6 Translating *Yonnondio* by Precedent and Evidence: The Mashpee Indian Case

GERALD TORRES and KATHRYN MILUN

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

"Yonnondio"—the address, the salutation—became a medium through which contending Indian and European cultures interacted. The evolving meaning of this salutation reflected changing relations of power as the Indians' early contact with European explorers themselves evolved into contact with the states represented by those explorers. Likewise, the land claim suits filed by various Tribes during the 1970s[1] served as a channel through which some Indians attempted to communicate with the state—this time, through the medium of courts. In order for the state to hear their claims, however, these Indians were forced to speak in a formalized idiom of the language of the state—the idiom of legal discourse. Consider one such land claim suit, *Mashpee Tribe v. Town of Mashpee*,[2] and the formalized address that it incorporated. What happens, we ask, when such claims receive a legal hearing? We suggest that first they must be translated by means of examples that law can follow (precedent) and examples that law can hear (evidence).

We should suspect that the legal coding through which such translation is conducted highlights a problem inherent in the post-modern condition—the confrontation between irreconcilable systems of meaning produced by two contending cultures. The post-modern condition is a crisis of faith in the grand stories that have justified our history and legitimized our knowledge.[3] The very idea of what we can know is unstable. The crisis in the law that emerged with the Legal Realists and the attempts to reconstitute formalism—as the basis for survival of the "rule of law"—also reflect our post-modern condition. In the case of the

1990 DUKE L.J. 625. Originally published in the Duke Law Journal. Reprinted by permission.

Mashpee, the systems of meaning are irreconcilable: The politics of historical domination reduced the Mashpee to having to petition their "guardian" to allow them to exist, and the history of that domination has determined in large measure the ways the Mashpee must structure their petitions. The conflict between these systems of meaning—that of the Mashpee and that of the state—is really the question of how we can "know" which history is most "true."

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

"Ignorant," of course, merely means uninformed. The central problem is whether the limitations of the legal idiom permit one party truly to inform the other, or conversely, whether the dimension of power hidden in the idiomatic structure of legal storytelling forecloses one version in favor of another.

> [W]hen you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. Eliminated, gone. You aren't just deprived of a language with which to articulate your distinctiveness, although you are; you are deprived of a life out of which articulation might come.[4]

What constitutes proof and what constitutes authority; what are the pragmatics of "legal" storytelling? Pragmatics in this context might be analyzed best in terms of a game. Any game must have rules to determine what is an acceptable move, but the rules do not determine all available moves. Although the total content of acceptable moves is not predetermined, the universe of potentially permissible moves is limited necessarily by the structure of the game. All language, but especially technical language, is a kind of game. What are the rules that govern discourse in the legal idiom? What kind of knowledge is transmitted?

By highlighting the peculiar nature of legal discourse and comparing it to other ways of telling and reading the Mashpee's history, we can explore and make concrete the roles of power and politics in legal rationality. The *Mashpee* case is especially well suited to this investigation because it casts so starkly the problem of law as an artifact of culture and power.

Looking Back at Indians and Indians Looking Back: The Case

In 1976 in *Mashpee Tribe v. Town of Mashpee*, the Indian community at Mashpee on Cape Cod sued to recover tribal lands alienated from them over the last two centuries in violation of the Indian Non-Intercourse Act of 1790.[5] The Non-Intercourse Act prohibits the transfer of Indian tribal land to non-Indians without approval of the federal government. The Tribe claimed its land had been taken from it, between 1834 and 1870, without the required federal consent. According to the Mashpee, the Commonwealth of Massachusetts had permitted the land to be sold to non-Indians and had transferred common Indian lands to the Town of Mashpee. The defendant, Town of Mashpee, answered by denying that the plaintiffs, Mashpee, were a Tribe. Therefore, they were outside the protection of the Non-Intercourse Act and were without standing to sue.

As a result, the Mashpee first had to prove that they were indeed a "Tribe." A forty-day trial then ensued on that threshold issue. The Mashpee were required to demonstrate their tribal existence in accordance with a definition adopted by the United States Supreme Court at the turn of the century in *Montoya v. United States:* "By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[6] This is a very narrow and particular definition. As Judge Skinner, who presided over the trial of the Mashpee's claim, explained in his instructions to the jury: "Now, what is the level of the burden of proof? I've said these matters need not be determined in terms of cosmic proof. The plaintiff has the burden of proving . . . if the [Mashpee] were a tribe."[7]

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

> I am seriously considering striking all of the definitions given by all of the experts of a Tribe and all of their opinions as to whether or not the inhabitants of Mashpee at any time could constitute a Tribe. I let it all in on the theory that there was a professionally accepted definition of Tribe within these various disciplines.
>
> It is becoming more and more apparent that each definition is highly subjective and idiosyncratic and generated for a particular purpose not necessarily having anything to do with the Non-Intercourse Act of 1790.[8]

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

The case providing the key definition, *Montoya*, involved a company whose

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

Beyond reflecting archaic notions of tribal existence in general, the *Montoya* requirements incorporated specific perceptions regarding race, leadership, community, and territory that were entirely alien to Mashpee culture. The testimony revealed the *Montoya* criteria as generalized ethnological categories that failed to capture the specifics of what it means to belong to the Mashpee people. Because of this disjunction between the ethno-legal categories and the Mashpee's lived experience, the Tribe's testimony and evidence never quite "signified" within the idiom established by the precedent. After forty days of testimony, the jury came up with the following "irrational" decision: The Mashpee were not a Tribe in 1790, were a Tribe in 1834 and 1842, but again were not a Tribe in 1869 and 1870. Based on the jury's findings, the trial court dismissed the Mashpee's claim.

The Baked and the Half-Baked

Whether the Mashpee are legally a Tribe is, of course, only half the question. That the Mashpee existed as a recognized people occupying a recognizable territory for well over three hundred years is a well-documented fact.[9] In order to ascertain the meaning of that existence, however, an observer must ask not only what categories are used to describe it but also whether the categories adopted by the observer carry the same meaning to the observed.

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

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

Colonial oversight quickly became a burden. In 1760, the Mashpee appealed directly to King George III for relief from their British overlords. In 1763, their petition was granted. The "Mashpee Plantation" received a new legal designation, granting the "proprietors the right to elect their own overseers."[10] This change in the Tribe's relationship with its newly arrived white neighbors did not last long, however. With the coming of the Colonies' war against England and the founding of the Commonwealth of Massachusetts, all previous protections of Mashpee land predicated on British rule quickly were repealed, and the Tribe was subjected to a new set of overseers with even more onerous authority than its colonial lords had held. The new protectors were granted "oppressive powers over the inhabitants, including the right to lease their lands, to sell timber from their forests, and to hire out their children to labor."[11]

During this time the Mashpee were on their way toward becoming the melange of "racial types" that ultimately would bring about their legal demise two hundred years later. Colonists had taken Mashpee wives, many of whom were widows whose husbands had died fighting against the British. The Wampanoags, another southern Massachusetts Tribe that suffered terrible defeat in wars with the European colonists, had retreated and had been taken in by the Mashpee. Hessian soldiers had intermarried with the Mashpee. Runaway slaves took refuge with and married Mashpee Indians. The Mashpee became members of a "mixed" race, and the names some of the Mashpee carried reflected this mixture. What was clear to the Mashpee, if not to outside observers, was that this mixing did not dilute their tribal status because they did not define themselves according to racial type, but rather by membership in their community. In an essay on the Mashpee in *The Predicament of Culture*,[12] one authority explained that despite the racial mixing that had historically occurred in the Mashpee community, since the Mashpee did not measure tribal membership according to "blood" Indian identity remained paramount. In fact, the openness to outsiders who wished to become part of the tribal community was part of the community values that contributed to tribal identity. The Mashpee were being penalized for maintaining their aboriginal traditions because they did not conform to the prevailing "racial" definition of community and society.

In 1833, a series of events began that culminated in the partial restoration of traditional Mashpee "rights." William Apes, an Indian preacher who claimed to be descended from King Philip, a Wampanoag chief, stirred the Mashpee to petition their overseers and the Governor of Massachusetts for relief from the depredation visited upon them. What offended Apes was the appropriation of the Mashpee's worshipping ground by white Christians. In response to the imposition of a white Christian minister on their congregation, they had abandoned the meetinghouse in favor of an outdoor service conducted by a fellow Indian. The petition Apes helped draft began, "we, as a Tribe, will rule ourselves, and have the right to do so, for all men are born free and equal, says the Constitution of the

country."[13] What is particularly important about this challenge is that it asserted independence within the context of the laws of the commonwealth of Massachusetts. The Massachusetts Governor rejected this appeal, and the Mashpee's attempt at unilateral enforcement of their claims resulted in the arrest and conviction of Apes.

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

Control of the land remained a critical issue for the Mashpee. By late in the 17th century, the area surrounding the homes and land of the "South Sea Indians" had been consolidated and organized into a permanent Indian plantation. The Mashpee's relationship to this land, however, remained legally problematic for the Commonwealth. In 1842, Massachusetts determined that the land was to be divided among individual Mashpee Tribe members, but their power over it was closely circumscribed; they could sell it only to other members of the Tribe. The "plantation" could tax the land, but the land could not be taken for nonpayment of those taxes. In 1859, a measure was proposed to permit the Mashpee to sell land to outsiders and to make the Mashpee "full citizens" of the commonwealth. This proposal was rejected by the Tribe's governing council. In 1870, however, the Mashpee were "granted" rights to alienate their property as "full-fledged citizens" and their land was organized by fiat into the town of Mashpee.[14]

It was the land that had moved out of Indian control, eleven thousand acres of undeveloped land estimated to be worth fifty million dollars, that the Mashpee Wampanoag Tribal Council sued to reclaim in 1976. Some of the land had been lost in the intervening years, and more was in danger of being lost or reduced to non-exclusive occupancy. The Council based its claim on the 1790 Non-Intercourse Act,[15] which prohibits the alienation of Indian lands[16] without federal approval. The Non-Intercourse Act applies to transactions between Indians and non-Indians, and, despite its inherent paternalism, serves to protect tribal integrity.

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

Many of the facts underlying the Mashpee's suit were not disputed. What the parties fought about was the *meaning* of "what happened." Seen from the perspective of the Mashpee, the facts that defined the Indians as a Tribe also invalidated the transactions divesting them of their lands. From the perspective of the property owners in the Town, however, those same acts proved that the Mashpee no longer existed as a separate people. How, then, is an appropriate perspective to be chosen? As told by the defendants, the Mashpee's story was one about "a small, mixed community fighting for equality and citizenship while abandoning, by choice or coercion, most of its aboriginal heritage."[18]

Using the same evidence, the plaintiffs told a very different story. It was the story of cultural survival: "[T]he residents of Mashpee had managed to keep alive a core of Indian identity over three centuries against enormous odds. They had done so in supple, sometimes surreptitious ways, always attempting to control, not reject, outside influences."[19] Which of the two conflicting perspectives is the "proper" one from which to assess the facts underlying the Mashpee's claim?

NOTES

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

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

3. *See* J. F. LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (G. Bennington & B. Massumi trans. 1984) (The crisis of modernity is examined as a lack of belief in the grand narratives which legitimized the modern social order, for example, liberalism and Marxism.).

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

5. 25 U.S.C. § 177 (1988) (derived from Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730). This Act provides: "No purchase, grant, lease, or other conveyance of lands, . . . from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." *Id.* The original language read: "That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose under the hand and seal of the superintendent of the department. . . ." Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137.

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

7. Record at 40:7 (Jan. 4, 1978); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1978) (No. Civ. A No. 76-3190-5) (instructions to jury on burden of proof); *see also Mashpee Tribe*, 447 F. Supp. at 943.

8. Record, *supra* note 7, at 36:189 (Dec. 28, 1977).

9. Paul Brodeur notes:

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

Brodeur, *supra* note 1, at 7–9; *see also* J. CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART 289 (1988) ("[The Mashpee] did have a place and a reputation. For centuries Mashpee had been recognized as an Indian town. Its boundaries had not changed since 1665, when the land was formally deeded to a group called the South Sea Indians by the neighboring leaders Tookonchasun and Weepquish.").

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

10. Brodeur, *supra* note 1, at 15.

11. *Id.*

12. CLIFFORD, *supra* note 9, at 306–07.

13. BRODEUR, *supra* note 1, at 17.

14. *Id.* at 19–20.

15. 25 U.S.C. § 177 (1988); *see supra* note 5 (quoting the relevant provisions of the Act).

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

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

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

18. CLIFFORD, *supra* note 9, at 302.

19. *Id.*

10 Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law

ROBERT A. WILLIAMS, JR.

AS AN eastern Indian who moved West, I have become more appreciative of the importance of a central theme of all American Indian thought and discourse, the circle. To come West, and listen to so many Indian people speak and apply a vital and meaningful discourse of tribal sovereignty, has been a redemptive experience. It has enabled me to envision what must have been for all Indian peoples before Europeans established their hegemony in America.

As an eastern Indian moved West, I continually reflect on the cycles of confrontation between white society and American Indian tribalism. I am most alarmed by the structural similarities which can be constructed between the early nineteenth-century Removal era and the modern West today. In the early nineteenth century, white society confronted the unassimilability of an intransigent tribalism in the East, and responded with an uncompromising and racist legal discourse of opposition to tribal sovereignty. The full-scale deployment of this discourse resulted in tribalism's virtual elimination from the eastern United States. In the modern West today, white society again finds itself confronting a resurgent discourse of tribal sovereignty as its intercourse with once remote Indian Nations increases. The revival of an uncompromising and racist legal discourse of opposition to tribal sovereignty, articulated by many segments of white society today, just as certainly seeks tribalism's virtual elimination from the western United States. While there are many differences between the Removal era confrontations with tribalism and the confrontations occurring today in Indian Country over the place and meaning of tribal sovereignty in contemporary United States society, the importance of the circle in American Indian thought and discourse particularly alerts me to many alarming similarities.

31 ARIZ. L. REV. 237 (1989).

The Removal of Tribalism in the East

DOCUMENTS OF CIVILIZATION: THE CHEROKEES' DISCOURSE OF TRIBAL SOVEREIGNTY

In his illuminating *Theses on the Philosophy of History* written in 1940, a few months prior to his death in the face of Hitler's final solution, the German-Jewish writer Walter Benjamin observed that there is no document of civilization which is not at the same time a document of barbarism.[1] By all documented accounts, the United States' forced removal of the Five "Civilized" tribes of the Indians—the Cherokees, Creeks, Chickasaws, Choctaws, and Seminoles—from their ancestral homelands in the south across the Great Father of Waters was an act of barbarism. In his classic and ironically titled text, *Democracy in America*,[2] Alexis de Tocqueville, who was *there* when the Choctaws crossed the Mississippi at Memphis in 1831, described the horrible scene as follows:

> It was then in the depths of winter, and that year the cold was exceptionally severe; the snow was hard on the ground, and huge masses of ice drifted on the river. The Indians brought their families with them; there were among them the wounded, the sick, newborn babies, and old men on the point of death. They had neither tents nor wagons, but only some provisions and weapons. I saw them embark to cross the great river, and the sign will never fade from my memory. Neither sob nor complaint rose from that silent assembly. Their afflictions were of long standing, and they felt them to be irremediable.[3]

While Tocqueville was a witness to Removal, his most famous insight into the American character was his notation of a national obsession with the legal process. Thus, Tocqueville's digressions in *Democracy in America* on United States Indian policy in general contain a special poignancy in light of his reflections on the Choctaw removal. Commenting on the history of the nation's treatment of Indian tribal peoples, Tocqueville noted the United States' "singular attachment to the formalities of law" in carrying out a policy of Indian extermination.[4] Contrasting the Spaniards' Black Legend of Indian atrocities, Tocqueville's *Democracy in America* complimented the United States for its clean efficiency in "legally" dealing with its Indian problem. It would be "impossible," the Frenchman declared in mock admiration of the Americans' Indian policy, "to destroy men with more respect for the laws of humanity."[5]

The cases, treatises, and other scholarly commentary comprising the textual corpus of modern federal Indian law discourse revere the documents of an ineffectual United States Supreme Court declaring the Cherokee Nations' impotent rights to resist the forces intent on their destruction. In particular, the celebratory narrative traditions of federal Indian law scholarship regard the Marshall Court's 1832 decision in *Worcester v. Georgia*,[6] recognizing the inherent sovereignty of Indian Tribes, as perhaps the Removal era's most important legacy for American tribalism. But there was a competing legal discourse in the early nineteenth century on tribalism's rights and status east of the Mississippi that denied,

and in fact overcame, the assertions of tribal sovereignty contained in the Marshall Court's much-celebrated *Worcester* opinion.

The dominant forces of political and legal power in United States society effectively ignored Marshall's declaration in *Worcester* that the Cherokee Nation "is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter."[7] The Cherokees, along with the other southern tribes, were coerced into abandoning their territory and were resettled in the West. The laws of Georgia are now in force in the Cherokees' ancestral homelands; in fact, the traces of many once vital forms of tribalism east of the Mississippi can be found only in the pages of the historian and place names on road maps. And, as noted by the witness Tocqueville, it was all accomplished with a "singular attachment to the formalities of law"; a law violently opposed to that laid down by Chief Justice Marshall in his *Worcester* opinion.

The period's best preserved discourse of tribal sovereignty is that articulated by the Cherokee Nation. Having survived their military subjugation by the United States in the post-Revolutionary period, the Cherokees' war against white repression was continued through other means, by law and politics. Thus, there exists a large corpus of official documents declaring Cherokee resistance preserved in enabling acts of Cherokee self-government, memorials to Congress, and arguments made before United States tribunals of justice. The basic themes of this discourse asserted the Cherokees' fundamental human right to live on the land of their elders, their right to the sovereignty and jurisdiction over that land, and the United States' acknowledgment and guarantee of those rights in treaties negotiated with the tribe.

The tribe's 1830 memorial to Congress contains perhaps the most concise summary of the principal themes of the Cherokees' discourse of sovereignty. The Cherokees presented their petition to the national government shortly after the passage of the Removal Act. The Cherokee memorial declared the tribe's firm opposition to abandoning its eastern homeland in the following terms:

> We wish to remain on the lands of our fathers. We have a perfect and original right to remain without interruption or molestation. The treaties with us, and the laws of the United States made in pursuance of treaties, guaranty our residence and privileges, and secures us against intruders. Our only request is, that these treaties may be fulfilled, and these laws executed.[8]

The Cherokees' discourse of resistance, with its organizing theme of an Indian tribe's fundamental human right to retain and rule over its ancestral homeland, asserted itself most threateningly in an adamant refusal to remove voluntarily from Georgia westward to an Indian Territory beyond the Mississippi River. It was the Cherokees' refusal to abandon their homeland that rendered their discourse so "presumptuous" and intolerable to those segments of United States society determined to see tribalism eliminated from within the borders of white civilization.

In response to the Cherokees' legal discourse of sovereignty over their ancestral lands, Georgia enacted a series of laws that partitioned the Cherokee country to several of the state's counties, extended its jurisdiction over the territory, and declared all Indian customs null and void. Under these laws, Indians were also deemed incompetent to testify in Georgia's courts in cases involving whites.

These positive expressions of Georgia's intent to exercise political jurisdiction over the Cherokee country were accompanied by a legal discourse stridently opposed to the Cherokees' own discourse of tribal sovereignty. This legal discourse of opposition to tribal sovereignty was not, however, directed only at the Cherokees, and was not the exclusive possession of the Georgians. The themes of this discourse focused beyond the Cherokee controversy, and were embraced by many members of the dominant white society who denied all Indian tribes the right to retain sovereignty over their ancestral lands. According to this discourse, tribal Indians, by virtue of their radical divergence from the norms and values of white society regarding use of and entitlement to lands, could make no claims to possession or sovereignty over territories which they had not cultivated and which whites coveted. Treaties of the federal government allegedly recognizing tribal rights to ancestral homelands had been negotiated primarily to protect the tribes from certain destruction. Destruction of the tribes now appeared inevitable, however, as the territories reserved to the tribes east of the Mississippi were being surrounded by land-hungry whites.[9] Because conditions had changed so dramatically from the time of the treaties' negotiation, the treaties could no longer be regarded as binding. Only removal could save the tribes from inevitable destruction.

In 1830, Georgia Governor George C. Gilmer summed up the basic thesis of the legal discourse legitimating the breach of treaties required by the Removal policy as follows: "[T]reaties were expedients by which ignorant, intractable and savage people were induced without bloodshed to yield up what civilized peoples had a right to possess by virtue of that command of the Creator delivered to man upon his formation—be fruitful, multiply and replenish the earth, and subdue it."

Georgia Congressman, later governor, Wilson Lumpkin made virtually the same claim in his speech before the House of Representatives in support of the 1830 Removal Act, which would facilitate the expulsion of all remaining tribal Indians to the western Indian territory.

> The practice of buying Indian lands is nothing more than the substitute of humanity and benevolence, and has been resorted to in preference to the sword, as the best means for agricultural and civilized communities entering into the enjoyment of their natural and just right to the benefits of the earth, evidently designed by *Him* who formed it for purposes more useful than Indian hunting grounds.[10]

The Georgians consistently stressed that tribalism's claims to sovereignty and ownership over lands coveted by a civilized community of cultivators were inconsistent with natural law. Tribalism's asserted incompatibility with United

States society east of the Mississippi was in fact the most frequently articulated theme in the argument of all the advocates of the Removal policy. President John Quincy Adams, in a message to Congress in 1828, recognized the need for a "remedy" to the anomaly of independence-claiming tribal communities in the midst of white civilization. This "remedy," of course, was removal of the Indians to the West, an idea which has been debated as the final solution to the "Indian problem" since Jefferson's 1803 Louisiana Purchase.[11] Noting that the nation had been far more successful in acquiring the eastern tribes' territory "than in imparting to them the principles of inspiring in them the spirit of civilization,"[12] Adams observed that:

> [I]n appropriating to ourselves their hunting grounds we have brought upon ourselves the obligation of providing them with subsistence; and when we have had the same good fortune of teaching them the arts of civilization and the doctrines of Christianity we have unexpectedly found them forming in the midst of ourselves communities claiming to be independent of ours and rivals of sovereignty within the territories of the members of our Union. This state of things requires that a remedy should be provided—a remedy which, while it shall do justice to those unfortunate children of nature, may secure to the members of our confederates their right of sovereignty and soil.[13]

Even so-called "friends of the Indian" argued that tribalism's incompatibility with the values and norms of white civilization left removal as the only means to save the Indian from destruction. In 1829, Thomas L. McKenney, head of the national government's Office of Indian Affairs, organized New York's Board for the Emigration, Preservation, and Improvement of the Aborigines. McKenney formed the Board to gain support from missionaries and clergymen for the government's removal plan. He asked former Michigan territorial governor Lewis Cass, a well-regarded expert on the Indian in early nineteenth-century white society, to publish the argument in favor of the Removal policy in the widely circulated *North American Review*.[14] As Cass explained in one article:

> A barbarous people, depending for subsistence upon the scanty and precarious supplies furnished by the chase, cannot live in contact with a civilized community. As the cultivated border approaches the haunts of the animals, which are valuable for food or furs, they recede and seek shelter in less accessible situations. . . . [W]hen the people, whom they supply with the means of subsistence, have become sufficiently numerous to consume the excess annually added to the stock, it is evident, that the population must become stationary, or, resorting to the principle instead of the interest, must, like other prodigals, satisfy the wants of to-day at the expense of to-morrow.[15]

Cass further argued that any attempt by the tribes to establish independent sovereign governments in the midst of white civilization "would lead to their inevitable ruin."[16] The Indians had to be removed from the path of white civilization for their own good.

JOHN LOCKE'S CONTRIBUTIONS TO THE NARRATIVE TRADITION OF TRIBALISM'S INFERIOR LAND RIGHTS

On both sides of the Atlantic and throughout the seventeenth and eighteenth centuries, the narrative tradition of tribalism's incompatibility with white civilization generated a rich corpus of texts and legal arguments for dispossessing the Indian. These texts and arguments, while enriching and extending the tradition itself, enabled English-Americans to better understand and relate the true nature of the Indian problem confronting their transplanted New World society. John Locke's chapter on *Property*, contained in his widely read *Second Treatise of Government*,[17] was but one famous and influential text that can be located within this tradition. Written towards the end of the seventeenth century, Locke's text illustrates the widely diffused nature of the impact of more than seventy years of English colonial activity in the New World on so many aspects of English life and society.

Locke himself was a one-time functionary in the slave plantation enterprise of the colonial proprietors of South Carolina.[18] His late seventeenth century philosophical discussion on the natural law rights of an individual to acquire "waste" and common lands by labor assumed the status of a canonical text in a number of still vital narrative traditions emerging out of early United States political and legal culture.[19] With respect to the narrative tradition of tribalism's incompatibility with white norms and values, Locke's famous text represents the principal philosophical delineation of the normative arguments supporting white civilization's conquest of America.

The *Second Treatise*'s legitimating discourse of a civilized society of cultivators' superior claim to the "waste" and underutilized lands roamed over by savage tribes provided a more rigidly systematized defense of the natural law–grounded set of assumptions by which white society had traditionally justified dispossessing Indian society of the New World. The primary philosophical problem set out in Locke's famous chapter on *Property* in his *Second Treatise* was a demonstration of "how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners."[20] Thus, Locke's text constructed its methodically organized argument for dispossessing the Indian of the presumed great "common" that was America in indirect fashion, through abstraction. Locke sought to demonstrate, through a series of carefully calculated contrasts between English and American Indian land use practices, how individual labor upon the commons removes "it out of the state of nature" and "begins the [private] property."[21] For Locke, the narrative tradition of tribalism's normative deficiency provided the needed illustrations for his principal argument that" 'Tis labour indeed that puts the difference of value on everything."[22] In turn, this "difference" was the source of a cultivator society's privileges to deny the wasteful claims of tribalism to the underutilized "commons" of America. Locke wrote:

> There cannot be a clearer demonstration of any thing, than several Nations of the Americans are of this [the value added to land by labor] who are rich in Land, and

> poor in all Comforts of Life; whom nature having furnished as liberally as any other people, with the materials of Plenty, i.e., a fruitful soil, apt to produce in abundance, what might serve for food, rayment, and delight; yet for want of improving it by labour, have not one hundredth part of the Conveniences we enjoy; and the king of a large fruitful territory there feeds, lodges, and is clad worse than a day labourer in the *England*.[23]

Locke's argument was firmly grounded in a narrative tradition familiar to any late seventeenth-century Englishman who had heard the countless sermons or read the voluminous promotional literature designed to encourage English colonization of the unenclosed, uncultivated expanses of territory in America claimed by Indian tribes. Locke's gross anthropological overgeneralizations of the living conditions of the kings "of several Nations of the Americans"[24] serve to illustrate his basic theme that land without labor-added value, such as Indian-occupied land, remains in the state of nature free for individual English appropriation as property. This use of the Indian's "difference" as a shorthand device to demonstrate the value added to uncultivated land by labor illuminates the economizing and legitimating functions of a narrative tradition when skillfully deployed in expository and rhetorical discourses.

Locke's famous argument in his *Second Treatise* that land lying waste and uncultivated has no owner and can therefore be appropriated by labor actually contained an express normative judgment on the Indian's claims under natural law to the "in-land parts of America."[25] Drawing on the narrative tradition's dominant theme of tribalism's deficiency and unassimilability respecting land use, Locke declared toward the end of his text:

> Yet there are still *great tracts of ground* to be found, which (the inhabitants thereof not having joined with the rest of mankind, in the consent of the use of their common money) lie waste, and are more than the people, who dwell on it, do, or can make use of, and so still be in common. Tho' this can scarce happen amongst that part of mankind, that have consented to the use of money.[26]

Locke's refrain in the closing sentences of his discussion in *Property* that "thus, in the beginning, all the world was America,"[27] was therefore far more than a metaphorical illustration of the conditions of the state of nature from which private property emerged. The oft-quoted allusion was also a tactical deployment of a principal theme of a narrative tradition that had legitimated and energized the call to colonization of the vast "commons" that was supposedly the Indian's America since the beginnings of the English invasion of the New World.

Locke's natural law thematic of the Indian's failure to adopt the supposedly universal "rational" norms by which Englishmen assessed claims to natural rights drew heavily on the narrative tradition of tribalism's normatively deficient land use practices. In supporting the claims of a society of cultivators to the Indian's America, Locke in turn strongly reinforced and extended that same tradition. But while extremely influential, Locke's philosophical text simply supplemented the cumulative burden already placed upon Indian land rights in a

narrative tradition focused on tribalism's difference from white culture. Nevertheless, Locke more systematically rationalized the privileges flowing to white society by virtue of that difference, and, for a society that valued systemic rationalization as a confirmation of divinely inspired natural law,[28] this was indeed an enlightening achievement.

The Discourse of Opposition to Tribal Sovereignty in Contemporary United States Society

THE TASK OF HEARING WHAT HAS ALREADY BEEN SAID

The pre-nineteenth-century narrative tradition on tribalism's deficiency and unassimilability with white civilization provided the Removal era's legal discourse of opposition to tribal sovereignty with a number of valuable and venerable themes and thematic devices. Its central vision of tribalism's normative deficiency respecting land use grounded the claims of Georgia and the other southern states to superior rights of ownership and sovereignty over Indian Country. Its intimately connected themes of tribalism's unassimilability and doomed fate in the face of white civilization's superior difference and privileges arising from that difference perfectly complemented the advocates of Removal's claims that the only way to save the tribes was to banish them from the midst of white civilization.

As has been illustrated, the idea that tribalism east of the Mississippi was incompatible with the territorial ambitions and superior claims of United States society had been an integral component of United States public discourses on Indian policy long prior to the emergence of the Removal era's dominant legal discourse of opposition to tribal sovereignty. The widely asserted position of the early nineteenth-century advocates of Removal that tribalism was doomed to extinction in its confrontation with United States civilization east of the Mississippi was appropriated from a narrative tradition refined by Europeans in the New World in the course of two centuries of colonial contact with American Indians.

Just as it is possible to reconstruct the emergence of the early nineteenth-century Removal era's dominant legal discourse of opposition to tribal sovereignty out of a broader legitimating narrative tradition on tribalism's normative deficiency and unassimilability with white civilization, so too can this tradition itself be explained as a localized extension of a more global discursive legacy. That legacy, of course, would be the colonizing discourses and discursive strategies of the West's one-thousand-year-old tradition of repression of peoples of color.[29] For so many of the world's peoples of color, their history has been dominated by the seemingly eternal recurrence of the West's articulation and rearticulation of the privileges of its superior difference in their homelands.[30]

To say that it has all been heard before does not trivialize the significance of the circle in the thought of so many of the world's peoples of color, particularly the tribal peoples of America. Rather, it resignifies the importance of the circle's

organizing vision that, borrowing from an apostate's discourse of opposition to the West's mythos of historical linearity,[31] "a meaning has taken shape that hangs over us, leading us forward in our blindness, but awaiting in the darkness for us to attain awareness before emerging into the light of day and speaking."[32]

While the strategy of stressing the Indian's difference has been frequently deployed throughout the history of public discourses on United States Indian policy, the modern United States Supreme Court also frequently cites tribalism's continuing difference from the norms of the dominant society in its opinions articulating the inherent limitations on tribal sovereignty.[33] The strategy of stressing difference in order to intensify the exclusion by which tribalism was placed outside white civilization clearly animates the discussion of then–Associate Justice William Rehnquist's 1978 majority opinion in *Oliphant v. Suquamish Indian Tribe*.[34] *Oliphant* is the modern Supreme Court's most important discussion on the inherent limitations on tribal sovereignty. The Court held in *Oliphant* that Indian tribes lacked the inherent sovereign power to try and punish non-Indians for minor crimes committed in Indian Country.[35] The decision constrained the exercise of tribal sovereign power so as not to interfere with the interests of United States citizens to be protected from "unwarranted intrusions" on their personal liberty.[36] The decision also obviously constrains the ability of tribal government to maintain law and order in Indian Country according to a possibly divergent tribal vision.[37]

Rehnquist's *Oliphant* text legitimated these Supreme Court–created constraints on modern tribalism by first noting the following historical distinctions marking the administration of tribal criminal jurisdiction:

> Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than on punishment. In 1834 the Commissioner of Indian Affairs described the then status of Indian criminal systems: "With the exception of two or three tribes . . . the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint."[38]

Having identified this historical difference by which the exercise of tribal criminal jurisdiction was placed outside white civilization, Rehnquist's opinion in *Oliphant* declared that this difference had been essentially continued in the contemporary divergence of modern tribal court systems from the norms governing the exercise of criminal jurisdiction in the dominant society's courts.[39] Citing to the Indian Civil Rights Act of 1968, a congressional act extending to tribal court criminal defendants "many of the due process protections accorded to defendants in federal or state criminal proceedings,"[40] Rehnquist observed that the protections afforded defendants in tribal court "are not identical" to those accorded defendants in non-Indian courts.[41] "Non-Indians, for example, are excluded from . . . tribal court juries" in a tribal criminal prosecution, Rehnquist noted, even if the defendant is a non-Indian.[42] It was this and other substantive differences

stated and implied throughout the opinion between tribal and federal and state court proceedings[43] that determined, in Rehnquist's opinion, that Indian tribes do not possess the "power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[44] Quoting from an 1834 House of Representatives report,[45] Rehnquist declared that the "principle" that tribes, by virtue of their difference, lacked criminal jurisdiction over non-Indians

> would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.[46]

Rehnquist's implication in *Oliphant* was clear; despite their "dramatic advances," tribal courts operate according to norms that are too radically different from those governing United States courts. Tribes cannot be permitted to exercise their deficient forms of criminal jurisdiction over white society.[47]

Conclusion

The legacy of a thousand years of European colonialism and racism can be located in the underlying shared assumptions of Indian cultural inferiority reflected in the narrative tradition of tribalism's normative deficiency, the Removal era's dominant discourse of opposition to tribal sovereignty, and in those contemporary Indian policy discourses seeking to constrain tribalism. Since its invasion of America, white society has sought to *justify*, through law and legal discourse, its privileges of aggression against Indian people by stressing tribalism's incompatibility with the superior values and norms of white civilization. For half a millennium, the white man's Rule of Law has most often served as the fundamental mechanism by which white society has absolved itself for any injustices arising from its assumed right of domination over Indian people.

European-derived racist-imperial discourse illuminates the continuing determinative role of racism and cultural imperialism in United States public discourses on the legal rights and status of Indian tribes. The racist attitude, focusing on the tribal Indian's cultural inferiority as the source of white society's privilege of acting as rightful judge over the Indian, can be located in the discourses of seventeenth-century Puritan divines, nineteenth-century Georgia legislators, and twentieth-century members of Congress, the federal judiciary, and federal executive branch.

The relationship between the thousand-year-old legacy of European racism and colonialism and United States public discourses of law and politics regarding Indian rights and status can be more precisely defined by focusing on the racist attitude itself. This racist attitude can be found recurring throughout the history of white society's contact with Indian tribalism. *The legacy of European colonialism and racism in federal Indian law and policy discourses can be located most definitively, therefore, in those Indian policy discourses that seek*

to justify white society's privileges or aggression in the Indian's Country on the basis of tribalism's asserted deficiency and unassimilability. That so many contemporary Indian policy discourses unhesitatingly cite tribalism's deficient difference as the legitimating source of white society's role as rightful judge over Indian people understandably causes great alarm to those who appreciate the significance of the circle in American Indian thought. The genocidal legacy of European racism and colonialism in the narrative traditions of federal Indian law continues to threaten tribalism with elimination from what once was the Indian's America.

NOTES

1. W. BENJAMIN, ILLUMINATIONS 256–57 (H. Arendt ed. 1969).

2. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 298–99 (J. Mayer & M. Lerner eds. & G. Lawrence trans. 1966).

3. *Quoted in* F. PRUCHA, 1 THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 218 (1984).

4. A. DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 336–55 (H. Reeve trans. 1945), *quoted in* R. Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 718 (1986).

5. *Quoted in* R. STRICKLAND, FIRE AND THE SPIRITS 718 (1975).

6. 31 U.S. (6 Pet.) 515 (1832).

7. *Id.* at 561.

8. A. GUTTMAN, STATES' RIGHTS AND INDIAN REMOVAL 58 (1965).

9. *See, e.g., Andrew Jackson's First Annual Message to Congress* (Dec. 8, 1829), in 2 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 456–59 (J. Richardson ed. 1907).

10. W. LUMPKIN, THE REMOVAL OF THE CHEROKEE INDIANS FROM GEORGIA 83, 196 (1969).

11. *See* PRUCHA, *supra* note 3, at 183–84.

12. *John Quincy Adams' Message to Congress* (Dec. 2, 1828), in 2 A COMPILATION OF MESSAGES, *supra* note 9, at 415.

13. *Id.* at 416.

14. *Governor Cass on the Need for Removal*, 30 N. AM. REV. 62–121 (1830), *reprinted in* GUTTMAN, *supra* note 8, at 30–36.

15. *Id.* at 31.

16. *Id.* at 35.

17. J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1963).

18. *See* K. STAMP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH 18 (1956). It was Secretary Locke who drafted the Carolina Lord Proprietors' 1669 "Fundamental Constitutions," which granted every English colonial freeman "absolute power and authority over his negro slaves." *See id.*

19. *See, e.g.*, R. EPSTEIN, TAKINGS (1987). For varying assessments of Locke's contributions to the narrative traditions of Anglo-American political and legal culture, *see, e.g.*, C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDI-

VIDUALISM (1962); J. TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES (1980); L. HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

20. LOCKE, *supra* note 17, at 327.

21. *Id.* at 330.

22. *Id.* at 338.

23. *Id.* at 338–39.

24. There were "several" hundred American tribal nations, with widely disparate land use practices, traditions of wealth accumulation, and political organization at the time Locke wrote. *See generally* H. DRIVER, INDIANS OF NORTH AMERICA (2d ed. 1975).

25. LOCKE, *supra* note 17, at 343.

26. *Id.* at 341.

27. *Id.* at 343.

28. *See generally* R. Williams, *Jefferson, the Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165 (1987).

29. R. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

30. We are, after all, borrowing Foucault's haunting words, "doomed historically to history, to the patient construction of discourses about discourses, and to the task of hearing what has already been said." M. FOUCAULT, THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION XV–XVI (1975).

31. See M. FOUCAULT, *Nietzsche, Genealogy, History*, in LANGUAGE, COUNTER-MEMORY, PRACTICE 139–64 (1977), which contains the best short account of Foucault's problematization of the idea of historical linear development in Western thought.

32. FOUCAULT, *supra* note 30, at xv–xvi.

33. *See* Williams, *supra* note 29, at 267–89.

34. 435 U.S. 191 (1978).

35. *Id.* at 210.

36. *Id.*

37. *See* Williams, *supra* note 29, at 272–74.

38. *Oliphant*, 435 U.S. at 197.

39. *Id.* at 194–94.

40. *Id.* at 194.

41. *Id.*

42. *Id.*

43. *See* Williams, *supra* note 29, at 267–74.

44. *Oliphant*, 435 U.S. at 210.

45. *Id.* (quoting H.R. REP. NO. 474, 23d Cong., 1st Sess. 18 (1834)).

46. *Id.*

47. *See* Williams, *supra* note 29, at 272–74.