

Identity in Mashpee

James Clifford

Introduction: The Mashpee Case – the Presentation of Identity

This is an account of the trial of lawsuit brought in 1976 in a federal court by a tribal council claiming 16,000 acres of land. Their claim to the land rested on their contention that the Mashpee were an Indian tribe. Methodologically, Clifford does three things in his treatment of this trial. He presents the testimony of various witnesses verbatim. These pages of testimony have been omitted in the excerpt that follows for reasons of space, but they are well worth reading for the sense that they give of the people who were involved. Secondly, Clifford classifies the lines of argument and types of witnesses who appeared. And he summarizes part of the evidence, particularly the historical evidence, giving his own opinion of what it shows.

Clifford describes the history of the ancestors of the people bringing the lawsuit in summary form. The gist of his argument is that there had been an earlier time when they were a much more organized and coherent collectivity. Later they could only be seen as geographically co-resident individuals with few things in common. He says that they had abandoned their tribal organization and many of their customs by the 1920s and become "individual citizen-farmers, workers and businessmen" (p. 300). They had no surviving native language. They intermarried with other populations in the area. A historian testified about their past, as did some anthropologists speaking to the question whether they were a "tribe" and whether they had been so continuously in the relevant period. The way anthropologists have filled this role and the problems they have faced is described in an article by Lawrence Rosen published in 1977, "The Anthropologist as Expert Witness," *American Anthropologist* 79:555-578.

Identity itself has at least two meanings, both of which were significant in this case. Identity can signify the way a person conceives him or herself, the kind of person he or she thinks himself to be. That is identity as the individual imagines himself. But, obviously, identity can have a social or collective meaning. Members of a group can see themselves as having the same social identity, can conceive themselves as being alike in some way. The testimony of the various Mashpee Indians in this case showed them to be very different individually, one from another, but it also shows them trying to make the argument that they nevertheless had institutions and practices in common, and therefore constituted "a tribe."

The difference between the legal definition of a "tribe" for the purpose of making land claims, and the Mashpee's conception of themselves is clearly brought out in this article. It is a useful demonstration of the attempt to create precise criteria for legal categorization. Yet it shows what a poor fit this may be for the actual accounts when lay people are testifying about their general sense of a situation.

S.F.M.

Clifford, *Identity*

IN AUGUST 1976 the Mashpee Warnpanoag Tribal Council, Inc., sued in federal court for possession of about 16,000 acres of land constituting three-quarters of Mashpee, "Cape Cod's Indian Town." (The township of Mashpee extends inland from the Cape's southern shore, facing Martha's Vineyard, between Fairnouth and Barnstable.) An unprecedented trial ensued whose purpose was not to settle the question of land ownership but rather to determine whether the group calling itself the Mashpee Tribe was in fact an Indian tribe, and the same tribe that in the mid-nineteenth century had lost its lands through a series of contested legislative acts.

The Mashpee suit was one of a group of land-claim actions filed in the late 1960s and 1970s, a relatively favorable period for redress of Native American grievances in the courts. Other claims were being initiated by the Gay Head Warnpanoag Tribe on Martha's Vineyard; the Narragansets of Charlestown, Rhode Island; Western Pequots, Schaghticokes, and Mohegans in Connecticut; and Oneidas, St. Regis Mohawks, and Cayugas in New York. The Mashpee action was similar... tribes laying claim to a large portion of the state of Maine. Their suit, after initial successes in Federal District Court, direct intervention from President Jimmy Carter, and five years of hard negotiation, resulted in a favorable out-of-court settlement. The tribes received \$81.5 million and the authority to acquire 300,000 acres with Indian Country status.

The legal basis of the Penobscot-Passamaquoddy suit, as conceived by their attorney, Thomas Tureen, was the Non-Intercourse Act of 1790. This paternalist legislation, designed to protect tribal groups from spoliation by unscrupulous whites, declared that alienation of Indian lands could be legally accomplished only with permission of Congress. The act had never been rescinded, although throughout the nineteenth century it was often honored in the breach. When in the 1970s Indian groups appealed to the Non-Intercourse Act, they were attempting,

in effect, to reverse more than a century of attacks on Indian lands. The alienations had been particularly severe for eastern groups, whose claim to collective land was often unclear. When court decisions confirmed that the Non-Intercourse Act applied to nonreservation Indians, the way was opened for suits, like those of the Maine tribes, claiming that nearly two centuries of Indian land transfers, even ordinary purchases, were invalid since they had been made without permission of Congress.

Although the Mashpee claim was similar to the Maine Indians', there were crucial differences. The Passamaquoddy and Penobscot were generally recognized Indian tribes with distinct communities and clear aboriginal roots in the area. The Mashpee plaintiffs represented most of the nonwhite inhabitants of what, for over three centuries, had been known as an "Indian town" on Cape Cod; but their institutions of tribal governance had long been elusive, especially during the century and a half preceding the suit. Moreover, since about 1800 the Massachusetts language had ceased to be commonly spoken in Mashpee. The town was at first largely Presbyterian then Baptist in its public religion. Over the centuries inhabitants had intermarried with other Indian groups, whites, blacks, Hessian deserters from the British Army during the Revolutionary War, Cape Verde islanders. The inhabitants of Mashpee were active in the economy and society of modern Massachusetts. They were businessmen, schoolteachers, fishermen, domestic workers, small contractors. Could these people of Indian ancestry file suit as the Mashpee Tribe that had, they claimed, been despoiled of collectively held lands during the mid-nineteenth century? This was the question a federal judge posed to a Boston jury. Only if they answered yes could the matter proceed to a land-claim trial.

The forty-one days of testimony that unfolded in Federal District Court during the late fall of 1977 bore the name *Mashpee Tribe v. New Seabury et al.*, shorthand for a complex, multipartied dispute. Mashpee Tribe referred to the plaintiffs, the Mashpee Wampanoag Tribal Council, Inc., described by its members as an arm of the Mashpee Tribe. A team of lawyers from the Native American Rights Fund, a nonprofit advocacy group, prepared their suit. Its chief architects were Thomas Tureen and Barry Margolin. In court the plaintiffs' case was argued by the trial lawyer Lawrence Shubow, with assistance from Tureen, Margolin, Ann Gilmore, and Moshe Genauer. New Seabury et al. referred to the New Seabury Corporation (a large development company), the Town of Mashpee (representing over a hundred individual landowners), and various other classes of defendant (insurance companies, businesses, property owners). The case for the defense was argued by James St. Clair (Richard Nixon's Watergate attorney) of the large Boston firm Hale and Dorr, and Allan Van Gestel of Goodwin, Proctor, and Hoar. They were assisted by a team of eight other lawyers.

The presence of the Town of Mashpee among the defendants requires explanation. It was not until 1869 that the community living in Mashpee was accorded formal township status. From 1869 until 1964 the town government was overwhelmingly in the hands of Indians. During this period every selectman but one was an Indian or married to an Indian. Genealogical evidence presented at the trial showed that the families of town officers were closely interrelated. No one contested the fact that before the 1960s Mashpee was governed by Indians. The disagreement was over whether they governed as an "Indian tribe."

This basic demographic and political situation, which had not altered drastically for over three centuries, was revolutionized during the early 1960s. Before then census figures showed a population in Mashpee fluctuating in the neighborhood of 350 Indians and "negroes," "coloreds," or "mulattoes" (the official categories shifted), and 100 or fewer whites. A reliable count of 1859, which served as a benchmark in the trial, listed only one white resident. After 1960 for the first time whites were recorded in the majority, and by 1970 whites outnumbered Indians and other people of color by 982 to 306. By 1968 two of the town's selectmen were whites, the third Indian. This proportion was in effect at the time of the lawsuit. Mashpee's white selectmen voted that the town should legally represent the non-Indian majority of property holders who were threatened by the land claim.

"Cape Cod's Indian Town" had finally been discovered. For centuries a backwater and a curiosity, in the 1950s and 1960s Mashpee 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 new influx of money and jobs was first welcomed by many of Mashpee's Indian residents, including some of the leaders of the land-claim suit. They took advantage of the new situation. 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. Large tracts of undeveloped land formerly open for hunting and fishing were suddenly ringed with "No Trespassing" signs. The New Seabury development, on a choice stretch of coastline, with its two golf courses and expansionist plans, seemed particularly egregious. Tensions between traditional residents and newcomers increased, finally leading to the suit, filed with the support of most, but not all, of the Indians in Mashpee. 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.

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Images

At the end of the trial Federal Judge Walter J. Skinner posed a number of specific questions to the jurors concerning tribal status at certain dates in Mashpee history; but throughout the proceedings broader questions of Indian identity and power permeated the courtroom. Although the land claim was formally not at issue, the lawyers for New Seabury et al. sometimes seemed to be playing on a new nightmare. At the door of your suburban house a stranger in a business suit appears. He says he is a Native American. Your land has been illegally acquired generations ago, and you must relinquish your home. The stranger refers you to his lawyer.

Such fears, the threat of a "giveaway" of private lands, were much exploited by politicians and the press in the Penobscot-Passamaquoddy negotiations. Actually small holdings by private citizens were never in danger; only large tracts of undeveloped land held by timber companies and the state were in question. In Mashpee the plaintiffs reduced their claim to eleven thousand acres, formally excluding all private

homes and lots up to an acre in size. Large-scale development, not small ownership, was manifestly the target; but their opponents refused pretrial compromises and the kinds of negotiation that had led to settlement of the Maine dispute.

According to Thomas Tureen the sorts of land claims pursued in Maine, Mashpee, Gay Head, and Charlestown were always drastically circumscribed. At that historical moment the courts were relatively open to Native American claims, a situation unlikely to last. In a decision of 1985 permitting Oneida, Mohawk, and Cayuga Non-Intercourse Act suits the Supreme Court made it abundantly clear, in Tureen's words, "that Indians are dealing with the magnanimity of a rich and powerful nation, one that is not about to divest itself or its non-Indian citizens of large acreage in the name of its own laws. In short, the United States will permit Indians a measure of recompense through the law – indeed, it has done so to an extent far greater than any other nation in a comparable situation – but it ultimately makes the rules and arbitrates the game.

Seen in this-light, the Mashpee trial was simply a clarification of the rules in an ongoing struggle between parties of greatly unequal power. But beneath the explicit fear of white citizens losing their homes because of an obscure past injustice, a troubling uncertainty was finding its way into the dominant image of Indians in America. The plaintiffs in the Non-Intercourse Act suits had power. In Maine politicians lost office over the issue, and the Mashpee case made national headlines for several months. Scandalously, it now paid to be Indian. Acting aggressively, tribal groups were doing sophisticated, "nontraditional" things. All over the country they were becoming involved in a variety of businesses, some claiming exemption from state regulation. To many whites it was comprehensible for Northwest Coast tribes to demand traditional salmon-fishing privileges; but for tribes to run high-stakes bingo games in violation of state laws was not.

Indians had long filled a pathetic imaginative space for the dominant culture; they were always survivors, noble or wretched. Their cultures had been steadily eroding, at best hanging on in museumlike reservations. Native American societies could not by definition be dynamic, inventive, or expansive. Indians were lovingly remembered in Edward Curtis' sepia photographs as proud, beautiful, and "vanishing." But Curtis, we now know, carried props, costumes, and wigs, frequently dressing up his models. The image he recorded was carefully staged. In Boston Federal Court a jury of white citizens would be confronted by a collection of highly ambiguous images. Could a group of four women and eight men (no minorities) be made to believe in the persistent "Indian" existence of the Mashpee plaintiffs without costumes and props? This question surrounded and infused the trial's technical focus on whether a particular form of political-cultural organization called a tribe had existed continuously in Mashpee since the sixteenth century.

The image of Mashpee Indians, like that of several other eastern groups such as the Lumbee and the Ramapough, was complicated by issues of race. Significant intermarriage with blacks had occurred since the mid-eighteenth century, and the Mashpee were, at times, widely identified as "colored." In court the defense occasionally suggested that they were really blacks rather than Native Americans. Like the Lumbee (and, less successfully, the Ramapough) the Mashpee plaintiffs had struggled to distinguish themselves from other minorities and ethnic groups, asserting tribal status based on a distinctive political-cultural history. In court they

were not helped by the fact that few of them looked strongly "Indian." Some could pass for black, others for white.

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Borderlines

Mashpee Indians suffered the fate of many small Native American groups who remained in the original thirteen states. They were not accorded the reservations and sovereign status (steadily eroded) of tribes west of the Mississippi. Certain of the eastern communities, such as the Seneca and the Seminoles, occupied generally recognized tribal lands. Others – the Lumbee, for example – possessed no collective lands but clustered in discrete regions, maintaining kinship ties, traditions, and sporadic tribal institutions. In all cases the boundaries of the community were permeable. There was intermarriage and routine migration in and out of the tribal center – sometimes seasonal, sometimes longer term. Aboriginal languages were much diminished, often entirely lost. Religious life was diverse – sometimes Christian (with a distinctive twist), sometimes a transformed tradition such as the Iroquois Longhouse Religion. Moral and spiritual values were often Native American amalgams compounded from both local traditions and pan-Indian sources. For example the ritual and regalia at New England powwows now reflect Sioux and other western tribal influences; in the 1920s the feathered "war bonnet" made its appearance among Wampanoag leaders. Eastern Indians generally lived in closer proximity to white (or black) society and in smaller groups than their western reservation counterparts. In the face of intense pressure some eastern communities have managed to acquire official federal recognition as tribes, others not. During the past two decades the rate of applications has risen dramatically.

Within this diversity of local histories and institutional arrangements the long-term residents of Mashpee occupied a gray area, at least in the eyes of the surrounding society and the law. The Indian identity of the Penobscot and Passamaquoddy was never seriously challenged, even though they had not been federally recognized and had lost or adapted many of their traditions. The Mashpee were more problematic. Partisans of their land claim, such as Paul Brodeur, tend to accept without question the right of the tribal council, incorporated in 1974, to sue on behalf of a group that had lost its lands in the mid-nineteenth century. They see the question of tribal status as a legal red herring, or worse, a calculated ploy to deny the tribe its birthright. However procrustian and colonial in origin the legal definition of tribe, there was nonetheless a real issue at stake in the trial. Although tribal status and Indian identity have long been vague and politically constituted, not just anyone with some native blood or claim to adoption or shared tradition can be an Indian; and not just any Native American group can decide to be a tribe and sue for lost collective lands.

Indians in Mashpee owned no tribal lands (other than fifty-five acres acquired just before the trial). They had no surviving language, no clearly distinct religion, no blatant political structure. Their kinship was much diluted. Yet they 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 Mashpee plaintiffs of 1977 could offer as evidence surviving pieces of Native American tradition and political structures that seemed to have come and gone. They could also point to a sporadic history of Indian revivals continuing into the present.

The Mashpee were a borderline case. In the course of their peculiar litigation certain underlying structures governing the recognition of identity and difference became visible. Looked at one way, they were Indian; seen another way, they were not. Powerful *ways of looking* thus became inescapably problematic. The trial was less a search for the facts of Mashpee Indian culture and history than it was an experiment in translation, part of a long historical conflict and negotiation of "Indian" and "American" identities.

(This is how I came to see the Mashpee case, and the account I give of it reflects my way of seeing. As a historian and critic of anthropology I tend to focus on the ways in which historical stories are told, on the alternate cultural models that have been applied to human groups. Who speaks for cultural authenticity? How is collective identity and difference represented? How do people define themselves with, over, and in spite of others? What are the changing local and world historical conditions determining these processes?)

At the Mashpee trial these were the kinds of questions that interested me and that now organize my account. I am not fictionalizing or inventing anything, nor am I presenting the whole picture. The reality presented here is the reality of a specific interest and field of vision.

I attended most of the trial, and I've used my courtroom notes as a guiding thread. I've read what has been published about the history of Mashpee and the litigation, notably Francis Hutchins' *Mashpee: The Story of Cape Cod's Indian Town* (1979), Paul Brodeur's *Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England* (1985), and William Simmons' *Spirit of the New England Tribes* (1986). I've had access to Rona Sue Mazur's Ph.D. thesis in anthropology at Columbia University, "Town and Tribe in Conflict: A Study of Local-Level Politics in Mashpee, Massachusetts" (1980). And I have consulted the trial record. But I haven't systematically interviewed participants or done firsthand research in the archives or in Mashpee.

It should be clear from what follows that I am portraying primarily the trial, not the complex lives of Indians and other ethnic groups in Mashpee. Still, in the process I make strong gestures toward truths missed by the dominant categories and stories in the courtroom. Thus I invoke as an absence the reality of Mashpee and particularly of its Indian lives. I do this to maintain the historical and ethnographic seriousness of the account, a seriousness I wish both to assert and to limit.

I accept the fact that my version of the trial, its witnesses, and its stories may offend people on several sides of the issue. Many individual positions are more complex than I have been able to show. My account may be objectionable to Native Americans for whom culture and tradition are continuities, not inventions, who feel stronger, less compromised ties to aboriginal sources than my analysis allows. For them this version of "identity in Mashpee" may be about rootless people like me, not them.

It is, and is not only, that.

When I report on witnesses at the trial, the impressions are mine. Others I spoke with saw things differently. The trial record – which stenographically preserves, by a

precise but not infallible technique, the meaningful, spoken sounds of the trial – provides a check on my impressions. It does not, of course, provide much information on the *effect* of witnesses or events in the courtroom. It omits gestures, hesitations, clothing, tone of voice, laughter, irony... the sometimes devastating silences.

I offer vignettes of persons and events in the courtroom that are obviously composed and condensed. Testimony evoked in a page or two may run to hundreds of pages in the transcript. Some witnesses were on the stand for several days. Moreover, real testimony almost never ends the way my vignettes do; it trails off in the quibbles and corrections of redirect and recross-examination. While I have included for comparison a verbatim excerpt from the transcript, I have generally followed my courtroom notes, checked against the record, and have not hesitated to rearrange, select, and highlight. Where quotation marks appear, the statement is a fairly exact quotation; the rest is paraphrase.

Overall, if the witnesses seem flat and somewhat elusive, the effect is intentional. Using the usual rhetorical techniques, I could have given a more intimate sense of peoples' personalities or of what they were really trying to express; but I have preferred to keep my distance. A courtroom is more like a theater than a confessional.

Mistrustful of transparent accounts, I want mine to manifest some of its frames and angles, its wavelengths.)

[...]

History I

The case against the plaintiffs was straightforward: there never had been an Indian tribe in Mashpee. The community was a creation of the colonial encounter, a collection of disparate Indians and other minorities who sought over the years to become full citizens of the Commonwealth of Massachusetts and of the Republic. Decimated by disease, converted to Christianity, desirous of freedom from paternalistic state tutelage, the people of mixed Indian descent in Mashpee were progressively assimilated into American society. Their Indian identity had been Lost, over and over, since the mid-seventeenth century.¹

The plague

When the English Pilgrims arrived at Plymouth in 1620, they found a region devastated by a disease brought by white seamen. The settlers walked into empty Indian villages and planted in already cleared fields. The region was seriously underpopulated. In the years that followed Puritan leaders like Myles Standish pressed steadily to limit Indian territories and to establish clear "properties" for the growing number of newcomers. Misunderstandings inevitably ensued: for example whites claimed to own unoccupied land that had been ceded to them for temporary use.

Richard Bourne of Sandwich, a farmer near what is now Mashpee Pond and a tenant on Indian lands, studied the language of his landlords and soon became an effective mediator between the societies. He was friendly to the area's inhabitants, remnants of earlier groups, who came to be called South Sea Indians by the settlers

to the north. He believed that they needed protection; becoming their advocate, he negotiated formal title to a large tract adjoining his farm (which in the meantime he had managed to purchase). His ally in these transactions was Paupmunnuck, a leader of the nearby Cotachesset.

Bourne's "South Sea Indian Plantation" was to become a refuge for Christian converts, for as white power increased, it became increasingly dangerous for Indians to live around Cape Cod unless they came together as a community of "praying Indians." Under Bourne's tutelage the Mashpee plantation was a center for the first Indian church on the Cape, organized in **1666**.

Thus Mashpee was originally an artificial community, never a tribe. It was created from Indian survivors in an area between the traditional sachemdoms of Manomet and Nauset – the former centered on the present town of Bourne at the Cape's western edge, the latter near its tip.

Conversion to Christianity

Badly disorganized after the plague and confronted by a growing number of determined settlers, the Cape Cod Indians made accommodations. Live and let live was not the Puritan way, especially once their power had been consolidated. Tensions and conflicts grew, leading to war in **1675** with the forces of the Wampanoag Supreme Sachem Metacomet ("King Philip"). After Metacomet's defeat Indians who sympathized with him were expelled from their lands. Many, including some who had remained neutral, were sold into slavery.

The price for living on ancestral lands in eastern New England was cooperation with white society. The Mashpee, under Bourne's tutelage, became model Christians. By **1674** ninety Mashpee inhabitants were counted as baptized, and twenty-seven were admitted to full communion. The "praying Indians" were entering a new life. They stopped consulting "powwows" (medicine men, in seventeenth-century usage); they respected the Sabbath and other holy days, severed ties with "pagans," altered child-rearing practices, dressed in new ways, washed differently. The changes were gradual but telling. They reflected not only a tactical accommodation but also a new belief, born of defeat, that the powerful white ways must be superior. When Bourne died in 1682, his successor as Protestant minister was an Indian, Simon Popmonet, son of Bourne's old ally Paupmunnuck. This was a further sign that the Indians were willingly giving up their old ways for the new faith.

"Plantation" status

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 Mashpee 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-proprietory form, as applied to early Cape Cod settlements such as Sandwich and Barnstable, 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. Mashpee followed the same course, but more slowly. As late as 1830 its lands were the joint property of proprietors.

For complex historical reasons Mashpee's progress toward full citizenship lagged almost two centuries behind that of its neighbors. An enduring prejudice against Indians and their supposed lack of "civility" certainly played a part, for during the early and mid-eighteenth century the Indian plantation was governed in humiliating ways by white "guardians." Nonetheless, development toward autonomy, while delayed, did occur. In 1763, after a direct appeal to King George III, Mashpee won the right to incorporation as a district, a step on the road to township status and a liberation from oppressive meddling by white outsiders. Then, beginning in 1834 and culminating in 1870, a series of acts of the Massachusetts legislature changed the Mashpee plantation into an incorporated town. Its inhabitants had overcome the prejudice and paternalism that had so long hemmed them in. They were now full-fledged citizens of Massachusetts.

Taking the colonists' side

From early on the Indian inhabitants of Mashpee gave signs of active identification with the new white society. During King Philip's War a certain Captain Amos, probably a Nauset from near Sandwich, led a group of Indians against Metacomet. Amos became a prominent inhabitant of Mashpee after the conflict ended. A century later the district of Mashpee sent a contingent to fight in the Revolutionary War against the British, a commitment of troops even greater than that of the surrounding white towns. Reliable accounts estimate that about half the adult male population died in the war. A Mashpee Indian, Joshua Pocknet, served at Valley Forge with George Washington. At these critical moments, therefore, the descendants of the South Sea Indians showed something more than simple acquiescence under colonial rule. Their enthusiastic patriotism strongly suggests that they had identified with white society, relinquishing any sense of a separate tribal political identity.

Intermarriage

Mashpee's population showed two significant periods of expansion. During the 1660s and 1670s there had been an influx of Indians from elsewhere on the Cape. Then after a century of relative equilibrium the population rose again in the 1760s and 1770s. Census figures are inexact and subject to interpretation, but it seems clear that before 1760 the principal newcomers were a steady trickle of New England Indians: Wampanoags from Gay Head and Herring Pond, Narragansets and Mohicans from Connecticut, Long Island Montauks. Immigration was restrained by the tutelage of outside "guardians," some of whom had an interest in keeping Mashpee small so that "unused" Indian lands could be made available for whites. After 1763, however, the newly incorporated district opened its borders to a variety of new settlers. A few whites entered by marriage but maintained a separate legal status. Their progeny, if one parent was Indian, could become proprietors. At

least one white man “went native,” living in a wigwam – just as the Indian residents of Mashpee were abandoning the last of theirs. Four Hessian mercenaries stayed on after the Revolutionary War and married Mashpee women. It is recorded that they accepted Indian manners.

The 1776 census counted fourteen “negroes” in a total population of 341. Significant intermarriage with freed black slaves occurred in this period, but it is difficult to say how much since common parlance, reflected in the census, sometimes mixed diverse peoples of brownish skin color in categories such as “Indian,” “mulatto,” or “negro.” Intermarriage between blacks and Indians was encouraged by a common social marginality and by a relative shortage of men among the Indians and of women among the blacks. The local racial mix also included Cape Verde islanders and exotic imports resulting from the employment of Mashpee men in the far-flung sailing trades and women in domestic service: a Mexican and an Indian from Bombay are mentioned in the written sources.

By 1789 Mashpee’s white minister, the Reverend Gideon Hawley, had become so concerned about Mashpee being overrun by blacks and foreigners that he engineered a return to plantation status, with himself as guardian of the town’s threatened authenticity. This return to a restrictive paternalism was a setback for Mashpee’s ability to grow and develop into a distinctive, independent nonwhite community. It was not until the 1840s, after a long conflict with Hawley’s successor, the Reverend Phineas Fish, that local leaders finally rid themselves of outside tutelage. The struggle for citizenship had been slowed but not stopped. By the time of the final transition from plantation to township status in the four decades after 1830 the American citizens of Mashpee had become a complex mix – “colored” in contemporary parlance – that included several American Indian, black, and foreign ingredients.

Mashpee becomes a town

In 1834, following a popular rebellion against the outside authority of the Presbyterian minister Fish, district status was again accorded by the Massachusetts General Court. The Mashpee were no longer wards of the state and, like other towns, were governed by three elected selectmen. But full citizenship did not follow, largely because the proprietors of Mashpee wished to preserve traditional restraints on the sale of lands to outsiders. Leaders such as Daniel Amos argued that many inhabitants of Mashpee were not yet ready for the responsibilities of citizenship and unrestricted property rights. They might sell their lands irresponsibly or be maneuvered into debt; the community would be invaded and broken up. In practice the entailment on property did not seal off Mashpee from growth. To qualify as a landowner one had to trace ancestry to at least one Indian proprietor; and by the midnineteenth century quite a few individuals around the Cape could make this claim. In 1841–2, at the urging of Indian entrepreneurs such as Solomon Attaquin, who had returned to Mashpee with the end of state tutelage, most of the district’s common lands were divided among its individual proprietors – men, women, and children. Lands could now be freely bought and sold, but still only among proprietors.

This progress did not go uncontested. Mashpee was divided among those who, like Attaquin – self-made men reflecting the era’s dominant laissez-faire capitalist ethos – wanted to move quickly to remove all barriers to individual initiative and others who

wanted to move more slowly or who saw in the old plantation entailments a guarantee of community integrity. In 1868 matters finally came to a head. A petition to the General Court from two of Mashpee's three selectmen and twenty-nine residents requested an end to all land-sale restrictions and the granting of full state and federal voting rights. This petition was promptly countered by a "remonstrance" signed by the third selectman and fifty-seven Mashpee residents urging that the district's status not be altered. A public hearing was called to air the differing views.

The hearing, which took place in early 1869, marks a crucial turning point in Mashpee history. Records of its disagreements offer a rare access to a diversity of local voices and opinions. Those who spoke in favor of the proposed changes evoked centuries of degrading state tutelage and second-class status. It was time, they said, for Mashpee inhabitants to be full citizens, to stand on their own. If this meant that some would fail or be displaced from their lands, so be it. They spoke also of the commercial advantages to the region of making portions of its land available for outside capital investment. Representatives of Mashpee's "colored nonproprietary" (a status that gave certain mulattoes and blacks all rights of proprietorship except title to land) also favored the changes in legal status. As valued members of the community they felt the restriction on landholding to be an insult and a reminder of an inferior condition they had in every other respect left behind.

Others opposed the changes. They argued that the influx of outside capital would be a very mixed blessing, and without the present protections many who were not wealthy and wise to the ways of business would soon be displaced. They would find themselves, in the words of one speaker, "ducking and dodging from one city to another, and gain no residence." Some proprietors did not think the right to vote in state and federal elections worth the risk; the present system, providing real control over Mashpee's government, seemed sufficient to local needs. The Reverend Joseph Amos ("Blind Joe" Amos), the community's most influential spiritual voice and leader of a successful Indian Baptist movement three decades earlier, opposed the changes. He said that another generation of preparation was needed before the proposed step could safely be taken. Solomon Attaquin, who owned the Hotel Attaquin, a renowned hunting lodge in Mashpee, spoke for abandoning the district's special status. He evoked a lifelong dream of full citizenship and equality, a dream shared with others in the community. Those who had worked long and hard for this day should not have to die without gaining the status of free men in the commonwealth and the nation.

A vote was taken. Eighteen favored participation in federal and state elections, eighteen were opposed. The removal of land restrictions was sharply rejected, twenty-six to fourteen. Despite this vote by a minority of the total population the recorded discussions clearly showed a consensus in favor of ultimately ending Mashpee's special status, with disagreements only on the timing. The Massachusetts General Court, recognizing this fact and more impressed by Mashpee's "progressive" voices, in 1870 formally abolished the status of "Mashpee proprietor." All lands were henceforth held in fee simple with no restrictions on alienation. All residents, whatever their ancestry, now enjoyed equal status before the law. The transfer of town lands to outsiders began immediately.

This turning point marked the end of Mashpee's distinctive institutional status stemming from its Indian past. Though the community was divided on the change, the most dynamic, forward-looking leaders favored it; whatever their hesitations on

timing, community members willingly embraced their future as Massachusetts and United States citizens.

Assimilation

During the years between 1870 and the 1920s Indians throughout the nation were forced to abandon tribal organizations and to become individual citizen-farmers, workers, and businessmen. This was the period of the Dawes Act with its extensive land-allotment projects west of the Mississippi. Not until the twenties was there much evidence anywhere of tribal dynamism. Mashpee residents continued to live as before, working as hunting and fishing guides, servants, and laborers in various trades. The town remained a backwater. To find steady work people often had to move to nearby towns or even farther afield. The historical record contains little evidence of any distinctly Indian life in Mashpee before the Wampanoag revival movements of the twenties. The town apparently did not undergo any major demographic or social changes and remained a rather cohesive community of long-term residents, most of whom were of varying degrees of Indian descent. Significantly, between 1905 and 1960 the category "Indian" disappeared from Mashpee's federal census records. The more than two hundred individuals who had previously been so classified were now listed as either "colored" (distinct from "negro") or "other." Only in 1970 would they again be called Indian. In the eyes of the state the majority of Mashpee's inhabitants were simply Americans of color.

Some of these Americans participated in the founding of the Wampanoag Nation in the late twenties. At that time various more-or-less theatrical revivals of Indian institutions were under way. People in Mashpee showed interest, but the daily life and government of the town were not materially affected. The Wampanoags did not, like many other Indian groups in the thirties, take advantage of the turnaround in policy at John Collier's Bureau of Indian Affairs (BIA) to reorganize themselves as a federally recognized "tribal" unit. The new sense of Indianness around Mashpee was a matter of county fairlike powwows, costumes, and folkloric dances.

The individuals of Indian ancestry from Mashpee who filed suit in 1976 were American citizens similar to Irish- or Italian-Americans with strong ethnic attachments. Individuals such as Earl Mills and John and Russell Peters had simply taken advantage of the latest wave of pan-Indian revivalism and the prospect of financial gain to constitute themselves as a Mashpee Tribe. Mashpee's distinctive history was in fact a story of Indian-Christian remnants who over the centuries had repeatedly given up their customs and sovereignty. Theirs had been a long, hard struggle for equality and respect in a multiethnic America.

[...]

History II

The case against the Mashpee plaintiffs was based on a reading of Cape Cod history. Documents were gathered, interpreted, and arranged in a coherent sequence. The story emerged of a small mixed community fighting for equality and citizenship while abandoning, by choice or coercion, most of its aboriginal heritage. But a

different, also coherent, story was constructed by the plaintiffs, drawing on the same documentary record. In this account the 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 ways, always attempting to control, not reject, outside influences.

The plague

Aboriginally the concept of tribe has little meaning. The “political” institutions of Native American groups before contact with Europeans varied widely. Cape Cod Indian groupings seem to have been flexible, with significant movement across territories. Communities formed and reformed. In this context it is unclear whether the elders of local villages or sachems or supreme sachems should be identified as “tribal” leaders. These individuals had supreme power in some situations, limited authority in others. The plague was a disaster, but it did not decimate the Cape to the extent that it did the Plymouth area. In any event the response of the survivors at Mashpee, regrouping to form a cohesive unit, was a traditional political response, albeit to an unusual emergency. Written sources reflect only the views of whites, such as the evangelist Bourne, who saw his “praying Indians” paternalistically as passive remnants. The intentions of leaders such as Paupmunnuck and his kin are not recorded.

Thus it is anachronistic to say that the community gathered at what would later be called Mashpee was not a tribe. It is well known that the political institutions of many bona fide American Indian “tribes” actually emerged during the nineteenth and twentieth centuries in response to white expectations and power. Neat analytic categories such as “political organization,” “kinship,” “religion,” and “economy” do not reflect Indian ways of seeing things. The simple fact remains that Bourne’s South Sea Indian Plantation was a discrete community of Cape Cod Indians living on traditional Indian land – an arrangement that, through many modifications, survived until the mid-twentieth century.

Conversion to Christianity

Accounts of conversion as a process of “giving up old ways” or “choosing a new path” usually reflect a wishful evangelism rather than the more complex realities of cultural change, resistance, and translation. Recent ethnohistorical scholarship has tended to show that Native Americans’ response to Christianity was syncretic over the long run, almost never a radical either-or choice. Moreover, in situations of drastically unequal power, as on Puritan Cape Cod, one should expect the familiar response of colonized persons: outward agreement and inner resistance.

The disruptions caused by disease, trade, and military conquest were extreme. All Indian societies had to adjust, and they developed varying strategies for doing so. Some passed through revitalization movements in the late eighteenth and early nineteenth centuries, led by messianic figures: the Delaware Prophet or Handsome Lake. These movements incorporated Christian features in a new “traditional” religion. Other groups renewed native culture by using Christianity for their own purposes. The white man’s religion could be added on to traditional deities and rites.

Beliefs that appeared contradictory to Puritan evangelists coexisted in daily life. Native American religions are generally more tolerant, pragmatic, and inclusive than Christianity, a strongly evangelical, exclusive faith.

This is not to say that groups such as the South Sea Indians did not embrace Christianity in good faith or find there a source of spiritual strength. It is only to caution against the either-or logic of conversion as seen by the outsiders whose accounts dominate the written record. The gain of Christian beliefs did not necessarily mean the loss of Indian spirituality. It is easy to be impressed by surface transformations of clothing and public behavior and to forget that continuous kin ties and life on a familiar piece of land also carry potent "religious" values.

Adopting Christianity in Mashpee was not merely a survival strategy in an intolerant, hostile environment. The faith of the "praying Indians" kept a distinctly indigenous cast. Beginning with Richard Bourne's successor, Simon Popmonet, Indian ministers in Mashpee preached in Massachusetts, a practice that continued throughout the eighteenth century. When white missionaries were imposed from outside, they were forced to use some Massachusetts or to compromise, like Gideon Hawley, who conducted bilingual services in tandem with a respected Indian pastor, Solomon Briant. Moreover, the historical record before 1850 is filled with conflict between authoritarian missionaries and Indian church members. Hawley, who served from 1757 to 1807, progressively alienated his parishioners, especially after Solomon Briant's death in 1775. His successor, Phineas Fish, lost virtually all local support and in 1840, after a protracted struggle, was physically ejected from the Old Indian Meeting House by irate Indian Christians.

Baptist revivalism had already won over most of the congregation, a change tied to a political assertion of Indian power. As in many nativist revitalization movements, an Indian outsider took a leading role – in this case William Apes, a young Pequot Baptist preacher. Blind Joe Amos had already acquired a larger following for his all-Indian Baptist meetings than the Congregationalist minister, Fish.

The situation was volatile. Apes, a firebrand with a vision of united action by "colored" peoples against white oppressors, stimulated a Mashpee "Declaration of Independence" in 1833 on behalf of a sovereign Mashpee Tribe. (This was one of the few times before the twentieth century that the word *tribe* appears in the historical record.) The effect of the declaration and of the political maneuvers that ensued was to wrest control of the town's religion from the outsider Fish, reclaiming the Meeting House and funds from Harvard University supporting Indian Christianity for the majority faith, which was now Baptist. Mashpee returned to district status, free of outside governors.

Over the centuries Indians in Mashpee fought to keep control first of their Presbyterian and then their Baptist institutions. Religion was a political as well as a spiritual issue. Well into the 1950s the New England Baptist Convention habitually referred to Mashpee as "our Indian church." The exact nature of Mashpee Christian belief and practice over the centuries is obscure. The historical record does not inform us, for example, of exactly what took place in Blind Joe Amos' insurgent Baptist services during the 1830s; but even the partial written record makes it clear that Christianity in Mashpee, symbolized by the Old Indian Meeting House, was a site of local power and of resistance to outsiders. At recurring intervals it was a focus of openly Indian, or "tribal," power.

"Plantation" status

Leaders of the South Sea Indians probably recognized, with Bourne, that title to land under white law was needed if it was not to be despoiled by an aggressive colonization; but seventeenth-century English proprietary forms did not unduly restrict their ability to function as an Indian community. Collective ownership of land, with individual use rights, could be maintained. The legal status that to some appeared an impediment to progress in fact protected the traditional life ways of Indian proprietors.

Although eastern Indians were not accorded reservation lands, Mashpee's plantation status created a de factor reservation. Unlike all its neighbors Mashpee did not quickly become a town but had the status forced on it in 1869. The plantation was widely considered to be Indian land held collectively in a distinctive manner. The reasons for keeping Mashpee "backward," a pupil of the state, were often racist and paternalist; but from the viewpoint of a small group struggling to maintain its collective identity, the proprietorship arrangement was an effective way of having legal status while also maintaining a difference. While there was internal disagreement at times, the majority of Mashpee proprietors consistently favored keeping the plantation land system. This was changed only by legislative fiat in 1969, against their expressed wishes. Until then an "archaic" status had been effectively used to preserve Indian lands in a collective form through rapidly changing times. The land-claim suit aimed to restore a situation illegally altered by the Massachusetts legislature.

Taking the colonists' side

The fact that some South Sea Indians fought against Metacomet in King Philip's War does not prove that they were abandoning their Indian sovereignty or independence. More did not fight, and the motivations of those who did are a matter of speculation. There was nothing new about Indians making war on other Indians. Moreover they may have had little choice. Puritan authorities were on the warpath, and even "loyal" Indians were punished during and after the war by loss of lands and slavery.

As for the war against England, again we should be wary of imputing motives. The Mashpee Indians who served in the Revolutionary Army may not have done so primarily as "American" patriots. They were, among other things, rebelling against the authority of their missionary Hawley, an ardent Tory. Moreover, as Indian status has evolved in the United States, it has been legally recognized that the privileges of citizenship (including the decision to unite in war against a common enemy) do not contradict other arrangements establishing special group identity and status. One can be fully a citizen and fully an Indian.

To expect Cape Cod Indians to hold themselves apart from the historical currents and conflicts of the dominant society would be to ask them to commit suicide. Survival in changing circumstances meant participation, wherever possible on their own terms. Staying separate or uninvolved would be to yield to the dangerous fantasies of protectors, like Hawley, who worked to keep the Mashpee pure – and under his tutelage. The inhabitants of Mashpee again and again resisted this restrictive "authenticity." The record confirms that they wanted integrity but never isolation.

Intermarriage

There was a good deal of racial mixing in Mashpee, but the exact extent is hard to determine, given the shifting categories of different censuses and doubts about how race was actually measured. Mashpee was a refuge for misfits, refugees, and marginal groups. At certain times a natural alliance against dominant white society formed between the town's Indian "survivors" and newly freed blacks. The crucial issue is whether the core Indian community absorbed the outsiders or were themselves absorbed in the American melting pot.

Historical evidence supports the former conclusion. Since whites and people of color who settled in Mashpee during the eighteenth and most of the nineteenth centuries could not become proprietors, this limited the influx; non-Indians remained a significant but small minority. Children with one Indian parent could become full community members. Intermarriage frequently occurred, and thus the purity of Indian blood was much diluted; but the legal and social structure consistently favored Indian identification. With land entailment and the maintenance of close kin ties among property holders a core was maintained. In any event blood is a debatable measure of identity, and to arrive at quotas for determining "tribal" status is always a problematic exercise. There are federally recognized tribes as mixed as the Mashpee, and organized Indian groups vary widely in the amount of traceable ancestry they actually require for membership.

Ethnohistorical studies show that in New England the mixing of different communities was common well before the Pilgrims' arrival. Adoption was frequent, and it was customary to capture and incorporate opponents in war. Indians were in this respect color blind. In colonial times a large number of white captives stayed with their captors, adopting Indian ways, some even becoming chiefs. Mashpee's later openness to outsiders – as long as the newcomers intermarried and conformed to Indian ways – was a continuation of an aboriginal tradition, not a loss of distinct identity.

In 1859, after more than a century of intermarriage and sporadic population growth (the dilution of Indian stock lamented by the missionary Hawley), a detailed report by the commissioner for Indian affairs, John Earle, offered a census of the "Marshpee Tribe" that included 371 "natives" and 32 "foreigners." The latter were people living on the land without proprietary rights and not lineal descendants of Indians. They were described as "Africans" and "colored." Only one "white" was listed. The names of "natives" listed on the 1859 census served in the trial as a benchmark of continuous "tribal" kinship ties.

Mashpee becomes a town

There is strong documentary evidence that most of the proprietors between 1834 and 1869 wanted to hold on to Mashpee's special land restrictions. Commissioner Earle asserts this in his report. "Progressives" such as Attaquin were more vocal, and their testimony thus receives more weight in the record than the less articulate majority who in 1869 voted decisively against township status. Spokesmen (note how few female voices are "heard" by history, although the role of women

at the center of community life was undoubtedly crucial) such as Blind Joe Amos and his brother Daniel urged postponing the transition. They argued that most people in Mashpee were too "immature," not "ready" to dispose of their land individually. Give us just one more generation, Daniel Amos asked in the 1830s. His brother asked the same thing in the late 1860s. What do these arguments signify?

For those who see Mashpee's "development" and assimilation as inevitable, such statements require no interpretation: they simply show that even the traditionalists in Mashpee were ready eventually to give up their special status. But this is to assume the historical outcome. The Indian proprietors of Mashpee valued community integrity and possessed effective public and informal leadership. They had shown much strength and initiative in dealing with their various "protectors." The early historical record reveals a steady stream of petitions – 1748, 1753, 1760 – on behalf of the "poor Indians of Marshpee called the South Sea Indians" protesting abuses by the agents appointed to watch over them. More recently they had successfully asserted their autonomy against the missionaries Hawley and Fish. They were hardly "immature." Yet throughout the mid-nineteenth century Mashpee proprietors temporized, hesitated in the face of an "inevitable" progress. Their ability to protect their community from the coercions and enticements of white society was evidently precious to them.

The modified plantation status they had secured in 1834 gave them a way of keeping collective control over land and immigration while not isolating the community from interaction with the surrounding society. Even the "allotment" of lands sanctioned at that time reproduced an aboriginal land arrangement. Parcels were traditionally given to families for exclusive use while ultimate collective ownership was maintained. (In 1834, moreover, three thousand acres were formally kept as common land.) Continuing entailments on land sales outside the community guaranteed a flexible nineteenth-century tribalism. In this context public arguments about Mashpee's "immaturity" should be seen as ways of addressing an outside audience, the Massachusetts General Court, which still thought of the plantation as a ward of the state and which had already decided and again would arbitrarily decide its fate. It would be impolitic in addressing this body to say that Mashpee rejected full township status in the name of a distinctive vision of Indian community and citizenship. An argument for delay couched in paternalist rhetoric was more likely to succeed.

This interpretation of the debates in 1869 is at least as plausible as a literal reading of the recorded public utterances. Mashpee, like Indian communities throughout their recent history, was split between modernists and traditionalists. The traditionalists prevailed in the vote, but the modernists swayed the authorities. In changing Mashpee's land entailment the legislature violated both simple democracy and the Federal Non-Intercourse Act of 1790. But even the forced change – although it ultimately brought much land into non-Indian hands – was not fatal. The Mashpee Indians used their new imposed status as they had their former one. For almost a century local government was kept firmly in the hands of a closely interrelated group of town officers. Mashpee remained "Cape Cod's Indian Town."

Assimilation

The Mashpee Indians did not “assimilate.” The term’s linear, either-or connotations cannot account for revivalism and for changes in the cultural and political climate between 1869 and 1960. There have been better and worse times in the United States to be publicly Indian. The late nineteenth and early twentieth centuries were among the worst. Government policy strongly favored tribal termination and the dispersal of collective lands. It was not until the late 1920s that the failure of allotment schemes was recognized and a “New Indian Policy” instituted at the BIA that favored tribal reorganization. If there is little evidence in the historical record of “tribal” life in Mashpee between 1869 and 1920, it is no surprise. Many groups all over the nation that would emerge later as tribes kept a low profile during these years. Mashpee seemed to be simply a sleepy town run by Indians, known for its good hunting and fishing. There was no political need or any wider context for them to display their Indianness in spectacular ways. Everyone knew who they were. A few attended the Carlisle Indian School in Pennsylvania during this period. Traditional myths and stories were told around kitchen tables; the piles of sticks at Mashpee’s “Indian taverns” or “sacrifice heaps” grew into enormous mounds; life close to the land went on.

The history of Indian tribes in the United States has been punctuated by revival movements. The 1920s saw the organization of the Wampanoag Nation, with various explicit tribal institutions including a supreme sachem and a renewed interest in more public Indian displays: dances, regalia, powwows, and the like. As in all revitalization movements “outside” influences from other Indian groups played a major role. Eben Queppish, who had once ridden with Buffalo Bill’s Wild West Show, taught traditional basket making and on demand donned his Sioux war bonnet. Individuals from Mashpee participated in nationally known groups such as the Thunderbird Indian Dancers. The effects of these revivals were largely cultural. There was little need for political reorganization in Mashpee, for the town was still governed by an unchallenged Indian majority. Political reorganization of a more explicit “tribal” structure would occur during a later revivalist period, the ferment spurred by the loss of town control after 1968.

Like other tribal groups the Mashpee have been opportunists, taking advantage of propitious historical contexts and undergoing external influences. They have survived as Indians because they have not conformed to white stereotypes. They have lived since aboriginal times in a traditional locale. They have maintained their own hybrid faith. Over the centuries they have controlled the rate of intermarriage and have fought for the political autonomy of their community. Explicitly tribal political structures have sometimes been visible to the outside world, as in 1833, the 1920s, and the 1970s, but for the most part these structures have been informal. Often the “tribe” in Mashpee was simply people deciding things by consensus, in kitchens or at larger ad hoc gatherings where no records were kept. The chief in Mashpee, when there was one, shared authority with a variety of respected leaders, women and men. Politics was not hierarchical and did not need much in the way of institutional forms. The “tribe” in Mashpee was simply shared Indian kinship, place, history, and a long struggle for integrity without isolation. Sometimes the Baptist parish served as

an arm of the tribe; so did the town government. When the Mashpee Wampanoag Tribal Council, Inc. filed suit in 1976, it did so as a new legal arm of the tribe.

[...]

The Experts

Expert testimony by professional anthropologists and historians played a major role in the Mashpee trial. The defense rested much of its case on the historical testimony of a single scholar, while the plaintiffs depended more on anthropologists. Indeed the trial can be seen as a struggle between history and anthropology.

[...]

An adversary system of justice, the need to make a clear case to counterbalance an opposing one, discourages opinions of a “yes, but,” “it depends on how you look at it” kind. Experts on the stand were required to answer the question: Is there a tribe in Mashpee? Yes or no? On cross-examination, confronted with evidence that their disciplines had no rigorous, commonly accepted definitions of key categories such as tribe, culture, and acculturation, the experts could only smile or wince and stick to their guns.³

Anthropologists speaking as scientific experts could not explain to the court that theirs was a historically limited and politically enmeshed discipline. They could not admit that many fieldworkers were now testifying in court on behalf of resurgent indigenous cultures as part of a postcolonial context governing how researchers from one society could represent or “speak for” another group. (There was a time when an anthropologist could casually refer to “my people”; now indigenous groups can speak of “our anthropologist”!) On the stand it was difficult to explain that the word *tribe* could mean different things to a scholar discussing a range of aboriginal systems, reservation Indians of the nineteenth century, and legally reorganized groups of the 1930s, or that the term was unlikely to mean the same thing for an author of evolutionist theories writing in the 1950s and an expert evaluating the aspirations of eastern Indian communities in the 1970s...

The anthropologists on the stand were clearly more comfortable with a polymorphous notion of culture than with the political category of tribe. And given the court’s unwillingness to establish a rigid initial definition, much, if not most, of the testimony at the trial concerned the status of Indian “culture,” broadly conceived, in Mashpee. This cornerstone of the anthropological discipline proved to be vulnerable under cross-examination. Culture appeared to have no essential features. Neither language, religion, land, economics, nor any other key institution or custom was its *sine qua non*. It seemed to be a contingent mix of elements. At times the concept was purely differential: cultural integrity involved recognized boundaries; it required merely an acceptance by the group and its neighbors of a meaningful difference, a we-they distinction. But what if the difference were accepted at certain times and denied at others? And what if every element in the cultural melange were combined with or borrowed from external sources?

[...]

The Verdict

When Hutchins finished, the defense rested its case. The two principal attorneys, St. Clair and Shubow, then delivered their summations. Each was a review of the trial's evidence in the form of a compelling story. Life in Mashpee over the centuries was given two heroic shapes and outcomes. Shubow recounted "an epic of survival and continuity." St. Clair celebrated a "slow but steady progress" toward "full participation" in American society.

Judge Skinner then gave his instructions. He reviewed the course of the trial, mentioning briefly each witness. He reminded the jurors that the burden of proof was with the plaintiffs; they must prove by preponderance of the evidence (but not, as in a criminal case, beyond a reasonable doubt) the existence of a tribe in Mashpee. In its decision the jury was free to rely on inference and circumstantial evidence. They should not be unduly swayed by the authority of experts but must trust their own common sense judgment of the witnesses' credibility, weighing how well their conclusions matched the evidence presented, observing their way of speaking, even their "body English."

The jurors would be asked to decide whether the proprietors of Mashpee were an Indian tribe on six dates pertinent to the land-claim suit: (1) July 22, 1790, the date of the first Federal Non-Intercourse Act; (2) March 31, 1834, when Mashpee achieved district status; (3) March 3, 1842, when land was partitioned to individuals; (4) June 23, 1869, the end of all alienation restraints; (5) May 28, 1870, incorporation of the Town of Mashpee; and (6) August 26, 1976, commencement of the present suit.

Skinner told the jurors that they would also be required to decide on a seventh question: Did a tribe in Mashpee exist *continuously* during the relevant historical period? If not, the plaintiffs would fail. Moreover the judge instructed the jurors that if at any time they found tribal status in Mashpee to have been voluntarily abandoned, then it could not be revived. Once lost, it was lost for good.

The judge specified the legal definition of *tribe* that would apply, a matter about which there had been considerable suspense. Skinner opted for a relatively loose formula preferred by the plaintiffs and drawn from the case of *Montoya v. United States*, 1901: "A body of Indians of the same or similar race united in a community under one leadership or government and inhabiting a particular, though sometimes ill defined, territory." For the plaintiffs to win, all the key factors of race, territory, community, and leadership had to be continuously present.

Skinner reviewed the testimony related to key factors of the definition.

Race. Exogamy and an influx of outsiders into a tribe is normal and necessary. The crucial question was whether the outsiders had been incorporated. If the jurors found that the group had Indian ancestry and had opted to focus on that ancestry rather than others, this could satisfy the racial requirement.

Territory. By holding land legally under an English proprietorship, Indians did not thereby become English. Without a reservation system there was no other way to secure land in New England. The jury had to decide whether the Mashpee proprietors used the English arrangement to preserve their tribal form or whether they preferred the English way, and thus abandoned the old form. Skinner warned against

the “Catch-22” of requiring a formal land base in this case, since that was precisely what the suit was about.

Community. An “Indian community,” Skinner cautioned, is not just “a community of Indians.” Boundaries are crucial and can be maintained in various ways. The jury had to decide on the basis of incomplete historical evidence whether Mashpee constituted a discrete community with a definite boundary. A community for the purposes of *Montoya* is something more than a neighborhood.

Leadership. At this small scale leadership can be informal. Sovereignty, a requirement raised by the defense, is inappropriate; but tribal leadership should have roots in a once-sovereign Indian political community. The jury was to rely on its common sense about participation and leadership, the balance of core enthusiasts and people peripheral to the group. There must be more than a coterie claiming to speak for an Indian community. There is no inherent contradiction between serving as a tribal leader and functioning in the wider society, for example as a businessman. Skinner pointed to the gaps in the historical record. Evidence of tribal leadership in Mashpee between 1870 and 1920 is particularly scarce.

The issue of tribal existence is complex, the judge concluded, but it is not more so than issues of sanity or criminal intent, which are routinely decided by juries. Skinner expressed confidence in this jury’s ability to weigh the evidence, argue freely, persuade, and finally reach unanimity on the seven yes-or-no questions.

The jurors were sequestered, accompanied by a large pile of documents. After twenty-one hours of deliberation they emerged with a verdict:

Did the proprietors of Mashpee, together with their spouses and children, constitute an Indian tribe on any of the following dates:

July 22, 1790? No.	June 23, 1869? No.
March 31, 1834? Yes.	May 28, 1870? No.
March 3, 1842? Yes.	

Did the plaintiff groups, as identified by the plaintiff’s witnesses, constitute an Indian tribe as of August 26, 1976? No.

If the people living in Mashpee constituted an Indian tribe or nation on any of the dates prior to August 26, 1976, did they continuously exist as a tribe or nation from such date or dates up to and including August 26, 1976? No.

The verdict was a clear setback for the Indians’ suit. But as a statement about their tribal history it was far from clear. Judge Skinner, after hearing arguments, finally decided that despite its ambiguity – the apparent emergence of a tribe in 1834 – the jury’s reply was a denial of the required tribal continuity. His dismissal of the suit has since been upheld on appeal.

The verdict remains, however, a curious and problematic outcome. We can only speculate on what happened in the jury room – the obscure chemistry of unanimity. What was done with the pile of historical documents during the twenty-one hours of discussion? Did the jurors search for a false precision? Asked to consider specific dates, did they conscientiously search the record for evidence of tribal institutions, for mention of the word *tribe*? If so, their literalism was nonetheless different from

that encouraged by the particularist history of the defense, for the jury found that Mashpee Indians were inconsistently a tribe. Violating the judge's instructions, they found that a tribe first did not, then did, then did not again exist in Mashpee. Historical particularism does not by itself yield coherent developments or stories. Entities appear and disappear in the record.

The jurors' response contained an element of subversion. In effect it suggested that the trial's questions had been wrongly posed. Asked to apply consistent criteria of tribal existence over three centuries of intense change and disruption, the jury did so and came up with an inconsistent verdict.

Afterthoughts

The court behaved like a philosopher who wanted to know positively whether a cat was on the mat in Mashpee. I found myself seeing a Cheshire cat – now a head, now a tail, eyes, ears, nothing at all, in various combinations. The Mashpee "tribe" had a way of going and coming; but something was persistently, if not continuously, there.

The testimony I heard convinced me that organized Indian life had been going on in Mashpee for the past **350** years. Moreover a significant revival and reinvention of tribal identity was clearly in process. I concluded that since the ability to act collectively as Indians is currently bound up with tribal status, the Indians living in Mashpee and those who return regularly should be recognized as a "tribe."

Whether land improperly alienated after **1869** should be transferred to them, how much, and by what means was a separate issue. I was, and am, less clear on this matter. A wholesale transfer of property would in any case be politically unthinkable. Some negotiation and repurchase arrangement – such as that in Maine involving local, state, and federal governments – could eventually establish a tribal land base in some portion of Mashpee. But that, for the moment, is speculation. In the short run the outcome of the trial was a setback for Wampanoag tribal dynamism.

In Boston Federal Court, Cape Cod Indians could not be seen for what they were and are. Modern Indian lives – lived within and against the dominant culture and state – are not captured by categories like tribe or identity. The plaintiffs could not prevail in court because their discourse and that of their attorneys and experts was inevitably compromised. It was constrained not simply by the law, with its peculiar rules, but by powerful assumptions and categories underlying the common sense that supported the law.

Among the underlying assumptions and categories compromising the Indians' case three stand out: (1) the idea of cultural wholeness and structure, (2) the hierarchical distinction between oral and literate forms of knowledge, and (3) the narrative continuity of history and identity.

The idea of cultural wholeness and structure

Although the trial was formally about "tribal" status, its scope was significantly wider. The Montoya definition of tribe, featuring race, territory, community, and government, did not specifically mention "cultural" identity. The culture concept in its broad anthropological definition was still new in **1901**; but the relatively loose

Montoya definition reflected this emerging notion of a multifaceted, whole way of life, determined neither by biology nor politics. By 1978 the modern notion of culture was part of the trial's common sense.

In the courtroom an enormous amount of testimony from both sides debated the authenticity of Indian culture in Mashpee. Often this seemed to have become the crucial point of contention. Had the Mashpee lost their distinct way of life? Had they assimilated? In his summation for the plaintiffs Lawrence Shubow took time to define the term *culture* anthropologically, distinguishing it from the "ballet and top hat" conception. Closely paraphrasing E. B. Tylor's classic formula of 1871, he presented culture as a group's total body of behavior. He said that it included how people eat as well as how they think. Using the anthropological definition, he argued that ecology, the special feeling for hunting and fishing in Mashpee, the herring eaten every year, spitting on a stick at an "Indian tavern," these and many other unremarkable daily elements were integral parts of a whole, ongoing way of life.

It is easy to see why the plaintiffs focused on Indian culture in Mashpee. Culture, since it includes so much, was less easily disproven than tribal status. But even so broadly defined, the culture concept posed problems for the plaintiffs. It was too closely tied to assumptions of organic form and development. In the eighteenth century culture meant simply "a tending to natural growth." By the end of the nineteenth century the word could be applied not only to gardens and well-developed individuals but to whole societies. Whether it was the elitist singular version of a Matthew Arnold or the plural, lower-case concept of an emerging ethnography, the term retained its bias toward wholeness, continuity, and growth. Indian culture in Mashpee might be made up of unexpected everyday elements, but it had in the last analysis to cohere, its elements fitting together like parts of a body. The culture concept accommodates internal diversity and an "organic" division of roles but not sharp contradictions, mutations, or emergences. It has difficulty with a medicine man who at one time feels a deep respect for Mother Earth and at another plans a radical real estate subdivision. It sees tribal "traditionalists" and "moderns" as representing aspects of a linear development, one looking back, the other forward. It cannot see them as contending or alternating futures.

Groups negotiating their identity in contexts of domination and exchange persist, patch themselves together in ways different from a living organism. A community, unlike a body, can lose a central "organ" and not die. All the critical elements of identity are in specific conditions replaceable: language, land, blood, leadership, religion. Recognized, viable tribes exist in which any one or even most of these elements are missing, replaced, or largely transformed.

The idea of culture carries with it an expectation of roots, of a stable, territorialized existence. . . the *Montoya* definition of tribe was designed to distinguish settled, peaceful Indian groups from mobile, marauding "bands." This political and military distinction of 1901 between tribe and band was debated again, in technical, anthropological terms, during the Mashpee trial. How rooted or settled should one expect "tribal" Native Americans to be – aboriginally, in specific contact periods, and now in highly mobile twentieth-century America? Common notions of culture persistently bias the answer toward rooting rather than travel.

Moreover the culture idea, tied as it is to assumptions about natural growth and life, does not tolerate radical breaks in historical continuity. Cultures, we often hear,

“die.” But how many cultures pronounced dead or dying by anthropologists and other authorities have, like Curtis’ “vanishing race” or Africa’s diverse Christians, found new ways to be different? Metaphors of continuity and “survival” do not account for complex historical processes of appropriation, compromise, subversion, masking, invention, and revival. These processes inform the activity of a people not living alone but “reckoning itself among the nations.” The Indians at Mashpee made and remade themselves through specific alliances, negotiations, and struggles. It is just as problematic to say that their way of life “survived” as to say that it “died” and was “reborn.”

The related institutions of culture and tribe are historical inventions, tendentious and changing. They do not designate stable realities that exist aboriginally “prior to” the colonial clash of societies and powerful representations. The history of Mashpee is not one of unbroken tribal institutions or cultural traditions. It is a long, relational struggle to maintain and recreate identities that began when an English-speaking Indian traveler, Squanto, greeted the Pilgrims at Plymouth. The struggle was still going on three-and-a-half centuries later in Boston Federal Court, and it continues as the “Mashpee Tribe” prepares a new petition, this time for recognition from the Department of the Interior.²

The hierarchical distinction between oral and literate

The Mashpee trial was a contest between oral and literate forms of knowledge. In the end the written archive had more value than the evidence of oral tradition, the memories of witnesses, and the intersubjective practice of fieldwork. In the courtroom how could one give value to an undocumented “tribal” life largely invisible (or unheard) in the surviving record?

As the trial progressed the disjuncture of oral and literate modes sharpened. The proceedings had been theatrical, full of contending voices and personalities, but they ended with a historian’s methodical recitation of particulars. In the early portions of the trial the jurors had been asked to piece together and imagine a tribal life that showed recurring vitality but no unimpeachable essence or institutional core. Indianness in Mashpee often seemed improvised, ad hoc. The jury heard many wishful, incomplete memories of childhood events and debatable versions of recent happenings. In what may be called the “oral-ethnographic” parts of the trial many – too many – voices contended, in its “documentary” ending too few. A historian’s seamless monologue was followed by attorneys’ highly composed summations, two fully documented stories. There was no way to give voice to the silences in these histories, to choose the unrecorded.

The court imposed a literalist epistemology. Both sides searched the historical records for the presence or absence of the word and institution *tribe*. In this epistemology Indian identity could not be a real yet essentially contested phenomenon. It had to exist or not exist as an objective documentary fact persisting through time. Yet oral societies – or more accurately oral domains within a dominant literacy – leave only sporadic and misleading traces. Most of what is central to their existence is never written. Thus until recently nearly everything most characteristically Indian in Mashpee would have gone unrecorded. The surviving facts are largely the records

of missionaries, government agents, outsiders. In the rare instances when Indians wrote – petitions, deeds, letters of complaint – it was to address white authorities and legal structures. Their voices were adapted to an imposed context. The same is true even in the rare cases in which a range of local *voices* was recorded, for example the public debates of 1869 on township status.

History feeds on what finds its way into a limited textual record. A historian needs constant skepticism and a willingness to read imaginatively, “against” the sources, to divine what is not represented in the accumulated selection of the archive. Ultimately, however, even the most imaginative history is tied to standards of textual proof. Anthropology, although it is also deeply formed and empowered by writing, remains closer to orality. Fieldwork – interested people talking with and being interpreted by an interested observer – cannot claim to be “documentary” in the way history can. For even though the origin of evidence in an archive may be just as circumstantial and subjective as that in a field journal, it enjoys a different value: archival data has been found, not produced, by a scholar using it “after the fact.”

The distinction between historical and ethnographic practices depends on that between literate and oral modes of knowledge. History is thought to rest on past – documentary, archival – selections of texts. Ethnography is based on present – oral, experiential, observational – evidence. Although many historians and ethnographers are currently working to attenuate, even erase this opposition, it runs deeper than a mere disciplinary division of labor, for it resonates with the established (some would say metaphysical) dichotomy of oral and literate worlds as well as with the pervasive habit in the West of sharply distinguishing synchronic from diachronic, structure from change. As Marshall Sahlins (1985) has argued, these assumptions keep us from seeing how collective structures, tribal or cultural, reproduce themselves historically by risking themselves in novel conditions. Their wholeness is as much a matter of reinvention and encounter as it is of continuity and survival.

The narrative continuity of history and identity

Judge Skinner instructed the jury to decide whether the Indians of Mashpee had *continuously* constituted a tribe prior to filing suit in 1976. For the land claim to go forward the same tribal group had to have existed, without radical interruption, from at least the eighteenth century. The court’s common sense was that the plaintiffs’ identity must be demonstrated as an unbroken narrative, whether of survival or change. Both attorneys in their summations duly complied.

St. Clair’s story of a long struggle for participation in plural American society and Shubow’s “epic of survival and continuity” had in common a linear teleology. Both ruled out the possibility of a group existing discontinuously, keeping open multiple paths, being *both* Indian *and* American.

An either-or logic applied. St. Clair argued that there had never been a tribe in Mashpee, only individual Indian Americans who had repeatedly opted for white society. His story of progress toward citizenship assumed a steady movement away from native tradition. Identity as an American meant giving up a strong claim to tribal political integrity in favor of ethnic status within a national whole. Life as an American meant death as an Indian. Conversely Shubow’s Mashpee had “survived”

as a living tribe and culture from aboriginal times; but the historical record often contradicted his claim, and he sometimes strained to assert continuity. The plaintiffs could not admit that Indians in Mashpee had lost, even voluntarily abandoned, crucial aspects of their tradition while at the same time pointing to evidence over the centuries of reinvented "Indianness." They could not show tribal institutions as relational and political, coming and going in response to changing federal and state policies and the surrounding ideological climate. An identity could not die and come back to life. To recreate a culture that had been lost was, by definition of the court, inauthentic.

But is any part of a tradition "lost" if it can be remembered, even generations later, caught up in a present dynamism and made to symbolize a possible future?

The Mashpee were trapped by the stories that could be told about them. In this trial "the facts" did not speak for themselves. Tribal life had to be emplotted, told as a coherent narrative. In fact only a few basic stories are told, over and over, about Native Americans and other "tribal" peoples. These societies are always either dying or surviving, assimilating or resisting. Caught between a local past and a global future, they either hold on to their separateness or "enter the modern world." The latter entry – tragic or triumphant – is always a step toward a global future defined by technological progress, national and international cultural relations. Are there other possible stories?

Until recently the "history" accorded to tribal peoples has always been a Western history. They may refuse it, embrace it, be devastated by it, changed by it. But the familiar paths of tribal death, survival, assimilation, or resistance do not catch the specific ambivalences of life in places like Mashpee over four centuries of defeat, renewal, political negotiation, and cultural innovation. Moreover most societies that suddenly "enter the modern world" have already been in touch with it for centuries.

The Mashpee trial seemed to reveal people who were sometimes separate and "Indian," sometimes assimilated and "American." Their history was a series of cultural and political transactions, not all-or-nothing conversions or resistances.³ Indians in Mashpee lived and acted *between* cultures in a series of ad hoc engagements. No one in Boston Federal Court, expert or layperson, stood at the end point of this historical series, even though the stories of continuity and change they told implied that they did. These stories and the trial itself were episodes, turns in the ongoing engagement. Seen from a standpoint not of finality (survival or assimilation) but of emergence, Indian life in Mashpee would not flow in a single current.

Interpreting the direction or meaning of the historical "record" always depends on present possibilities. When the future is open, so is the meaning of the past. Did Indian religion or tribal institutions disappear in the late nineteenth century? Or did they go underground? In a present context of serious revival they went underground; otherwise they disappeared. No continuous narrative or clear outcome accounts for Mashpee's deeply contested identity and direction. Nor can a single development weave together the branching paths of its past, the dead ends and hesitations that, with a newly conceived future, suddenly become prefigurations.

NOTES

- 1 The two "histories" that follow represent the best brief interpretive accounts I could construct of the contending versions of Mashpee's past. They draw selectively on the expert testimony presented at the trial – testimony much too long, complex, and contested to summarize adequately. The overall shape of the two accounts reflects the summation provided at the end of the testimony by each side's principal attorney. "History I" owes a good deal to Francis Hutchins' book *Mashpee: The Story of Cape Cod's Indian Town* (1979). This book takes a somewhat more moderate position than the courtroom testimony on which it is based. "History II" owes something to the general approach of James Axtell's book *The European and the Indian* (1981). Axtell was witness for the plaintiffs.
- 2 In the preceding discussion I am not suggesting that the ethnographic categories of culture and tribe, however compromised, should be subsumed in the recent and more mobile discourse of ethnicity. Ethnicity, as usually conceived, is a weak conception of culture suitable for organizing diversity within the pluralist state. The institution of *tribe*, still trailing clouds of aboriginal sovereignty and reminiscent of its eighteenth-century synonym *nation*, is less easily integrated into the modern multiethnic, multiracial state. The resurgent cultural-political identity asserted by Indian tribes is more subversive than that of Irish-Americans or Italian-Americans: Native Americans claim to be both full citizens of the United States *and* radically outside it.
- 3 William Simmons' collection and analysis of New England Indian folklore, *Spirit of the New England Tribes* (1986), not available at the time of the trial, provides much evidence for the productive interpenetration of Christian and Native American sources. It shows how Indian "tradition" was maintained through appropriation and interaction, transmitted both orally and in writing. Simmons provides background on the Mashpee Wampanoag culture hero, the giant Maushop, who, in Ramona Peters' testimony, unexpectedly turned into Moby Dick. The plaintiffs' lawyers and experts made little appeal to continuing Indian folklore, perhaps because of its evident implication in the religious traditions and fairytales of surrounding ethnic groups.