indian," he was also a staunch prohibitionist. He reportedly told a delegate from the Indian Rights Association that the "greatest menace" to the American Indian was the liquor traffic in Indian country. Hence Sells took it as his personal aim to stop the sale of liquor in Indian country by putting an end to the bootleggers and saloonkeepers who made their living there, even if it meant postponing the agency's general goal of individualization. Sell's personal aim reflected a greater preexisting conflict about liquor, one that culminated in the forced resignation of Sell's predecessor, Robert Grosvenor Valentine (1909-1912), who was forced out of office because he introduced liquor into Indian country. *Sandoval* arose out of the swirl of conflict over Valentine's resignation. Lawrence C. Kelly, *Cato Sells, 1913-1921*, *in* THE COMMISSIONERS OF INDIAN AFFAIRS, 1824-1977 [hereinafter COMMISSIONERS] (Robert M. Kvasnicka and Herman J. Viola eds., 1979).

12. The legal attributes of aboriginal title were first described in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). The quality of the United States' title to the land is contestable. *See, e.g.*, ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990).

13. 94 U.S. 614, 618-19 (1876). The Nonintercourse Act was one of the initial ways by which Congress stopped states from authorizing the sale of tribal land to individual owners. Under the Act, such sales were void, unless Congress granted approval to them. The 1789 Constitution gave Congress the power to pass the first Indian Nonintercourse Act, which it did on July 22, 1790. The Act stated that:

> No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, . . . unless the same shall be made and duly executed at some public treaty, held under to authority of the United States.

Quoted in FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 511 (1982 ed.).

This provision, reenacted with minor modifications in the subsequent Trade and Intercourse Acts and Revised Statutes, is presently codified at 25 U.S.C. § 177 (1988). *See* COHEN, *supra*, at 512.

14. *Joseph*, 94 U.S. at 617.

time as non-Indian, a new wave of field agents and anthropologists reported that they still retained "old customs and [Indian] rules," which presumably took the place of law.[15]

That is, while *Joseph* held that Taos Pueblo had assimilated into the surrounding society (a Spanish-speaking society that was itself problematic to colonial officials), there were nevertheless distinct aspects of Pueblo culture that a later generation of observers would identify as clearly Indian. Pueblo religious calendars, for example, were extensive; according to one official, the religious calendar, rather than law, appeared to govern the Pueblos. Also, whites were excluded from the Pueblos during many ceremonial times, which, aside from being a clear affront to colonial power, had the practical effect of disrupting mail service and closing roads. To the colonial eye, this, too, was evidence of the prominence of religion and custom over law in Pueblo life.

The conclusion drawn from these observations was that because Pueblo practices appeared chaotic to colonial officials, Pueblo governors probably ruled by absolute force. From this conclusion flowed another: If the Pueblo governors ruled by absolute force, then the Pueblos lacked democratic legal and political systems, except as revealed in the crudest form of custom. The comments of one field official offer a good illustration of the colonial search for systems of law. This official complained that because of religious activities, the Pueblos led a life that was "little less than a ribald system of debauchery," a life full of practices that not even the Catholic Church—itself considered the epitome of New Mexican superstition—could stop.[16] Thus, the Pueblos, who according to *Joseph* had been identified as "locals" (non-Indians) for adjudicating land claims, became reidentified as "Indians" under *Sandoval* for prosecuting liquor distribution cases. Their legal reclassification from rural northern New Mexicans to distinct American Indian tribes came about more because of a shift in colonial perception, intellectual method, and policy than because of any shift in the federal law on American Indian tribal recognition.[17]

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15. *Sandoval*, 231 U.S. at 42.

16. This official wrote:

> Santa Fe, 1905: "Until the old customs and Indian practices are broken among this people we cannot hope for a great amount of progress. The secret dance, from which all whites are excluded, is perhaps one of the greatest evils. What goes on at this time I will not attempt to say, but I firmly believe that it is little less than a ribald system of debauchery. The Catholic clergy is unable to put a stop to this evil, and know as little of same as others. The United States mails are not permitted to pass through the streets of the pueblos when one of these dances is in session; travelers are met on the outskirts of the pueblo and escorted at a safe distance around. The time must come when the Pueblos must give up these old pagan customs and become citizens in fact."

Sandoval, 231 U.S. at 42.

17. *Joseph* derived its information about Pueblo characteristics from the observations of the territorial judge who first heard the case. Forty-six years later, when *Sandoval* was decided in 1913, the Court was using what it considered to be more reliable sources of evidence such as field reports of local agents and professional anthropologists.

See infra notes 79 to 94 and accompanying text for a discussion of the hierarchy of what is considered reliable cultural evidence.

See also William W. Quinn, Jr., *Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEG. HIST. 331 (1990) (discussing the historic ways in which the word "recognition" has been used relative to Indian tribes, noting that there was no exact moment when the

At the time of *Joseph*, in 1867, the law did not distinguish between the Pueblo communities and the rural Hispanic population of northern New Mexico in part because colonial observers were not cognitively attuned to Taos "Indian-ness" as compared to, say, Taos "Hispano-ness," and in part because to deem the Taos Pueblo a federally recognized American Indian tribe would be to allow it to regain ancestral land under the federal Nonintercourse Act. This in turn would be in direct opposition to the federal government's then-stated policy of assimilating American Indians into the mainstream through the individual allotment of tribal land.[18] And with respect to ethnographic method, *Joseph* relied on crude comparative models to reason that if a rural population was agricultural, as the Pueblos were, then somewhere in its midst one would find the signs of law, no matter how undeveloped.[19] By the time *Sandoval* was decided in 1913, however, colonial perceptions and theories of indigenous law-ways had changed. Officials recognized the Pueblos as Indian communities presumably because "recognized sources of information [had become] available" in the form of the field notes of officials and anthropologists.[20] This new wave of observers had taken the trouble to travel to "the field," hence their copious notes of "primitive" practices were considered more reliable than the notes of their sedentary predecessors of the Aristotelian comparative era or of the colonial questionnaire era.[21]

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jurisdictional sense of tribal recognition superseded the cognitive).

18. The Commissioner of Indian Affairs at the time, William P. Dole, who served from 1861-65, most likely influenced the adjudication of *Joseph*. Dole accepted the common notion of his day that American Indians lived a semi-nomadic existence, that this existence allowed tribes more land than they needed, and that a transition to farming would both "civilize" the American Indian and open up "surplus" land for white settlement. *See* Harry Kelsey, *William P. Dole, 1861-1865*, *in* COMMISSIONERS, *supra* note 11, at 89.

19. E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS (1954). Hoebel begins his discussion of the emergence of scholarly attention to indigenous law-ways by noting:

> Historians of law and analytical jurisprudes have told us, for instance, that nothing so refined and sophisticated, so well organized and logically perfected, nothing so authoritarian, so purposeful as law, could exist on the primitive level. Most anthropologists, until recently, have responded with a solemn nod. The legal life of primitive man was looked upon as being nonexistent rather than as simply unexplored.

Id. at 20. *See also* ANTHONY PAGDEN, THE FALL OF NATURAL MAN: THE AMERICAN INDIAN AND THE ORIGINS OF COMPARATIVE ETHNOLOGY (1982) for an in-depth history of the prominence of the Aristotelian method of cultural comparison in the colonial era.

20. *Sandoval*, 231 U.S. at 49. The observations referred to as being absent in *Joseph* came from the reports of field superintendents and the writing of ethnologists like Adolf Bandelier. *See* Bandelier, Papers Arch. Inst. Am. Ser. Vol. 3, part 1 (1890); Bureau Am. Ethn. Reports, Vols. 11 (1889-90) and 23 (1902).

21. A short history of the intellectual development of indigenous law studies is set out in the first two chapters of HOEBEL, *supra* note 19. Hoebel narrates the historical development of indigenous law studies like this: First there was the crude comparative method founded on Aristotelian notions of culture and ideal form. *See, e.g.*, PAGDEN, *supra* note 19, for a more detailed treatment of this method.

Next came work initiated by A.H. Post (1839-1895) and Joseph Kohler (1849-1910). This work tried to move beyond the purely intellectual comparative method of the past. Post and Kohler's method was novel because they formulated and distributed questionnaires for gathering information about indigenous law-ways. These questionnaires were typically filled out by colonial officers and missionaries. Organized by categories,

But regardless of the ethnographic method that informed thoughts about the law on tribal recognition, that law always had a humiliating and oppressive ring to it.[22] American

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like "Family and Personal Law, Property Law, Penal Law, and Procedural Law, the questionnaires posed questions in this vein: Does mother or father right prevail? i.e. Does the child follow the family of the mother or the father?" Hoebel reported that "one literal-minded missionary responded . . . 'When young, they follow the mother—in later years, the father.'" HOEBEL, *supra* note 19, at 31 (citing J.E. LIPS, NASKAPI LAW (TRANSACTIONS OF THE AMERICAN PHILOSOPHICAL SOCIETY) 382 (1937)).

Next came works that glorified custom as a precursor of law; the implication of these works was that Native American societies lived under the sway of custom, not the working of law. *See, e.g.*, EDWIN SIDNEY HARTLAND, PRIMITIVE LAW (1924); WILLIAM SEAGLE, THE QUEST FOR LAW (1941) (acknowledging that Native American communities have incorporeal rights, but taking the position that such rights were not property rights, and hence that such communities did not have a concept of property). *Cf.* Robert H. Lowie, *Incorporeal Property in Primitive Society,* 37 YALE L.J. 551 (1928) (arguing that incorporeal property rights existed in Native American communities, and that such rights were property rights in the Hohfeldian sense of property governing the relationship between persons vis-à-vis a thing, rather than the relationship of a person with a thing). This particular debate foreshadowed the late twentieth century debate about the ownership of seeds and other natural resources, as did Hoebel's discussion of the debate. *See* HOEBEL, *supra* note 19, at 61-63 (discussing ownership in relation to the Plains visionary whose fasting and prayer allowed him to acquire four new songs and instructions on how to prepare a shield to be used with the songs). *See, e.g.*, Wade Davis, Ph.D., *Biodiversity: The Fabric of the Kin-Dom*, Tape # SOC-15, from Selected Audiotapes recorded live at the Seeds of Change, Fifth Annual Conference: The Bioneers: Practical Solutions for Restoring the Environment, held on Oct. 15-17, 1993, San Francisco, Cal.; Rebecca L. Margulies, *Protecting Biodiversity: Recognizing International Intellectual Property Rights in Plant Genetic Resources*, 14 MICH. J. INT'L L. 322 (1993); James O. Odek, *Bio-piracy: Creating Proprietary Rights in Plant Genetic Resources,* 2 J. INTELL. PROP. L. 141 (1994); June Starr and Kenneth C. Hardy, *Not By Seeds Alone: The Biodiversity Treaty and the Role for Native Agriculture*, 12 STAN. ENVTL. L.J. 85 (1993).

Hoebel next discusses the work of Malinowski, Barton and Rattray. These writers lived among indigenous groups for extended periods of time either as anthropologists or, as in Rattray's case, as government officials. Their method was novel because their narratives were heavily descriptive rather than based on a doctrinal ideology, or on questionnaires. *See* ROY F. BARTON, IFUGAO LAW (1919); BRONISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC: AN ACCOUNT OF NATIVE ENTERPRISE AND ADVENTURE IN THE ARCHIPELAGOES OF MELANESIAN NEW GUINEA (1922); R.S. RATTRAY, ASHANTI LAW AND CONSTITUTION (1929).

Hoebel gave this history as a way of explaining how he and Karl Llewellyn instituted a method founded on the "trouble case." This method, based on the Hohfeldian framework of jural opposites, applied the case study approach to the study of indigenous law-ways. HOEBEL, *supra* note 19, at 46-63 (citing Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1916-17)). *See also* KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941).

22. Which definition will determine whether a group constitutes an "Indian tribe" depends on the circumstances of the case, since the term has no widely accepted legal meaning. Nevertheless, multiple legal efforts in the form of acts, laws, and regulations have attempted to define Indian status in cases where easy reference to treaties, statutes or ratified agreements are lacking. For some landmark cases that address the issue, *see, e.g.*, United States v. Candelaria, 271 U.S. 432 (1926); United States v. Sandoval, 231 U.S. 28 (1913); United States v. Joseph, 94 U.S. 614 (1876); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.

Indian communities were, by definition, "Other." As such, they were believed to either employ crude methods of law, or else be swayed by custom, with the implication being that those who lived by custom did not employ law at all. And no matter where an indigenous community fell on this law/no-law spectrum, it was assumed to have not yet

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1979); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

For landmark cases that address the issue in the context of the 1891 Indian Depredation Act, ch. 538, sec. 1, 26 Stat. 851, *see, e.g.,* Montoya v. United States, 180 U.S. 261 (1901) (holding that the words "tribe" and "band" are distinguishable, thereby allowing for the release of a tribe from liability for depredations carried out by a part, or "band," of that tribe); Dobbs v. United States, 33 Ct. Cl. 308 (1898) (identifying three broad ways of fixing tribal status: (i) definition by treaty; (ii) observations by Government officers; and (iii) autoethnographic statements); Tully v. United States, 32 Ct. Cl. 1 (1896) (holding that treaties were one of many possible ways to determine tribal status for purposes of the Act); Graham v. United States, 30 Ct. Cl. 318 (1895) (holding that a suit under the Act could be maintained where the tribe had a treaty with the United States that fixed its status as a tribe). More generally, Congress has broad power to recognize tribes and thus bring them within the full range of the federal trust responsibility. *See* United States v. John, 437 U.S. 634 (1978); *see also* COHEN, *supra* note 13, at 3-27.

But the definition in *Montoya* is often invoked when there is no clear evidence of Congressional recognition. It is frequently quoted as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya*, 180 U.S. at 266. It bears noting that the *Montoya* standard was articulated at the height of the Post/Kohler questionnaire movement, discussed *supra* note 21. The effect of this Post/Kohler method is also seen in *Sandoval*, where the Court quoted field notes from colonial observers verbatim.

Mashpee relied on the *Montoya* standard, with the First Circuit Court of Appeals completing the circle by noting that it was preferable not to adopt the trial court judge's "word-for-word" definition of tribe as a "true" definition. *Mashpee*, 592 F.2d at 587-88. Even for those who think the concept of tribal identity can be reduced to a neat verbal formula, refusal to rely on the trial court judge's definition turned out to be a blessing in disguise. As Jack Campisi noted, the trial judge, Judge Skinner, "a graduate of Harvard Law School and a Nixon appointee who had won high praise as a jurist [but whose] knowledge of contemporary American Indian societies . . . verged on the nonexistent," was himself confused about the meaning of the concept. CAMPISI, *supra* note 5, at 18. The judge's confusion was apparent at the close of the trial. But, rather than faithfully adhering to anthropological or ethnohistorical definitions of the term "tribe" (definitions that would have favored the plaintiff by taking into account the fact of acculturation), Campisi told how the judge made up his own definition so that there was "something for everyone." CAMPISI, *supra* note 5, at 57. As part of his definition, the judge distinguished between the proprietorship and plantation forms of ownership, a distinction that "however erudite . . . ignored that both systems were imposed on the Mashpees to serve the conveniences of the Crown and commonwealth." CAMPISI, *supra* note 5, at 56. Said Campisi, "The court created a false and meaningless dichotomy and provided the jury with a spurious but important distinction from which it could imply tribal abandonment." CAMPISI, *supra* note 5, at 56. This, apparently, is exactly what the jury did.

The issue of tribal recognition is now decided by administrative process under 25 C.F.R. § 83 (1978) and its revision, 25 C.F.R. § 83 (1994). The Branch of Federal Acknowledgment and Research, which holds the administrative procedure to decide whether or not a tribe will be recognized by the federal government, is staffed by two ethnohistorians, two cultural anthropologists, and one certified Native American Lineage Specialist. *See* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 AM. INDIAN L. REV. 37 (1992).

attained the degree of legal sophistication that the surrounding culture attributes to itself.[23] Thus under *Montoya*, which set the most general standard for determining tribal status,[24] an Indian tribe was defined as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[25] And under *Sandoval*, Indians were defined as "[a]lways living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, . . . essentially a simple, uninformed, and inferior people."[26]

Montoya was applied for the first time in *United States v. Candelaria*, yet another case addressing the problematic line between local and Indian identity in Pueblo country.[27] In *Candelaria*, the issue was whether the Pueblos—who after *Joseph* were not recognized as Indian for Nonintercourse Act purposes, but who after *Sandoval* were recognized as Indian for federal liquor law purposes—could now be considered an Indian tribe under the Nonintercourse Act in light of newly acquired accounts of field officers and enthographers.[28] Incorporating these accounts as they appeared in *Sandoval*, the *Candelaria* court used them to support the opposition that served as *Montoya*'s conceptual framework. This opposition pitted governance by custom (which was associated with primitiveness) against governance by law (which was associated with modernity). Relying on this descriptive body of colonial narrative, then, *Candelaria* held that the Pueblos were, as of 1925, a distinct Indian tribe for Nonintercourse Act purposes because "although [the Pueblos were] sedentary, industrious and disposed to peace, they are

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23. The idea that American Indian communities had not yet attained the degree of law that the surrounding community "enjoyed" assumed that they could "evolve" to such a degree with the right instruction. Hence, it became federal policy under Commissioner Dole to place the proceeds from the sale of "surplus" Indian land into trust funds to help pay the cost of educating American Indians in the ways of white society. *See* Kelsey, *supra* note 18. In another sphere, in a widely-cited A.B.A.-sponsored study, Samuel J. Brakel concluded that tribal courts are inferior courts. AMERICAN INDIAN TRIBAL COURTS: THE COST OF SEPARATE JUSTICE (1978). For more specific discussions meant to counter that view, *see, e.g.*, Martin M. Pacheco, *Finality in Indian Tribunal Decisions: Respecting Our Brothers' Vision*, 16 AM. INDIAN L. REV. 119 (1991) (arguing that the non-Indian perception of Indian justice is biased; calling for the creation of a federal Indian Court of Appeals); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts* 56 U. CHI. L. REV. 671 (1989) (noting the importance of tribal courts to the society at large); Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo Nation Code of Judicial Conduct*, 76 JUDICATURE 15 (1992), and *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989) (containing descriptions of Navajo courts by Chief Justice Tso of the Navajo Supreme Court); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994) (defending tribal courts by arguing that they can serve the important function of a laboratory for national jurisprudence); Robert Yazzie, *Law School as a Journey*, 46 ARK. L. REV. 271 (1993) (providing thoughts on law school training by Chief Justice of the Navajo Supreme Court).

24. *See supra* note 22 and accompanying text.

25. *Montoya*, 180 U.S. at 266.

26. *Sandoval*, 231 U.S. at 39.

27. 271 U.S. 432 (1926).

28. For a description of the Nonintercourse Act, *see supra* note 13.

Indians in race, customs and domestic government."[29] In other words, despite their agricultural economies, they lacked law and the understanding of property that comes with it; hence, they constituted American Indian tribes under the Nonintercourse Act, a federal act meant to ensure federal preeminence in Indian affairs, and especially in Indian land affairs. After *Candelaria*, the Pueblos were entitled to federal Nonintercourse protection despite *Joseph*, which had earlier declined to extend such protection. Commentators treated this discrepancy by explaining that *Joseph* had not been overruled, but rather now stood for the proposition that unrecognized tribes had an ephemeral sort of federal protection as compared to federally recognized tribes, meaning that the Pueblos, who were unrecognized tribes at the time of *Joseph*, had actually acquired a more secure status under *Sandoval* and *Candelaria* by virtue of gaining federal recognition.[30]

By 1976, when the federally unrecognized Mashpee tribe brought its claim in federal district court, echoes of the Pueblo cases haunted the litigation. To those who had only abstract knowledge of the Mashpee, they seemed indistinguishable from the local, non-Indian population; but to those with detailed knowledge of the Mashpee and the situation in the town of Mashpee, it was apparent that they were indeed a Native American community. What made acknowledging the Mashpee's Indian-ness daunting from a non-Indian perspective, however, was that *Mashpee* was similar to *Candelaria* in the sense that the tribe was suing under the Nonintercourse Act to invalidate sales of land that had been made in the nineteenth century without the consent of Congress.[31] On this point, the Mashpee argued that they were entitled to the return of their land because they had not received the federal protection to which they had been (and still were) entitled, with the consequence being that they had lost title to their aboriginal land.[32] The defendants responded to the Mashpee claim with a motion to dismiss,[33] a strategy meant to postpone the question of who owned the land in Mashpee until a court could first decide whether the Mashpee plaintiff group was a "tribe" in the legal sense of the word.[34]

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29. *Candelaria*, 271 U.S. at 441-42, relying on *Sandoval*, 231 U.S. at 45-47.

30. *See, e.g.*, Note, *The Unilateral Termination of Tribal Status:* Mashpee Tribe v. New Seabury Corp., 31 ME. L. REV. 153 (1979) (illustrating one effort to reconcile *Joseph*, *Sandoval*, and *Candelaria* by acontextual legal analysis); *cf.* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW (3d ed. 1993) (offering a more contextualized view of the above cases with reference to the Pueblo Lands Act, 43 Stat. 636 (1924) (a statute meant to resolve claims by non-Indians to Pueblo lands), and the fact that the approximately two million acres of Pueblo lands held in fee simple absolute are nevertheless defined as Indian Country under 18 U.S.C. § 1151(b)).

31. *Mashpee*, 447 F. Supp. 940.

32. For a description of the current BIA procedure for deciding these issues, *see supra* note 22.

33. Defendant's motion was filed pursuant to FED. R. CIV. P. 12(b)(6), (7) & 19. The specific motion to dismiss for failure to state a claim upon which relief could be granted was predicated on plaintiff's failure to plead federal recognition as an Indian Tribe. The defendants argued that absent such recognition the plaintiff could not proceed with its claim for the return of land alienated in violation of the Nonintercourse Act because the Act was one that extended protection only to federally recognized tribes. For a detailed description of the defendants' strategy, *see* James D. St. Clair & William F. Lee, *Defense of Nonintercourse Act Claims: The Requirement of Tribal Existence*, 31 ME. L. REV. 91 (1979).

34. Several commentators noted this strategy in their own treatment of the case. *See* CAMPISI, *supra* note 5, at 65; MARTHA MINOW, MAKNG ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW

The defendants claimed that because the plaintiff had no formal relationship with the federal government, it was not entitled to federal Nonintercourse Act protection. Agreeing with the plaintiff's point that *Montoya*, and thus by implication the *Joseph*, *Sandoval*, and *Candelaria* line of cases, controlled, defendants argued that the plaintiff was required to prove four elements in order to secure its federal tribal status.[35] The first was that it was made up of persons of the same or similar race; this was problematic since the Mashpee had intermarried with other groups over the course of European contact. The second was that the Mashpee had a distinct political leadership (or government); this was at issue since the tribal and town government had been synonymous for over a century. The third was that the Mashpee tribe was socially and culturally distinct from non-Indians in the area; this too was at issue since the Mashpee had adopted substantial aspects of American material culture. And the fourth was that the Mashpee tribe inhabited a particular area, or territory, an element that was also contested given that the Mashpee first acquired title to the land with the help of an English missionary.[36] Furthermore, the plaintiff had to prove these four elements at two distinct points in time: at the time the lawsuit was filed in 1976; and using historical methods, at the time the illegal transfers of land had been made.[37]

Also at issue in *Mashpee* was the procedural question of who ought to bear the burden of proving whether the tribe had voluntarily abandoned its tribal status.[38] On this issue, the *Mashpee* plaintiff took the position that (1) federal protection could not be terminated under federal law except through either an act of Congress or complete, voluntary abandonment of tribal status by the community, and (2) because the Mashpee group was a tribe (recognized or not) the burden of proving that they had voluntarily abandoned their tribal status lay with the defendant.[39] The defendants, on the other hand, asserted that it was the plaintiff's burden to prove that the Mashpee were a tribe, or if not,

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365 (1990).

35. The actual language is:

> By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design.

Montoya v. United States, 180 U.S. 261, 266 (1901).

The plaintiff had the burden of proof on the issue of tribal status. Plaintiff appealed this placement of the burden. For a detailed discussion of this procedural issue, *see* CAMPISI, *supra* note 5, at 63-64. *Cf.* St. Clair & Lee, *supra* note 33.

36. YASUHIDE KAWASHIMA, PURITAN JUSTICE AND THE INDIAN: WHITE MAN'S LAW IN MASSACHUSETTS, 1630-1763, at 58 (1986) (noting that Richard Bourne, a white minister, bought a 16-square-mile piece of land from the native owners for the benefit of the Mashpee Indians).

37. Plaintiff had to rely on historical methods to prove that its predecessors in interest constituted an Indian tribe, again under *Montoya*, at the time the illegal land transfers were made. *See* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979); CAMPISI, *supra* note 5; FRANCIS G. HUTCHINS, MASHPEE, THE STORY OF CAPE COD'S INDIAN TOWN (1979).

38. *See* CAMPISI, *supra* note 5; Note, *supra* note 30. *Cf.* St. Clair & Lee, *supra* note 33.

39. *Mashpee*, 592 F.2d at 585, relying on Confederated Salish & Kootenai Tribes v. Moe, 392 F. Supp. 1297 (D. Mont. 1975), *aff'd*, 425 U.S. 463 (1976).

that the community had been coerced into abandoning its tribal status.[40] According to the defendants, there were three ways in which a tribe could cease being a tribe: an act of Congress; complete, voluntary abandonment; and assimilation.[41] Only Congress had the power to terminate its trust responsibility toward a tribe, the defendants argued, but only a tribe had control over whether it would abandon its status or assimilate.[42] And if a tribe decided to assimilate, even if gradually (and unwittingly) over time, that decision was nonetheless voluntary, even if only constructively so.

To support this argument, the defendants implicitly urged the court to recognize an evidentiary spectrum on the issue of assimilation that implicated issues of power, agency, consciousness, and historical proof. They pointed out that at one extreme were the cases in which Congress exercised its power to terminate Nonintercourse Act protection, and thereby force indigenous assimilation into the mainstream. These were clear cases in terms of the sort of proof they required because somewhere in the record one would find

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40. The court noted:

> The importance of the burden of proof is minimized in this case because each party presented some evidence relevant to the voluntariness of the tribe's change in status. Therefore, it is unlikely that the issue was decided for lack of evidence. The jury's problem was not so much weighing conflicting evidence as choosing between plaintiff's and defendant's interpretations of historical data.

Mashpee, 592 F.2d at 590.

41. Defendants claimed that the assimilation element of its argument was implied from the "white settlement" exception to the Trade and Intercourse Act of 1834. The gist of the white settlement exception was the assumption that if an Indian community had become surrounded by non-Indian communities, then a court could infer that the Indian community had assimilated into the non-Indian communities. That is, the defendant argued that Justice McLean's concurring opinion in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 589 (1832) noted that the power to regulate intercourse with "remnants, fragments, or remains" of Indian tribes that had lost the power of self-government was beyond the scope of the various Trade and Nonintercourse Acts, and specifically of § 19 of the 1802 Trade and Nonintercourse Act. *Id.* This section excepted "Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states" from Nonintercourse Act protection. Act of March 30, 1802, ch. 13, sec. 19, 2 Stat. 139, 145. The defendant argued that when the Nonintercourse Act of 1834 repealed the 1802 Act, it did not "impair or affect the [white settlement exception to the] intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi"; and, therefore, that because the Mashpee were a remnant tribe living east of the Mississippi, the 1834 Act did not extend its protection to them because they had assimilated. Act of 1834, ch. 161, sec. 29, 4 Stat. 729, 734. This argument was made in the form of a motion for a directed verdict on the ground that the Nonintercourse Act did not control.

The *Mashpee* trial court denied the defendants' motion on the ground that § 19 of the 1802 Act applied only to exclude the land of individual, non-tribal Indians from Nonintercourse Act protection, and the defendant appealed. The First Circuit Court of Appeals affirmed the trial court's decision. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.*, Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979). For further discussion of Justice McLean's opinion, *see* James Lobsenz, *Dependent Indian Communities: A Search for Twentieth Century Definition*, 24 ARIZ. L. REV. 1 (1982). *See also* St. Clair & Lee, *supra* note 33, at 100-01.

42. *Mashpee*, 592 F.2d at 575; St. Clair & Lee, *supra* note 33, at 107-13.

evidence of congressional or executive intent.[43] These cases were the most rule-oriented, since no knowledge of anthropological detail was necessary in order to render a decision.[44] Next were the cases in which a tribe exercised its power to voluntarily (and presumably consciously) abandon its tribal status. These cases were more difficult than congressional termination cases because they could be proved (or disproved) with a myriad of evidence showing conduct from which voluntariness could be inferred. This sort of evidence might be as faint as the adoption of European "labels" and "forms" of government, or as blatant as a formal statement made by a tribe of its intent to abandon its status.[45]

Finally, came the assimilation cases, which were the most difficult. In these cases, a tribe could remove itself from federal Nonintercourse Act protection by slowly and progressively "evolving" into a community that was indistinguishable from the surrounding local (non-Indian) community. These cases were proved either through implication of law,[46] or with more general historical and anthropological evidence. This evidence might include descriptions of how the tribe had adopted European "labels" and "forms," or it could be more "everyday" in describing how Native American custom gradually had been replaced either by American law or custom.[47]

In this way, the defendants' argument paralleled what had been the doctrinal, historical, and intellectual movement of the federal law generally. The framework of the rules was such that custom was implicitly opposed to law: Communities that governed themselves by "custom" were by definition "Indian"; communities that governed themselves by "law" were by definition "non-Indian." And the assumption underlying the framework was that the movement from custom to law could only be explained as an evolutionary embrace of order, predictability, and process by the assimilating Native

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43. The Menominee Tribe of Wisconsin is an example of a tribe that was terminated pursuant to an Act of Congress. Menominee Indian Termination Act of 1954, Pub. L. No. 84-399, 68 Stat. 250 (codified as amended at 25 U.S.C. §§ 891-902 (1970)).

44. Martha Minow aptly describes this process. She writes:

> By the time a case reaches an appellate court, the adversaries have so focused on specific issues of doctrinal disagreement that the competing arguments have come under one framework, not under competing theories. Opposing arguments become counters in a game rather than efforts to craft new understandings of a difficult problem. Legal analogies become narrow references to precedents, telescoping the creative potential of a search for surprising similarities into a limited focus on prior ruling that could "control" the instant case. As a result, fabricated categories assume the status of immutable reality. Of course, law would be overwhelming without doctrinal categories and separate lines of precedent. But by holding to rigid categories, the courts deny the existence of tensions and portray a false simplicity amid a rabbit warren of complexity.

MINOW, *supra* note 34, at 370.

45. Judge Skinner described abandonment to the jury as conduct that could theoretically include the adoption of English "forms" and "labels." Trial Transcript at 40-51, Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978). *See* CAMPISI, *supra* note 5, at 56 for a discussion of how Judge Skinner applied this idea at trial. *See also* Note, *supra* note 30.

46. *See supra* note 41.

47. *See, e.g.*, United States v. Candelaria, 271 U.S. 432 (1926); United States v. Sandoval, 231 U.S. 28 (1913).

American community. Because of the evolutionary aspect of this assumption, it was further thought that when a community moved from custom to law, no matter how gradually or unwittingly, that movement was by definition voluntary because it constituted an inevitable shift away from primitivism and toward modernism. Thus what determined assimilation under the law was a complicated set of oppositions meant to describe how power was exercised (chaotically, or in an orderly fashion), how identity was constructed (as one governed by superstition and custom, or law), and how consciousness was communicated and recorded (orally, or in writing). In these oppositions the former set was defined as Indian, and on the decline; the latter as modern and on the rise. These were the rules, schemes, and oppositions upon which the anti-Indian forces relied in *Mashpee*.

II. DIFFERENT OR NOT?: THE LITERATURE ABOUT MASHPEE

To summarize the above discussion, the law on tribal identity was one that created and enforced a system of biases. According to this system, "Indian-ness" was opposed to "non-Indian-ness," and was proven by reference to ethnographic as opposed to autoethnographic sources. In addition, the local was opposed to the Indian as evidenced by the way in which anthropological and historical evidence about Indian identity and rights became irrelevant in the face of non-Indian property rights. Thus in cases like *Mashpee* where the tribe sought return of title to land, the law was more inclined to interpret the *Joseph/Montoya* line of cases as requiring a strong, apparent showing of "Indian-ness."[48] Without this showing, the assimilation standard, which only arguably was imbedded in the law on tribal recognition, applied to return the case from the realm of federal Indian law to that of state property law.

The law review literature noted these biases in the substantive law and took an even broader view of the matter. One often-cited theoretical article emerged about *Mashpee*: *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case* by Gerald Torres and Kathryn Milun.[49] Torres and Milun argued that the legal system, its rules of

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48. In *Mashpee*, this application was indeed the case. Judge Skinner repeatedly linked issues of identity and land, for example:

> I think that you have got a constitutional question, really. You (Margolin) are saying that somebody who sells his land in 1842 fully and freely and for fair consideration with full knowledge, and being otherwise an adult human and so on, can get it back just for the say so 150 years later, and that rather severely distinguishes that group from the rest of the population; and, if you are going to make that distinction as a constitutional question, you have to show that there is a real honest-to-God difference between that group and everybody else; and, you know the remedy you are seeking is a very radical remedy. It seems to me quite proper to say that whoever seeks that remedy has got to show that they are a radically different kind of status than other people.

Trial Transcript 38 at 190-91, Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978).

49. Gerald Torres & Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 (1990). *See also* Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635 (1991); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1761-66 (1993) (discussing "the violence done to the Mashpee and other oppressed groups [resulting] from the law's refusal to acknowledge the negotiated quality of

evidence and its use of precedent, rendered it unable to suppress its anti-Indian bias, and hence unable to hear the call of the Mashpee story.[50] In Torres and Milun's theoretical construct, "hearing the call of the Mashpee story" was a call for a presumption that would operate in favor of acknowledging tribal status. While this suggestion corresponded with the plaintiff's argument on appeal, it was nonetheless considered novel in the scholarly literature because of what it posited about American Indian culture(s). According to Torres and Milun, American Indian culture(s) was/were by definition irreconcilably different from mainstream American culture; but given that this irreconcilability could not be proven because of the legal system's preference for ethnographic, as opposed to autoethnographic, forms of evidence, it ought to be presumed as a matter of law.[51]

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identity"); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 624-26 (1995) (analyzing *Mashpee* in terms of applying postmodern theory to statutory interpretation).

Minow also dealt with Mashpee, and like Torres & Milun, Minow relied on James Clifford's work for her analysis. MINOW, *supra* note 34, at 351-56. *See also* Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97 (1991) (discussing the negotiated quality of identity).

50. Although Torres & Milun do not rely on ROBERT COLES, THE CALL OF STORIES: TEACHING AND THE MORAL IMAGINATION (1989), their article parallels Dr. Coles's book. In "Stories and Theories," for example, Coles describes the difference in approach between his two residency supervisors, Dr. Binger and Dr. Ludwig. Dr. Binger was regarded by his students as intensely theoretical; Dr. Ludwig as somewhat of an anti-theorist. One day Dr. Ludwig suggested the following to Coles:

> "The people who come to see us bring us their stories. They hope they tell them well enough so that we understand the truth of their lives. They hope we know how to interpret their stories correctly. We have to remember that what we hear is *their story*.
>
> "Remember, what you are hearing [from the patient] is to some considerable extent a function of *you* hearing. . . .
>
> "In a manner of speaking," Dr. Ludwig added, "we physicians bring *our* stories to the consultation room—even as," he pointedly added, "the teachers of physicians carry *their* stories into the consulting rooms where 'supervisory interaction' takes place. Sometimes our knowledge and our theories (the two are not to be confused with each other !) interfere with or interrupt a patient's momentum; hence the need for caution as we listen and get ready to ask our questions. The same was true for the 'case presentations' I was making to my supervisors: I formulated my account of a patient to a particular supervisor in keeping with the way I presumed that doctor was inclined to think with respect to psychological matters. The story I told would be affected by his mind's habits and predilection, *his* story."

COLES, *supra*, at 7, 15, 24.

51. Torres & Milun, *supra* note 49, at 631-32, 658 (considering orality as one of the aspects of Native American culture responsible for the irreconcilable difference). The suggestion of a presumption in favor of tribal status has been made before. *See, e.g.*, Terry Anderson, *Federal Recognition: The Vicious Myth*, 4 AM. INDIAN J., May 1978, at 7, 19. *Cf.* Quinn, *supra* note 22, at 54-55 n.63 (arguing that under the new BIA process, petitions for tribal acknowledgment are apparently regularly opposed by other tribes, and noting that the Tulalip tribe opposed the Samish and Snohomish petition and the Navajo Tribe opposed the San Juan Southern Paiute claim for federal recognition).

The intellectual foundation of Torres and Milun's work was James Clifford's essay, *Identity in Mashpee*, an insightful description and analysis of the Mashpee case.[52] Torres and Milun's reliance on Clifford's work presented Clifford's observations about the anti-Indian biases of the legal system in a procedural light. Clifford's first observation concerned the importance of methodology in arguing one's case.[53] He noted that since there were many ways to begin, tell, and end the Mashpee "story," the "history" one told depended on whether one focused on what the documentary record revealed (as the defendants' historian Francis Hutchins did)[54] or on what that record revealed and failed to reveal (as the plaintiff's experts James Axtell and Jack Campisi did).[55] Methodologies that focused on both utterances *and* silences left the expert witness more able to convey the undocumented aspects of Mashpee history; methodologies that focused only on positive utterances minimized, or worse overlooked, these same important aspects.[56] In *Mashpee*, this focus made a critical difference, as illustrated by how Hutchins and the plaintiff's experts arrived at radically different conclusions by analyzing the same general body of evidence.[57]

Hutchins interpreted the Mashpee use of English and later American governmental forms, language, and material items as evidence that the Mashpee had voluntarily abandoned their Indian identity, or at least assimilated into American culture, even if at the lowest rung of the local class and race hierarchy. He regarded the Mashpee Wampanoag cultural revival of the 1920s as born of a mixture of economics, pride, and the complex psychology that results when ethnicity is relegated to public display because the quest for assimilation into the American mainstream is the thread that more fully makes up the fabric of daily life. Hutchins's position was that the historical record revealed how the Mashpee display of "Indian-ness" paralleled white fantasies more than anything authentic. This position, he noted, was confirmed by the Mashpee tribal

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52. *Identity in Mashpee*, *in* JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART (1988) [hereinafter PREDICAMENT].

53. CLIFFORD, *supra* note 52, offers the best discussion of the different ways that *Mashpee* could have been seen, the different stories that it represented, and how different methodologies produced those stories.

54. HUTCHINS, *supra* note 37.

55. CAMPISI, *supra* note 5.

56. The ultimate irony of all of this was described by the plaintiff's expert witness Vine Deloria, Jr., who noted: "You don't really study tribes. You work with the people to help them prepare the best understanding you can of what the current problems are, [and] how they got into the situation they got into. . . . And there's no really good history on any tribe in the country." Record at 16:109, Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).

This methodological split was important to the issue of political organization. *See generally* CAMPISI, *supra* note 5.

> By entering the universe of legal discourse, the term "Tribe," in the context of the Non-Intercourse Act, has no meaning for the internal perspective of people claiming that status. Instead, "Tribe" means a groups of indigenous people who have structured their existence in such a way that outsiders, specifically legal experts, would say the grouping is a "Tribe." Thus the legal notion of "Tribe" contains within it projected ethnological categories as well as political categories.

Torres & Milun, *supra* note 49, at 655.

57. HUTCHINS, *supra* note 37; *cf.* CAMPISI, *supra* note 5.

members who appeared in court, unsure of their identity, and looking rather more non-Indian than Indian. According to Hutchins, "[I]f Buffalo Bill needed bareback riders for his Wild West Show, [then] mild-mannered Eben Queppish of Mashpee was willing to pretend to be a Wild Western Indian, even though he didn't know how to ride a horse to begin with, and hated it once he learned."[58] Similarly, if the plaintiff needed "Indians" to further its legal agenda, there would be witnesses willing to testify from the position of their recently discovered (and inauthentic) cultural perspective.[59] Thus, Hutchins concluded: Mashpee "Indian-ness" was a recent and constructed phenomenon in Mashpee; Mashpee cultural identity was more or less a few recipes; and these together did not and ought not make the Mashpee a tribe (or Indian nation) under federal law.[60]

Campisi noted how the plaintiff's experts had read the same record differently.[61] To them it revealed how the Mashpee had experienced nearly every phase of Indian history in their struggle to maintain their Indian ways. They survived missionaries, disease, corrupt guardians, land speculators, the death of their language, and political structural changes initiated at the whim of the colony and later the state. Campisi, for example, concluded that the ways in which the Mashpee seemed to have assimilated into the American mainstream were veneers covering a tribal core that was detectable in, among other things, family ties and a sense of common history, heritage, and attachment to the land. Most importantly, no matter what anyone else said or decided, the Mashpee Wampanoag Indian community saw itself as a unique and insular social and political aboriginal group with its own distinct cultural identity. "If the Mashpees possessed a failing in the years before 1970," Campisi concluded, it was not that they had lost their culture, as Hutchins argued, but rather that they had "so adapted the imposed [colonial] institutions to their own needs and devices that they appeared to the uninitiated" to have assimilated into the American mainstream.[62]

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58. HUTCHINS, *supra* note 37, at 187.

59. Clifford's article makes clear the many ways in which this point was made by the defense at trial. CLIFFORD, *supra* note 52.

60. HUTCHINS, *supra* note 37. *See* BRODEUR, *supra* note 3; CAMPISI, *supra* note 5; CLIFFORD, *supra* note 52 (all provide interpretations of Hutchins' conclusion). Brodeur notes that defense attorney St. Clair used his closing statement to focus on what he considered the two weakest points in the Mashpee's claim: (1) the question of racial mixture; and (2) the question of political leadership. Interestingly, both of these issues implicated gender in the sense that it was Mashpee women who, at times almost singlehandedly, kept the culture alive through intermarriage (after significant numbers of Mashpee men were lost during the American Revolution) and home arts. Both of St. Clair's themes during closing argument made light of these ways of keeping culture alive. In fact, Brodeur reports that St. Clair

> made light of efforts to assert cultural identity in terms of Indian dishes such as cornmeal dumplings and potato bargain. [St. Clair] concluded by telling the jury that "last minute efforts to create the appearance of a tribe won't do the trick," and that the fact that a lot of people in Mashpee are related to one another does not make the place "really different from any other small rural community."

BRODEUR, *supra* note 3, at 45. St. Clair played on the distinction between "Indian" and "local" as it is drawn in federal law. *See* St. Clair & Lee, *supra* note 33. *See also supra* notes 11 to 30 and accompanying text.

61. CAMPISI, *supra* note 5.

62. CAMPISI, *supra* note 5, at 150.

Clifford's second observation from watching the *Mashpee* trial was that Indian law precedent subtly enforced a preference for historical testimony based solely on utterances, like that of Hutchins's. So, while the law itself could take in a wide array of professional histories about the Mashpee, it nevertheless preferred those that subordinated autoethnographically derived explanations of identity to ethnographically derived (expert) ones.[63] This preference was rendered even more biased by the rules of evidence, which privileged both documentable histories over undocumentable, psychologically oriented ones, and histories that discounted or omitted internal, presumably ephemeral states of cultural consciousness over those that discussed them.[64] In this way, Clifford noted, both the substantive and evidentiary rules governing the *Mashpee* litigation facilitated the explication of less theoretical methodologies over more theoretical ones, and modernist (positivist) explanations over postmodernist ones.

While Hutchins's and Campisi's views about the evidence were fairly similar in terms of the array of possible histories the law could hear, there were important differences with respect to what the law would hear. And though these differences did not go to fundamental issues, like expert qualification or reliability, they were fundamental nonetheless. What Hutchins and Campisi disagreed about was the influence that their respective methodological approaches had on the conclusions they drew from the evidence. For Campisi especially, when the defendants objected to the plaintiff' experts' testimony, it was most often on the ground that they were offering facts not supported by data. When the plaintiff tried to explain to the court that because this case involved a colonial process, it raised serious epistemological questions about the definition of the word "fact" and the quality of the extant "data," its concerns were overlooked. The court's refusal to grasp the plaintiff's theoretical concerns meant, in practical terms, that the sort of evidence with which the court felt most comfortable were those documents that came in the wake of a seriously destructive (to the Mashpee) colonial process, documents more likely than not to be tainted by ethnocentric bias.[65]

Clifford's third point was that the outcome of the Mashpee identity claim determined how the Mashpee's claim of right to the land would be described, and even recorded, for the purpose of future histories.[66] If the Mashpee plaintiff was only entitled to invalidate past land transfers on the basis of a 1665 deed, then its rights were circumscribed, currently, by the terms of the deed itself, and, historically, by the Mashpee's status as "plantation Indians,"—a group of indigenous persons clearly governed by colonial (rather

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63. The trial allowed little room either for divergent cultural understandings or Mashpee self-understanding.

> The stories that members of the Mashpee Tribe told were stories that legal ears could not hear. Thus the legal requirements of relevance rendered the Indian storytellers mute and the culture they were portraying invisible. The tragedy of power was manifest in the legally mute and invisible culture of those Mashpee Indians who stood before the court trying to prove that they existed.

Torres & Milun, *supra* note 49, at 649. *See also* Torres & Milun, *supra* note 49, at 654.

64. Torres & Milun, *supra* note 49, at 655.

65. *See* CAMPISI, *supra* note 5, at 37-41 for his description of the sidebar discussions about bootstrapping.

66. Torres & Milun, *supra* note 49, at 654-56.

than indigenous) authority.[67] The upshot of this basis for entitlement, then, would be that Mashpee identity would be characterized and recorded as similar to that of any other American minority group—the Mashpee would be defined as persons of tribal descent who were nonetheless subject to the state law of Massachusetts. Under this result, it was highly probable that property law's strong policy against forfeiture would defeat the Mashpee claim.

If, on the other hand, the plaintiff was entitled to invalidate past land transfers on the basis of the Nonintercourse Act, then their claim of right lay in their status as an American Indian tribe. This basis for entitlement functioned quite differently than the first. It extended the Mashpee land claim beyond the area described in the 1665 deed to an undefinable, unmeted "territory," and it based this extension on the historic degree of protection from state law to which the Mashpee, as political minorities, were entitled under federal law. Unfortunately, through this lens the Mashpee claim appeared more daunting than it actually was because it raised the possibility, however unlikely, that individual purchasers (both Indian and non-Indian) who bought without knowledge of potential Indian claims would, via federal law, lose title to land that was clearly theirs under state law.[68] It also appeared to render the presumably most stable of rights under American law—property rights—unpredictable and unstable where Indian claims were concerned. From this politicized perspective, justice under federal law vis-à-vis the Mashpee tribe became equated with injustice under state law toward those who Alan van Gestel described as "innocent and law-abiding [non-Indian] citizens who live under the cloud of these legal [Nonintercourse Act] battles."[69]

Clifford's observations made a point with which Torres and Milun tacitly agreed. While *Mashpee* was about American Indian tribal identity, it was also about who would gain the right to control future land development in the town of Mashpee. In this sense, Mashpee mirrored, though was not identical to (as the defense argued), processes of change that other small, non-Indian towns had experienced in similar efforts to regulate the erosion of local culture by regional and national forces.[70] But although Torres and

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67. *See* KAWASHIMA, *supra* note 36, at 21 (offering a specific explanation of the differences between the three distinct groups of indigenous people within Massachusetts colonial society—"tribes," "plantation Indians" and "individual Indians").

68. Alan van Gestel, *When Fictions Take Hostage*, *in* THE INVENTED INDIAN: CULTURAL FICTIONS AND GOVERNMENT POLICIES (James A. Clifton ed., 1990).

69. van Gestel, *supra* note 68, at 292. For a contemporary and popularized version of this argument, *see* Jerry Ackerman, *The Hazards of Land Titles*, BOSTON GLOBE, Feb. 14, 1993, at A91 (noting that because Cape Cod deeds are notoriously problematic, title insurance is more difficult to purchase, in part, because of the $700,000 title companies spent to defend against the Wampanoag (Mashpee) Indian claims); *cf.* MAZER, *supra* note 2 (offering a detailed analysis of how small title holders, though not affected by the Mashpee claim, ended up bearing the brunt of the legal costs in relation to the land developers, whose title was in fact the subject of the Mashpee claim).

70. *See, e.g.*, CAROL J. GREENHOUSE ET AL., LAW AND COMMUNITY IN THREE AMERICAN TOWNS (1994); CAROL J. GREENHOUSE, PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN (1986); David M. Engel, *Law, Time and Community*, 21 L. & SOC'Y REV. 605 (1987) and *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 L. & SOC'Y REV. 551 (1984); Carol Greenhouse, *Signs of Quality: Individualism and Hierarchy in American Culture*, 19 AM.

Milun were right to say that Mashpee Indian culture was in many ways significantly different from mainstream culture, it was not, at least in this case, irreconcilably so. That is, *Mashpee* was not an either-or case because Mashpee Indian life was not altogether that different from Mashpee non-Indian life. Persons comprising the Mashpee tribe were neither clearly "Indian" nor "non-Indian" insofar as they had adopted American material culture, and, in most daily respects, were much like their neighbors in terms of how they lived and what they owned. For these reasons, Torres and Milun seemed to acknowledge that though Mashpee culture ought to be treated as fundamentally different from mainstream culture as a matter of law, in actuality there was a great deal of overlap between what was considered, on the one hand, traditional Mashpee culture and, on the other, mainstream American culture as represented by the non-Indian exurbanites who had recently moved to town.[71]

In summary, Torres and Milun's suggestion amounted to an argument that approximated the following: The law on tribal identity arguably had an assimilation exception. According to its terms, a tribe could remove itself from the protective realm of the Nonintercourse Act through its own agency, either by voluntarily abandoning its tribal status or by assimilating into the culture at large. This made assimilation the conceptual link between law and society, since the assimilation exception invited litigants to introduce historical, anthropological and sociological evidence about the ways in which their tribal culture was different from American culture at large. However, given the legal system's inherent structural biases, the law, after inviting autoethnographic evidence, was incapable of hearing it. Therefore, it was fairer to presume—as either a doctrinal or a procedural matter—that Native American cultures were irreconcilably different from mainstream American culture, than it was to require that Indian plaintiffs litigate the issue of identity.

The call for a presumption in favor of irreconcilable difference was highly problematic. As noted above, Mashpee "tribespeople" were in many material ways indistinguishable from Mashpee "townspeople," and when they showed up in court claiming difference, they *looked* like "contemporary Americans." Unfortunately, this picture brought with it the weight of a thousand words, ultimately exposing the Mashpee plaintiff to charges like those Hutchins voiced: that the persons calling themselves the Mashpee tribe had reconstructed their Indian identity in line with contemporary pan-Indian principles, not authentic, traditional Mashpee ones, and that they had done so out

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ETHNOLOGIST 39 (1992), and *Courting Difference: Issues of Interpretation and Comparison in the Study of Legal Ideologies*, 22 L. & SOC'Y REV. 687 (1988); Barbara Yngvesson, *Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town*, 22 L. & SOC'Y REV. 409 (1988).

71. As Torres & Milun note:

> What the parties fought about was the meaning of 'what happened.' Seen from the perspective of the Mashpee, the facts that defined the Indians as a Tribe also invalidated the transactions divesting them of their lands. From the perspective of the property owners in the Town, however, those same acts proved that the Mashpee no longer existed as a separate people. How, then, is an appropriate perspective to be chosen?

Torres & Milun, *supra* note 49, at 641. *See also supra* note 40.

of greed.[72] It also subjected the Mashpee to the criticism that their decision to sue for return of their aboriginal land was so impractical as to be chaotic. Thus a judgment in favor of the Mashpee Indians, the critics warned, would "overturn almost 200 years of real property law and transactions," thereby forcing the court to serve as a "transitional government," a move that would itself "instigate civil disobedience on a massive scale."[73] For that reason, Alan van Gestel concluded, these groups should be recognized for what he personally presumed them to be: (1) organizations calling themselves Indian, as in the case of the Oneida; (2) bilateral descent groups, as in the case of the Pequot; or (3) just

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72. For variations on this theme, *see, e.g.*, HUTCHINS, *supra* note 37 (Professor Hutchins, a Senior Research Fellow at the Newberry Library in Chicago, testified as a witness for the defense in Mashpee); van Gestel, *supra* note 68 (van Gestel, a partner in the Boston firm of Goodwin, Procter and Hoar, represented title insurance companies in Mashpee); St. Clair & Lee, *supra* note 33 (St. Clair, a partner at the Boston law firm of Hale & Dorr, and Lee, his associate, represented the Town of Mashpee at trial).

73. van Gestel, *supra* note 68, at 293-94.

The characterization of the Nonintercourse Act as an obscure federal statute only recently revived by Indian land claims cases is inaccurate given that the principle of inalienability is central to federal Indian law. The Nonintercourse Act has in fact been the basis for a steady stream of twentieth century cases meant to ensure federal preeminence over states by protecting Indian title. Tim Vollmann, *A Survey of Eastern Indian Land Claims: 1970-1979,* 31 ME. L. REV. 5 (1979).

The claim that chaos would follow the cancellation of conveyances of Indian land has been proven unlikely. In Oklahoma, for example, over the course of a 15-month period, the United States filed 301 bills in equity against 16,000 defendants to cancel 30,000 conveyances of Indian allotted lands. Heckman v. United States, 224 U.S. 413 (1912) (on behalf of the Cherokee). For other twentieth century cases resting on the Nonintercourse Act or principles of inalienability, *see* United States v. Santa Fe Pac. R.R., 314 U.S. 339 (1941) (on behalf of the Hualpai); United States v. Minnesota, 270 U.S. 181 (1926) (on behalf of the Chippewa); Cramer v. United States, 261 U.S. 219 (1923) (on behalf of three Indians living seperately in Siskiyou County, Cal.); Winters v. United States, 207 U.S. 564 (1908) (on behalf of the Gros Ventre and Assiniboing [sic] Tribes of the Fort Belknap Indian Reservation); United States v. Winans, 198 U.S. 371 (1905) (on behalf of the Yakima); United States v. Rickert, 188 U.S. 432 (1903) (on behalf of the Sioux); First Nat'l Bank of Decatur v. United States, 59 F.2d 367 (8th Cir. 1932) (on behalf of the Omaha); United States v. Boylan, 265 F. 165 (2d Cir. 1920) (on behalf of the Oneidas); United States v. Abraham, Civil No. 2256 (E.D. La., filed May 28, 1952) (on behalf of the Chitimachas); United States v. Franklin County, 50 F. Supp. 152 (N.D.N.Y. 1943) (on behalf of the St. Regis Mohawks); United States v. Flournoy Live-Stock & Real Estate Co., 71 F. 576 (C.C.D. Neb. 1896) (on behalf of the Omaha and Winnebago); United States v. Flournoy Live-Stock & Real Estate Co., 69 F. 886 (C.C.D. Neb. 1895) (on behalf of the Omaha and Winnebago). *See also* GETCHES ET AL., *supra* note 30, for a discussion of Indian land claims in the context of the Pueblo Lands Act, 43 Stat. 636 (1924).

Finally, in 1978 the American Land Title Association (ALTA) published a memorandum arguing (1) that Congress had the power and the duty to extinguish the eastern land claims cases; (2) that Congress could do so without fear of Fifth Amendment liability under Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); and (3) Congress could also extinguish land claims cases founded on treaty rights by compensating tribes, via the Court of Claims process, for the market value of the lands at the date of the challenged transaction plus 5% simple interest per year to date. AMERICAN LAND TITLE ASSOCIATION, INDIAN CLAIMS UNDER THE NONINTERCOURSE ACT: THE CONSTITUTIONAL BASIS AND NEED FOR A LEGISLATIVE SOLUTION (1978).

a local community of mixed racial heritage, as in the case of Mashpee, but in any case, not Indian nations.[74]

In *Making All the Difference*, Martha Minow took a different theoretical approach in an effort to support the Mashpee claim for tribal status. While Torres and Milun argued that Native American cultures were irreconcilably different from the mainstream, Minow argued against forcing cases like *Mashpee* into rigid "either-or" frameworks.[75] According to Minow, the *Mashpee* plaintiff lost because of the court's strong adherence to the oppositional categories of tribe/non-tribe, an adherence that was reflected by the judge's insistence on getting a straight "yes" or "no" answer from the jury on the issue of tribal status. Ironically, Torres and Milun's approach, at least under Minow's analysis, seemed problematic for the same reason: Their approach promoted an "either-or" analysis by forcing a distinction, even if only theoretically, between Native American culture and mainstream American culture.

To be fair, in discussing *Mashpee*, Minow was not concerned with finding a solution as specific as a presumption in favor of tribal status, as Torres and Milun apparently had been. Still, despite their point of disagreement, Torres, Milun, and Minow all took the position that the legal process unjustly discounted the Mashpee plaintiff's perception of itself as a tribe, a perception that should have counted in the assessment of legal difference. One good way to count it, Minow wrote, was first to initiate the breakdown of the idea that a tribe and a non-tribe were mutually exclusive legal entities, and then to set aside definitional questions so as to make possible a direct inquiry into the "real" issue: whether the plaintiff, given its history, ought to receive protection from land sales under federal law.[76] This line of inquiry, Minow argued, would have countered the defendants' effort to persuade the court that the *Mashpee* dispute was ultimately about competing visions of the town's future, rather than about the violation of federally protected American Indian rights.[77] In subordinating the question of land use to the more abstract question of rights, Minow's argument rested itself on one of the most fundamentally ethnocentric and increasingly problematic assumptions of American

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74. van Gestel, *supra* note 68, at 301-02. *See also* John M.R. Paterson & David Roseman, *A Reexamination of Passamaquoddy v. Morton*, 31 ME. L. REV. 115 (1979). Paterson & Roseman are Attorneys General for the State of Maine who, to avoid conceding the issue of tribal identity, prefaced their article in this peculiar way:

> The two Indian groups are commonly known as the Passamaquoddy Tribe and the Penobscot Nation. While the article may hereafter use the terms "Passamaquoddy Tribe" and "Penobscot Nation," the use of the titles "Tribe" or "Nation" does not necessarily indicate that the authors believe those Indian groups constitute tribes in a legal sense. The legal status of the Maine Indians could presumably be an issue in any future litigation, as it was in Mashpee Tribe v. New Seabury Corp. . . . However, because the Passamaquoddy and Penobscot are usually referred to as "Tribe" and "Nation," respectively, and for ease of reference, we have employed that nomenclature in this article.

Id. at 115 n.2.

75. MINOW, *supra* note 34, at 351-56.

76. Ironically, it was federal law that required the splitting of these two issues. *See supra* notes 13-14, 22, 27-30 and accompanying text.

77. MINOW, *supra* note 34, at 355-56.

property law: the assumption that land use—the physical use of land (space)—is an acultural activity, and thus a phenomenon completely separable from culture (identity).

To close, both Torres, Milun, with their procedural suggestion for defending tribal rights, and Minow, with her rights-based one, illustrate what makes the *Mashpee* case so central. On one hand, a tribe is a distinct entity. Based on that distinctness, the federal government decides whether or not to offer its (high-priced) protection under acts like the Nonintercourse Act to groups like the Mashpee. Yet on the other hand, a tribe is very much part of the community at large, an observation especially true for eastern tribes. In *Mashpee* there was no distinct, impermeable boundary between the tribe and the town, at least as far as culture was concerned, though there were rigid class boundaries. And yet both sides (not just the defendants, as Minow asserts) held a vision for the town's future. These visions were in sharp competition, and, more importantly, they were culturally constructed. From this relational set of competing views, the distinct Mashpee vision emerged, unexpressed and unarticulated until well after the final stages of litigation.[78] Here, too, what was distinctly "Indian" (or tribal) about Mashpee life came into focus, not as an essential trait, but as a political and economic commitment to a specific way of using a specific set of resources. The next section explores the details of this claim.

III. Different and the Same: The Shore as a Metaphor for the Future (Land Use) and the Past (Identity)

Most Native American land litigation has involved federally recognized Indian tribes on western reservations; therefore proving "Indian-ness," except in eastern land cases or the Pueblo cases cited above, has been a relatively straightforward process. Typically, it involved contradicting stereotypical beliefs by paradoxically locating them in the positive or incomprehensible (to the outsider) aspects of one's "culture." So, for example, if the colonial stereotype of Indian cultures was that they lived in mythical time, then testimony was often constructed to address, acknowledge or even mimic this belief.[79] Proof of this sort inextricably linked Indian descriptions of identity, both ethnographic and autoethnographic, with generally held stereotypes of the same. Thus, for a tribal community to secure its right to federal protection via the legal process, it had to present itself in a way that made it recognizable to non-Indians.[80] But as Torres and Milun noted, despite the admissibility of autoethnographic evidence, the legal system still preferred professionally prepared ethnographic evidence.[81]

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78. Campisi, *supra* note 5, argues that there were aspects of Mashpee "Indian-ness" that were in fact so much a part of Mashpee culture as to be unarticulable until they were negotiated at trial. This makes sense if one keeps in mind that the Mashpee led an isolated existence at least until the construction of the freeway in the 1950s, which linked Cape Cod with Boston. Hence, before the conflict that led up to the lawsuit, the Mashpee had not had to define themselves in opposition to non-Indian groups in any essentialist way. *See also* Minow, *supra* note 49.

79. Rennard Strickland, *The Absurd Ballet of American Indian Policy or American Indian Struggling with Ape on Tropical Landscape: An Afterword*, 31 Me. L. Rev. 213 (1979).

80. This is not a new insight. *See, e.g.*, Alfred Kroeber, *Nature of the Landholding Group*, 2 Ethnohistory 303 (1955) for one of the first articulations of this reality of Indian litigation.

81. Torres & Milun, *supra* note 49, at 631-32.

In a chapter on anthropological method, E. Adamson Hoebel explained the reason for this bias. In the sweepingly general tone of his time, he noted that some cultures thought in terms of formal patterns and ideal norms while others did not. To support this assertion he quoted the work of another anthropologist, Ralph Linton, who wrote that during his fieldwork when he had asked subjects what was proper behavior for a particular situation, "Polynesians [would] give you practically an Emily Post statement of what proper behavior should be on all occasions, whereas Comanches . . . [would] iimmediately answer, 'it depends.'"[82] According to Linton, while the Comanche informant *thought* of human behavior as a range of unlimited, individual choices, he or she *acted* as if there was only a narrow, predictable range of proper behavior for any given situation. Based partly on Linton's work, Hoebel concluded that, in addition to other problems with studying Native American law-ways, for "most North American Indian tribes there is little gain [for the ethnographer] in spending more than the briefest time in search for verbalized ideal norms."[83]

For Hoebel, the law responded to the ethnographic subject's reluctance to articulate ideal norms and principles with a systemic bias against autoethnographic evidence, which was designed to meet systemic needs.[84] The legal system needed reliability and verifiability, both of which could be ensured by uniformity in professional method. But autoethnographic presentations caused concern and always would, Hoebel argued, because a court (or an anthropologist) could never be certain just how seriously the witness (or informant) held the methodological values that were central to the professional's craft.[85] Even when autoethnographic evidence was "most sincerely offered," Hoebel concluded, problems of validation were "never absent."[86]

Returning to the issue of assimilation in American Indian identity cases, then, ethnographic evidence of assimilation in a case like *Mashpee* could nonetheless be treated

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82. HOEBEL, *supra* note 19, at 40 (citing Ralph Linton, Comment on the paper by L. Hanks, Jr., *The Locus of Individual Differences in Certain Primitive Cultures*, *in* CULTURE AND PERSONALITY (Stansfeld Sargent & Marian W. Smith eds., 1949)).

83. HOEBEL, *supra* note 19, at 40.

84. *Cf.* Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660 (1990) (pointing to indigenous peoples' insistence on the right to define themselves as superior to any systemic needs such as, for example, the ones that Hoebel noted).

85. Hoebel wrote:

> Determination of the validity of the recorded cases poses problems that are not always amenable to easy solution . . . .
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> This problem, of course, obtrudes itself in every courtroom, and the potential unreliability of even the most sincerely offered evidence is axiomatic in legal psychology. In ethnological field work the difficulties are decreased in situations in which the ethnologist is an on-the-spot observer. They are increased along with the danger of distortion when the ethnologist is working with reconstructions of events long past. In either event they are never absent.

HOEBEL, *supra* note 19, at 42.

See also Hoebel's description of "the significance of this aspect of validation" in his description of Stump Horn and Calf Woman's accounts. HOEBEL, *supra* note 19, at 44-45.

86. HOEBEL, *supra* note 19, at 42.

as consistent with evidence of anti-Mashpee (Indian) bias, especially if one factored in time. In other words, before assimilation, the conflict in Mashpee might accurately have been characterized as an ethnic one, with anti-local bias appearing as the crust of a deeper anti-Indian sentiment. But after assimilation, a conflict like the one in Mashpee was best theoretically characterized primarily, if not solely, as a struggle between local and regional actors over limited resources. Non-Indian communities could be regarded as separate and isolated from the American mainstream, as were Indian communities, yet "non-Indian backward-ness" was importantly different from "Indian backward-ness" because it implicated an entirely different set of images that suggested entirely different solutions to the real question of who would control the land, and under what claim of right.[87] "Non-indian backward-ness" implicated imagery of differences between the local and the cosmopolitan, but differences that were resolvable by courts, predictable rules, and sanctions. "Indian backward-ness," on the other hand, implicated imagery of irreconcilable cultural differences between Westerners and non-Westerners.[88] These differences were not necessarily resolvable because of the stereotype that Indians, though answerable in American courts, brought land suits out of lawlessness and a general disrespect for (or lack of familiarity with) the order of private property.

In other words, when Indian communities were called to explain their culture and beliefs, a pragmatic politics of memory necessarily shaped the terms of the legal discussion. These politics were pragmatic in the sense that litigants recognized how claims for Indian status had to reflect stereotype in order to be considered authentic.[89] It was also legal, though not explicitly so until *Mashpee*, in the sense that it recognized that the legal system treated ethnographic accounts as more reliable than autoethnographic ones, and, therefore, gave more weight to what others said about the Mashpee than to what the Mashpee said about themselves.[90] In *Mashpee*, both the plaintiff and defendants understood these politics. For that reason fourteen of the plaintiff's thirty-four witnesses, and twelve of the defendants' nineteen witnesses, identified as "persons of Mashpee descent" were called to testify about everyday life in Mashpee.[91] Their accounts were presented in an almost nameless, timeless way, with the witnesses serving more as real proof (did he or she *look* "Indian"?) than as anything else. Not surprisingly, what witnesses remembered or could not remember paralleled stereotypical perceptions of "Indian-ness": when a witness's memory (or looks) deviated from the standard

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87. *See supra* text accompanying notes 57-62.

88. *See* James Clifford, *On Orientalism*, *in* PREDICAMENT, *supra* note 52, at 255 (exploring the functions of a dichotomizing concept like "Western," and its opposite "non-Western"). *See also supra* text accompanying note 21; CAMPISI, *supra* note 5, at 9-58; Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

89. For a useful collection of articles on this point, *see* REMAPPING MEMORY: THE POLITICS OF TIMESPACE (Jonathan Boyarin ed., 1994).

90. *See supra* notes 60-61 and accompanying text.

91. *See* MAZER, *supra* note 2, at 422-24 for a complete list of trial witnesses for plaintiff and defendants.

stereotypical picture (accurate or not), that witness's cultural authenticity and integrity were called into question.[92]

Thus *Mashpee* represented the culmination of the federal acknowledgment cases that had been decided in the courts. It illustrated how a hierarchy of evidentiary authority had emerged in identity cases, during the over one-hundred-year period before the BIA instituted the Federal Acknowledgment Project.[93] By the terms of this hierarchy, the best way to determine whether a community was indigenous was to look to the federal system of treaties, statutes and executive orders.[94] If such documents existed, then the group constituted an Indian tribe. If not, then a deeper social inquiry was necessary to determine the group's status. In this way, then, each tribal recognition case was a microreflection of the pattern of Indian law and scholarship overall. Each case reflected a tension between the particular and the abstract, with litigants often presenting particular facts about identity only to serve as illustrations for the professionals' abstract definitions of "Indian-ness." This tension was apparent in *Mashpee*. No matter how the litigants tried to define their own cultural identity, as they knew it, the force of stereotype intruded: If they called themselves Indian, then they had to prove themselves radically different from their neighbors; but if they characterized themselves as locals, then they were presumed to have assimilated. In either case, whatever it was that might be called "Mashpee" was buried, and the law, no matter how well-meaning, could not help uncover it.

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92. James Clifford's article is the best source and illustration for how this phenomenon worked. *See* CLIFFORD, *supra* note 52. BRODEUR, *supra* note 3, also gives a good account of the defense's manipulation of belief on this issue at trial.

93. *See* Quinn, *supra* note 17, at 40-45 for a brief history of the Federal Acknowledgment Project which was instituted in 1978. Today the Project is part of the Branch of Acknowledgment and Research. The Branch has received 165 petitions (40 petitions that were on file when the Acknowledgment staff organized in October 1978, and 125 new petitions received since October 1978). Of the 165 petitions, the Branch has resolved 25, while Congress has resolved seven. Of the 25 petitions resolved by the Branch, nine tribes have been acknowledged, 13 have been denied, and the other three have been clarified by other means. Of the seven resolved by Congress, one tribe was restored and six of the petitioning tribes acquired federal recognition. SUMMARY, *supra* note 7.

The Branch is developing what is regarded as technical expertise in the area, thus making obsolete Judge Skinner's observation that determining tribal status is not a technical matter for experts, but rather part of the human condition that is within the purview of the jury. *See also* Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209 (1991) (describing the background of federal recognition in the executive branch); COHEN, *supra* note 13 at 270-72 (setting out Cohen's criteria for determining the eligibility of tribes; these criteria are a hierarchical list of evidence that the Executive ought to consider when determining tribal status); *see also Recognition of Certain Indian Tribes: Hearing on S. 2375 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. (1978).

94. The Kansas Indians, 72 U.S. (5 Wall.) 737, 756-57 (1866) (the courts will accord substantial weight to federal recognition of a tribe).

The Mashpee Tribe had been recognized as an Indian tribe by the state of Massachusetts under Executive Order 126, which was signed by then Governor Michael Dukakis. This recognition was dismissed by the federal court as being the result of a political rather than a cultural acknowledgement process; hence it carried no evidentiary weight at trial.

The *Mashpee* found it particularly difficult to convey that their lawsuit was not solely motivated by a need to elevate discussions of American Indian recognition to rights-talk, as Minow suggested. Nor was it solely about competing visions of land use. It was about both, if one considered that the litigation centered around physical, geographical spaces that the Mashpee, in their sense and custom as American Indians, regarded as common, not private, resources: the shore, the beach, fishing areas and other waterfront areas.[95] Over the years the Mashpee had treated these same areas as inalienable even though the land abutting them had been sold. But while the defendants regarded this behavior as evidence that the Mashpee plaintiff was motivated by greed (on the theory that if the Mashpee had assimilated enough to sell their land, they ought to be barred either from getting it back or being compensated for it under the Nonintercourse Act), the Mashpee plaintiff saw it as life-as-usual in a locality where most landowners had been absentee summer residents.

That is, what was different and irreconcilable about Mashpee culture in relation to the mainstream American culture was the way in which the Mashpee saw the waterfront areas. The Mashpee vision for these areas was that they remain open for common use, regardless of title formalities. This was a vision that individual tribemembers could hold independently of their opinions about whether the tribe ought to retrieve title under the Nonintercourse Act. And tribal members' views about the Nonintercourse Act were ones that they could hold independently of their ideas about identity. That these views were independent and yet related explains, in part, how the defendants managed to persuade tribal members to testify on their behalf.[96]

The exurbanite vision for the contested physical sites, on the other hand, was based on exclusive use stemming from individual property rights. This vision could also be held regardless of dissention in the non-Mashpee community over the litigation. That is, a non-tribal member could support the Mashpee claim for federal recognition and yet still promote the idea that waterfront areas ought to be treated as property whose use was exclusive to the title holder. And in fact, there was a small but vocal minority of non-Indian Mashpee citizens, calling themselves the Mashpee Coalition for Negotiation, who strongly supported a negotiated settlement between the tribe and the town as a way of resolving the Nonintercourse Act litigation.[97] This liberal coalition shared the plaintiff's concern about the suburbanization and overdevelopment of Mashpee, though its concern did not extend to visions about how the waterfront areas ought to be used. Over time, in the non-Indian part of town, the liberal pro-negotiation position came to be linked with an anti-development position, which itself became equated with what was considered the radical pro-Indian position.

Hence, over the course of the *Mashpee* litigation both the issue of who owned the land (a legal question) and how the land ought to be developed (a political question) were reduced to the question of whether the Mashpee were a tribe (a cultural question) in a

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95. CAMPISI, *supra* note 5, at 157 (detailing the shell fishing litigation and the way that the Mashpee reverence for these common areas eventually did get articulated).

96. *See* MAZER, *supra* note 2 (tracing the factions within the tribe in the town of Mashpee in such a way that corresponds with the idea that views of land use, Nonintercourse Act applicability, and tribal identity could be independent of each other).

97. MAZER, *supra* note 2, at 248-57.

process that Minow likened to "the Sesame Street game of 'Which one of these things is not like the others?'"[98] Ultimately, this is how the *Mashpee* judges and commentators fell into the trap of reaching yet another complacently pragmatic solution in the area of Indian law.[99] Because the tribe appeared to want the impossible (forfeiture of land), their solution seemed impractical; and because the exurbanites wanted the usual (exclusive use of private property), their solution seemed common sensical.[100] Under this sort of scrutiny, then, it "made sense" to dismiss the Mashpee tribe's claim unless there was a compelling showing of difference.[101] Ironically, this modern line of thought came dangerously close to the blatantly evoluntionary and racist custom (superstition) or law (reason) dichotomy followed in the *Joseph* and *Montoya* line of cases. "Indian-ness" became linked to impracticality and "non-Indian-ness" to common sense.

The Mashpee sought an "impractical" remedy under state property law. But was their vision for the waterfront as a commons so unprecedented in American law? Was private ownership of land coupled with something akin to an easement for public use so unusual under American property law as to be an incomprehensible solution?[102] The answer, of course, is no. The next section of this Article sets out details with which the Mashpee vision could have been rendered more understandable and familiar at trial.[103] Following a law and society approach, it distinguishes and separates the Mashpee vision of the shoreline areas from aspects of landownership and local political control. This move is analytically important, especially in light of the fact that the Mashpee lost title to the shoreline areas long before they lost control of them, and they lost control long before they lost access.

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98. MINOW, *supra* note 34, at 356.

99. Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821 (1990). *Cf.* Minow, *supra* note 49, at 97-98.

100. *See Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990), with specific attention to Singer, *supra* note 99 (analyzing how complacent pragmatism relies on ideas of "common sense" to make situated judgments, and how appeals to common sense are hidden appeals to the myth that there is a consensus on fundamental values, especially with respect to such institutions as property).

101. Judge Skinner noted as much when he pointed out that given the extraordinary remedy the tribe was seeking, they would have to prove to him that something significant in fact set them apart from the American mainstream. Mashpee Tribe v. Town of Mashpee, 427 F. Supp. 899, 902 (D. Mass. 1977). *See supra* note 48.

102. *See, e.g.*, Zuni v. Platt, 730 F. Supp. 318 (D. Ariz. 1990) and State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969), two cases involving public easement rights over private land.

103. For an analysis of the importance of familiarity as a decolonization technique, *see* Abdul R. JanMohamed, *The Economy of Manichean Allegory: The Function of Racial Difference in Colonialist Literature*, 12 CRITICAL INQUIRY 59 (1985).

IV. IDENTITY AS IDIOM: THE SHORE AS A COMMONS[104]

In 1869, the General Court of Massachusetts removed all restrictions on the sale of Mashpee land to outsiders; the next year, Mashpee was incorporated as a town. In 1871, Mashpee Indian residents still held most of the acreage in Mashpee.[105] By 1900, however, land in Mashpee was owned primarily by absentee non-Indian owners. That year there was a total of about 4009 acres of Mashpee land in residents' hands and 8302 acres in non-residents' hands, with 117 Mashpee residents owning over 20 acres or more of land, and 180 non-residents owning the same. By 1910, 106 Mashpee residents owned 20 acres or more as opposed to 224 non-residents; in 1920, only 83 residents owned 20 acres or more as opposed to 637 non-residents; and by 1930, while 100 residents owned 20 acres or more of land, 659 non-residents had acquired title in fee simple absolute, each to 20 acres or more of Mashpee land. Tax valuation records for the year 1930 showed that non-residents owned about 11,787 acres of the 14,200 acres assessed in Mashpee.[106]

The one non-resident owning over 200 acres of land in 1871 was Timothy Pocknett; he owned 360 acres.[107] Pocknett, though not a Mashpee, was married to a Mashpee woman. By 1890, Harvard's George Lowell (through his estate) was the largest non-resident owner in Mashpee, with about 441 acres. And by 1900, only a single Mashpee native, Walter Mingo, continued to own over 200 acres of Mashpee land. Tax valuation books showed that none of the five non-resident owners that year were related to Mashpee Indians by marriage. Those books also show that over the course of the next eighty years, there would be a slow transfer of land, first, from Mashpee hands to the hands of those who were neither tribal members nor the spouses of tribal members, and, second, from private hands to corporate ones. Thus, by 1950 the Popponesset Beach Company was reportedly the largest non-resident land owner in Mashpee. In 1960 the Henry C. Labute, JP Trust gained the distinction. In 1970, the New Seabury Corporation, which was the principal defendent in *Mashpee*, entered the picture with 288 acres. By the end of the *Mashpee* litigation, in 1979, the New Seabury Corporation had acquired about 1161 acres of land, making it far and away the largest record land owner in Mashpee. So, even though the newly incorporated Mashpee Tribe owned 55 acres of land in 1979, there were no individual Mashpee Indian landowners with 200 acres or more; and, in fact, there had been none since the 1920s.

Over the years, voter registration records showed yet another way in which the Mashpee were losing control of the town.[108] From 1870 to the 1960s, although land was

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104. The following discussion draws heavily from MAZER, *supra* note 2. Mazer's work, which is a Ph.D. dissertation, collects the documents analyzed below. Mazer's study of *Mashpee* is by far the most complete of the extant literature. Both CAMPISI, *supra* note 5, and HUTCHINS, *supra* note 37 describe these aspects of Mashpee history throughout their accounts. This view of Mashpee is also present, though in very general form, in the Mashpee's BIA Petition for Acknowledgement (on file with author).

105. Mashpee residents (the majority of whom were no doubt Indian) owned 8520 acres; non-residents 928 acres. MAZER, *supra* note 2, app. 1 at 393, Resident/Non-Resident Landowners of More than 20 Acres. See also app. 4 at 410, Individuals Owning Over 200 Acres of Land, 1871-1979.

106. MAZER, *supra* note 2, app. 1 at 393.

107. MAZER, *supra* note 2, app. 4 at 410.

108. MAZER, *supra* note 2, app. 5 at 413, Voter Registration in Mashpee, 1940-1979.

passing into non-Mashpee hands, the tribe retained control of the town via local government structures.[109] In the 1940s there were 152 registered voters in Mashpee. By 1960, 510 people called Mashpee their principal place of residence, and so registered to vote there. From 1960 to 1970, voter registration increased dramatically[110] so that when the New Seabury Corporation first appeared on the tax valuation records in 1970, there were 856 registered voters in Mashpee. The year 1976 showed a jump to 1978 voters; 1977, 2412; and 1979, 2562 registered voters in the town of Mashpee with no significant increase in the Mashpee Indian population over that same period of time.[111]

The new voters were distinguishable from the Mashpee Indian voters, although not necessarily irreconcilably so, in several important respects. First, they were considerably more affluent. In 1970 Mashpee was reportedly the one town on Cape Cod that had the highest percentage of owner-occupied housing units valued at both over $50,000 and under $10,000.[112] This class distinction eventually effected the split between the town and the tribe as more of the affluent, non-Indian voters became permanent residents of one of the four New Seabury developments. Over time, the Mashpee plaintiff formed the opinion that these affluent voters were the ones who had succeeded in wrestling local political control from the tribe. They based their opinion on the following information.

In the 1950s, Otis Air Force Base opened, with many military families living off-base, and although these families increased the demand for housing, they were not heavily involved in organized local politics.[113] Popponesset also began growing at this time. Popponesset was a working class, Catholic subdivision that had once tried to secede from the town of Mashpee because of its dissatisfaction with the town (tribal) services; despite the Popponesset residents' dissatisfaction, however, they had not managed to wrestle political control from the tribe in twenty years of growth.[114] In 1979, housing prices in Popponesset remained in the modest $35,000 to $90,000 price range, with houses closer to the waterfront in the high end of the range.[115] Thus, the Popponesset residents, though perhaps at odds with the Mashpee tribe, had reached a point of political stasis with it.

In the early 1960s, however, New Seabury started its development, with four subdivisions for the exurban affluent.[116] The Village of Highwood was designed for horseback riding; Bright Coves and Summer Seas for boating and water sports; and

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109. MAZER, *supra* note 2, app. 2 at 394, Lists of Town Selectman, 1870-1979, and app. 3 at 395-409, Town Political Officers, 1870-1979.

110. MAZER, *supra* note 2, at 111, 137. Mazer quantifies increases in voter registration from 1930 to 1970 at 341%. *See also* MAZER, *supra* note 2, app. 5 at 413.

111. MAZER, *supra* note 2, at 137. *See also* MAZER, *supra* note 2, at 132 for discussion of the town's growing population; MAZER, *supra* note 2, app. 5 at 413.

112. MAZER, *supra* note 2, at 135. So divided was the town in this respect that the term "Mashpee" was used to refer to the native (Indian) section of town, which marked the $10,000 and below point, and "New Seabury" to the non-native area of town, which marked the $50,000 and above point., MAZER, *supra* note 2, at 134-36.

113. MAZER, *supra* note 2, at 105.

114. MAZER, *supra* note 2, at 105.

115. MAZER, *supra* note 2, at 112.

116. *See* MAZER, *supra* note 2, at 106 for a related analysis of the changes in the average number of building permits during this time.

Greensward East for golfing.[117] With this development came other significant developments, like the construction of the New Seabury Shopping Center, whose existence over time shifted the center of town from the Indian area, which was "poor," to the New Seabury area, which was "affluent."[118] In 1979, housing prices in the New Seabury developments ranged from $55,000 to $250,000, again with waterfront units falling in the high end. Eventually, New Seabury succeeded in its effort to develop Mashpee, and over time Mashpee Indians, who had once been enthusiastic about the developments, found themselves upset for being cut off from the shoreline and its resources.[119]

The new voters of Mashpee, who were neither Mashpee Indians nor married to Mashpee Indians, were significantly more affluent than Mashpee Indians, as represented by housing prices. They were also willing to build on and exclude others from the waterfront areas, unlike the Mashpee who had treated these areas as a common resource.[120] Moreover, New Seabury residents had a political ambition that the Popponesset residents apparently lacked, because not only were New Seabury residents registering to vote in Mashpee, they were participating in and gaining control of the local political process. Together these factors changed, first, the ethnic balance of power in local politics, and, second, the physical layout of the land. With the wealthiest non-Indians clustered around the waterfront areas, the recent, affluent, non-Indian arrivals in Mashpee were quick to push for a new regime of local concerns, one that benefitted the less affluent, non-Indian residents of Popponesset as well.[121] This new regime came at the expense of the Mashpee tribespeople who, unlike their more affluent neighbors, lived inland, but travelled to the shore to engage in subsistence fishing activities.[122] Over time, class differences between the non-Indians receded into the background while ethnic differences between whites and Indians came to the fore.[123]

The new coalition of "white" voters wanted local government to protect their property from trespassers, and to assure that residents would have freedom to develop their land as they saw fit. They also wanted increased town services. Freedom to develop and protection from trespassers (exclusive use), in the fray of the conflict overall, constituted a call to cut off Mashpee tribespeople from access to the waterfront areas. Hence the new regime was an implicit (and successful) effort to further divide the town along ethnic lines by defining the Mashpee tribespeople as the very same trespassers from whom local government was supposed to protect "legitimate" and "bona fide" Mashpee landowners.[124]

The new local regime was also an implicit (and successful) commencement of a development process that would eventually shift the center of town to the New Seabury

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117. MAZER, *supra* note 2, at 107.

118. MAZER, *supra* note 2, at 108-11, 134-36 (describing how intitially New Seabury's development was welcomed by the tribe). *See also* CAMPISI, *supra* note 5, at 139 (citing HUTCHINS, *supra* note 37, at 160-61).

119. MAZER, *supra* note 2, at 108-16.

120. MAZER, *supra* note 2, at 116 (noting that public access to the bay in South Mashpee's lakes and rivers declined as development increased).

121. MAZER, *supra* note 2, at 218-71.

122. MAZER, *supra* note 2, at 116.

123. *See* MAZER, *supra* note 2, at 229-48, 313-64.

124. MAZER, *supra* note 2, at 229-48, 313-64.

area, since these areas, given their relatively greater affluence, consumed significantly more in the way of town services.[125] So, for example, over the years, the fire department would move south, as would the post office and the main freeway exit. In this way, the Mashpee tribespeople became "outsiders" in their own land through shifting machinations of local power, an assignation that was in many ways independent of whether they would or would not be labeled outsiders ("an Indian tribe") under federal law. And in fact, as discussed in previous sections, even though the incoming voters of Mashpee took the position (via the statements of their selectmen) that the Mashpee tribespeople were "outsiders" in relation to the local political process, they adamantly maintained the position that the Mashpee were "insiders" under American law—by virtue of having assimilated into mainstream American society—and thus ought to be subject to state property law rather than to federal Indian law.

Here, then, is one point of cultural irreconcilability that emerges from the record, rather than from stereotypes of who the Mashpees were or should have been as "Indians." Though the Mashpee Indians believed in and practiced the dictates of private property, they viewed various waterfront areas as a common resource. In this respect they were indeed irreconcilably different from their affluent neighbors who regarded the shore as highly marketable (and hence exclusive) private property. So integral a part of Mashpee culture was this view of the commons, that in the years during which the tribe controlled the town of Mashpee without holding title to most of its land, this notion had not been articulated, either as ideal or concern.

Campisi testified that the failure to articulate this norm of the waterfront as commons resulted because shared use of the waterfront areas was in fact so fundamental a part of Mashpee life that it had not been questioned until the influx of newcomers; hence it had not been articulated, only acted upon.[126] The right to use the waterfront areas as a commons, regardless of who owned the adjacent land, was not consciously expressed as a "right" in Mashpee culture—it was simply assumed. But when the process whereby the Mashpee tribespeople lost local political control rendered them outsiders to power, what was only background became visible. At this point, key symbols of identity, and ultimately of access to power (like the symbolic word "tribe"), became so charged that their meaning was adjudicated. Meanwhile, the system of non-Indian dominance, a system that opposed custom to law, superstition to reason, impracticality to common sense, and Indian to American was left not only unquestioned, but more deeply entrenched than before, both at the federal and the local levels.[127] Ironically, it was not until the legal process reached its end that the Mashpee came to articulate their ideal of

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125. MAZER, *supra* note 2, at 134, 137, 142 (discussing the physical separation between the Mashpee and the New Seabury communities; the changes in voter registration laws, dates of annual town meetings, and location of meeting elections; and the passage of a 1971 referendum allowing public funds to be used to remove snow from "private roads," all of which were in the affluent New Seabury area of town).

126. *See* CAMPISI, *supra* note 5. *See also* text accompanying *supra* note 82.

127. *See* Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689 (1989).

the shore as a common, inalienable resource, and in some ways, regrettably, to even reconfigure this idea into stereotype.[128]

CONCLUSION

The Mashpee Wampanoag Tribe turned to federal law to validate what it regarded as its superior rights to its ancestral land. What the Mashpee Tribe discovered was that federal law served as both resource and constraint; that is, the law that was applied to resolve the dispute ended up escalating it instead by virtue of the way in which it skated on the surface of stereotype after stereotype. The law presumed Indian ways to be primitive, chaotic, timeless, simple; more troubling, it assumed that any tribal adaptation to colonial society was in fact an assimilative embrace of the mainstream. Even as late as 1977, lawyers who prided themselves on defending "innocent" land purchasers from the Nonintercourse Act claims of "greedy" Indians interpreted this body of law to allow for the unwitting and unconscious assimilation of Indian tribes into the American mainstream. According to this view, if tribespeople conformed to the broader culture, they were said to be choosing to assimilate, even if only constructively so. This presumption, the lawyers argued, was rebuttable, but *only if* the tribe could prove that it had been coerced by the broader society into abandoning the "old" and embracing the "new."

The commentary that surfaced to explain and counter what happened in *Mashpee*, though sympathetic to the Mashpee Tribe's position, based itself on similarly general discussions about whether the Mashpee were or were not culturally different from the mainstream. But while the commentary noted that identity is negotiated and dependent on circumstance, it nevertheless conceptualized identity as something separate and apart from social life. Hence this commentary ignored a significant body of local evidence about land use patterns in Mashpee in favor of wrestling with time-weary stereotypes about Indians generally.

The implication of the local data that rested directly beneath the surface of these various layers and articulations of stereotype linked the Mashpee Wampanoag Indians to other Indian nations across the country. In other words, while the Mashpee may have had a unique and on-the-surface "non-Indian" history, the way in which they lost control of their land linked them to other tribes who have also been forced to contend with the flow

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128. *See, e.g.*, CAMPISI, *supra* note 5, at 142-44 (describing speeches given in Mashpee around the time of the litigation).

> In Mashpee, the Wampanoag tribe wails for their weakened home. Struggling to maintain the Earth's tender and tenuous balance, they hunt deer that dart across the landscape and bait lines to hook fat silvery fish. They harbor an unquestioning reverence for the land, for the trampled grasses, the ugly concrete and the towering trees with wind-rippled leaves just beginning to teeter toward gold.

Smith, *supra* note 9, at 33. Thus began the obituary for Lewis Gurwitz, who defended four members of the Mashpee tribe after they were arrested for taking shellfish without a permit and for exceeding the limits set by the state. Gurwitz argued that the Mashpee had an aboriginal right to take shellfish. The assistant district attorney countered that the Mashpee had no such right because they "are not a tribe, they are individuals who are assimilated into American society and culture." CAMPISI, *supra* note 5, at 157, citing CAPE COD TIMES, Sept. 15, 1984.

of a new, late-twentieth century wave of "settlers." These settlers moved to Indian Country and found themselves subject to tribal jurisdiction; this in turn fueled their bitter resentment about the fact that Indian nations have a legitimate governmental interest in those areas. In Indian Country, this particular kind of disappointment has given rise to rhetoric that Indian governments, because they represent "irreconcilably different" cultures, do not know how to use land in ways that maintain or increase property values, and that Indian people, because they have treaty rights, lead lives of luxury bankrolled by the federal government. These sorts of mutterings carried persuasive weight in *Mashpee*, even though it was the Mashpee Wampanoag Indians' use of the shore as an common area that helped maintain its undeveloped and wild quality, a quality that contributed to making the lots along the shore some of the highest-priced real estate in Mashpee. But despite this irony, the non-Indians in Mashpee complained that their property rights ought to trump any rights that the Indians might have, and that it would be an injustice for federal law to validate Indian rights over what they considered the more fundamental property rights of non-Indians. From this position it was but a short leap to their next argument, which was that the Mashpee were not an Indian tribe and hence had no rights under federal law. All of this rhetoric found its way into the legal process, where it in turn found support in the existing doctrine.

I have tried to make two points in this paper. The first is that the Mashpee became "outsiders" in their own home because of gradual changes in land use and ownership patterns, which were themselves connected to changing voting patterns. And the fact that the Mashpee loss came in steps rather than in a single moment should not invalidate their claim for tribal recognition. My second point is that evidence supporting and illustrating the specific ways in which the Mashpee lost control of their land cannot be found either in doctrine or legal commentary. It is available, however, if one looks to local records. Theorizing about Indian identity alone was not enough to gain federal recognition in *Mashpee*; and in fact reliance on stereotype, from whatever source, contributed to the *Mashpee* loss at trial. What sets Native Americans apart from other groups in this country, after all, is that Native Americans are political minorities whose entire history has proven that they wish to preserve their inherent governmental sovereignty. By this I mean to say that Indian nations have long standing, well-established rights, even under the cases discussed herein, to remain territorially and jurisdictionally separate from the mainstream, if that is what they so wish. These rights ought to be respected, even furthered, especially as against non-Indians who refuse to abide by tribal law in Indian Country. By corollary, in areas like Mashpee, where territorial separateness has been compromised, courts and commentators must insist that the legal process help reveal what is under the surface of stereotype, so that it can help the parties get to the heart of the matter. A far-reaching and rich body of local evidence was overlooked both in the litigation and in the growing literature on *Mashpee*. For this reason alone, *Mashpee* should be reconsidered.