Identities

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"We were different/We knew we were different/We were told we were different,"[1] stated Chief Flying Eagle of the Mashpee Wampanoag Indians in the course of a trial over their tribal status. The plaintiffs, the Mashpee Indians, asked for a determination that the residents of "Cape Cod's Indian Town" were direct descendants of Native Americans known as the Mashpee, had lived continuously as a tribe, and thus were entitled to regain control of the land in their town despite repeated sales to non-Indians. The defendant, the State of Massachusetts, argued that these people simply were a group with some Indian and some non-Indian ancestors; they had essentially assimilated into mainstream American life through intermarriage and acculturation and thus had no special claim to the land.[2]

The tribe's Medicine Man at the time of the trial was named William James. This small detail exemplified the difficulty of the case. Given the same name as one of the most distinguished American philosophers, how could this Medicine Man demonstrate the distinctive identity of his tribe? What would the other William James, the philosopher, say to this question?

As a founding parent of pragmatism, that James would reject any approach to the riddle of identity that sought the essence of a person or a group. Rather than search for essences or intrinsic qualities of people or concepts, the pragmatists looked to purposes and effects, consequences and functions.[3] Similarly, the pragmatists preferred not to assess foundations of knowledge. Instead, they urged the questions: what works, and

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1. James Clifford, The Predicaments of Culture 281 (1988) (quoting Earl Mills, Chief Flying Eagle).

2. *See* Paul Brodeur, Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England (1985); James Clifford, The Predicament of Culture 8-9, 277-346 (1988); Francis Hutchins' Mashpee: The Story of Cape Cod's Indian Town (1979).

3. *See* Israel Scheffler, Four Pragmatists: A Critical Introduction to Peirce, James, Mead, and Dewey 110-121, 204-220 (1986).

for whom.[4]

No pragmatist spirit guided the federal district court reviewing the claims of the Mashpee Indians.[5] The judge thought that the identity question was answerable by expert historians and anthropologists. He ruled against the Mashpees when a jury found the Mashpee were a tribe at some points in history but not continuously until the present.[6] Of course, in a crude sense, the decision was pragmatic. It "worked" for the white owners of the disputed lands and for the dominant legal system generally, which has repeatedly undermined Indian rights.[7] But missing from the trial—and from many legal treatments of questions of identity—was an acknowledgment that the cultural, gender, racial, and ethnic identities of a person are not simply intrinsic to that person, but depend upon that person's self-understanding in conjunction with communal understandings.[8]

The clash between a person's internal and external senses of self can lead to the abandonment of the internal sense.[9] People may find meaning and opportunity for self-expression in the tensions between and among who they themselves think they are and what others think of them. This tension is especially complex because people so often establish who they are by constructing a sense of the place and identity of others around them. Each individual has different degrees of control over these tensions, and different kinds of power over their self-definition.

Relationships between people shape identities which depend on negotiations and interactions between oneself and others.[10] The relative power

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4. *See* Hilary Putnam, *A Reconsideration of Dewey on Democracy*, 63 So. Cal. L. Rev. 1671 (1990); Marion Smiley, *Pragmatism as Political Theory*, 63 So. Cal. L. Rev. *See generally* Cornel West, The American Evasion of Philosophy (1981).

5. *See* Martha Minow, Making All the Difference 350-372, (1990).

6. *See* Clifford, *supra*, at 335 (the jury found that the group did not constitute a tribe as of July 22, 1790, June 23, 1869, May 38, 1870, and August 26, 1976, although the jury did find them a tribe as of March 31, 1834 and March 3, 1842).

7. *See* Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 So. Cal. L. Rev. 1821 (1990).

8. Angela Harris suggests "that we are not born with a 'self,' but rather are composed of a welter of partial, sometimes contradictory, or even antithetical 'selves.' A unified identity, if such can ever exist, is a product of will, not a common destiny or natural birthright." Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 584 (1990).

9. Some psychoanalytic literature acknowledges this pattern, *see* Alice Miller, The Drama of the Gifted Child (1981), but most psychological work on identity lacks attention to the multiple relationships and social contexts within which people forge their senses of self. For discussions of both this limitation and efforts to include social dimensions to psychological explorations of identity, *see* Changing the Subject: Psychology, Social Regulation and Subjectivity (Julian Henriques, Wendy Hollway, Cathy Urwin, Couze Veen & Valerie Walkerdine 1984); Children of Social Worlds (Martin Richards and Paul Light eds. 1986); Culture Theory: Essays on Mind, Self, and Emotion (Richard Shweder and Robert LeVine eds. 1984).

10. This approach bears some affinities to the view advocated by some under the term "positionality." Both the emphasis on the negotiated, interactive quality of relationships and a focus on the social and cultural position of a person as the source and impetus for identity depart from the view that identities are innate, intrinsic to the person and stand free from relationships and position. *See, e.g.*, Linda Alcoff, *Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 Signs 405, 433 (1988): "The essentialist definition of woman makes her identity

enjoyed by some people compared with others is partly manifested through the ability to name oneself and others, and to influence the process of negotiation over questions of identity. Someone with the power to select and express his or her own desires is someone with relative ability to define identity. Sometimes people who seem to have little power over exercising either their desires or their identities can nonetheless exert control by playing off other people's misconceptions and misunderstandings. People with apparently greater power in these areas nonetheless encounter sharp limits because of the presence and influence of others, even those who have less status and authority.

All of this seems awkward to state and unduly abstract. Works of fiction and selected legal disputes provide sources for rich, contextual depictions of issues of identity. Works of fiction afford glimpses into the interior lives of characters. They can illuminate the potential conflicts between the identities experienced internally and those others project. In an era when identities seem unmoored from social institutions and disturbed by encounters between people with different backgrounds,[11] authors of fiction rightly focus on the theme of identity as a setting for dramatic tension and psychological insight.

In what follows I will consider how works of fiction explore the negotiated quality of identities and how lawyers and judges neglect it when they craft legal arguments and decisions. Contemporary scholarship in law and in literary criticism provides some vocabularies for talking about negotiated identities, and fights over identity figure prominently in claims of knowledge and judgment.[12] Looking at works of fiction and law with

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independent of her external situation: since her nurturing and peaceful traits are innate they are ontologically autonomous of her position with respect to others or to the external historical and social conditions generally. The positional definition, on the other hand, makes her identity relative to a constantly shifting context, to a situation that includes a network of elements involving others, the objective economic conditions, cultural and political institutions and ideologies, and so on." *See also* Diana Fuss, *Reading Like a Feminist*, 78 Differences 1 (Spring 1989); Katharine Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 880-887 (1990).

11. *See* Robert Bellah, et al, Habits of the Heart (1985); Charles Taylor, Sources of the Self (1989).

12. For literary theory and philosophy, *see* Gloria Anzaldua, Borderlands, La Frontera: The New Mestiza (1987); Diana Fuss, Essentially Speaking: Feminism, Nature & Difference (1989) (exploring dangers of essentialist thought); Henry Louis Gates, Jr., Figures in Black: Words, Signs, and the "Racial" Self (1987); Elizabeth Meese, (Ex)tensions: ReFiguring Feminist Criticism (1990); Elizabeth V. Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought (1988) (examining persistence of privilege in works by both nonfeminists and feminists); Kimberly Benston, *I Yam What I am: The Topos of Un(naming) in Afro-American Literature*, in Henry Louis Gates, Jr., ed., Black Literature and Literary Theory 151 (1984); R. Radhakrishan, *Negotiating Subject Positions in an Uneven World*, in Feminist and Institutions: Dialogues on Feminist Theory (Linda Kauffman ed. 1989).

For recent legal analyses of identity and knowledge, *see* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 University of Chicago Legal Forum 139; Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990) (arguing against essentialism in definitions of identity); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 Harv. C.R.-C.L. L. Rev. 9 (1989).

Considerable debate over the significance of identity to knowledge was triggered by Randall

the notion of negotiated identity within patterns of power can help heighten attention to the pragmatist's questions: what works, and for whom.

Perhaps any effort in the new tradition of "law and humanities" must invent meaning for the conjunction of the two. I mean to suggest that lawyers and judges have something to learn about identity from the nuanced evocation of a process of negotiation depicted in stories like the ones discussed here. But I also mean to avoid implying that lawyers and judges can or should use literature as they would use legal authority, or that there is any easy relationship between law and literature. The purposes and contexts of literary texts and legal argument diverge. It is, however, the conviction that valuable insights can be provoked by conjoining and contrasting fiction and law that motivates this piece.

I. Stories of Identity

Sometimes fiction writers treat identities as fixed, assigned, or innate. But often the fictional exploration of people's interior consciousness also allows explorations of the processes through which people make and remake their identities and the identities of others, as in the stories discussed here.

A. Negotiating Identity

In a collection called *The Middleman and Other Stories*, Bharati Mukherjee includes one piece called "A Wife's Story."[13] It begins with the narrator criticizing, to herself, an ethnic joke in a play by David Mamet.[14] Quickly the reader learns that the narrator is an Indian woman, at the play with a man from Budapest; reviewing an insulting line in the play about Indian women, the character speculates that perhaps the actors improvise and rotate ethnic insults depending on the day of the week, or whom they happen to spy in the audience on a given night.[15] The narrator thinks of protesting, or walking out, but recalls that after attending expensive girls' schools, "My manners are exquisite, my feelings are delicate, my gestures are refined, my moods undetect-

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Kennedy's *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745 (1989), which characterized and challenged claims by other legal scholars of color that membership in a racial minority affords special claims of authority and knowledge. *See Symposium: Responses*, 103 Harv. L. Rev. (1990). For an especially thoughtful guide to the contested terrain over knowledge and identity, *see* Katharine Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829 (1990) (contrasting rational/empirical, experiential, agnostic, and positional theories of knowledge used by contemporary feminists).

13. Bharati Mukherjee, *A Wife's Story*, in The Middleman and Other Stories 23 (1989). Mukherjee was born in Bombay, received a Ph.D. at the University of Iowa, and teaches writing at several New York universities.

14. *Id.*, at 25.

15. *Id.*, at 26.

able."[16] Thus, Mukherjee's story from the start introduces a strong sense of ethnic identity both as a given and as a basis for the constant risk of ridicule. The story also suggests the suppression of real identity, desire, and feelings through external training and internal control. The self-conscious narrator knows that her sensitivity to insult is contingent and situational. She sees both sides, that of the old colonizer and that of the new pioneers.[17] "Postcolonialism has made me their referee. It's hate I long for; simple, brutish, partisan hate."[18] But a simple and uncomplicated stance is not readily available in this world of shifting and negotiated relationships.

The story includes many references to assimilation as a goal, a temptation, and an impossibility. The narrator's roommate is an Asian woman who recently had plastic surgery to have "her eyes fixed."[19] As the roommate discusses with the narrator her current crisis in a love relationship, the narrator puts away her silk sari, plans to brew some tea, and thinks of the man who gave them the tea. He is her roommate's uncle who once worked for the railways in Szechuan Province and who was shot at, once, during the Wuchang Uprising. The narrator notes that when she is lonely for her husband and son whom she left back in India, she thinks of this uncle. "If I hadn't left home, I'd never have heard of the Wuchang Uprising. I've broadened my horizons."[20] The narrator has traveled half the world to work for a Ph.D. in special education, and she compares herself with her mother who sought to learn French despite the violent opposition of her own mother-in-law.[21]

The narrator's husband calls to say he is coming to visit her from India. Memories of her long-ago hopes for marriage mingle with her mixed feelings for the man she married by traditional arrangement—the man she still does not call by his first name.[22] She greets him at the airport, and he asks why she is not wearing his mother's ring. She answers that it is not safe in a city with muggers. She does not say that she thinks the ring is "showy, in ghastly taste anywhere but India."[23] She notes her husband's discomfort in a setting where she knows more than he does. He is "used to a different role."[24]

But he adjusts to his new role as tourist. He delights in American foods, from the Perdue chickens to McNuggets. They take a sightseeing tour. He shifts between excitement and disappointment in relation to images of America he had hoped to see. He says his wife, our narrator,

16. *Id.*, at 27.
17. *Id.*, at 27.
18. *Id.*
19. *Id.*, at 29.
20. *Id.*, at 31.
21. *Id.*, at 29.
22. *Id.*, at 32.
23. *Id.*, at 33.
24. *Id.*

should return to India because the men in America are not to be trusted, and he misses her. She says "Special ed. course is two years" and "I can't go back."[25] Later, he receives a cable calling him back to India to help deal with a labor dispute at his company. She prepares to make love with him, and "pretend with him that nothing has changed." But something has.

The narrator's identity has changed. It is not a given. She is different in America from who she was at home. Her difference gives her a different vantage point on her husband; he is a tourist, she is not. When her husband wants to see Radio City Music Hall, he does not catch the sympathetic wink from her Hungarian friend. The narrator then feels "[g]uilt, shame, loyalty. I long to be ungracious, not ingratiate myself with both men."[26] She is already in a different relationship with her husband. She is both protective in a new way and distant enough from him to receive a private and condescending communication about him from another man. She sees herself as someone trained to comply and to give others, especially men, what they want and expect. Yet she also has developed desires that resist her training.[27]

She soothes her husband as he complains about things, such as the cost of the sightseeing tour. She thinks, "He is not accusing me of infidelity. I feel dread all the same."[28] In order to believe that he is not accusing her of infidelity, she must first consider the possibility that perhaps her independence amounts to a rejection of him for other more ambiguous loyalties.

She experiences herself as someone with a beautiful body, waiting for her husband to come to bed that last night of his visit. She is "shameless, in ways he has never seen me." And she is "free, afloat, watching somebody else."[29] Her very bodily self is different in this different country where she is getting a degree in special education.[30] Her identity is neither constant through time nor fixed across relationships. Her own relationship with herself can and does change.

Other stories, such as Philip Roth's "Defender of the Faith," similarly depict ways in which identities are not fixed and essential but negotiated and mutually constructed within patterns of assigned and challenged roles.[31] Roth describes an army sergeant, Nathan Marx, who is reas-

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25. *Id.*, at 39.

26. *Id.*, at 34.

27. The story does not suggest that emotions or moods are any more "authentic" or free from external influence than are any other feature of identity, such as role or sense of group membership. Yet tensions between emotions and role provide clues to a shifting sense of identity.

28. *Id.*, at 40.

29. *Id.*

30. Although this degree certainly exists and concerns education for people with disabilities, the author could well mean something more specific about the special education the narrator is receiving about herself.

31. Philip Roth, *Defender of the Faith*, in How We Live: Contemporary Life in Contemporary

signed to a training camp in Missouri after serving two years in battle in World War II. A trainee named Grossbart approaches him just after Marx's arrival to request help for Jewish soldiers who want to attend religious services on Friday nights but who also do not want the other soldiers to think this an excuse to avoid the weekly barracks cleaning scheduled for Friday nights. The trainee tries to establish that Marx is also Jewish. Marx at first resists the identification, and then accepts it. He shows no intention to help the Jewish trainees, but in fact he does smooth the way for them by talking with the Captain. Marx then finds himself walking to the Friday night services where he sits in the back row and watches the trainees from his company. He notices that Grossbart is entirely disengaged from the religious ritual.

Grossbart wheedles Marx for more favors, including assistance in obtaining Kosher food and a leave pass to attend a Passover Seder. In each instance Marx at first resists, and then grants the favor. He is most moved by the almost forgotten memories of his own childhood and his own family that are evoked by the young Jewish trainees. But in Grossbart's case, the claims of religious need are apparently lies. He returns from the supposed Passover Seder with a Chinese egg-roll for Marx, and a story about why the Seder did not work out. When Grossbart then asks Marx to help him avoid combat duty overseas, Marx refuses, only to find that Grossbart was able to pull strings with someone else. Marx then uses his own position to pull strings. He lies to another officer that Grossbart wants to see combat duty, and secures a reassignment to assure that he will.

The story is not unambiguous about Marx's motives. Perhaps there is some vindictiveness, some anger about being used by Grossbart, and being claimed as a co-religionist. Perhaps Marx finally seeks to protect the truly religious Jews from the bad reputation of a manipulative, deceitful, and self-interested coward like Grossbart. In that way, Marx accepts and defends his own identity as a Jew. The end of the story suggests both possibilities. Marx watches the trainees learn of their orders to ship out; he hears Grossbart weep, swallow hard, and try to accept his fate. "And then, resisting with all my will an impulse to turn and seek pardon for my vindictiveness, I accepted my own."[32]

Roth describes his story as "about one man who uses his own religion, and another's uncertain conscience, for selfish ends; but mostly it is about this other man, the narrator, who because of the ambiguities of being a member of his particular religion, is involved in a taxing, if mistaken,

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Fiction 602 (1968). The story also appears in Philip Roth, Goodbye, Columbus (1959). Roth was born in New Jersey; he obtained an M.A. from the University of Chicago, and has written many novels and short stories addressing cultural conflicts of Jews who assimilated to American culture to varied degrees.

32. *Defender of the Faith*, at 625.

conflict of loyalties."[33] The character of Marx is also involved in a construction of loyalties; a process of claiming, resisting and remaking his own identity. Whatever it means to be a Jew, the meaning is contingent on relationships with other Jews and non-Jews, and it depends on shifting affinities within and between both groups.

Roth's story demonstrates ways in which people remain interdependent with others even as they test out new versions of themselves. The story also suggests how an identity is founded on both the views of others and the individual; Marx is treated as a Jew by his non-Jewish fellow officers and he is treated as a Jew by the Jewish trainees. Both kinds of treatment influence his sense of himself as a Jew and, although he resists both, in the course of that resistance, he defines himself.

"Defender of the Faith" suggests the power that memory and history can wield in the process of defining a person's identity even as the person retains the ability to affirm or repress that identity. The Jewish trainees are able to appeal to Marx in part because they remind him of his own past and his own family and experiences that have remained a part of him even though he has put aside all forms of affiliation with Judaism. Marx feels Grossbart used their shared Jewishness to secure benefits he could not obtain from a non-Jewish officer. Marx's response, making sure that Grossbart is sent along with the other soldiers to combat duty, reflects a reconciliation with his Jewish identity and a personal effort to define it not as a primitive tribal loyalty, but instead as his own sense of self and his values. He composes his identity by accepting his heritage and by choosing to act mindfully of it. Marx who thought he had the power as a soldier, a war hero, and an officer to abandon his Jewish identity, finds that the expectations of others and his own history vigorously reassert themselves. He manages nonetheless to retain to some degree his ability to define himself.

B. Power and Identity

People vested with little or no power may nonetheless exercise control over their identities. Individuals craft images for others to believe in while preserving a different inner self. Sherley Ann Williams introduces her story "Meditations on History" with this comment about herself during the time she wrote it: "I sought during this time to conform, only to discover that even my attempts at conformity set me apart."[34] Paradox

33. Roth, Writing About Jews, Commentary (Dec. 1963) (quoted in How We Live, *Supra* n. 31, at 626).

34. Sherley Ann Williams, *In Honor of Free Women, Meditations on History*, in Midnight Birds 195, 196 (Mary Helen Washington ed. 1980). She also wrote, "I try to elucidate those elements in our lives on which constructive political changes, those that do more than blackwash or femalize the same old power structure, can be built." Id., at 198. Williams reworked the story as part of her novel, Dessa Rose (1986). Williams did graduate studies at Howard University and at Brown University, but decided not to pursue a Ph.D. because "I didn't want to spend the rest of my life

offers insights into experiences of belonging and exclusion. In "Meditations on History,"[35] a white male writer in 1829 interviews a black female slave whom he describes as "a wild and timorous animal finally brought to bay."[36] The woman was involved in a slave uprising, but her execution is postponed so that her pregnancy can reach full term—and her child can become the possession of the master. She refuses to speak to the writer who is researching the facts of the uprising and the ensuing trial. It is through his eyes that we see her, or who he thinks she is. He describes her as an animal and as someone casting spells.[37] He notes that she moans and sings in ways he does not understand, and even when she responds to his questions she remains incomprehensible.[38]

The writer is impatient with the slave woman's refusal, or inability, to answer his questions about the motivations behind the slave revolt and the events that led to the execution of nineteen people and punishment of ten others. To his irritation, she does not look him in the eye, and she hums "an absurd, monotonous little tune in a minor key" over and over.[39] She tells of acts of resistance by the African Americans toward their masters. She is curious about his writing, and asks why he is recording what she says. He assumes she is set at ease when he responds that his book will be written "in the hope of helping others to be happy in the life that has been sent them to live."[40] But, after talking a while, she asks if he really thinks that what she says will help people be happy in the life they are sent, and if so, then " 'Why I not be happy when I live it? I don't wann talk no more.' "[41]

When they meet again, the woman intones her monotonous melody again. It is Sunday, and the writer reads from the Bible and asks her to stop humming. She says the song is about righteousness and heaven; he asks her to sing it and she does, which pleases him. The next day he resumes questioning her. She responds initially, but returns to humming.

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poring over other people's work and trying to explain the world thru their eyes." Sherley Ann Williams, in Midnight Birds, 195, 198. She has published works of poetry, fiction, and literary criticism.

35. One critic argues that Williams takes her title from the William Styron's note at the beginning of The Confessions of Nat Turner: " 'Perhaps the reader will want to draw a moral from this narrative, but it has been my own intention to re-create a man and his era, and to produce a work that is less an 'historical novel' in conventional terms than a meditation on history.' " Elizabeth Meese, (Ex)Tensions: Re-Figuring Feminist Criticism 136 (1990) (quoting William Styron, The Confessions of Nat Turner ix (1967)). Meese comments: "Surely the moral Williams cares to draw differs from the one Styron, or many of her (white) feminist readers for that matter, must have envisioned, just as her 'meditations on history'—spoken (of) in the plural and from an/other perspective—take a radically different form and meaning from his." *Id.*

36. *Meditations on History*, *supra*, note 34, at 211.

37. *Id.*, at 213-14, 215.

38. *Id.*, at 225.

39. *Id.*, at 226.

40. *Id.*, at 231.

41. *Id.*, at 234.

He realizes that she is capable of smiling and joking and even sees that she is pretty, but he still thinks her unintelligent and like an animal.

The writer's attention quickly shifts when a posse is formed to locate a settlement of escaped slaves. As he joins the posse, the writer hears the slave woman singing again. Before he departs, he chats with her, thinking he will yet discover the origins of the slave insurrection. She is still no help, however, which angers him. The woman resumes her song, and he leaves with the posse. When he returns she has escaped with the help of three black men who had participated in the uprising. Beyond a certain point, no trace of her can be found.

Mary Helen Washington comments that in the story the white man defines the slave woman as "foreign, different, inferior, non-white, and non-male."[42] She continues, "We finish the story, however, convinced of her power, not his. She learns enough about his psychology to engineer his defeat."[43] She tricks him into thinking she is incompetent and crazy, when in fact she has been planning her escape and, through her songs, communicating the plan to her friends. She fashions an identity that plays into his prejudices in order to purchase time and space to secure her freedom. Williams imagines this brave and smart slave woman as a means to craft a new history and a renewed African-American identity. Renaming and reclaiming experiences of resistance, Williams recasts images of contemporary black women in light of a reconstructed past.[44]

Williams suggests that people who lack power can nonetheless find space for free action by constructing identities that fulfill the expectations of others and thus distract them. She explores how people with little power may also find latitude for action by creating expectations in others or by remaking their own desires in line with others' expectations.[45] Some works of fiction explore how people with relatively more power may nonetheless find their identities challenged and changed by the actions of those in their employ or below their social station.

Flannery O'Connor's story "The Displaced Person"[46] is a complex

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42. Mary Helen Washington, *In Pursuit of Our Own History*, in Midnight Birds, xiii, xxii (1980).

43. *Id.*

44. She dedicated the story to Angela Davis, and prefaced the story with this quotation from Davis: "The myth [of black matriarchy and the castrating black female] must be consciously repudiated as myth and the black woman in her true historical contours must be resurrected. We, the black women of today, must accept the full weight of a legacy wrought in blood by our mothers in chains. . .as heirs to a tradition of supreme perseverance and heroic resistance, we must hasten to take our place wherever our people are forging on towards freedom." *Meditations on History*, *supra*, note 34, at 200 (quoting Angela Davis, Reflections on the Black Woman's Role in the Community of Slaves) (brackets in the original).

45. Cf. David Leavitt, *Danny in Transit*, in Family Dancing 95 (1983) (a child learns he can avoid adult demands by throwing tantrums and then learns he can claim the choice pushed upon him—the choice of going to boarding school—and thereby build his own sense of dignity).

46. Flannery O'Connor, *The Displaced Person*, in Collected Works 285 (1988). Flannery O'Connor, who attended Georgia State College for Women and the writing program at University of Iowa, spent most of her life in Georgia and her fiction is often described as Southern Gothic. *See*

evocation of the world of a Southern farm owned by a white woman named Mrs. McIntyre, the widow of a prominent judge. She runs her farm with the help of a poor white family and two poor black men. The wife in the poor white family, Mrs. Shortley, is acutely attuned to the relative status of everyone in her world; she listens to Mrs. McIntyre complain about the "[p]oor white trash and niggers" she has employed in the past but knows that "[i]f Mrs. McIntyre had considered her trash, they couldn't have talked about trashy people together."[47] Mrs. Shortley elevates her own sense of self by joining with her boss, Mrs. McIntyre, to condescend toward others.[48]

Everything changes with the arrival of the "Displaced Person" and his family—refugees from Poland who are hired by Mrs. McIntyre and whose presence disturbs Mrs. Shortley's sense of place. Indeed, over the course of the story, the presence of the "Displaced Person" and his family shakes up everyone's delicately interconnected sense of social standing and personal worth at the farm. Right from the start, Mrs. Shortley notes how Mrs. McIntyre accords the Displaced Person and his family a special greeting never given to other hired help.[49] Mrs. Shortley tries to maintain her superiority by refusing to learn how to pronounce "Guizac," the family's name. Instead, she calls them the Gobblehooks. She imagines them as tainted by their foreign language and their contact with a brutal war. But Mr. Guizac proves to be an efficient and productive worker, and that simple fact jostles and then topples the positions of everyone else at the farm.

Before the Guizacs' arrival Mrs. Shortley had imagined herself as a giant angel telling the Negro employees that they would have to find other work because of the changes at the farm. Now, however, she realigns herself in relation to the Negro workers and imagines standing up for them in case their jobs become threatened by the efficient productivity of the European arrival.[50] Mrs. McIntyre starts to "act like somebody who was getting rich secretly and she didn't confide in Mrs. Shortley the way she used to."[51] Mrs. Shortley comforts herself with the old adage, "The devil you know is better than the devil you don't"[52] and clings to the sense of herself as someone her boss knows, someone like

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How We Live, 787 (Penney Chapin Hills and L. Rust Hills eds. 1968). When referring to the African Americans in the story, O'Connor uses the term Negro, which I will use in the context of this story as well.

47. *Id.*, at 293.

48. She is irritated by the "illogic of Negro-thinking" when one of the black employees questions Mrs. Shortley about how a displaced person has nowhere to go. " 'It seem like they here, though,' the old man said in a reflective voice. 'If they here, they somewhere.' " *Id.*, at 290.

49. *Id.*, at 285.

50. *Id.*, at 298.

51. *Id.*, at 299.

52. *Id.*

her boss. But in the very desperateness of this claim to familiarity, she reveals doubts about it and about its durability.

Mrs. Shortley overhears Mrs. McIntyre tell the priest her plans to discharge the Shortleys, and immediately rushes to pack up her family and things and leave the farm.[53] As they race off, all their belongings squeezed in the car with their children and themselves, her husband asks where were they going. With that question drumming in her ear, Mrs. Shortley furiously rearranges the belongings in the car. "[T]hen all at once her fierce expression faded into a look of astonishment and her grip on what she had loosened."[54] Having bolted from the farm, she loses hold of who and where she is.

Back at the farm, Mrs. McIntyre tells Astor, the old Negro employee, that she will make do without the Shortleys. Astor and Mrs. McIntyre exchange sentences acknowledging their bond through time as the two people who see others come and go but who themselves stay on through it all.[55] Mrs. McIntyre also emphasizes nonetheless that the Guizacs will stay. She thereby disturbs Astor's sense of stability and security of place.[56]

Mrs. McIntyre later finds Guizac talking with the younger Negro, Sulk, who holds a photo of a young girl. Guizac is negotiating a marriage between Sulk and Guizac's cousin. Mrs. McIntyre thinks that the girl in the photograph looks to be about twelve, although Guizac says she is sixteen. This cousin is still waiting in a displaced persons camp in Europe. The idea of an interracial match horrifies Mrs. McIntyre. She shrieks at Sulk, she goes to the house and cries, she sits motionless in the office of her deceased husband, waiting for strength. She goes to call Guizac a monster for planning to "bring this poor innocent child over here" and trying "to marry her to a half-witted thieving black stinking nigger!"[57] She looks at Guizac "as if for the first time." He seems artificial and pasted together from pieces. She tells him how impossible such a marriage would be, how wrong it would be to excite the young black man. She cannot even listen as Guizac explains that his cousin has been in the camp for three years, that her mother has died there.[58] Something clicks into place, and Mrs. McIntyre declares that she cannot run her farm without "my niggers" but she can run it without Guizac, so he had better terminate all discussion of the marriage between his cousin and Sulk. "This is my place," she says. "I say who will come here and who won't."[59] She later tells the priest that Guizac just does not fit in, and is

53. *Id.*, at 303.
54. *Id.*, at 305.
55. *Id.*
56. *Id.*, at 307.
57. *Id.*, at 313.
58. *Id.*, at 314.
59. *Id.*

not her responsibility.[60]

Mr. Shortley returns to the farm—and Mrs. McIntyre realizes how much she had missed his wife. But Mrs. Shortley does not return; she had died of a stroke the very day they left the farm.[61] Mrs. McIntyre mourns her as if they had been relatives; she tells Mr. Shortley she plans to discharge the Displaced Person and rehire Mr. Shortley. She thinks of herself as obliged to Mr. Shortley, as one of her own people, as someone who fought in the world war for his country.[62] But she postpones discharging Guizac which irritates and dismays Mr. Shortley. Mrs. McIntyre seems weighted down, inattentive.[63] She has nightmares; she worries about the economic costs of firing her most productive worker and the emotional difficulty of actually discharging someone. For although she has threatened to do so in the past, she has never before let anyone go; people have always left on their own.[64]

Mrs. McIntyre starts off to fire Mr. Guizac and she finds him lying under the tractor fixing it. She watches Mr. Shortley drive another tractor in front of it and brake it on an inclined ground. Then, she watches the brake slip and the tractors collide, crushing Guizac. In the seconds in which this happens, she feels "her eyes and Mr. Shortley's eyes and the Negro's eyes come together in one look that froze them in collusion forever."[65]

Shocked and confused, Mrs. McIntyre herself now feels like a foreigner, a stranger.[66] Mr. Shortley soon thereafter leaves the farm, as does Sulk. Astor will not work alone. Mrs. McIntyre sells the farm and becomes bedridden, losing her sight and voice.[67]

In the course of this story, then, the introduction of someone from outside the social hierarchy and someone indifferent to its rigid rules challenges each person's relationships to the others so much that the relationships crumble. After first straining and then revising patterns of loyalty and identification, the experience undermines Mrs. McIntyre's identity as owner and her place as mistress of the farm. Her dependence on Guizac already alters her sense of herself as someone in command, as someone who could fire an employee, as someone who had never done so and had now to face a different sense of herself. She loses her position, just as Mrs. Shortley does. Each person on the farm is displaced by the anxieties, hopes, and fears of the others.

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60. *Id.*, at 316.
61. *Id.*, at 318.
62. *Id.*, at 319.
63. *Id.*, at 321.
64. *Id.*, at 322.
65. *Id.*, at 325-326.
66. *Id.*, at 326.
67. A subtheme throughout the story is her relationship with the priest, who had sponsored the Displaced Person and who had consistently tried to convert Mrs. McIntyre; at the end of the story, the priest becomes Mrs. McIntyre's only visitor. *Id.*, at 327.

To negotiate means "to hold communication or conference (with another) for the purpose of arranging some matter by mutual agreement"; it also means "to deal with or manage."[68] To treat identity as something negotiated, as do these works of fiction, is to extend the theme of interactions into the exchange between author and reader.[69] Merely noticing the inevitable mutuality of meaning—the contributions of readers to the meanings of texts and of outsiders to the meanings of identity—should not supplant needed attention to the patterns of social, political, and economic power within which people relate. These patterns create constraints against which individuals may push, but each person is situated differently in relation to constraints. Identities are not stable, fixed or innate, but nor are they entirely mutable at the wishes of anyone. The weight of one's own experiences and social position and the press of others' expectations and practices stack the negotiations over identity.

II. Law and Identity

Questions of identity crop up as legal problems. Some of these questions are quite immediate and seem amenable to scientific or empirical answers: who is the father of the child? Who is this woman's husband? Who is the owner of this property? Yet, even the answers to these questions can be challenged and such contests reflect the significance of mutuality, negotiation, and complex patterns of power relationships within which even simple matters of identity take hold.

Courts use blood tests and genetic typing to establish paternity. But the question of who is a child's "father" reflects community rules about marriage and parenthood, the child's own perceptions and feelings, and a man's own acceptance of the role.[70] Similarly, societal rules, a woman's desires and a man's own efforts to take on the identity of another can create a setting for enormous disagreement over who is a husband, as

68. I Compact Edition of the Oxford English Dictionary 1910 (1971).

69. *See generally* Wayne Booth, The Company We Keep: An Ethics of Fiction (1984); James Boyd White, When Words Lose Their Meaning (1988).

70. For an analysis of community rules affecting the definition of fatherhood, *see infra* (discussing Michael H.). Proponents of psychological notions about parent/child bonds have introduced a concept of "psychological parenthood" which looks to the child's own perceptions and feelings about who is the parent. *See*, e.g., Joseph Goldstein, Albert Solnit & Anna Freud, Beyond the Best Interests of the Child (1973). And the man's own voluntary acceptance of the role means more than engaging in the physical act that produced the child; the Supreme Court has held that for purposes of asserting due process rights to participate in an adoption proceeding that would terminate his claims about a child, an unmarried father must also have undertaken a significant custodial, personal, or financial relationship with the child. Lehr v. Robertson, 460 U.S. 248 (1983). Finally, whatever commonsense or scientific definitions of fatherhood may have worked in the past, the advent of new productive technologies exposes the definition of a father as a matter of social choice from among many possible candidates, including the person who donates the sperm, the husband of the woman who carries the child, the man who seeks adoption or who has undertaken an actual relationship with the child. In short, communal definitions, the child's own participation, and the man's efforts can all contribute to negotiations over the identity of the father.

Natalie Zemon Davis explored in her work, *The Return of Martin Guerre*.[71] And so basic a legal question as who is the owner of property can be enormously contested not only by people claiming the same ownership rights, but also by people in relationships of reliance on or mutuality with the owners.[72]

When lawyers and judges neglect the dynamic negotiations over questions of identity, and treat identity as simply something that exists innately and can be uncovered, they risk producing not only unfortunate results, but also unconvincing reasons for the results. If lawyers and judges treat identity as something discoverable rather than forged or invented, they hide the latitude for choice and struggle over identity. At the same time they exercise their own power to make those choices. Lawyers and judges may defend themselves by declaring that they do not decide questions of identity; they simply interpret and apply the law. But when a critical link in the chain of legal reasoning asserts a particular meaning of identity, I challenge that defense. The use of a specific notion of identity to resolve a legal dispute can obscure the complexity of lived experiences while imposing the force of the state behind the selected notion of identity.

Translation into legal categories and attention by legal authorities transforms the law and lawyers themselves into additional participants in the negotiations over identity. Lawyers and judges need to pay attention to their own contributions to the constraints within which the identities of others are negotiated and assigned. In practice, lawyers and judges also need to consider whether one person's presentation of self is devised to gain an advantage, and whether another's opposition to the claimed identity similarly reflects self-interest. Works of fiction such as those discussed in the last section illuminate how it is possible to acknowledge negotiations over identity while also recognizing the larger patterns of power and constraint that may undermine an individual's choice.

Legal preoccupation with identity may reflect society's increasing anxiety about its fragility. Although questions of identity appear in biblical stories and classical Greek dramas,[73] identity is in many ways a modern

71. Natalie Zemon Davis, The Return of Martin Guerre (1983). Even after the advent of social security cards, finger-prints, and other techniques of identification, disputes over identity can become complicated where an individual takes on more than one identity, and forms relationships with different groups of people who will vouch for him. *See Many Identities Emerge for Amnesia Victim*, N.Y. Times, March 14, 1990, A26 col. 1 (amnesia victim first identified by family members as one person and then as two other people, based on employment records and employee reports despite, three different social security numbers).

72. *See* Joseph William Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611, 663-699 (1988).

73. Consider the story of Moses and his response to discovering that he was not an Egyptian prince but instead an abandoned son of Jewish parents; consider the story of Oedipus and his discovery that his wife was his mother, and his failure to avoid a foretold destiny.

preoccupation.[74] After world wars, industrial dislocation and exposure to mass communications people may have a greater sense of the mutability of their identities. Encounters with people of more varied ethnic, racial, religious and class backgrounds challenge an individual's sense of self and community.[75] Perhaps identity becomes important when it becomes a question, and it becomes a question when individuals and groups are mobile and able to change some of their identifying traits. When people come into frequent contact with others unlike themselves they can both heighten and submerge their sense of distinctiveness.[76]

Lawyers and judges who address legal questions of identity should keep in mind its kaleidoscopic nature. They should examine the multiple contributions given to any definition of identity. They ought to examine the pattern of power relationships within which an identity is forged. And they need to explore the pattern of power relationships within which a question of identity is framed. Where people debate the identity of others, it is important to consider the contrast between choice and assignment. Who picks a given identity, and who is consigned to it?

A. Identity, History, and Anthropology: The Mashpee Case

Lawyers and judges might find instruction in the debates among anthropologists. Anthropologists currently engage in debates over the field's methods and purposes. Anthropologists know that they cannot avoid influencing the identities of the cultures they describe. Contact with outsiders can change a group's sense of itself. A current debate about the authenticity of the traditional tales of origin told by the Maori of New Zealand exposes the complex effects of prior contacts with outsiders. Some evidence suggests that European anthropologists contributed to the tales of origin elaborated by the Maori. Members of the Maori argue that whatever the source of their story of origin, it is now their story.[77] Objective description seems impossible to anthropologists who know that they have their own points of orientation that differ from those they describe and they understand that the stability of any individual or group identity seems at risk of disruption, change, and growth

74. *See generally* William Barrett, Irrational Man (1960) (discussing modernity and existentialism).

75. On the other hand, in the United States it is probably more difficult to abandon one identity and take on another now than in the days before social security numbers and before the Western territories became states.

76. *See* James Clifford, The Predicament of Culture (1988) (exploring post-colonial contexts of debate over identity especially in light of the effect of prior intercultural contacts on any given group's sense of itself). *See also* Anthony Cohen, The Symbolic Construction of Community (1985).

77. John Noble Wilford, *Anthropology Seen as Father of Maori Lore*, N.Y. Times, Feb. 20, 1990, C1 col.4, C12 col.1. Besides reviewing this particular debate, the article discusses contemporary examinations of anthropology itself and the mutual effects of anthropologists and the cultures they study; the article discusses the work of Allan Hanson, James Clifford, George Marcus, and Clifford Geertz. *See* also Clifford Geertz, Works and Lives: Anthropologist as Author (1988).

through contact with an observer.[78]

James Clifford writes extensively about the interaction between cultures and between anthropologists and the peoples they study. He found—or created—in the litigation over Mashpee Indian land rights a marvelous case study for his thesis that culture reflects a process of transplantation, translation, and transmutation. His work explicitly addresses the contingency of identity and the important contributions of observers and their own perspectives to what they know about the identities of others.[79]

For example, Clifford summarizes the lawsuit over 16,000 acres of land in which members of the Mashpee community challenged land transfers occurring since the 18th century as a violation of federal law.[80] To prevail, the plaintiffs had to establish that they were the descendants of a tribe and that they remained members of a viable tribe with a continuous existence. Clifford describes how the lawsuit presented two versions of the history of Mashpee tribal status. According to one view, there never was a tribe.[81] People from varied Indian tribes and other minority groups settled in the area and intermarried with whites. They sought full citizenship in Massachusetts and in the United States and pursued assimilation into American culture. Most of the residents converted to Christianity during the course of the 18th century. Through a period of political changes, Mashpee became a town. Its early legal form as a collective plantation prevented sales and purchases of individual plots of land. During the 19th century these initial restraints on alienating land prompted debates over reform. By 1870 the state legislature had abolished the special restrictions and transfers of land to outsiders began and continued for the next 100 years. Although Mashpee citizens show an attachment to their ethnic heritage, they do not represent a tribe. Instead, they are descendants of an eclectic group of Native American, black, and white people who lived in the Mashpee area.[82]

Clifford summarized the alternative history also presented at trial. In this narrative, the very idea of "tribe" is a historical invention by whites and reflects the organizational forms imposed by white America's regulation of Indians during the 19th century. Traits of political organization,

78. *See* Geertz, *supra*, at 144: "The moral asymmetries across which ethnography works and the discursive complexity within which it works make any attempt to portray it as anything more than the representation of one sort of life in the categories of another impossible to defend."

79. James Clifford, *supra* note 76.

80. *Id.*, The Non-Intercourse Act of 1790 protected tribal groups from exploitation by whites who sought to purchase tribal lands without full compensation. The Act required Congressional approval before the alienation of Indian lands. In the context of a suit by the Passamaquoddy and Penobscot Indians in Maine, the tribes received over $80 million and authority to acquire properties as an out-of-court settlement. *See* Paul Brodeur, Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England (1985).

81. Clifford, *supra* note 76, at 294-302.

82. *See also* Francis Hutchins, Mashpee: The Story of Cape Cod's Indian Town (1979). Hutchins served as the chief expert witness in the trial on behalf of the defendants.

religious identity, kinship, and distinctive culture are important to whites who classify Indians, not to Indians themselves. Thus, outsiders saw the retention of collective land ownership in Mashpee long after other Cape Cod towns had abandoned it as a sign of backwardness, while insiders considered it an important device for preserving traditions in the midst of changing times.[83]

The tribe's version of Mashpee history treats conversion to Christianity as no abandonment of Indian identity because the Native Americans view religion inclusively and pragmatically. This account emphasizes that most of the Christian ministers in Mashpee have identified themselves as Indians. The churches in fact played a role in preserving a sense of cultural heritage in Mashpee. Intermarriage between Indians and non-Indians does not represent assimilation into mainstream American culture but instead the capacity of the Mashpee to absorb outsiders. Most importantly, the group continuously saw itself as a group apart. The leaders of the town and its citizens maintained a continuous presence on the same land for several hundred years. They claimed the identity of "Indian" even when it hurt them in the larger community. They preserved traditions and passed on their history to succeeding generations even while appearing to assimilate to the dominant white culture. When they revived aspects of traditional culture after periods of de-emphasizing them, the Mashpee did not fabricate their identity but instead demonstrated the importance of choice in reaffirming identity.[84] This point is echoed in Philip Roth's story about an assimilated Jewish army officer who reaffirms his religious identity after a period of assimilation.[85]

As Clifford portrays the Mashpee Indian trial, the Mashpee identity reflected multiple sources and contributions from inside and outside the community. Clifford notes how the power relationships within which people construct identities complicate any decision about the tribal status of the Mashpee. For example, Clifford contrasts two interpretations of the records of a town debate in 1869 over whether to end all restrictions on land sales. In one interpretation, the town members sought assimilation and only disagreed about the timing of changes that would bring it about. Those who favored quick change rejected the paternalism and second-class status embodied in state restrictions on sales of Indian lands; those who opposed sudden change feared losing their community. One leader said the community needed another generation before it could responsibly exercise the freedom to sell land.[86] The town voted against

83. Clifford, supra note 76, at 305.

84. *Id.*, at 285-293.

85. *See supra* text accompanying note 31 (*discussing Defender of the Faith*).

86. Clifford, *supra* note 76, at 299. This view comported with an attitude held by many whites and embodied in the Dawes Act. *See* Leonard A. Carlson, Indians, Bureaucrats, and Land: The Dawes Act and the Decline of Indian Farming 4 (1981) (describing legislation that allocated Indian reservation lands to individual Indians in an effort to encourage "each family to farm its own land

eliminating the land restrictions, but the discussions indicated widespread agreement that their removal should be a future community goal.

Yet, the tribe's interpretation of the 1869 town debate maintained that "public arguments about Mashpee's 'immaturity' should be seen as ways of addressing an outside audience, the Massachusetts General Court, which still thought of the plantation as a ward of the state and which had already decided and again would arbitrarily decide its fate. It would be impolitic in addressing this body to say that Mashpee rejected full township status in the name of a distinctive vision of Indian community and citizenship. An argument for delay couched in paternalist rhetoric was more likely to succeed."[87] Just as a slave woman in Sherley Williams' story could find latitude for movement by playing upon a white journalist's stereotype of her identity, these Native Americans could make space for their continued existence by playing into white expectations of Indian immaturity and desire to assimilate.[88] Attention to the ways people with little power can deploy notions of identity and gain some control over their lives complicates interpretations of the Mashpee population's identity. If the Mashpee leaders manipulated white preconceptions in order to prolong their distinctive community, the Massachusetts legislature's decision to remove restrictions on the Mashpee lands in 1870 is not necessarily evidence of the tribal status of the Mashpee at that time, or later.

The case of the Mashpee underlines two levels for understanding identity. The first involves the mutual constructions by insiders and outsiders; the second emphasizes the impact of unequal power relationships. Signs of assimilation by a group treated as less powerful than the majority deserve a second look because they may indicate subtle acts of resistance and accommodation by people seeking to retain an independent identity without risking conflict or further suppression. When identity becomes a legal issue, the legal institutions add another layer of power relationships to the dynamic between majority and minority groups. Asked to decide whether the Mashpee were a tribe,[89] the jury of non-Indians itself sat in a position of power not only in the context of the broader social and political context of American life but also in the context of the lawsuit.

The jury rejected the plaintiffs' claim that a tribe, under federal law, existed continuously from the period before the colonies through 1976. But the jury also rejected the defendants' claim that there had never been

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and acquire the habits of thrift, industry, and individualism needed for assimilation into white culture.").

87. *Id.*, at 308. In this interpretation, the town members showed how well they knew the attitudes of the white politicians about the Mashpee, and played off of those attitudes in order to purchase the space and autonomy for pursuing their own vision of governance.

88. *See supra*, text accompanying note 44.

89. The federal district court judge asked the jury to answer whether a tribe existed in 1790, 1834, 1842, 1869, 1870, and 1976 because these were critical dates in the history of Mashpee pertinent to the land claims. Clifford, at 333.

tribe.[90] Yet the jury's resistance to accept either interpretation entirely may also reflect discomfort with the notion of "tribe," especially as a concept defined by whites to describe and regulate nonwhites.[91] Or the jury's decision may express uneasiness with the pretense of a singular history, given the contradictory narratives offered by witnesses. By refusing to define the tribe in one way, the jury thus may have acknowledged what its members probably knew about themselves: identities can change and still represent important continuities with the past. This insight animates Mukherjee's story about the woman from India who experiences a shift in identities while studying in the United States and yet another shift when her husband comes to visit.[92]

The question of people's identity will forever be befuddling if detached from the purposes for which the question is being asked. Once the purposes are disclosed, the perspective of the inquirer, the perspective of the evaluator, the perspective of the community, and in some cases, self-proclaimed identity become critical. Neither perceptions by outsiders nor claims of insiders are "objective." Each reflects interests and a position, a perspective. If the purpose of asking about the tribal status of the Mashpee is to determine whether the plaintiffs should obtain compensation for past land sales or protection against future land sales, that purpose is cut off from consideration by an intervening question: are the Mashpee a tribe? Talking about the objectives in the case directly exposes questions of power, politics, and justice, but these are in fact the same questions embedded in descriptions and assessments of identity.

B. Identity, Family, and Presumptions: Michael H. v. Gerald D.

Sometimes legal rules are designed to close off discussion—to cut off some inquiries based on the view that certainty may be more important than truth or even more important than fairness. For example, legal presumptions, especially those that are irrebuttable,[93] work by a legal rule that states that proof of x shall be deemed to be proof of y. If the presumption is irrebuttable no amount of contrary evidence about not-y can make a difference to the legal conclusion.[94]

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90. The jury found that no tribe existed in 1670, but a tribe existed in Mashpee in 1834 and 1842.

91. The relationship between an assigned name and a chosen identity can be quite complex. One observer described it this way: "The program of naming and unnaming takes the following historically determinate steps (different phases of a development sequence): ethnic reality realizes that it has a "name," but this name is forced on it by the oppressor, that is, it is the victim of representation; it achieves a revolution against both the oppressor and the discourse of the oppressor and proceeds to unname itself through a process of inverse displacement; it gives itself a name, that is, represents itself from within its own point of view; and it ponders how best to legitimate and empower this new name." R. Radhakrishnan, *Ethnic Identity and Post-Structuralist Difference*, Cultural Critique 199, 208 (1987).

92. *See supra*, at text accompanying note 13. (discussing A Wife's Story).

93. Such presumptions are also sometimes called "conclusive."

94. *See* Michael H. v. Gerald D., 109 S.Ct. 2333, 2340 (1989) (Scalia, J., plurality opinion) ("A

Questions of identity—for legal purposes—are sometimes handled through an irrebuttable presumption. For example, many states have a rule that a child born to a married woman who lives with her husband is presumed to be the child of the husband.[95] Such a rule may reflect a goal of eliminating uncertainty about the parentage of children born to married people and also an aim of reducing the chances that husbands may refuse to accept paternity, including support obligations, when their wives have children. It may also stem from a time when paternity was difficult to establish and when illegitimacy stigmatized children and deprived them of inheritance rights.[96] Either set of goals could be reexamined in light of changing cultural and technological developments affecting parentage. For example, advances in the technology of blood tests to establish paternity could render obsolete the premise that the presumption solves an otherwise protracted question.[97] A conclusive presumption forecloses any such reconsideration.[98]

The Supreme Court faced a challenge to a presumption of legitimacy in Michael H. v. Gerald D.[99] There, Carole gave birth to Victoria while married to Gerald; Carole told Michael she thought he was the father and blood tests showed a 98.07% probability of that fact which Carole never contested. Carole and her husband spent time apart. Carole spent some of that time with Michael, and Michael treated the child as his own during some periods; during some periods they lived together as a family. Carole returned ultimately to Gerald, and Michael sought visitation rights. Based on the arguments of an attorney and guardian ad litem for the child, and on the evaluation of a psychologist, a court ordered limited visitation rights for Michael during the litigation. Meanwhile, Gerald, the husband, successfully sought to terminate the litigation on the basis of the conclusive presumption in California law that the child born to a cohabiting married couple is the offspring of the marriage.

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conclusive presumption does, of course, foreclose the persona against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate.")

95. E.g., Cal. Evid. Code Ann. sec. 621 (West Supp. 1989). The California rule does allow rebuttal only within two years after the child's birth, and then, only at the request of the husband or wife, not a third party. Sec. 621 (c), (d).

96. The California statute was enacted in 1872. 109 S.Ct., at 2338. A similar rule was part of the common law tradition. E.g., 1 Blackstone's Commentaries 456 (Chitty ed. 1826). Although illegitimacy may still be a stigma in some communities, by law, it is not a permissible basis for denying a child inheritance and succession rights. Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977). Similarly, the constitution has been interpreted to assure some protected parental relationship for unwed fathers. *See* Stanely v. Illinois, 405 U.S. 645 (1972); Caban v. Mohammed, 441 U.S. 380 (1979).

97. *See* Little v. Streater, 452 U.S. 1, 6 (1981) (examining changes in blood test accuracy). Moreover, the 1872 statute was amended several times. *See* Michael H. v. Gerald D., 109 S.Ct. 2333, 2339 (1989).

98. There may indeed be a problem of infinite regress here: if the presumption forecloses consideration of alternative evidence in a given case, does it also foreclose consideration of the presumption itself, and then consideration of the consideration of the presumption?

99. 109 S.Ct. 2333 (1989).

Michael pursued on appeal a constitutional challenge to the presumption as a violation of both his right to procedural due process and his protected liberty interest in his relationship with the child. In a plurality opinion for the Supreme Court, Justice Scalia wrote, "California law, like nature itself, makes no provision for dual fatherhood."[100] By invoking nature, Justice Scalia treated the presumption as inevitable and immutable—as beyond reconsideration. The plurality opinion also rejected Michael's arguments more specifically[101] but this introductory remark sets the tone for the analysis. Identity is treated in the opinion as natural, discoverable, and unable to be changed. Even when acknowledging that alternative understandings of family identities are possible, the plurality converts the issue into one that can be answered by reference to an unchanging source of evidence: "the historic practices of our society" which recognize a protected family unit.[102] The plurality's approach is intended to reduce disputes and to treat the judicial inquiry as one readily answered by pre-existing traditions.[103]

In pursuit of that purpose, the plurality's approach exemplifies the mistaken view that identities are fixed and knowable, rather than contingent and capable of change. Perhaps Justice Scalia's opinion never intended to speak to the nature of identities, and only meant to preserve the timesaving device of a conclusive presumption. Yet, the plausibility of the presumption in question depends upon popular as well as legal conceptions of the identity of a father. By referring to tradition and nature, Justice Scalia himself turns to popular and historical notions of fatherhood. The plurality opinion also neglects the varied sources of a father's identity. Besides or even instead of biological connection to the child, the father may have an emotional relationship, a financial responsibility, or a set of caretaking functions. Treating as conclusive the pre-

100. 109 S.Ct., at 2339.

101. Justice Scalia rejected the procedural due process objection on the ground that the presumption did not deny Michael procedures but instead represents a classification that survives review as to the fit between its terms and its purposes. 109 S.Ct., at 2341. The opinion also rejected Michael's claim that the presumption violated his constitutionally protected liberty interest in a relationship with his daughter on the ground that only fundamental liberties are protected, and that only traditional family ties fall within that sphere of protection. *Id.*, at 2341-2345.

102. 109 S.Ct., at 2342. In stressing this look at specific historical traditions, Justice Scalia's analysis bears consequences for the entire project of judicial interpretation, especially of terms such as due process and liberty. Justice Scalia's effort to clarify this historical test prompted sharp dissents even from Justices O'Connor and Kennedy, who otherwise joined his opinion, 109 S.Ct. 2346 (O'Connor and Kennedy, JJ., concurring in part), as well as from the dissenting justices. 109 S.Ct. 2349 (Brennan, J., joined by Marshall, J., and Blackmun, J., dissenting). *See also* 109 S.Ct. 2360 (White, J., dissenting).

103. This dimension of the plurality prompted especially sharp dissents from Justices who argued in contrast that the Constitution's meaning should evolve in relation to changing social practices and attitudes. 109 S.Ct., at 2349, 2349-2351 (Brennan, J.,dissenting); *Id.*, at 2360, 2360-2361 (White, J., dissenting). *See also* Loving v. Virginia, 388 U.S. 1 (1967) (rejecting state law forbidding interracial marriage as unconstitutional burden on fundamental liberty); Stanely v. Illinois, 405 U.S. 645 (1972) (rejecting presumption that unwed father is unfit caretaker for his children).

sumption that the husband of the mother is the father of the child allows the plurality to reinforce structures of social and institutional power that have selected some family forms as preferable and thus recognizable. Most importantly, the plurality seeks to cover its own tracks despite its critical power to choose what kind of family roles to permit, and even what kinds of debates over family roles to countenance.

The plurality thus hides behind a historical test to identify the traditional family forms that are entitled to constitutional protection. This test for answering questions about family is faulty in part because it disguises the exercise of legal power in the fiction of a discoverable past. Histories of extended families', households', and subgroups' experiences render problematic Justice Scalia's basic notion that "family" has had a stable meaning even within Anglo-American culture over time.[104] Changing patterns of divorce and remarriage and apparently increasing births of children outside of marriage makes the emphasis on a nuclear family with one father and one mother less and less germane to the lives of real people living today.[105]

Moreover, within any given period of time, family roles have acquired meaning through a complex process of interpretation by the people who fill them.[106] Family identities are unavoidably relational. The woman in Muhkerjee's story developed a new identity while living apart from her husband, and shaped still another while spending time with him in a world she knew better than he did. The very meaning of her status as "wife" changed in the course of these experiences in relation to her husband and to other people. Similarly, a woman is a mother in relation to a child; a boy is a brother in relation to a sibling; they are a family in relation to one another. None of these relationships is intrinsic to a single person; each depends upon the patterns of connection between indi-

104. *See, e.g.*, Steven Mintz, A Prison of Expectations: The Family in Victorian Culture 14 (1985) ("Demographic historians have found that while in the seventeenth and early eighteenth centuries in England and colonial America the nuclear household (i.e., a husband and wife living in a private, independent household) was predominant, most people, at least in their youth, lived for a time in more complex households, as a servant, an apprentice, a trade assistant, or a boarder"). *See also* Carol Stack, All Our Kin (1974) (exploring kin relationships among unrelated people within poor Black communities); Lawrence Stone, The Family, Sex and Marriage in England 1500-1800 100-108 (Abridged ed. 1979) (exploring transition from extended family to nuclear family forms); Carol Weisbrod, The Bounds of Utopia (1980) (examining 19th-century utopian communities and their use of law to create alternative family and community forms). American law has sometimes recognized plural traditions in family identity, *e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion) (recognizing extended family as traditional form deserving constitutional protection), and sometimes not, *e.g.*, Reynolds v. United States, 98 U.S. 145 (1890) (denying free exercise objection to criminal sanction against polygamy).

105. *See* Statistical Abstract of the United States 51 (1990) (comparing 10.1% single parent households in 1970 with 22.2% single parent households in 1985): David Chambers, *Stepparents, Biologic Parents, and the Law's Perception of "Family" after Divorce*, in Divorce Reform at the Crossroads 102 (Steven Sugarman and Herma Hill Kay eds. 1990) (examining incidence and patterns of step-families).

106. *See* Minow, *'Forming Underneath Everything that Grows': Toward a History of Family Law*, 1985 Wis. L. Rev. 819.

viduals, and between those people and the larger society and culture within which they live and make meaning of their lives. The appearance of new farm hands from another country dislodged the pattern of relationships in the story of "The Displaced Person" and exposed how much people's identities and sense of place could be altered by relationships with additional people. A new person entering a workplace or a family requires others to remake their relationships to one another as well as to the new arrival.

These relationships are not reducible solely to biological connection. Even historically, the fact of a biological connection could be supplanted by people's refusal to recognize it or to act in accordance with it.[107] In this era of new reproductive technologies,[108] high divorce and remarriage rates, and high levels of cohabitation outside of marriage for both heterosexual and homosexual partners,[109] a child may have relationships with more than two adults who can each claim some kind of parental bond. The actual social and psychological relationship forged through time, care, and experiences building trust better exemplifies what our culture means by "parent" than does the sheer biological fact of parenthood. Judicial decisions recognizing the psychological connection between "parent" and child are not uncommon; respected legal theories elaborate the point that psychological parenthood is more important than biological facts to judicial determinations of custody and visitation.[110] Family identities are contingent and mutable, not fixed. There are multiple contributions to family identities, including biological facts, individual choices to be together, community support or hostility, and legal recognition.

A judicial use of history to determine the kinds of family relations that deserve legal protection is also faulty because it risks privileging some kinds of family forms over others without offering a justification of this practice. The impact of religious traditions and other structures of authority in defining approved forms of families represents one contestable contribution to family identity, not the answer to contested questions about it. Again, in Mukherjee's story of the wife from India who came to the United States to study, religious and cultural forms at home provided

107. *See, e.g.*, John Boswell, The Kindness of Strangers: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance (1988).

108. Artificial insemination, in vitro fertilization, frozen embryo transfer, and other devices allow a situation in which a child may have connections to two parents who contributed genetic material, one more who carried the fetus through the pregnancy, and one or more others who take on the daily tasks of parenting.

109. *See* Children and Families: Key Trends in the 1980's: A State Report of the Select Committee on Children, Youth, and Families, 100th Cong., 2d Sess. (December 1988).

110. *See* Joseph Goldstein, Albert Solnit & Ann Freud, Beyond the Best Interests of the Child (1973). *But see* In the Matter of Alison D. v. Virginia M. (N.Y. App. Div. 1990), appeal pending (rejecting claim by lesbian co-mother for visitation with child born through artificial insemination of her former lover).

one structure for her sense of identity while alternative cultural influences in the United States offered a different context and set of influences on her identity.

As that story also suggests, legal recognition is but one contribution to family identity, and legal traditions can be in conflict with other sources. Predictably, then, people have begun to assert legal claims to protect social relationships in addition or in contrast to biological relationships and relationships assigned by legal presumptions.[111] A legal response that treats such claims as irrelevant and undeserving of attention expresses a simple act of state power to supplant identities developed and asserted by people. Of course, the Court might question and evaluate whether those relationships should be recognized and protected, but the refusal even to discuss them is a sheer imposition of judicial power in framing the question so it cannot be discussed.

Thus, one need not explore all the complex layers contributing to family identities to recognize that the use conclusive presumption in Michael H. v. Gerald D. prevents any legal inquiry into the "demonstrable fiction that Gerald is Victoria's father."[112] Consequently, the dissenters maintained that the use of a conclusive presumption operated to deny Michael's chance to be heard, and thereby violated requirements of constitutional due process.[113] Even before asking whether an individual claimant, such as Michael, should obtain legal recognition for his identity as father and any associated rights, such as the right to visit the child,[114] the law governs whether the claimant has a right to raise the question of identity and make an argument about it. The conclusive presumption works to avoid even that initial stage.

Such a presumption may itself be warranted. What seems strange and assailable in the Supreme Court's plurality opinion in Michael H., however, is the refusal to even permit debate over its warrant.[115] By refusing to consider the possibility that Michael H. has a protected liberty interest in his relationship to the child, the plurality bypassed the inquiry into justifications for a presumption cutting off his legal claims.[116] Not only

111. *See, e.g.*, Smith v. OFFER, 431 U.S. 816 (1977) (foster families); Lehr v. Robertson, 460 U.S. 248 (1983) (biological relationship plus actual social relationship necessary to obtain legal protection for unwed father).

112. 109 S.Ct., at 2361 (White, J., dissenting).

113. 109 S.Ct., at 2353-2345 (Brennan, J., dissenting); *Id.* at 2362 (White, J., dissenting).

114. This ultimate question could well be answered by reference to the child's best interests rather than any basis for the father's claims. *See* Quilloin v. Walcott, 434 U.S., at 255; Lehr v. Robertson, 463 U.S. 248 (1983).

115. *See supra*, at note 98 (discussing infinite regress in the discussions foreclosed by the presumption).

116. Justice Brennan concluded that the plurality's approach allows "the State's interest in terminating the relationship to play a role in defining the 'liberty' that is protected by the Constitution. According to our established framework under the Due Process Clause, however, we first ask whether the person claiming constitutional protection has an interest that the Constitution recognizes; if we find that she does, we next consider the State's interest in limiting the extent of the

does this approach redefine the shape of liberty interests protected by the Court; it also treats the very issue of what cannot be questioned as beyond debate. Especially when the potential question concerns a matter of personal identity, this refusal to entertain questions represents an extreme exercise of power beyond the check of potential challenge and review.

C. Identity and Politics: The Great Kerchief Quarrel[117]

Sometimes, a question of identity may ignite national and even international political controversy. Here, too, inattention to the relational qualities of identity, and to the impact of patterns of power in those relationships, unduly confines participants to unacknowledged power struggles just when perceptions of nuance and complexity are vital.

An international debate arose after the principal of a junior high school outside of Paris ordered three Moslem girls—two from Morocco and one from Tunisia—to take off their "Islamic scarves" while in class.[118] The event immediately prompted a legal question: would the school expel the girls from school if they failed to remove their scarves?[119]

Within days national and then international media coverage drew attention to the incident. Some reactions from the right-wing in France blamed the whole problem on the influx of North African Moslems. But as Diana Johnstone reported for an American left-wing magazine, "the real quarrel was inside the left."[120] Some charged the school with racism and intolerance of difference, whether by race or religion. From this view, failure to accommodate the different practices of students in the school degraded their identities. Yet, others maintained that the principal's action represented a commitment to fight racism by adhering to a vision of equality and commonality within the school system, a vision accommodating every student, regardless of her background. Some responded to this claim—grounded in a vision of secular humanism—by challenging its alleged universality. They argued that an imposition of a dress code could not avoid particularity or evade the preference for cultural forms that privileged some people in the society over others. A dress code that forbids Islamic scarves but permits, for example, dresses

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procedures that will attend the deprivation of that interest." 109 S.Ct., at 2354. Justice Brennan concluded that the plurality "takes both of these steps at once." *Id.*

117. A fascinating source for this discussion is Diana Johnstone, *In 'Great Kerchief Quarrel' French United Against 'Anglo-Saxon Ghettos,'* In These Times 10-11 (Jan. 24-30, 1990). Also helpful to the following discussion is Robert Malley, *Ex Une Plura: Reflections on theRise of Plural Politics in France and Algeria* (May 2, 1990) (unpublished paper).

118. The school is in Creil, France; the incident occurred in October, 1989.

119. In the United States, such a question would also prompt a constitutional issue: would such expulsion violate constitutional guarantees of free exercise of religion and equal protection of the laws? In France, the issue became an administrative and political matter, not a judicial one.

120. Johnstone, *supra* at note 117, at 10.

in the style of a popular American rock star, favors some cultural groups over others.[121]

Thus far, the controversy is a familiar exchange over assimilation versus accommodation, a debate sometimes described in terms of the melting pot versus the salad bowl theories of social diversity. Should a society strive to achieve equality by drawing all of its members into a mainstream, even if this necessitates melting or stripping away traits that have differentiated them from one another? Or should a society try to create settings that make room for differences between people who can then live and work beside one another while preserving different customs and traits? These questions reflect different pictures of the ideal end and also of the ideal means to achieve equality.

Yet, it is also a debate over identity. On one side is a view that identity is mutable; on the other is the view that it is eternal and failures to accommodate different identities produce discrimination or oppression. One side emphasizes individual identity, the other group identities; one looks to individual choice, the other to group autonomy constraining the individual but resisting the larger society. There is little attention, from either side, to the ways that identities are constructed in relationships and the ways the background relationships of power influence both the possibilities for individual choice and the significance of subgroup autonomy. Attention to these dimensions illuminates the complexities of the "great kerchief affair."

An important pattern of relationships among subgroups within a postcolonial power helps to situate the controversy. Fears of ethnic and religious tension and threats to the social peace accompanied the debate and reflected underlying discomfort among many French people with the increasing presence of immigrants from former French colonies. How could France avoid the tense situation of constant and irremedial conflict symbolized by late 20th-century Beirut? Perhaps the school system could create a common language and cultural practice so that people who retain sharp cultural differences could nonetheless communicate with one another. This idea permeated the movement for public schools in the United States during the heightened immigration just after the turn of the 20th century. Rather than positing as a goal a melting pot that would dilute distinctive ethnic identities, however, the dream of a common language and cultural practice could proceed from the view that identities are profoundly etched and durable. Therefore, practices requiring uniformity at school would neither threaten those different identities nor demean them, but would instead set a foundation for a social and political peace within which different communities might flourish.

121. *Id.* (discussing remarks of Alain de Benoist).

For some French observers, it would be a distinctively French solution to the problem of multi-culturalism. Arguments against the kerchiefs thus advance efforts to affirm and reconstruct a national identity not through forced assimilation. Defining themselves against other nations, some French people specifically sought to manage difference but also to avoid British and American practices which seem to confine ethnic and racial minorities to enclaves with less status, money, and access to resources than majority group members.[122] The peculiarly French way harkened back to the philosophes and their faith in reasoned dialogue: teachers in the late 20th century could claim a philosophical tradition stemming from the 18th century Enlightenment.[123]

Nonetheless, equally "French" participants in the public debate argued for accommodation, adaptation, and respect for differences. Perhaps, in light of the tug-of-war for the proper solution, the Education Minister produced an indecisive directive: the Minister indicated that school administrators should advise pupils not to come to school veiled, but not to exclude such students if dialogue failed to convince them and their parents.[124]

As another aspect of debates over French identity, Johnstone finds in the kerchief controversy an underlying conflict over the future of socialism and market capitalism in that nation. Barely a month after the incident at the school, a landslide vote elected a right-wing candidate to the National Assembly. That election indicated a strong association between forces for capitalism and anti-immigrant attitudes.[125] Conflicts within the left about how best to treat immigrants seemed to reflect a broader public discomfort about immigrants altogether. Larger struggles for power within France, and across the globe, thus provide important contexts for understanding the great kerchief controversy.

The debate over the kerchiefs, indeed, reaches beyond a debate over the meaning of French identity. Transcending and bisecting questions of national identity and national politics are two linked questions: gender relations and international politics. Thus, for some, the rule against wearing kerchiefs represented an important stand in favor of gender equality that should transcend subgroup identity and even national identity. Some feminists feared that a school practice allowing the kerchiefs would simply strengthen the hands of fathers and brothers within fundamentalist Islamic communities against emerging efforts for gender equality. Those efforts for gender equality within Islamic communities especially take place outside of France, in Tunisia, Algeria, and Saudi

122. *See id.*, at 11 ("The worst version of 'the Anglo-Saxon model' is, of course, Britain, where immigrants are isolated in ghettos and surrounded by violent mass racism. . . the U.S. with its 'underclass' ghettos has also become a shining example of what to avoid").

123. *Id.*, at 10, 11.

124. *Id.*, at 10.

125. *Id.*, at 11.

Arabia. Yet some French feminists, notably the president's wife Danielle Mitterrand, protested the risk that the girls themselves would be punished for wearing the kerchiefs, and punished perhaps by expulsion from school.[126]

The argument over how best to achieve gender equality becomes even more complicated in the context of international fundamentalist Islamic societies. In some Islamic communities women have reclaimed the kerchief, or the veil, because within the rules of their own cultures wearing these gender-specific items affords a certain latitude of action and freedom from further sexism they would otherwise encounter.[127] Specifically, in some communities, only by wearing the requisite head-covering can the women move freely in public spaces without facing disapproval or even violence. Some Moslem women may find that wearing the coverings saves them from being viewed by men as a sexual object.[128] In addition, preserving signs of a separate women's sphere can reinforce the emotional support and status within that sphere that some Moslem women report.[129] Moreover, for Moslems displaced into minority status, preserved traditions may actually acquire new and different meanings.

Thus, even those who seek to promote gender equality may find themselves divided over strategies, and those divisions may reflect different degrees of understanding of cultural mores and the capacity of Islamic women to fashion—within externally imposed constraints—the meanings of their own identities. Johnstone reports that, according to a French sociologist and a leader of a French anti-racist youth organization, excluding from school those girls who are not yet ready to reject their Islamic traditions "could only strengthen religious fundamentalism" in its international struggle for dominance.[130]

Undoubtedly, there are still further interpretations of the great kerchief quarrel. Johnstone reports this sobering resolution: the two Moroccan girls returned to school without their kerchiefs because "King Hassan II of Morocco had sent word to their fundamentalist father that his majesty did not appreciate seeing his subjects draw so much adverse attention abroad. It was a paradoxical victory for the authoritarian approach,"[131] and a suggestion that matters of identity include levels of loyalty within patterns of relationships and lines of power.

This partial denouement also suggests the contingent nature of identity; to be Muslim, and to be a female Muslim may call for different kinds

126. *Id.*, at 10.

127. *Cf.* discussion *supra* of Meditations on History (slave woman finds latitude for movement by playing into role assigned by white journalist).

128. I thank Isabel Marcus for this point.

129. *See* Elizabeth Fernea, Guests of the Sheik (1969) (autobiographical account of the benefits of seclusion for village Iraqi women).

130. Johnstone, *supra* note 117, at 10.

131. *Id.*, at 11.

of behavior depending upon the circumstances. In "Defender of the Faith," a Jewish soldier expresses his fidelity to his religious identity by rejecting a co-religionist's request for a favor, while such a request might have prompted a different response under different circumstances. A devout and loyal Muslim girl may take off the kerchief as an affirmation of loyalty to her father and King; an Islamic woman who seeks to change the status of Islamic women may wear a veil in order to remake traditions from within or even in order to secure a degree of community acceptance while pushing for a distinctive identity. That such actions may take place within a country like France, and in reaction to the responses of French officials, underscores the interactive qualities of identity just as the controversy among French citizens over the treatment of Islamic students becomes a fight over the meaning of French identity. Similarly, the struggles set in motion by the arrival of the Displaced Person in Flannery O'Connor's short story embroils everyone on the farm in conflicts over their own identities and positions.[132]

Participants in the debate over the kerchiefs committed errors when they neglected power relationships, such as the great power of men within Islamic culture. Some advocate a school policy against the kerchiefs and others push a school policy permitting them; either opinion mistakenly views the girls as separate and autonomous people, able to make a choice and bear its consequences outside of continuing relationships with fathers and brothers. Moreover, it is a mistake to read a girl's appearance without the scarf as her own choice just as it is a mistake to read her appearance with the scarf as a coerced behavior. In both instances, she is constructing who she is in relationship with others who have large but not complete degrees of control over her well-being.

Similarly, it would be a mistake to read a policy forbidding religious attire in the schools as obviously discriminatory, as so many observers were quick to assert. Such a view betrays the assumption that the French junior high principal had power as a member of the dominant culture to restrict the exercise of a minority identity. Actually, the junior high school principal who banned the kerchief was himself from the French Caribbean island of Martinique; he wanted to restrict religious proselytizing in a school in which immigrant children are the majority.[133] Looking at the identities of people and their mutual participation in constructing one another's identities complicates matters enormously and does not tell any observer what to think or what to decide about a given issue. But this attention to the relationships between people and within networks of power can alert observers to their own participation in the construction of identity, and to the political struggles over it.

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132. *See supra*, at text accompanying note 46.
133. Johnstone, *supra* at note 117, at 10.

III. IDENTIFYING: CHOICE AND CONSTRAINT

Paradoxically, underestimating individuals' latitude for choice despite their assigned identities, and failing to acknowledge the constraints on individuals despite the powers to choose, are two central mistakes in legal assessments of identity. This paradox points out the interconnections between choice and constraint as people negotiate their identities in relation to others and against the backdrop of social and political structures of power. Thus far, I have explored this theme in some works of fiction and in some legal disputes. A related process of negotiation between choice and constraint arises for lawyers who argue cases about identity, and for judges who decide them.

Contemporary lawyers and judges did not invent the terms society uses to address legal debates over identity, but by using these terms, today's legal actors give them new and renewed definition.[134] They may experience as constraints the prevailing legal doctrines and categories even though they face choices about how to use them and imbue them with new meanings. Attention to choice and constraint in the construction and expression of identity could help lawyers and judges not only in assessing other people's identities, but also when enacting and evaluating their own.

By turning to the identities of lawyers and judges, I mean to underscore two points. First, lawyers and judges, no less than other people, negotiate their identities in the course of their work and their daily lives. The potential conflicts between their perceptions of their roles and their own characters must be navigated.[135] Even more particularly, as people with the power to use language and state authority, lawyers and judges may influence the identities of others and in so doing shape their own identities.[136] Lawyers and judges constitute themselves in the course of defining others.

Second, the identities of lawyers and judges must be mobilized in performing their roles, and yet these identities are no more firm than any

134. Their choices and constraints differ from those encountered by someone with less power to affect the social definitions of his or her own identity, but even such a severely oppressed person finds a combination of constraint and choice. *See, e.g.*, Ambalavaner Sivandan, A Different Hunger 86 (1982) (a Black intellectual "finds definition not in its own right but as the opposite of white. Hence in order to define himself, he must first define the white man. But to do so on the white man's terms would lead him back to self-denigration. And yet the only tools of intellection available to him are white tools—white language, white education, white systems of thought—the very things that alienate him from himself. Whatever tools are native to him lie beyond his consciousness somewhere, condemned to disuse and decay by white centuries. But to use white tools to uncover the white man so that he (the black) may at last find definition requires that the tools themselves are altered in their use. In the process, the whole of white civilization comes into question, black culture is reassessed, and the very fabric of bourgeois society threatened").

135. *Cf.* Betty A. Sichel, Moral Education: Character, Community, and Ideals 226-245 (1988) (exploring potential tension between the moral implications of a role and the moral commitments embodied in one's character).

136. *See generally* John Noonan, Persons and Masks of the Law (1976).

one else's. The argument throughout this essay, put in schematic terms, is that debates over identity can founder on the clash between a claim that truth can be discovered and a claim that only descriptions and re-descriptions are available. The initial claim is that there is something about the world that defies re-description. The availability of a blood test that can establish a 98% probability that Michael H. is the father of Victoria triumphs over efforts to claim that he is not the father. The rejoining claim, advanced by advocates of social construction theories, emphasizes the significance of language to human perceptions and the prevalence of complexity that defies the crude simplifications embodied in linguistic categories. Accordingly, redescriptions are possible because the human capacity to know is limited and invariably shaped through the frail and incomplete language categories used by humans. Reinterpretations of identity are likely because of the crude simplifications demanded by the either/or and yes/no quality of questions about identity: is he the father or not, is she assimilated or not? Any answer to the question suppresses a third and often plausible alternative.[137] Michael H. is one kind of father and not another kind of father; the Mashpee residents exemplify some qualities that have been used to describe Indian tribes and not others. Or: the school girl does not choose but nor is she forced to wear the scarf: it is part of how she knows herself in the context of her family and culture.

As long as arguments over identity can be parried in this fashion, they may seem interminable. One alternative is to shift from the question of identity to the question of who decides any question of identity. That question opens still another inquiry: how does the language used for decision-making itself constitute the players, their identities and self-understandings now and in the future? In these successive inquiries, the identities of lawyers and judges become central. So do efforts by lawyers and judges to resolve tensions between role and character and between uncertainties about themselves compared with uncertainties about others. Constraint and choice reappear, but this time for those who argue about and decide the identities of others.

Robert Cover explores these themes in his remarkable book, *Justice Accused*. He examines the ways that antebellum judges experienced constraints on their decisions. Even judges who opposed slavery felt constrained to enforce the Fugitive Slave Law rather than act upon their own beliefs.[138] Professor Cover considers the confluence of conceptions about law, judicial capacity, and psychological mind sets that allowed individuals to attribute their actions to their roles as judges. His work argues that these judges had more room to act and more choice about the

137. *See* J. M. Balkin, *Nested Oppositions*, 99 Yale L.J. 1669, 1672-1678 (1990).
138. Robert Cover, Justice Accused (1975).

very meaning of their roles than they let themselves believe or experience. Cover's work illuminates how the judges' efforts to define themselves and to resolve their doubts in terms of conceptions of their roles determined people's identities as persons or as property.

A current Supreme Court Justice pointed to Robert Cover's *Justice Accused* in criticizing the Court's majority for thinking itself unable to respond to a present-day issue of oppression. A county social service agency allowed a child to remain with his father who subjected him to violent and devastating abuse.[139] Justice Blackmun challenged the assumption of the Court's majority that the availability of damages here was a closed question because due process only protects people from action, not inaction, by the state.[140] Justice Blackmun rejected the idea that existing legal doctrine compelled the result and maintained that the question presented was "an open one."[141]

Besides agreeing with Justice Blackmun's view of the merits of the case,[142] I commend his attention to the ambit of free action for the Court. It must be attractive to judges to adopt concepts of the judicial role as constrained and of legal doctrine as compelling the results; it is a view that relieves individuals of the responsibility for their actions. But this view submerges the possibilities for choice, even given constraint. It treats answers to controverted questions as preordained rather than mutable and chosen. This view not only helps to justify results about which people can and do disagree, it also closes off humanly made decisions from public criticism and debate.[143] A conception of the judicial role as a mixture of constraint and choice would help remedy this problem.[144]

Professor Jerry Frug has argued that lawyers try to persuade judges and other decision-makers by relying heavily on arguments about who they should think they are: what character do they identity with, and in so doing, choose?[145] Similarly, Professor Joe Singer illustrates an exercise

139. DeShaney v. Winnebago County Department of Social Services, 57 U.S.L.W. 4218, 4224 (Feb. 21, 1989) (Blackmun, J. dissenting).

140. The child's mother had alleged violations of section 1983 which allows for damage actions arising from violations of federal law; the argument here was that the state's inaction deprived the child of liberty and therefore violated the due process clause.

141. *Id.*

142. I discuss them elsewhere, and side with the dissenters, in Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 Vanderbilt Law Rev. 16 (1990).

143. *See also* Cover, *Violence and the Word* 95 Yale L.J. 1601 (1986) (judges are institutionally protected from direct contact with the violence they may order); Minow and Spelman, *Passion for Justice*, 10 Cardozo L. Rev. 37 (1988) (same).

144. *See generally* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Legal Educ. 518 (1986) (exploring mental processes of a judge who sees opportunities for choice amid constraints of convention and the expectations of others).

145. Gerald Frug, *Argument as Character*, 40 Stan. L. Rev. 869 (1988). See also Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 Am. U. L. Rev. 1065 (1985) (examining how readers with different self-claimed identities would respond to book and to arguments about it).

he uses in class that takes into account who students think they are, and with whom they would identify; he seeks to engage their sympathies.[146] Singer found in his property class that his students did not identify with workers who lost their jobs when a steel company decided to close a plant and then refused to sell the plant to the workers. Singer crafted a hypothetical situation in which the students faced expulsion under terms that seem comparably unfair and a betrayal of expectations. Both Frug and Singer imply that an advocate can make more or less persuasive arguments by both knowing how the listener conceives of his or her own identity, and by appealing to some versions of that identity rather than others. There is a reciprocal implication: the listener, too, has some choice about how to identify, about what character to claim, and what aspects of experience to attend to in listening to an argument. We can perceive on occasion gaps between people's self-understandings and what they know about what others think of them. We can see the spaces between the identities people think they have and those they would like to have. There are tensions between identities people feel they have been assigned and identities they would like to define for themselves. Finding these spaces and gaps, working with the tensions, we may persuade one another to affirm and to resist who we are and who we are thought to be.

My argument calls for just one more step. How lawyers talk about identity influences not only results, not only moments of persuading others. How lawyers talk about identity helps to constitute the identities of themselves and others. If we talk more explicitly about how we all negotiate identities and make choices amid the constraints of relationships with others and patterns of power, we may make more room for discussion of what works for whom, and why. Perhaps some decisions will come out differently. More importantly, the people who define themselves and define others in the process of reaching decisions will be in a position to take greater responsibility for their influence on the identities of others, and the identities of themselves.

146. Joseph William Singer, *Persuasion*, 87 Mich. L. Rev. 2442 (1989). See also Gerald Lopez, *Lay Lawyering*, 32 UCLA L. Rev. 1 (1984) (exploring the role of familiar stories in persuasion).