Duke Law Journal

VOLUME 1990 SEPTEMBER NUMBER 4

TRANSLATING *YONNONDIO* BY PRECEDENT AND EVIDENCE: THE MASHPEE INDIAN CASE

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I.

A song, a poem of itself—the word itself a dirge,
Amid the wilds, the rocks, the storm and wintry night,
To me such misty, strange tableaux the syllables calling up . . . .

—Walt Whitman, *Yonnondio*

* * *

As part of the "sacred text," the land—like sacred texts in other traditions—is *not* primarily a book of answers, "but rather a principal symbol of, perhaps *the* principal symbol of, and thus a central occasion of recalling and heeding, the fundamental aspirations of the tradition."[1]

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1. Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D.L. REV. 246, 269 (1989) (quoting M. PERRY, MORALITY, POLITICS & LAW 137 (1988)). Although Pommersheim's article deals specifically with the Lakota, a Great Plains Tribe, his insight extends to other indigenous peoples, including the Mashpee Tribe of Cape Cod, Massachusetts, whose 1976 land claim action is the focus of this essay. Given the length of time the Mashpec have had to deal with assimilation pressures from the outside, non-Indian community, perhaps the insight is actually more appropriate to the eastern Tribes than to those of the American west.

When Walt Whitman wrote his poem *Yonnondio*[2] for the collection *Leaves of Grass,* he added the following parenthetical explanation under the title: "The sense of the word is *lament for the aborigines.* It is an Iroquois term; and has been used for a personal name."[3] In fact, *Yonnondio* also is the title of a long narrative poem by William H.C. Hosmer published in 1844 with the subtitle *Warriors of the Genesee: A Tale of the Seventeenth Century.*[4] That poem, Hosmer wrote, is a description of "the memorable attempt of the Marquis de Nonville, under pretext of preventing an interruption of the French trade, to plant the standard of Louis XIV in the beautiful country of the Senecas."[5] In a note following the poem itself, Hosmer explained that "Yonnondio was a title originally given by the Five Nations to M. de Montmagny, but became a style of address in their treaties, by which succeeding Governor Generals of New France were designated."[6]

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2. *Yonnondio*

[The sense of the word is *lament for the aborigines.* It is an Iroquois term; and has been nsed for a personal name.]
A song, a poem of itself—the word itself a dirge,
Amid the wilds, the rocks, the storm and wintry night,
To me such misty, strange tableaux the syllables calling up;
Yonnondio—I see, far in the west or north, a limitless ravine,
with plains and mountains dark,
I see swarms of stalwart chieftains, medicine-men, and warriors,
As flitting by like clouds of ghosts, they pass and are gone in the twilight,
(Race of the woods, the landscapes free, and the falls!
No picture, poem, statement, passing them to the future:)
Younondio! Yonnondio!—unlimn'd they disappear;
To-day gives place, and fades—the cities, farms, factories fade;
A muffled sonorous sound, a wailing word is borne through the air for a moment,
Then blank and gone and still, and utterly lost.

W. WHITMAN, *Yonnondio,* in LEAVES OF GRASS 524 (S. Bradley & H. Blodgett eds. 1958).

Yonnondio—a lament, but also a proper name—cannot be translated without damage to the word itself and to the cultural structure of meaning that gives identity to the translatable content and to the name. We incorporated *Yonnondio* into our title, to bring to mind just this problem. Thanks to Jerry Creedon for reminding us of the poem and Wlad Godzich for suggesting we look at the Mashpee case.

As Clifford Geertz has put it in the anthropological context:

> "Translation," here, is not a simple recasting of others' ways of putting things in terms of our own ways of putting them . . . but displaying the logic of their ways of putting them in the locutions of ours; a conception which again brings it rather closer to what a critic does to illumine a poem than what an astronomer does to account for a star.

C. GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 10 (1983).

3. W. WHITMAN, *supra* note 2.

4. W. HOSMER, YONNONDIO, OR WARRIORS OF THE GENESEE: A TALE OF THE SEVENTEENTH CENTURY (1844).

5. *Id.* at v.

6. *Id.* at 218.

It is easy to understand that Whitman took "Younondio" to signify[7] "Lament for the Aborigines"; if "Yonnondio" was indeed the word the Iroquois used to address the state, then as Whitman says in his poem, its mere mention "is itself a dirge." For the Iroquois, "Yonnondio" itself took on new meaning as the relation to which it referred shifted. Even as the word became a greeting, its meaning was different for the Iroquois than for the French and other Europeans with whom the Iroquois had contact. This cascade of meanings reflects the highly volatile system of relations produced by contact between the Iroquois and the various Europeans intent on "opening up" or "claiming" the "New World."

One still hears the Iroquois language, Onondaga, in place names derived from it: Ohio ("Great River") or Ontario ("Great Lake"). Indian history indeed is inscribed on the land of North America. Its inscription, however, has faded for most Americans because the inscription exists without any tie to the proper names that give these words significance. The remnants of language attached to real places prompt romantic images of America's pre-European past.[8] The telling of this past (history), like all stories, is replete with meanings, and as with most narratives, its very telling is an expression of power.

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7. "Signify" is used here in both the technical and popular senses. "Signify" means the relationship between the sign "Yonnondio" and its referent. The sign may have several referents: the proper name, the representative of the state, the loss of tribal autonomy. As Jonathan Culler notes, the potential existence of a vast array of referents "does not mean that the notion of sign could or should be scrapped: on the contrary, the distinction between what signifies and what is signified is essential to any thought whatever." J. CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 188 (1982).

Professor Gary Peller explains that "[i]n the terminology of semiotics, the 'sign' is made up of two parts, the 'signifier' which stands as a symbol in the social language for what is being represented, and the 'signified,' the concept or thing that is represented by the signifier." Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1163 n.10 (1985) (examining the political and metaphysical fonndations of American law and rejeeting the ennui that has bedeviled much of modern interpretive jurisprudence).

8. For a general discussion of the ways in which language becomes detached from its historical referents, see J.-F. LYOTARD, THE DIFFEREND: PHRASES IN DISPUTE (1988). By adopting non-European names for places that are thoroughly westernized we are able to possess and domesticate a past we did not fully control. We observe this process of domestication in many places. Take, for example, American Civil War battle sites. The sanitization of one aspect of our unruly history was highlighted in the *Gettysburg Tower Case.* Commonwealth v. National Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 311 A.2d 588 (1973). A group of developers planned to construct a 300-foot tower overlooking one of the most revered battle sites in American history—a place that has indeed become sacred in the lore of the American Civil War. In their zeal to build this tourist attraction, however, these developers negleeted to recognize that the power of the site itself is derived from its human scale. Loss of that scale portended a concomitant loss of some of its power, some of its meaning. Similar patterns have emerged in the southwest, though more slowly, as Spanish names lose their mooring, and the difference is lost. *See generally* D. MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986 (1987) (a history of conflict and accommodation between Anglos and Mexicans in the development of Texas).

The telling of stories holds an important role in the work of courts. Within a society, there are specific places where most of the activities making up social life within that society simultaneously are represented, contested, and inverted.[9] Courts are such places. Like mirrors, they reflect where we are, from a space where we are not. Law, the mechanism through which courts carry out this mirroring function, has a curious way of recording a culture's practices of telling and listening to its stories. Such stories enter legal discourse in an illustrative, even exemplary, fashion.

"Yoimondio"—the address, the salutation—became a medium through which contending Indian and European cultures interacted. The evolving meaning of this salutation reflected changing relations of power as the Indians' early contact with European explorers themselves evolved into contact with the states represented by those explorers. Likewise, the land claim suits filed by various Tribes during the 1970s[10] served as a channel through which some Indians attempted to communicate with the state—this time, through the medium of courts. In order for the state to hear their claims, however, these Indians were forced to speak in a formalized idiom of the language of the state—the idiom of legal discourse. This paper analyzes one such land claim suit, *Mashpee Tribe v. Town of Mashpee,*[11] and the formalized address that it incorporated. What happens, we ask, when such claims receive a legal hearing? We suggest that first they must be translated by means of examples that law can follow—precedent, and examples that law can hear—evidence.

We should suspect that the legal coding[12] through which such translation is conducted highlights a problem inherent in the post-modern

9. *See* Foucault, *Of Other Spaces,* DIACRITICS, Spring 1986, at 22 (the text of a speech Foucault delivered in March, 1967, translated by J. Miskowiec, in which Foucault describes the creation of social space in terms of material spatial relations—places given their identities by ideas and ideologies that are projected on to them, like a courthouse or a brothel).

10. *See generally* P. BRODEUR, RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AND PENOBSCOT INDIANS OF NEW ENGLAND (1985). During the late 1960s and early 1970s, several Indian tribes pursued legal actions aimed at reclaiming land alienated from them by various means during the 16th, 17th, 18th, and 19th centuries: the Passamaquoddy and Penobscot in Maine; the Gay Head Wampanoag in Massachusetts; the Narragansett in Rhode Island; the Western Pequot, Schaghticot and Mohegan in Connecticut; the Oneida, Cayuga and St. Regis Mohawk in New York; the Catawba in South Carolina; the Chitimacha in Louisiana; and the Mashpee of Cape Cod in Massachusetts.

11. 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied,* 444 U.S. 866 (1979).

12. Roberta Kevelson explains the concept of "legal coding" in THE LAW AS A SYSTEM OF SIGNS 23-31 (1988) (applying semiotic theory, especially that of C.S. Peirce, to law). Kevelson's idea of legal coding is that there is "no dominant legal system in any given society; there are only networks of legal subsystems." "[L]egal systems evolve through conflicting internal forces" within the society as a whole. The legal system evolves and is coded as a result of "a dynamic exchange of messages between legal and other social systems." *Id.* at 24.

condition[13]—the confrontation between irreconcilable systems of meaning produced by two contending cultures. The post-modern condition is a crisis of faith in the grand stories that have justified our history and legitimized our knowledge. The very idea of what we can know is unstable. The crisis in the law that emerged with the Legal Realists and the attempts to reconstitute formalism—as the basis for survival of the "rule of law"—also reflect our post-modern condition. In the case of the Mashpee, the systems of meaning are irreconcilable: The politics of historical domination reduced the Mashpee to having to petition their "guardian" to allow them to exist, and the history of that domination has determined in large measure the ways the Mashpee must structure their petitions. The conflict between these systems of meaning—that of the Mashpee and that of the state—is really the question of how can we "know" which history is most "true."

Yet the difficulty facing the Mashpee in this case is not just that they cannot find the proper "language"[14] with which to tell their story or capture the essence of the examples that would prove their claims. The problem with conflicting systems of meaning is that there is a history and social practice reflected and contained within the language chosen. To require a particular way of telling a story not only strips away nuances of meaning, but also elevates a particular version of events to a non-contingent status. More than that, however, when particular versions of events are rendered unintelligible, the corresponding counter-examples that those versions represent lose their legitimacy. Those examples come unglued from both the cultural structure that grounds them and the legal structure that would validate them. The existence of untranslatable examples renders unreadable the entire code of which they are a part, while simultaneously legitimizing the resulting ignorance. This Essay examines the nature of that ignorance.

13. Here we reference the concept of "postmodernism" expressed in J.-F. LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (G. Bennington & B. Massumi trans. 1984), wherein Lyotard investigates both the control of information in the Western world and the collapse of legitimizing forces in Western culture. The "modern" account of knowledge makes "an explicit appeal to some grand narrative," *id.* at xxiii, a meta-narrative that legitimates the endeavor. The post-modern account views such meta-narratives with incredulity. This is not to say that modernists view the world as fully presentable in narrative. The modernist attempts to characterize the world as ultimately unpresentable, while relying on a form of narrative presentation that remains recognizable and that offers the reader solace. In contrast, the postmodernist incorporates the unpresentable in the narrative itself. *Id.* at 71-82; *see also* Schlag, *Missing Pieces: A Cognitive Approach to Law,* 67 TEX. L. REV. 1195, 1217 (1989).

14. *See generally* Peller, *supra* note 7, at 1160-70 (explaining how linguistic conventions separate the speaker and the listener, necessitating the use of language available in the "linguistic community," which is common to both speaker and listener).

"Ignorant," of course, merely means uninformed. The central problem addressed by this essay is whether the limitations of the legal idiom permit one party truly to inform the other, or conversely, whether the dimension of power hidden in the idiomatic structure of legal storytelling forecloses one version in favor of another. Note that this Essay is not the story of "different voices:"

> [W]hen you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. Eliminated, gone. You aren't just deprived of a language with which to articulate your distinctiveness, although you are; you are deprived of a life out of which articulation might come.[15]

The law does not permit the Mashpee's story to be particularized and still be legally intelligible. By imposing specific "ethno-legal" categories such as "Tribe" on the Mashpee, law universalizes their story. This universalizing process eliminates differences the dominant culture perceives as destabilizing. Criticism of the imposition of cultural/legal categories on subcultures should not, however, be used to fetishize the idea of difference. Instead, the inability of the law to hear, or equally to weigh, culturally divergent versions of "the truth" should be examined to help us understand how social knowledge is constructed.

Similarly, the recounting of the Mashpee's travails in their attempt to tell their story does not yield an object lesson in the open texture of American pluralism. Some versions of reality *are* foreclosed, plain and simple. The legal boundaries made apparent in the Mashpee's story require that they remain frozen in time: Cultural evolution itself is prohibited for the Mashpee.

This Essay examines the nature of "telling" within the confines of litigation: What constitutes proof and what constitutes authority; what are the pragmatics of "legal" storytelling? Pragmatics in this context might be analyzed best in terms of a game. Any game must have rules to determine what is an acceptable move, but the rules do not determine all available moves. Although the total content of acceptable moves is not predetermined, the universe of potentially permissible moves is limited necessarily by the structure of the game. All language, but especially technical langnage, is a kind of game. What are the rules that govern discourse in the legal idiom? What kind of knowledge is transmitted? "[W]hat must one say in order to be heard, what must one listen to in order to speak, and what role must one play . . . to be the object of a narrative[?]"[16]

15. C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 39 (1987) (articulation of feminism as a critique of the gendered system of social hierarchy and social power).

16. J.-F. LYOTARD, *supra* note 13, at 21.

By highlighting the peculiar nature of legal discourse and comparing it to other ways of telling and reading the Mashpee's history, we can explore and make concrete the roles of power and politics in legal rationality. The *Mashpee* case is especially well-suited to this investigation because it casts so starkly the problem of law as an artifact of culture and power. Parts I[17] and II[18] introduce this problem and outline the historical and legal dimensions of the Mashpee land claim. There is a powerful historical and cultural context within which Native Americans operate, much of it imposed. For Indians of the eastern seaboard, the longstanding confrontation and association with Europeans have produced relations that are substantially different from those confronting the Western and Great Plains Tribes. For a largely peaceful Tribe like the Mashpee, this long association also has produced a history that intersects white America at many points. The meaning of the events that mark these intersections is unproblematic, so long as there is no dispute implicating the legitimacy of the underlying structure of relations that has grown up between the contending groups. The Mashpee land claim suit, however, directly challenges the structure of those relations and the legitimacy of meaning that supports it.

The following treatment of the Mashpee's story is presented from historical and anthropological perspectives. In this way, the discussion mirrors the manner in which evidence was presented at the trial of the Mashpee's land claim. Part III melds the idioms of these two academic discourses in an effort to illustrate the essentially hermeneutic task at hand.[19] The task facing both parties was to give a particular meaning to the facts presented. The normally difficult problem of assaying meaning from events was complicated additionally because the court, through the application of its rules, was attempting to mediate conflicting cultures with conflicting systems of meaning. The court that heard the Mashpee's case was faced with the problem of making "sense" out of the events giving rise to the Tribe's suit. In doing so, the court purported to translate the "description" provided by historians and anthropologists into "meaning" enforced by the power of the state. Law was therefore the tool used to define and interpret the meaning of specific events, although in accomplishing this task it could not accommodate irreconcilable cultural perspectives. The trial allowed no room for divergent cultural understandings, even the Mashpee's self-understanding.

The process of foreclosing certain kinds of interpretation illuminates the way in which "principled, rational decisionmaking" merely obscures

17. *See supra* notes 1-16 and accompanying text.
18. *See infra* notes 23-39 and accompanying text.
19. *See infra* notes 40-60 and accompanying text.

the political roots of certain versions of social life. The legal structure of the issues allowed the court to evade the duty of explaining the virtues of one version of cultural life over another. Thus, the description of "what happened next" is viewed as an objective question, rather than one that ought to be guided by an evolving set of inter-subjective relations. By distinguishing a pre-literate from a post-literate phase in the life of the Mashpee, for example, the court devalued the oral history of the Mashpee where it conflicted with written documents, even though those documents did not reflect the understandings of the Mashpee at the time the documents were created.

The problem of deciding "what happened" is compounded by the rules governing relevance. Part IV addresses the system of examples at work in legal interpretation and explanation.[20] By isolating the exemplary nature of the elements of legal rationality, this Part demonstrates the essentially tautological structure of legal persuasion. The procedure is revealed as self-elaborating: "[T]he conceptual structure hangs above and dominates social being."[21] The method of proof is shown to be a form of idealism masquerading as hard-headed realism. This Part also illustrates how a system of examples described as forming the content of "rationality" privileges some stories over others, and, more importantly, how that privilege is a reflection of the underlying distribution of social power.

Finally, Part V demonstrates that there remain many ways to view the substantive events at issue in the Mashpee trial.[22] That both the Tribe and the non-Indian residents of the town were litigants necessarily colored their individual versions of the events. Apart from the parties, however, there are significantly divergent explanations of the events that escape the internal/external perspective problem that the trial placed in high relief. This conflict of views suggests that faith in American pluralism requires a recognition of certain fundamentally irreconcilable futures. Not everything is possible, even though deferred conflict may lead to the illusion that it is. This Essay illustrates that the choices contained in the structure of law applied to the *Mashpee* case permitted only a limited kind of cultural vision, one from the perspective of the dominant culture. A pluralistic conception of justice may require the incorporation of those conflicting views, but law, in this instance, may not be where justice is found.

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20. *See infra* notes 61-79 and accompanying text.

21. E.P. THOMPSON, THE POVERTY OF THEORY & OTHER ESSAYS 13 (1978) (criticizing Althusserian structuralism for allowing categories to attain a primary role in relation to their material referents, thereby creating precisely the system Marx recognized as idealism).

22. *See infra* notes 80-105 and accompanying text.

II.

A. *Looking Back at Indians and Indians Looking Back: The Case*

In 1976 in *Mashpee Tribe v. Town of Mashpee,*[23] the Indian community at Mashpee on Cape Cod sued to recover tribal lands alienated[24] from them over the last two centuries in violation of the Indian Non-Intercourse Act of 1790.[25] The Non-Intercourse Act prohibits the transfer of Indian tribal land to non-Indians without approval of the federal government. The Tribe claimed its land had been taken from it, between 1834 and 1870, without the required federal consent. According to the Mashpee, the Commonwealth of Massachusetts had permitted the land to be sold to non-Indians and had transferred common Indian lands to the Town of Mashpee. The defendant, Town of Mashpee, answered by denying that the plaintiffs, Mashpee, were a Tribe. Therefore, they were outside the protection of the Non-Intercourse Act and were without standing to sue.

As a result, the Mashpee first had to prove that they were indeed a "Tribe." A forty-day trial then ensued on that threshold issue. The Mashpee were required to demonstrate their tribal existence in accordance with a definition adopted by the United States Supreme Court at the turn of the century in *Montoya v. United States*: "By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[26] This is a very narrow and particular definition. As Judge Skinner, who presided over the trial of the Mashpee's claim, explained in his instructions to the jury: "Now, what is the level of the burden of proof? I've said these matters need not be determined in terms of cosmic proof. The plaintiff has the burden of proving . . . if the [Mashpee] were a tribe."[27]

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23. 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied,* 444 U.S. 866 (1979).

24. "Alienated" was chosen because of its usual meaning—a conveyance that transfers title, regardless of how the transaction occurs.

25. 25 U.S.C. § 177 (1988) (derived from Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730). This Act provides: "No purchase, grant, lease, or other conveyance of lands, . . . from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." *Id.* The original language read: "That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose under the hand and seal of the superintendent of the department. . . ." Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137.

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

27. Record at 40:7 (Jan. 4, 1978), Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1978) (No. Civ. A. No. 76-3190-S) [hereinafter Record] (instructions to jury on burden of proof); *see also Mashpee Tribe,* 447 F. Supp. at 943.

Judge Skinner agreed to allow expert testimony from various social scientists regarding the definition of "Indian Tribe." By the closing days of the trial, however, the judge had become frustrated with the lack of consensus as to a definition:

> I am seriously considering striking all of the definitions given by all of the experts of a Tribe and all of their opinions as to whether or not the inhabitants of Mashpee at any time could constitute a Tribe. I let it all in on the theory that there was a professionally accepted definition of Tribe within these various disciplines.
>
> It is becoming more and more apparent that each definition is highly subjective and idiosyncratic and generated for a particular purpose not necessarily having anything to do with the Non-Intercourse Act of 1790.[28]

In the end, Judge Skinner instructed the jury that the Mashpee had to meet the requirements of *Montoya*—rooted in notions of racial purity, authoritarian leadership, and consistent territorial occupancy—in order to establish their tribal identity,[29] despite the fact that *Montoya* itself did not address the Non-Intercourse Act.

The case providing the key definition, *Montoya,* involved a company whose livestock had been taken by a group of Indians. The company sued the United States and the Tribe to which the group allegedly belonged under the Indian Depredation Act.[30] This Act provided compensation to persons whose property was destroyed by Indians belonging to a Tribe. The theory underlying tribal liability is that the Tribe should be responsible for the actions of its members. The issue in *Montoya* was whether the wrong-doers were still part of the Tribe. The court found they were not.

Beyond reflecting archaic notions of tribal existence in general, the *Montoya* requirements incorporated specific perceptions regarding race, leadership, community, and territory that were entirely alien to Mashpee culture. The testimony revealed the *Montoya* criteria as generalized ethnological categories that failed to capture the specifics of what it means to belong to the Mashpee people.[31] Because of this disjunction between

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28. Record, *supra* note 27, at 36:189 (Dec. 28, 1977).

29. *See id.* at 40:36 (Jan. 4, 1978).

30. Indian Depredation Act, ch. 538, 26 Stat. 851 (1891).

31. The questioning of Vernon Pocknett, a Mashpee Tribe member, illustrates the attempt to impose certain preconceived notions of leadership upon the Mashpee Tribe:

Q: [W]hat was it Mr. Mills did as chief?
A: What he did?
Q: Yes. And you said he gives advice.
A: Very good advice.
Q: He gives good advice, is that right?
A: Right.
Q: He doesn't issue any orders, does he?
A: No, no way.

the ethno-legal categories and the Mashpee's lived experience, the Tribe's testimony and evidence never quite "signified"[32] within the idiom established by the precedent. After forty days of testimony, the jury came up with the following "irrational" decision: The Mashpee were not a Tribe in 1790, were a Tribe in 1834 and 1842, but again were not a

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Q: The [Tribe] has no rules or regulations, does it?

A: Rules or regulations? That would come under way of life. No, we don't have rules or regulations.

Record, *supra* note 27, at 3:191 (Oct. 19, 1977).

Jack Campisi, an ethno-anthropologist, attempted an alternate characterization of the concept of tribal membership:

> What happens is, as I suggested, this is a very close-knit population who lived together for an extended period of time and pretty much knew everybody. . . . But if an individual comes in who has not been known by the community and asserts a birthright, then that individual—it really depends upon members of the community being able from their knowledge of the membership, being able to validate that.

Id. at 11:109 (Nov. 1, 1977).

James L. Axtell, an ethno-historian, described a notion of tribal membership that was not coexistent with "physical membership":

> Q: Is it possible for Indians to walk away and leave a tribe, or are they in a tribe forever, whether they want to be that way or not?
>
> A: Well, that's not a simple question. One could walk out of the physical tribe, where it was located, and still maintain membership in the tribe. On the other hand, one could renounce one's tribal affiliation and yet you could never wipe out the blood line that established you as a descendant of people who were members of that tribe . . . .

Id. at 8:63 (Oct. 25, 1977).

Jack Campisi attempted to explain Indian land use:

> A: [T]he concept of owning land in Fee Simple, generally speaking, is not a North American Indian concept, one used the land, and when one ceased to use the land it reverted.
>
> Q: To whom?
>
> A: To whoever came along and used the land after you.

Id. at 11:130 (Nov. 1, 1977).

32. *See supra* note 7 (exploring the meaning of "signify"). As Jean-François Lyotard commented:

> It is in the nature of a victim not to be able to prove that one has been done a wrong. A plaintiff is someone who has incurred damages and who disposes of the means to prove it. One becomes a victim if one loses these means. One loses them, for example, if the author of the damages turns out directly or indirectly to be one's judge. The latter has the authority to reject one's testimony as false or the ability to impede its publication. But this is only a particular case. In general, the plaintiff becomes a victim when no presentation is possible of the wrong he or she says he or she has suffered. Reciproeally, the "perfect crime" does not consist in killing the victim or the witnesses (that adds new crimes to the first one and aggravates the difficulty of effacing everything), but rather in obtaining the silence of the witnesses, the deafness of the judges, and the inconsistency (insanity) of the testimony. You neutralize the addressor, the addressee, and the sense of the testimony; then everything is as if there were no referent (no damages). If there is nobody to adduce the proof, nobody to admit it, and/or if the argument which upholds it is judged absurd, then the plaintiff is dismissed, the wrong he or she complains of cannot be attested. He or she becomes a victim. If he or she persists in invoking this wrong as if it existed, the others (addressor, addressee, expert commentator on the testimony) will easily be able to make him or her pass for mad. Doesn't paranoia confuse the *As if it were the case* with the *it is the case*?

J.-F. LYOTARD, *supra* note 8, at 8.

Tribe in 1869 and 1870.[33] The jury's finding was "irrational" because the judge had instructed them that if they concluded that the Mashpee had ever relinquished their Tribal status they could not regain it. Based on the jury's findings, the trial court dismissed the Mashpee's claim.[34]

The Mashpee immediately challenged the trial court's dismissal on several grounds.[35] The Tribe argued that the jury verdict presumed it had disbanded voluntarily at some point—a presumption the Tribe alleged had never been proven.[36] Further, the Tribe alleged that the verdict was entirely inconsistent with the trial court's instruction that once the jury found tribal existence ceased at a given time, it could not find the Tribe existed again at a later date.[37] The First Circuit rejected the Mashpee's assignments of error and affirmed the trial court's decision to dismiss their claim.[38] The United States Supreme Court subsequently denied the Tribe's petition for certiorari, allowing the First Circuit's decision to stand.[39]

III.

Yonnondio—I see, far in the west or north, a limitless ravine,
with plains and mountains dark,
I see swarms of stalwart chieftains, medicine-men, and warriors,
As flitting by like clouds of ghosts, they pass and are gone in the twilight

* * *

33. The decision was irrational, given Judge Skinner's instructions:

> Because of the necessity of an historical continuity for the existence of a tribe as I have tried to define it [in this case], once tribal status has been voluntarily abandoned, it is my opinion that it is lost and cannot be revived. It cannot be created anew. . . .
>
> It is, I suppose, possible that by reason of circumstances, tribal existence be so suppressed that it be in limbo for a period, that it not be manifest for a period without there being an abandonment. If you find that there was, by reason of the activities in 1869, 1870, a conscious abandonment of tribal status, then you would not be warranted in finding the existence of a tribe in 1976.

Record, *supra* note 27, at 40:63-64 (Jan. 4, 1978) (instructions to jury). Given the finding that the Mashpee did *not* coustitute a Tribe in 1790, the jury could not find that they *were* a Tribe in 1834 and 1842, according to Judge Skinner's instructions.

34. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 950 (D. Mass. 1978), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied,* 444 U.S. 866 (1979).

35. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied,* 444 U.S. 866 (1979).

36. *Id.* at 585.

37. *Id.* at 590.

38. *Id.* at 594.

39. Mashpee Tribe v. New Seabury Corp., 444 U.S. 866 (1979).

The Baked and the Half-Baked [40]

Whether the Mashpee are legally a Tribe is, of course, only half the question. That the Mashpee existed as a recognized people occupying a recognizable territory for well over three hundred years is a well-documented fact.[41] In order to ascertain the meaning of that existence, however, an observer must ask not only what categories are used to describe it, but also whether the categories adopted by the observer carry the same meaning to the observed.[42]

The earliest structure used for communal Mashpee functions—a colonial-style building that came to be known as "the Old Meetinghouse"—was built in 1684.[43] The meetinghouse was built by a white man, Shearjashub Bourne, as a place where the Mashpee could conduct their Christian worship. Shearjashub's father, Richard Bourne, had preached to the Mashpee and oversaw their conversion to Christianity almost a generation earlier. The Bourne family's early interest in the Mashpee later proved propitious. The elder Bourne arranged for a deed to be issued to the Mashpee to "protect" their interest in the land they occupied. Confirmation of this deed by the General Court of Plymouth Colony in 1671 served as the foundation for including "Mashpee Plantation" within the protection of the Massachusetts Bay Colony. As part of the Colony, the Mashpee were assured that their spiritual interests, as defined by their Christian overseers, as well as their temporal interests would receive official attention. However, the impact of introducing the symbology of property deeds into the Mashpee's cultural structure reverberates to this day. Whether the introduction of European notions of private ownership into Mashpee society can be separated from either the

40. This subtitle is intended as a tongue-in-cheek reference to Claude Lévi-Strauss' work, THE RAW AND THE COOKED (1969). This structuralist account of ethnological categories presaged much modern semiotic theory. Here, of course, the reference to the baked and the half-baked plays on the theme of ethnological categories while, at the same time, invoking the popular pejorative term for an ill-contrived story.

41. Paul Brodeur notes:

> Mashpee was never really settled in any formal sense of the word. It was simply inhabited by the Wampanoags and their Nauset relatives, whose ancestors had been coming there to fish for herring and to gather clams and oysters since the earliest aboriginal times, and whose descendants currently represent, with the exception of the Penobscots and the Passamaquoddies of Maine, the largest body of Indians in New England.

P. BRODEUR, *supra* note 10, at 7-9; *see also* J. CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART 289 (1988) ("[The Mashpee] did have a place and a reputation. For centuries Mashpee had been recognized as an Indian town. Its boundaries had not changed since 1665, when the land was formally deeded to a group called the South Sea Indians by the neighboring leaders Tookonchasun and Weepquish.").

The irony of this "documentation" is that either as journalism or as anthropology it recounts a telling that is not documentation for purposes of the dispute.

42. *See* C. LÉVI-STRAUSS, *supra* note 40, at 5-6.

43. P. BRODEUR, *supra* note 10, at 11.

protection the colonial overseers claim actually was intended or the Mashpee's ultimate undoing is, of course, central to the meaning of "ownership."

Colonial oversight quickly became a burden. In 1760, the Mashpee appealed directly to King George III for relief from their British overlords. In 1763, their petition was granted. The "Mashpee Plantation" received a new legal designation, granting the "proprietors the right to elect their own overseers."[44] This change in the Tribe's relationship with its newly arrived white neighbors did not last long, however. With the coming of the Colonies' war against England and the founding of the Commonwealth of Massachusetts, all previous protections of Mashpee land predicated on British rule quickly were repealed, and the Tribe was subjected to a new set of overseers with even more onerous authority than its colonial lords had held. The new protectors were granted "oppressive powers over the inhabitants, including the right to lease their lands, to sell timber from their forests, and to hire out their children to labor."[45]

During this time the Mashpee were on their way toward becoming the melange of "racial types" that ultimately would bring about their legal demise two hundred years later.[46] Colonists had taken Mashpee wives, many of whom were widows whose husbands had died fighting against the British. The Wampanoags, another southern Massachusetts Tribe that suffered terrible defeat in wars with the European colonists, had retreated and had been taken in by the Mashpee. Hessian soldiers had intermarried with the Mashpee. Runaway slaves took refuge with and married Mashpee Indians. The Mashpee became members of a "mixed" race, and the names some of the Mashpee carried reflected this mixture. What was clear to the Mashpee, if not to outside observers, was that this mixing did not dilute their tribal status because they did not define themselves according to racial type, but rather by membership in their community. In an essay on the Mashpee in *The Predicament of Culture,*[47] Professor Clifford explained that despite the racial mixing that had historically occurred in the Mashpee community, since the Mashpee did not measure tribal membership according to "blood," Indian identity remained paramount. In fact, the openness to outsiders who wished to become part of the tribal community was part of the community values that contributed to tribal identity. The Mashpee were being penalized

44. *Id.* at 15.

45. *Id.*

46. *See infra* text accompanying notes 82-84.

47. J. CLIFFORD, *supra* note 41, at 306-07.

for maintaining their aboriginal traditions because they did not conform to the prevailing "racial" definition of community and society.

In 1833, a series of events began that culminated in the partial restoration of traditional Mashpee "rights." William Apes, an Indian preacher who claimed to be descended from King Philip, a Wampanoag chief, stirred the Mashpee to petition their overseers and the Governor of Massachusetts for relief from the depredation visited upon them. What offended Apes was the appropriation of the Mashpee's worshipping ground by white Christians. In response to the imposition of a white Christian minister on their congregation, they had abandoned the meetinghouse in favor of an outdoor service conducted by a fellow Indian. The petition Apes helped draft began, "we, as a Tribe, will rule ourselves, and have the right to do so, for all men are born free and equal, says the Constitution of the country."[48] What is particularly important about this challenge is that it asserted independence within the context of the laws of the state of Massachusetts. The Massachusetts Governor rejected this appeal and the Mashpee's attempt at unilateral enforcement of their claims resulted in the arrest and conviction of Apes.[49]

The appeal of Apes' conviction, however, produced a partial restoration of the Tribe's right of self-governance and full restoration of its right to religious self-determination, for the Tribe was returned to its meetinghouse. When the white former minister tried to intervene, he was removed forcibly and a new lock was installed on the meetinghouse doors. By 1840, the Mashpee's right to worship was secured.[50]

Control of the land remained a critical issue for the Mashpee. By late in the 17th century, the area surrounding the homes and land of the "South Sea Indians"[51] had been consolidated and organized into a permanent Indian plantation.[52] The Mashpee's relationship to this land,

48. P. BRODEUR, *supra* note 10, at 17.

49. *Id.*

50. *Id.* at 18.

51. In earlier times, the Maslipee were known as "South Sea Indians" because they made their home near Nantucket Sound, which the Dutch called the South Sea.

52. At the trial, the evolution of the Mashpee community was explained expressly in terms of its legal relation to the colony and later the Commonwealth:

> [Prior to 1675, the Maslipee community] seems to have been literally an Indian plantation, that is to say, it was a plantation organized in the necopic [sic] sense like otlier plantations in other parts of the State.
>
> A plantation being in a sense a town in being, a town in becoming a town of the future, which at this point was not yet incorporated. It was an Indian plantation, which meant tliat certain speeial provisions had been established to accommodate tlie fact that the Indians did not speak Englisli by and large and were in tlie process of transition from their aboriginal state to persons who were familiar with the process of English law in the Englisli court system, so it was, essentially, a transitional community whicli was formerly

however, remained legally problematic for the Commonwealth. In 1842, Massachusetts determined that the land was to be divided among individual Mashpee Tribe members, but their power over it was closely circumscribed; they could sell it only to other members of the Tribe. The "plantation" could tax the land, but the land could not be taken for nonpayment of those taxes. In 1859, a measure was proposed to permit the Mashpee to sell land to outsiders and to make the Mashpee "full citizens" of the Commonwealth. This proposal was rejected by the Tribe's governing council. In 1870, however, the Mashpee were "granted" rights to alienate their property as "full-fledged citizens" and their land was organized by fiat into the town of Mashpee.[53]

It was the land that had moved out of Indian control, eleven thousand acres of undeveloped land estimated to be worth fifty million dollars, that the Mashpee Wampanoag Tribal Council[54] sued to reclaim in 1976. Some of the land had been lost in the intervening years, and more was in danger of being lost or reduced to non-exclusive occupancy. The Council based its claim on the 1790 Non-Intercourse Act,[55] which pro-

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under English law, and at the higher levels all appeals ran to the same courts to which appeals from English towns went.

Record, *supra* note 27, at 35:64-65 (Dec. 27, 1977) (Professor Hutchins). James Clifford describes the nature of (and ownership under) the plantation system,

> Once the South Sea Indian Plantation had been established, its inhabitants' claim to their land rested on a written deed and on English law rather than on any aboriginal sovereignty. Like other "plantations" in New England, the community at Maslipee was a joint-ownership arrangement by a group of "proprietors." Under English law proprietors were licensed to develop a vacant portion of land, reserving part for commons, part for the church, and part for individual holdings. All transfers of land were to be approved collectively. This plantation-proprietary form, as applied to early Cape Cod settlements . . . was intended to evolve quickly into a township where freemen held individual private property and were represented in the General Court of the colony. The white plantations around Mashpee did evolve directly into towns. From the late seventeenth century on their common lands were converted into private individual holdings in fee simple. Maslipee followed the same course, but more slowly. As late as 1830 its lands were the joint property of proprietors.

J. CLIFFORD, *supra* note 41, at 19-20.

53. P. BRODEUR, *supra* note 10, at 19-20.

54. In an effort to obtain federal grants offered to American Indians, the Mashpee incorporated a tribal council—The Mashpee Wampanoag Tribal Council, Inc.—in 1974. The Tribal Council became the official business and legal mechanism of the Tribe. *Id.* at 38. Hazel A. Oakley, a Tribal Council officers, testified as follows:

> Q: What does the Mashpee Wampanoag Tribal Council, Inc., of which you are the membership chairman, do?
>
> A: It's the administrative part of the Mashpee tribe.
>
> Q: What do you mean by "the administrative part of the Mashpee tribe"?
>
> A: Well, it does administrative work for the tribe, like making proposals to get funds for its people, and its purpose was to acquire land for its people and bring back its culture to its people.

Record, *supra* note 27, at 2:121-22 (Oct. 18, 1977).

55. 25 U.S.C. § 177 (1988); *see supra* note 25 (quoting the relevant provisions of the Act).

hibits the alienation of Indian lands[56] without federal approval. The Non-Intercourse Act applies to transactions between Indians and non-Indians, and, despite its inherent paternalism, serves to protect tribal integrity.

The Non-Intercourse Act applied only if the Mashpee had retained their "tribal identity" (defined, however, by the white man's rules of the game) from the mid-17th century until they filed their land claim action in 1976. In order to fall within the scope of the Act's protection, the Mashpee had to prove first that they were indeed a "Tribe" and that their status as such had not changed throughout this period. If the Mashpee were no longer a "Tribe" (or if they never had constituted a "Tribe" in the first place), the protection provided by the Non-Intercourse Act evaporated. If, however, the Indians retained their tribal status, then the transactions that resulted in the loss of their village were invalid. At the very heart of the dispute was whether the Mashpee were "legally" a people and thus entitled to legal protection.[57]

Many of the facts underlying the Mashpee's suit were not disputed. What the parties fought about was the *meaning* of "what happened."[58] Seen from the perspective of the Mashpee, the facts that defined the Indians as a Tribe also invalidated the transactions divesting them of their lands. From the perspective of the property owners in the Town, however, those same acts proved that the Mashpee no longer existed as a separate people. How, then, is an appropriate perspective to be chosen? As told by the defendants, the Mashpee's story was one about "a small, mixed community fighting for equality and citizenship while abandoning, by choice or coercion, most of its aboriginal heritage."[59]

Using the same evidence, the plaintiffs told a very different story. It was the story of cultural survival: "[T]he residents of Mashpee had managed to keep alive a core of Indian identity over three centuries against enormous odds. They had done so in supple, sometimes surreptitious

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56. Under the Non-Intercourse Act, protected "Indian lands" are the lands a Tribe claims title to on the basis of prior possession or ownership. *See* 25 U.S.C. § 194 (1988). Section 194 provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Id.

57. *See* 25 U.S.C. § 177 (1988) (referring to "Indian nation" and "tribe of Indians" as those covered by statute).

58. "The jury's problem was not so much weighing conflicting evidence as choosing between plaintiff's and defendant's interpretation of the historical data." Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 589 n.14 (1st Cir.), *cert. denied,* 444 U.S. 866 (1979).

59. J. CLIFFORD, *supra* note 41, at 302.

ways, always attempting to control, not reject, outside influences."[60] Which of the two conflicting perspectives is the "proper" one from which to assess the facts underlying the Mashpee's claim? The answers provided by the courts that considered the Mashpee's claims exemplify both the use and abuse of examples in American law. As the next Part illustrates, the exemplary nature of legal argument is bounded by the rules that control the substantive demonstration of the issues in dispute and by the authoritative use of previously decided cases. Demonstration and authority are two ways in which examples are used to structure legal understanding. Yet the choice of examples is not a neutral process; it always involves adoption of a substantive perspective. The abuse of example arises when the substantive perspective that is authoritatively adopted is treated as though it arose naturally.

IV.

(Race of the woods, the landscapes free, and the falls!
No picture, poem, statement, passing them to the future)

* * *

A. *Exempli Gratia*

Two closely related kinds of examples seem to be at work in legal discourse. First, there is the *authoritative* example—that which determines whether or not one may proceed toward obtaining a legal remedy for a perceived injustice. Precedent, even in the context of our statutory age,[61] is the cardinal manifestation of the authoritative example. A statute such as the Non-Intercourse Act may be a source of law, but courts, using a variety of common law techniques, ultimately determine the meaning of that statute.[62] The role of authoritative examples thus is twofold, specifying the outer limits of a particular legal pronouncement and, at the same time, establishing a foundation for subsequent interpretations of those limits. This bifurcated function allows legal authority to appear as though it were timeless. The example from the past is merged with a new example from the present: Linearity is redefined as simultaneity.[63] The past is always present in the form of the authoritative example.

60. *Id.*

61. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 165 (1982) (discussing the problems of adjudication in the face of increasingly detailed legislative attempts to control all relevant authority).

62. *See* Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (arguing that in order to understand how judges interpret statutes, the observer must look at the techniques of practical reason the courts apply in hard cases).

63. *See* Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1640 (1989). As Greenhouse explains:

Precedents accumulate as a "present body of law," yet the fact of accumulation leaves the body forever present, yet forever incomplete.

The second kind of example at work in legal discourse might be labeled "explanatory." An explanatory example is a statement or exhibit, either real or interpretive,[64] taken as evidence of the sufficiency of a legal claim. In contrast to authoritative examples, which govern whether or not a particular legal claim can be pursued at all, explanatory examples "flesh out" legal claims, giving them substance within the confines established by the controlling authoritative example. Explanatory examples must be constructed to showcase the reality being tested by a given legal claim in terms recognized by the governing authoritative examples. Explanatory examples may both give meaning to the facts that underlie a legal claim and provide a basis for distinguishing that claim from apparently relevant, but undesirable, authoritative examples.

There are, of course, rules governing the use of either type of example.[65] The essence of these rules is the predictive power they yield. Their predictive value resides in their power to inform legal actors how a given dispute will be resolved. However, the rules themselves are absolutely determinative only of the actual dispute to which they are applied. Hence, their predictive potential necessarily involves something of a gamble. When seeking an authoritative example, an attorney or a judge always must determine at the outset whether the facts of some previously

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The common law, which developed at this period, in some respects reflects perfectly a logic of linear time, in its reliance on precedent, its commitment to reform, and its acknowledgment of individual persons and rights. But the common law also involves larger claims beyond linear time. Reasoning by analogy to precedent creates a *false* historicity in that it perpetually reclaims the past for the present: in theory, a dispute in 1989 can be resolved by reference to cases from 1889 or 1389. "The law" thus accumulates, but it never passes; at any instant, it represents a totality. It is by definition complete, yet, its completeness does not preclude change. It is a human achievement, yet, by its reversible and lateral excursions, and by its collective voice, it is not identifiably the product of any *particular* individual or group. Symbolically, it stands at the border between the two great zones of Indo-European thinking—the human-made (anthropogonic) and the divine (cosmogonic)—and is nourished by the indeterminacy of the distinction between events in linear time and possibilities (all-times).

Id.

64. The distinction between "real" and "interpretive" is necessarily problematic, since the idea of "real" evidence might be understood as evidence with some non-contingent meaning. That inference is not intended here. Perhaps an illustration will help. Some conduct, say refusing to hire someone because of her race, is per se violative of a legal standard. So testimony such as "yeah, I wasn't going to hire a black woman," provides "real" evidence to support an intentional discrimination claim. Without such a "smoking gun," however a court must sort through other explanatory examples in order to give meaning to a whole series of events, each with problematic content. Interpretive examples, in contrast to real examples, provide a court with grounds for determining whether the conduct complained of is indeed proscribed.

65. *See* Frickey, *Stare Decisis in Constitutional Cases: Reconsidering* National League of Cities, 2 CONST. COMMENTARY 123 (1985) (discussing the flexibility of the doctrine of stare decisis, especially in the face of decisions that have proven to be wrong).

resolved dispute are sufficiently similar to the controversy at issue to dictate how the parties to that controversy ought to be treated. In order to make such a determination, the judge or attorney must closely examine the factual setting of the prior case—the legal precedent serving as authoritative example—for similarity, difference, and importance relative to the present dispute.[66]

In a system that uses previously decided cases as the foundation for authoritative statements, at least two questions of fact are central to resolving a given dispute. First, what facts may be recognized as proof of the legal claim? Second, what facts are recognized as legally determinative in the search for an authoritative example—in short, what facts count in this search? Determining which facts are critical and which interpretation of the facts is most like the authoritative interpretation is a continuing process. The translation of the raw material of life into legally cognizable claims is at the heart of the lawyer's art, but like any other extremely stylized art form, the artist's creativity is constrained by the structure of the project.

The centrality of the meaning of facts, in the sense of "what happened," recurs constantly. From precedent we get two additional kinds of examples: 1) the example of authoritative fact patterns, and 2) the example of authoritative *interpretations* of those fact patterns. Judicial opinions typically begin with a statement of the facts in dispute. That statement usually presages the conclusion, but the precedential import of the facts changes as the meaning of the case changes over time.[67] The simple conclusion that a court reached may not be the proposition for which the case is cited. The conclusory factual statement ultimately loses its mooring in the specific ease. Thus, which facts are authoritative will change as the ease is made to fit into an evolving system of relations that gives it meaning.[68] In cases in which different courts try to answer the same legal question, creating or discovering a set of authoritative interpretations lies at the heart of the attorney's task. These interpretations must be used to frame the raw material of a given case so as to suggest it is sufficiently similar to previous cases or to some articulated

66. Two important points are elided here: The first is a justification for giving a precedent—as prior decided case—dispositive force, the second is the question of how to go about determining which facts are important.

67. *See generally* Deutsch, *Precedent and Adjudication,* 83 YALE L.J. 1553 (1974) (discussing the relationship between relevance and legitimacy).

68. The dynamic process of interpretation and "meaning creation" is central to the "law making" role of courts. *See* G. CALABRESI, *supra* note 61, at 1-33; Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science,* 20 STAN. L. REV. 169 (1968).

statutory standard, in order to justify a court's listening to the claim and subsequently granting the desired relief.

At the core of such an enterprise, of course, is the recognition that there never are identical cases, only cases that are more similar or different. However, articulating a claim in terms of an authoritative example provides at least an initial foundation for determining the relative importance of specific facts. In this way, legal precedent in the role of authoritative example comes to life both as a *fact-filled instance* and as a *fact-denuded rule.* The existence of the authoritative example as rule suggests to the legal actor how the explanatory examples—the facts of the case—must be arranged. Exploration of the authoritative precedent must include both a sense of what the case "stands for," that is, what "rule of law" may be extracted from it, and a sense of what "actual facts" were essential to the expression of that rule. Both these functions are critical for a legal system that is predicated on prior determinations which are to be viewed by the participants in that system as timeless yet historically grounded. This is what is meant by saying that a precedent is "fact-filled"—it is grounded in a concrete situation. Part of its legitimizing power comes from the rootedness of the decision, but its authoritative *logical* power comes from the statement of the rule that emerges from the decision. This rule is "fact-denuded," for it ultimately does not depend upon the particular dispute that gave rise to the law suit to have persuasive power.

Intuitively, one assumes that everything potentially helpful to telling the story behind a given legal claim ought to be allowed in as part of the explanation. The reality of the legal process requires, however, that the story be told in accordance with a set of rules designed to protect the integrity of a subsequent decision as precedent or authoritative example. Further, the rules that limit notions of relevance to the authoritative commands also guide the structuring of the presentation.

B. *The Rules of the Game: Telling a "Relevant" Story*

The rules governing how one tells a story in court are supposed to protect the court from wasting its time by listening to immaterial information or testimony that might confuse or prejudice the ultimate decisionmakers about what they are supposed to be deciding. These rules turn on the legal concept of "relevance."

Typically, a legal claim is composed of elements that each must be proven independently. "Relevant" evidence is a statement or exhibit that tends to demonstrate the relationship between a factual assertion and a particular element of a legal claim. According to the Federal Rules of Evidence: " 'Relevant evidence' means evidence having any tendency to

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[69] Thus, "relevance," the foundation for rules permitting the introduction of evidence, controls and is controlled by the existence of other facts, which themselves are controlled by the substantive standard or statute being litigated. Relevance is the guide, but the question remains: Relevant to what? Treating relevance as though it were a neutral analytic category takes our attention away from the substantive standard being disputed because it requires that the judge making the relevance determination treat the substantive standard as a given. In cases like *Mashpee,* the underlying standard is often the heart of the dispute. Re-read the definition. Relevance is a probability determination. The judge is to ask herself: "If I let this evidence in, will it add any probitive value to the facts we already know?" This inquiry begs the question of whether the "facts" already admitted are those that *ought* to be in.

The legal concept of relevance empowers a court to approve or disapprove certain narrative elements of a party's story. A court's evidentiary rulings, however, do not *control* truth, but rather *translate* it into the terms of the substantive statute or standard at issue. The truth value of a particular fact within the confines of legal discourse, therefore, is directly related to whether it explicates the substantive claim being adjudicated. The issue being litigated is the measure of truth. Remember Judge Skinner's frustration at the testimony of the various "experts" concerning the definition of "Tribe." He had fully expected to consider some "objective" or, at minimum, generally accepted, definition of this ethno-legal category. Finding no agreement, Judge Skinner turned to a legal standard that was completely acontextual (as well as profoundly ethnocentric) by using *Montoya* to assess the Maslipee's claim to tribal status. Judge Skinner translated, via *Montoya,* the lived experience of the Mashpee into an objective, acontextual legal category.

The process of legal storytelling and relevance determination is more like a gathering of material for an index[70] than the telling of a classic narrative. Facts are assembled to tell a story whose conclusion is determined by others. Each fact must point to the next, not in a tempo-

69. FED. R. EVID. 401; *see also* MCCORMICK ON EVIDENCE § 185, at 544 (E. Cleary 3d ed. 1984) ("In sum, relevant evidence is evidence that in some degree advances the inquiry.").

70. According to Kevelson, "In semiotic terms the index is nothing but a sign, or sign system, pointing to topics regarded as significant to the indexer. Thus an index, like a code in any other system, is never complete." R. KEVELSON, *supra* note 12, at 137. The point here is that legal storytelling is more akin to the index of a book than to the text of that book. Like an index, the facts constituting a legal story indicate the places one might turn to discover information without actually supplying that information.

ral sense, but rather only in the sense dictated by the substantive standard being litigated. The determinations of relevance—what can be admitted as evidence—locate the court as the indexer: The one who determines significance. The story told by the parties must point back constantly to the story told by the court and the precedents, which, of course, are merely the stories deemed acceptable by previous courts. By structuring legal storytelling in this way, questions of power, perspective, and value are evaded.

So what kind of story can be told within the confines of legal discourse? Let us turn to the story of the Mashpee Indians and listen to the story they tell about themselves and the story that is told about them, and then decide which story makes more sense.

C. *Law Looks: Documentary Evidence*

> There is, then, an incommensurability between popular narrative pragmatics, which provide immediate legitimation, and the language game known to the West as the question of legitimacy—or rather, legitimacy as a referent in the game of inquiry. Narratives, as we have seen, determine criteria of competence and/or illustrate how they are to be applied. They thus define what has the right to be said and done in the culture in question, and since they are themselves part of that culture, they are legitimated by the simple fact that they do what they do.[71]

In response to the Mashpee's claims, attorneys for the Town of Mashpee argued that the Tribe lacked racial purity, that it failed to retain a sufficient degree of self-government. It exercised little if any "sovereignty" over specific territory; it maintained no perceivably coherent sense of "community," and therefore was not a Tribe as defined by the Supreme Court in *Montoya.*[72] The defense's main witness, Francis Hutchins, a historian, offered five days of exhaustive testimony.[73] Although he and the Mashpee referred to more or less the same documents, his positivistic[74] account of the Mashpee's history left no room to suggest that certain land deeds in fact reflected white, rather than Indian, notions of land ownership. The very acceptance by the court and the witnesses of the symbology of deeds presupposed a certain structure for the Mashpee story. This structure, framed with the European indicia of *ownership,* was asserted by the defense as the only basis for the Tribe's

71. J.-F. LYOTARD, *supra* note 13, at 23.

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

73. *See* Record, *supra* note 27, at 34 (Dec. 21, 1977), 35 (Dec. 22, 1977), 36 (Dec. 28-29, 1977), 38 (Dec. 30, 1977).

74. The implication of characterizing Hutchins' testimony as "positivist" is that the recounting did little more than specify "what happened" from a pseudo-objective perspective. There was no inquiry into the validity of how Hutchins might know "what happened."

claims. In doing so, defendant's counsel translated the Tribe's claims into terms foreign to the Mashpee. This rhetorical move stripped the land claim of nuances that deeds could not replace. The deeds not only reconstituted the Tribe's basic claim, they also temporalized it; deeds set it apart from the evolving tradition of the Indians' relationship to their physical surroundings, and, at once, both elevated and debased their relationship to the land.[75]

With regard to political leadership, the defendants' historian found scant historical traces of Indian government at Mashpee.[76] The court apparently did not recognize any irony in the defense's attack on the Mashpee's claim of "self-government." According to the defendants, the Mashpee could be "self-governed" only if the Tribe adopted political forms susceptible to documentary proof. Unfortunately, the Tribe did not see fit to create that kind of proof of its political existence, since the court was asking for evidence of the type of political life that white Europeans, but not the Mashpee, recognized as legitimate. The Mashpee tried to point out that what was "appearing" as a "lack" or "gap" in the defendants' account of their history was something that they simply

75. In his testimony, Professor Hutchins spoke of the "breakdown" of the Mashpee community, owing to its "choice" to remain on Cape Cod, rather than being relocated to the Western United States when "offered the opportunity" to do so in the 1700s. What Hutchins failed to comprehend, however, is that the command, "If you want a land base, go west," completely misperceives the Mashpee's fundamental sense of place. The irony, of course, is that the Tribe's culturally-defined relationship to the land was interpreted in light of Euro-American standards. As Bruce Chatwin writes in another context:

> White men . . . made the common mistake of assuming that, because the Aboriginals were wanderers, they could have no system of land tenure. This was nonsense. Aboriginals, it was true, could not imagine territory as a block of land hemmed in by frontiers: but rather as interlocking network of "lines" or "ways through."

B. CHATWIN, THE SONGLINES 56 (1987) (exploration of Australian Natives' understanding of time, place, and identity).

76. *See, e.g.*, Record, *supra* note 27, at 36:47-48 (Dec. 28, 1977). Hutchins testified that between 1666 and 1870 no Indian government existed:

> Q: From the period of time in 1666, when the sachem of [manomet] relinquished his interests, until the time that New Plymouth Colony became joined with Massachusetts Bay Colony, did you observe any governmental structure in the Mashpee community other than that established by the laws of New Plymouth Colony?
>
> A: No.
>
> Q: During the period of time when or immediately following the joining of New Plymouth Colony with Massachusetts Bay Colony, up through the time of the Revolutionary War, did you observe any governmental structure in the Mashpee community other than that established by the laws of the Province of Massachusetts Bay?
>
> A: No.
>
> Q: During the period of time from the Revolutionary War through 1870, did you observe any government in the community other than that established by the laws of the Commonwealth of Massachusetts?
>
> A: No.

Id.

would not have recorded in written form.[77] Within the idiom of documentary evidence as written record, because the Mashpee Indian culture is rooted in large measure on the passing of an oral record, their history could only signify silence.[78] The commonplace view, replicated in the process of legal proof, is that "facts" only have meaning to the extent that they represent something "real." The stories that members of the Mashpee Tribe told were stories that legal ears could not hear. Thus the legal requirements of relevance rendered the Indian storytellers mute and the culture they were portraying invisible. The tragedy of power was manifest in the legally mute and invisible culture of those Mashpee Indians who stood before the court trying to prove that they existed.[79]

V.

Yonnondio

> Yonnondio! Yonnondio!—unlimn'd they disappear;
> To-day gives place, and fades—the cities, farms, factories fade;
> A muffled sonorous sound, a wailing word is borne through the air
> for a moment,
> Then blank and gone and still, and utterly lost.
>
> * * *
>
> We are doubtless deluding ourselves with a dream when we think that equality and fraternity will someday reign among human beings without compromising their diversity. . . . For one cannot truly enjoy the other, identifying with him, and yet at the same time remain different.[80]
>
> * * *

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77. Vine Deloria, Jr., an attorney, author, and Indian affairs consultant, testified:

> [Y]ou don't really study tribes. You work with the people to help them prepare the best understanding you can of what the current problems are, how they got into the situation they got into. In the course of that you talk with a great many Indians. A lot of times they remember things that are not in the ordinary train of documents that your standard economic scholar would run across. So in checking the oral testimony, oral tradition of the people, then that gives you additional leads as to where you can find other sources to fill in the history. And there's no really good history on any tribe in the country.

Record, *supra* note 27, at 16:109 (Nov. 9, 1977).

78. The cultural bias in favor of written, as opposed to oral, history resounded throughout the trial of the Mashpee's land claim suit. Take, for example, the testimony of defense witness Francis Hutchins, a political scientist and historian, regarding his method of researching Indian history: "All the materials which the historian uses when you are dealing with a historical period, you can't pick and choose, you have to use what you can find. And I have tried to look at *every piece of paper* that survives from that period relating to the subject." Record, *supra* note 27, at 34:59-60 (Dec. 21, 1977) (emphasis added).

79. "It is important to remember that the voices to which power responds must be those that it can hear." Torres & Brewster, *Judges and Juries: Separate Moments in the Same Phenomenon,* 4 LAW & INEQUALITY 171, 181 (1986) (discussing the problems feminism has encountered in searching for a voice with which to participate in legal discourse).

80. C. LÉVI-STRAUSS, THE VIEW FROM AFAR 24 (J. Neugroschel & P. Hoss trans. 1985).

What were the underlying structures or categories guiding the determination of what evidence in the Mashpee trial was deemed "material"—that is, within the confines of the legally defined dispute?[81] In order to construct an answer, it is necessary to examine two other problems underlying the materiality of the evidence offered by the defense. First, in claiming blood as a measure of identity, the defense argued (to the all-white jury) that "black intermarriage made the Mashpees' proper racial identification black instead of Indian."[82] Because of the racial composition of the community, that the jury would be composed exclusively of white people virtually was guaranteed by the voir dire in which prospective jurors were asked whether they were themselves Indian, had any known Indian relatives, or had ever been identified with organizations involved in "Indian causes."[83] White intermarriage was mentioned only in passing.[84]

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81. "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial." MCCORMICK ON EVIDENCE, *supra* note 69, § 185, at 541.

82. Petition for Certiorari to the United States Court of Appeals for the First Circuit at 11, Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.) (No. 79-62), *cert. denied,* 444 U.S. 866 (1979) [hereinafter Petition for Certiorari]. The United States submitted extensive evidence of racial integration within the Mashpee community:

> We do know in many instances the geographic area from which both the Indians and the Negroes came, who came to Mashpee. So it's quite clear that quite apart from the question of Indian blood, the Indian blood which many of these people had was not local Indian blood.

Record, *supra* note 27, at 36:18-19.

> [By 1790, a] great many from a great many places and racial and cultural backgrounds had entered the community . . . not only through marriage, but also by coming as individuals or as families to the community. Mashpee by this time had already become what it has remained in subsequent years, a truly remarkable non-white melting pot.

Id. at 36:137.

83. For example, the Record contains the following exchange during voir dire questioning of William Brassill:

> The Court: Do you, yourself, have any Indian ancestry that you know of?
> Mr. Brassill: No.
> The Court: Do you feel that the Indians as a group have been unfairly treated in the past?
> Mr. Brassill: Well, from what I know of the history in some cases, yes, I do.
> The Court: Do you feel any personal responsibility to this that you have any obligation to right these ancient wrongs?
> Mr. Brassill: No.
> The Court: Have you ever been identified with any organization involved in Indian causes?
> Mr. Brassill: No.
> The Court: Have you or any member of your immediate family or any close friend ever been employed by a government agency dealing with Indian affairs?
> Mr. Brassill: No.
> The Court: All right, the juror may be seated as juror No. 2.

Record, *supra* note 27, at 1:21-22. One notes, of course, that this juror was *not* questioned regarding any affiliation, past or present, that might prejudice him *against* Indians or "Indian causes."

84. Even the slightest sensitivity to the racial history of the United States makes apparent the racial taxonomy being imposed here. The defense affected a purely external view of the process of

Second, "the trial court instructed the jury that the tribe could terminate through social or cultural assimilation of '*English forms*' and '*English labels.*' "[85] The court interpreted Mashpee adaptation to the dominant culture, necessary for their survival as an independent people, as proof the Tribe had surrendered its identity. That interpretation incorporates a dominant motif in the theory and practice of modern American pluralism.[86] Ethnic distinctiveness often must be sacrificed in exchange for social and economic security.

In their appeal to the United States Court of Appeals for the First Circuit,[87] the Mashpee argued that "integration and assimilation have expressly been held insufficient to destroy tribal rights."[88] Notions of social and cultural assimilation, such as those upon which the defense relied, impute reified[89] social standards to Indian communities that deny

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intermarriage and assimilation—not just *any* external view, but a racially *white* external view. The internal perspectives, within the tactical stance adopted by the defense, were irrelevant. *See, e.g.*, Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1988); Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

85. Petition for Certiorari, *supra* note 82, at 15-16 (emphasis added); *see also Mashpee Tribe*, 592 F.2d at 586 (addressing trial court's instructions to jury regarding the adoption of English forms and English labels).

86. *See* Torres, *supra* note 84 (arguing, in part, that cultural pluralism as presently defined in American culture reflects systemic inequalities).

87. *Mashpee Tribe*, 592 F.2d at 575.

88. The Kansas Indians, 72 U.S. (5 Wall.) 737, 756-57 (1867) (character of tribal organization not affected by actions of the state; change can only come through treaty or voluntary abandonment of tribal organization); Petition for Certiorari, *supra* note 82, at 16. *See also* United States v. Holliday, 70 U.S (3 Wall.) 407, 408-10, 417-20 (1866) (federal decision to recoguize a Tribe is political decision not subject to judicial review); Joint Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (lack of official federal recognition does not preclude tribal status for some purposes); Confederated Salish & Kootenai Tribes v. Moe, 392 F. Supp. 1297, 1315 (D. Mont. 1975) (changes in tribal status can only be aecomplished by treaty or voluntary abandonment of tribal status), *aff'd*, 425 U.S. 463 (1976).

89. Reification is a term that has generated an impressive amount of commentary, beginning with Hegel, through Marx, to Weber, and Lukács. The phenomenon, as I mean it to apply here, might be explained in the following way: "Its basis is that a relation between people takes on the character of a thing and thus acquires a 'phantom objectivity,' an autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature: the relation between people." G. LUKÁCS, HISTORY AND CLASS CONSCIOUSNESS 83 (1971). Professor Peller provides a useful illustration:

> Social roles are taken as objective to the same extent that they are seen to signify some positive, rather than merely relational, term. The teacher is socially created as "teacher" only in relation to the way "students" are socially created. There is no positive content to the roles themselves outside of their relational status. From within the subject/object dichotomization, however, the roles are seen to have positive content, and to exist as objective terms with fixed natures, which foreclose alternative possibilities for social organization. In short, they are reified.

Peller, *supra* note 7, at 1282. In another context, Professor Catharine MacKinnon explains:

> Objectification in marxist materialism is thought to be the foundation of human freedom, the work process whereby a subject becomes embodied in products and relationships. Alienation is the socially contingent distortion of that process, a reification of products and relations which prevents them from being, and from being seen as, dependent on human

not only their right to historical change, but also the reality of their paradoxical continued existence. If the Mashpee only could be "Indians" by fitting into the definitions relied upon by the court and the defense, then the Mashpee's lived experience was devalued to the extent it did not conform. Moreover, by arguing that the Mashpee had been assimilated into the dominant culture merely because they had adopted some forms of that culture meant that the Mashpee could not change, even if they determined that some cultural adaptation was necessary to their own cultural survival.

Thus, the story of the Mashpee and their "otherness" can be told in several ways. Whether that story could be told in a way that is legally relevant, while still encompassing the multiple paradoxes of the general inquiry, remains the central problem.

At least one version of the Mashpee story begins with the rise of "Indian consciousness"[90] in the late 1960s and 1970s that resulted in compelling political expression, partially through established legal mechanisms and institutions. Among the manifestations of this consciousness were the so-called Indian land claim suits of the 1970s.[91] These legal attacks on what were believed to be secure land titles were devastatingly upsetting to white landowners largely because they had the potential to undercut more than a century of settled expectations[92] and redistribute

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agency. But from the point of view of the object, objectification *is* alienation. For women, there is no distinction between objectification and alienation because women have not authored objectifications, they have been them . . . . Reification, similarly, is not merely an illusion to the reified; it is also their social reality.

C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 124 (1989).

90. *See* P. MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE 33-58 (1983) (chronicling the rise of the American Indian Movement and the United States Government's attempts to violently disrupt and disband it).

91. There is an interesting parallel to the Indian land claim suits, as discussed *supra* note 10, in the emergence of Mexican-American political consciousness of the 1950s, 1960s, and 1970s. *See generally* M. GARCIA, MEXICAN AMERICANS: LEADERSHIP, IDEOLOGY, AND IDENTITY, 1930-1960 (1989). Quite apart from the development of "chicano" consciousness was the "Hispano-Indio" movement of New Mexico. With much less success, that movement attempted to enforce land claims which antedated the formal jurisdiction of the United States over that territory.

92. The essence of the power of law comes from its seeming connectedness to "the way things are and have always been." *See* Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 186-88 (1980). As Sax explains:

> The essence of property law is respect for reasonable expectations. The idea of justice at the root of private property protection calls for identification of those expectations which the legal system ought to recognize. . . . To put the idea of expectations in a broader context, one might say that stability, and the protection of stable relationships, is one of the most basic and persistent concerns of the legal system. Stability in ownership is what we protect with property rights . . . . Of course, stability does not mean the absence of change, nor does it mean political or legal reaction. It does mean a commitment to evolutionary rather than revolutionary change, for the rate of change and the capacity it provides for transition are precisely what separate continuity and adaptation from crisis and collapse.

Id. (footnotes omitted).

power in a material way. The suits sought to shift control over the most basic material resource, land. What made the Mashpee's challenge particularly disconcerting to the white landowners was that it was conducted according to rules the now-frightened, non-Indian landowners felt compelled to respect—a lawsuit.

The Mashpee's story might begin another way. From the founding of the plantation for South Sea Indians and the Village of Mashpee until the middle 1960s, the area now known as the Town of Mashpee was controlled by people who identified themselves as Mashpee Wampanoag Indians. The Indian people of Mashpee exercised all the political power normally associated with Massachusetts' municipalities, including control over land use and permits for public activities.[93] How the Mashpee actually described themselves was immaterial to their exercise of power. The normal disputes that arose out of the conduct of municipal affairs were, in effect, family squabbles. Even if some Mashpee did not approve of how others were acting, the integrity of the group remained unchallenged.

Circumstances drastically changed, however, in the mid-1960s. An influx of non-Indians who were not incorporated into the Mashpee people[94] shifted the balance of political power in the town.[95] With a change of political power in the community from Indian to non-Indians came changes in the material conditions of life in Mashpee. Land formerly open to the community was posted by its new private owners. Seaside resort developments were planned where only unspoiled woods and shoreline existed before. These changes were unsettling to the long-term Indian residents of Mashpee, who turned to the Non-Intercourse Act as

93. J. CLIFFORD, *supra* note 41, at 279.

94. Much earlier in Mashpee history (although continuing to some extent throughout Mashpee's existence), the Tribe had taken in outsiders who subsequently became part of the Mashpee people. Some of the early non-Indians who intermarried into the Tribe complained about the limitations that Indian ways placed upon their ambition and tried to change those ways. At least initially they did not succeed. The full extent of their success across the whole of Mashpee history, however, became a central issue in the Mashpee's land claim suit. *See supra* note 52 and accompanying text.

95. As James Clifford notes:

> "Cape Cod's Indian Town" had finally been discovered. For centuries a backwater and a curiosity, in the 1950s and 1960s Mashpee land became desirable as a site for retirement, vacation homes, condominiums, and luxury developments. Fast roads now made it accessible as a bedroom and weekend suburb of Boston. . . . The town government, still run by Indians, enjoyed a surge in tax revenues. But when local government passed out of Indian control, perhaps for good, and as the scale of development increased, many Indians began to feel qualms. What they had taken for granted—that this was their town—no longer held true. . . . The land claim, while focusing on a loss of property in the nineteenth century, was actually an attempt to regain control of a town that had slipped from Indian hands very recently.

J. CLIFFORD, *supra* note 41, at 279-80.

by the rules to be comprehended by legal discourse, regardless of whether the self-constructed reality of the Mashpee corresponds to the legal model. Worse, these reified social relations are projected upon a background of settled expectations that run directly counter to the claims the Mashpee made. In order for the Mashpee's legal claim to make "sense," it must be phrased within a strictly legal context, and that context must include the justification for displacing two centuries of "the way things are."

In the context of this lawsuit, once "Tribe" became exclusively a legal construct, it embodied all of the subsidiary or provisional social meanings that gave it life within a pseudo-objective legal form. By entering the universe of legal discourse, the term "Tribe," in the context of the Non-Intercourse Act, has no meaning for the internal perspective of people claiming that status. Instead, "Tribe" means a group of indigenous people who have structured their existence in such a way that outsiders, specifically legal experts, would say the grouping is a "Tribe." Thus the legal notion of "Tribe" contains within it projected ethnological categories as well as political categories.

A Tribe is incapable of *legal* self-definition. Instead, it must point to something that then points back and leads others to declare the Tribe is indeed what it claims to be. That "something" functions as an indexical sign—that is, the information the sign supplies does not dispose of the legal identity, but merely suggests where an answer may be found. The "things" that the Indians must point to in order to establish they are a Tribe are the authoritative examples discussed earlier.

These authoritative examples are index-like in nature because they define the significance of other signs. Land can function as such a sign. The land is a constituent element of the Tribe itself. Without the requisite documentation, the land is only a part of the Tribe's *cultural* self-definition, but is legally meaningless. A Tribe can point to the land it occupies and controls as a sign that it exists. Thus, although the land becomes part of what constitutes tribal existence, it is a signal that the law can ignore.

But if a Tribe is still capable of constituting itself outside of the legal process, what need is there for legal recognition? The law polices the boundaries between contending cultures and provides one possible foundation for the integrity of subordinate cultures. As has been illustrated, law also can be culturally subversive. For example, the indexical value of land in establishing identity is completely different than the legal value of land inscribed in deeds. The latter is legally recognized as ownership,

carrying with it all the legal freight that "ownership" implies.[103] The former may have constitutive power, but it appears to signify nothing when translated into the idiom of legal discourse.[104] In this way, the law can undermine the foundational significance of land for a particular culture.

A deed signifies ownership. In the discourse of law, ownership of some interest is the most important relationship one can have to land. Yet according ownership this role occludes the important constitutive power specific land has for people and communities. We see this tension everywhere: in the "peuny auctions" of the recent farm crisis[105] and in the land claim suits brought by Indians.

The importance of community identity looms as large as the importance of "ownership" for any individual proprietor. The elevation to a dominant position of one aspect of a complex relationship reflects the power inherent in legal discourse to corrupt meaning, as well as the role of legal translation in that process.

CONCLUSION

> Hegel once wrote that the relationship between the individual and the community can be looked at in only two ways: "[E]ither we start from the substantiality of the ethical order [such as, the traditions and laws

103. Pound, *The Law of Property and Recent Juristic Thought,* 25 A.B.A. J. 993, 996 (1939). Pound comments on Duguit's assertion that property is merely a social function:

> [T]here are no such things as rights. There are only social functions . . . . "Liberty," says Duguit, "is a function." He adds: "Today each person is considered as having a social function to fulfill and therefore is under a social duty to develop to the greatest possible extent his physical, intellectual and moral personality in order to perform his function most effectively."
>
> Note how property tied up with liberty in this theory of state enforcement of social functions. According to the civilians, property involves six rights: a *jus possidende* or right of possessing, a right in the strict sense; a *jus prohibendi* or right of excluding others, also a right in the strict sense; a *jus disponendi* or right of disposition, what we should now call a legal power; a *jus utendi* or right of using, what we should now call a liberty; a *jus fruendi* or right of enjoying the fruits and profits; and a *jus abutendi* or right of destroying or injuring if one likes—the two last also what today we should call liberties. Thus at least half of the content of a right of property is liberty—freedom of applying as one likes, free of legal restraint. But, says Duguit, "property is not a right; it is a social function. The owner, that is to say the possessor of wealth, by the fact of his possession, has a social function to perform." If he does not perform it, the state is to intervene and compel him to employ it "according to its nature."

Id. at 997.

104. *See, e.g.,* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988) (permitting federal agency to build a highway through sacred tribal land did not impose unreasonable burden on religion, even though road rendered religious practice impossible; land was not *owned* by the Tribes).

105. Penny auctions, first used in the 1930s, were collective action taken by farmers to prevent foreclosure sales of neighbors' land. A group would gather on the day of the sale and attempt to prevent anyone from bidding on the land or equipment that was being sold.

> of a given community], or else we proceed atomistically and build on the basis of single individuals."[106]

Regulation of the interaction of groups within a polity that has taken the individual as a foundation for its moral and political order assumes a special poignancy where cultures conflict irreconcilably. Law provides no place of grace because what is at issue is the definition of the polity. To grant sub-groups a special status or alternative basis for defining themselves calls into question the "substantiality of the ethical order" that defines "rights" in terms of individuals. Yet structuring the debate in this way, as illustrated above, merely means that the proponents of the preservation of aboriginal claims ultimately will lose. It does no good to claim otherwise, unless the basis for the aboriginal claims can be reconstructed on the basis of group identity. The preservation of an alternative order is a direct challenge to the plenary power of Congress and to any notions of sovereignty other than a dependent sovereignty so constricted that it cannot deflect countervailing normative visions of community. The law, as it has been narrowly conceived in this Essay, creates at most a space where politics may be practiced, but it is itself an ineffective form of politics, especially for those who would change the prevailing order.

As was argued in an earlier essay, the hope for the development of alternative cultural norms lies in the creation of a real cultural pluralism.[107] A "real cultural pluralism" is one that within the context of a democratic polity, respects the cultural foundations for differently conceived notions of the "good" and provides a social space for such conceptions to take on material form. The material aspects of a culture's existence should not be underestimated. Without the concrete capacity to reproduce itself, a culture must wither and disappear. With the disappearance of each culture, the range of possible futures available to individual persons must also wither and decline.

Our culture enables us to make sense of our lives and determines, to a large extent, which life choices we make. And those choices must make sense according to the stories our culture tells about us:

> We decide how to lead our lives by situating ourselves in certain cultural narratives, by adopting roles that have struck us as worthwhile ones, as ones worth living. . . . [Yet] [o]ur upbringing isn't something that can just be erased—it is, and always remains, a constitutive part of

106. Kymlicka, *Liberalism, Individualism, and Minority Rights,* in LAW AND THE COMMUNITY 181 (A. Hutchinson & L. Green eds. 1989) (quoting G. HEGEL, PHILOSOPHY OF RIGHT 261 (T.M. Knox ed. 1942)) (discussing the liberal dilemma facing the Canadians in their attempt to redefine the federal government's relationship to Native peoples).

107. *See generally* Torres, *supra* note 84 (arguing that progress toward cultural pluralism requires altered understanding of the bargain that must be struck).

> who we are. Cultural membership affects our very sense of personal identity and capacity.[108]

Rather than wash individuals clean of any differentiating characteristics as a logical step prior to the assignment of rights, the recognition of cultural identity as an irreducible component of personal identity requires that we ask how group membership ought to be taken into account. Importantly, this recognition requires us to ask how group membership determines the capacity of the individual, who is the concern of liberal theory, to make "worthwhile choices." If the failure to respect a cultural grouping results in a limitation of the individual's capacity for self-determination, then the political choice leading to that end is indefensible on liberal grounds.[109]

The Hegelian characterization of the tension between the individual and community presumes a single polity. The question it cannot answer is whether a truly culturally pluralistic, liberal-democratic system is feasible. Are we willing to have truly independent cultural enclaves that define their own polity or create their own normative definition of community? The acceptance of such a possibility generates the potential for alternative cultural spheres in which the future may be imagined in a variety of ways, including rejection of the enlightenment project that is at the heart of liberal democratic theory. If that liberal faith is abandoned, what is the basis for mediating disputes between cultures? Without a reexamination of the foundation for liberal rights, the attempt to remake the argument for aboriginal claims from the perspective of liberal theory is fundamentally misguided.

Before these questions can be answered, remember that cultures have a material and inter-subjective dimension. The debate about aboriginal claims in late 20th century America cannot be limited to the realm of liberal democratic theory, but the debate also must include a critique of the material conditions in which Indian life reproduces itself. Cultural identity is integral to individual self-identity. To maximize the range of life choices and to preserve the capacity for individual integrity requires, in the context of aboriginal claims, that the *cultural* integrity of Tribes be maintained. The law as presently structured allows no clear way to achieve that end. In fact, the reality of Indian life is, in a real sense, untranslatable. This untranslatability has a material dimension. Land claims have no true aboriginal foundation but rather have a legal mooring in the state, a mooring subject to change and reevaluation. The developmental priorities are set not by Indians, but by others. The very

108. Kymlicka, *supra* note 106, at 190, 193.

109. *Id.* at 194-99.

theory of Indian sovereignty is debased by the plenary power of Congress.

The tragedy, of course, is that the failure is not merely a failure of theory. The reservation system was badly conceived, but it never was truly intended to provide a foundation for potentially competing powers. The reservations were designed to pacify, not compensate. The loss that Indians have suffered is material both in the damage to real people and in the destruction of cultures. What has been ruined may be irretrievable, and the continuing loss inexorable. To the extent cultures are destroyed or rendered incapable of self-expression, we are destroying individuals in disservice to what are ostensibly our own underlying values. We have two choices: pluralism materially redefined or the cultural assimilation implied in pluralism as we know it. Yet as one observer has noted: "Protecting people's cultural community and facilitating their assimilation into another culture are not equally legitimate options."[110]

110. Kymlicka, *supra* note 106, at 194; *see also Discrimination Against Indigenous Peoples: First Revised Text of the Draft Universal Declaration on the Rights of Indigenous Peoples, as presented to the U.N. Working Group on Indigenous Peoples* by Chairman/Rapporteur Ms. Erica-Irene Daes, at 31 U.N. Doc. E/CN.4/Sub.2/1989/33 (1989) (declaring the rights of indigenous peoples to maintain autonomous cultures, including the material resources to preserve their cultures and participate in the national government in a way sufficient to protect their interests).