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An Uncomfortable Truth: Law as a Weapon of Oppression of the Indigenous Peoples of Southern New England

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ABSTRACT

Southern New England, today, is a de facto exception to much of U.S. Indian law and policy, with progress sustained by Indigenous peoples in the region at a bare minimum. The exception is the product of more than three hundred years of discrimination and persecution with law employed as the primary weapon. After the conclusion of seventeenth century military battles and warfare, colonial governments employed law as a weapon of oppression against the Indigenous peoples. With law as a weapon, they continued the persecution of the American Indians based on their belief of racial

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superiority. The campaign of persecution was accomplished with colonial and later state statutes and municipal law, and with judicial decisions. Judicial decisions by the United States Supreme Court evidenced an obvious belief of racial superiority and the inferiority of the American Indians which became the bedrock of American Indian law. Colonial law adopted theocratical canons which justified conquest based on European superiority and Christian belief. Incorporation of Papal canons of Indigenous inferiority into American law has never been repudiated nor repealed. The article details the history of law as a weapon of oppression in Southern New England, reviews in great details, oppressive colonial legislation and, finally, offers suggestions for healing the profound wounds of the past. It calls for the legal profession, for municipalities and for states to accept responsibility, be held accountable and take action to repair the wrongs of the past.

INTRODUCTION

It is axiomatic that law can be a powerful force for good, for protection of rights and for advancement of social goals.[1] It is the premise of this article, however, that for one segment of the population of the United States, the Indigenous peoples, law has been a weapon of oppression,[2] a tool implemented over four centuries with precision to subjugate and dehumanize the original occupants of the lands which became the United States.

Plymouth, in what is now Massachusetts (along with Jamestown, in what is now Virginia) was among the first European settlements in North America.[3] Settlements developed into the colonies of Great Britain which then became States. Colonies established included one region commonly referred to as New England. It includes the current states of Connecticut, Rhode Island,

1. *See generally* CAROL SMART, FEMINISM AND THE POWER OF LAW (1989). It is Smart's argument that law is a very powerful tool because we give it more power over us than other forms of knowledge or experience. *Id.* at 10–11.

2. What is oppression? Iris Marion Young says that "In its traditional usage, oppression means the exercise of tyranny by a ruling group." She adds, "In its new usages, oppression designates the disadvantage and injustice some people suffer not because of a tyrannical power coerces them, but because of the everyday practices of a well-intentioned liberal society." IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 40–41 (1990).

3. ALDEN T. VAUGHAN, NEW ENGLAND FRONTIER: PURITANS AND INDIANS 1620-1675, at 64–92 (1st ed. 1995).

Massachusetts, New Hampshire, Vermont, and Maine.[4] The first New England settlers landed in Plymouth in 1620.[5] When they arrived, they discovered that the area was heavily populated with Indians. For around fifty years thereafter, colonists fought military battles and wars against the Indians in what is now Connecticut, Rhode Island, and Massachusetts.[6]

Historians estimate there were more than 100,000 American Indians living in New England at the beginning of the seventeenth century.[7] The Indian peoples of New England were part of the Algonquian people and shared a similar language and culture, but there were many different groups. Among them were the Abenaki, Micmac, Pennacook, Pequot, Mohegan, Nauset, Narragansett, Nipmuc, Woronoco, and Wampanoag.[8]

Following about 1675, however, the Southern New England Colonies changed their strategies and implemented a new primary weapon, and that was law.[9] They used their newfound weapon to maintain control over the Indians, to oppress and subjugate them

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4. John Smith is credited with coining the term "New England" as early as 1619, but that could very well be a myth. *See* Megan Gambino, *John Smith Coined the Term New England on This 1619 Map*, SMITHSONIAN MAG. (Nov. 24, 2014), https://www.smithsonianmag.com/history/john-smith-coined-the-term-new-england-on-this-1616-map-180953383/ [https://perma.cc/Q238-ASXM]. I refer to Southern New England as the current states of Connecticut, Rhode Island, and Massachusetts. The article focuses in greatest detail on Southern New England, however, many of my conclusions would also be true about law as an oppressive force upon the Tribes and Indigenous peoples of Northern New England, being the Indigenous peoples of New Hampshire, Vermont, and Maine.

5. VAUGHAN, *supra* note 3, at 64.

6. I use the terms "American Indians" and "indigenous peoples" when referring generally to the indigenous peoples of North America, and occasionally, "Indian." While others prefer the term "Native American" no clear preference exists, nor should it be expected to exist; they are oversimplifications with colonial connotations. Most indigenous peoples prefer to be referred to by the name of their specific tribe and I do that wherever possible.

7. Dean R. Snow & Kim M. Lanphear, *European Contact and Indian Depopulation in the Northeast: The Timing of the First Epidemics*, 35 ETHNOHISTORY 15, 24 (1988).

8. VAUGHAN, *supra* note 3, at 50–57.

9. What do I mean when I say law has been used as a weapon? Webster's Dictionary defines weapon as "something used to injure, defeat or destroy." *Weapon,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/weapon [https://perma.cc/MCV8-TV5K] (last visited Mar. 12, 2022).

and they did so from a belief of racial superiority.[10] Oppression manifested in colonial legislation and in court decisions. It was employed in this fashion by lawyers, by legislators, and by judges. The campaign of oppression of the Indigenous people of Southern New England continues today, and hostile treatment by state and local governments continues unabated.

For lawyers today, it is embarrassing to shine a spotlight on the profession and focus attention on the role lawyers played in a tragic campaign of oppression. It is an uncomfortable truth. What makes it even more uncomfortable is that law, as a tool of oppression, continues to cause great harm and suffering today. The oppressive way that law has been used as a weapon against the Indians has not been acknowledged or alleviated.

Part I of this article will examine the origins of colonization of Southern New England and its philosophical underpinnings in a belief of racial superiority. Part II will examine how codes, courts, and the law were employed in Southern New England's colonial period to defeat, oppress, and subjugate the American Indians. Part III will examine the early U.S. historical period and how legislation, the judiciary and law were employed in Southern New England to erase, oppress, and vanquish the American Indians. Part IV will examine how law has been employed in the modern era in Southern New England to create an exception to national policy and continue to maliciously suppress the American Indians. Finally, Part V will look to the future and examine the need for reparations, repair, apology, and atonement by the legal community, both in New England and elsewhere.

I. COLONIZATION OF NEW ENGLAND AS A CONTINUATION OF THE MEDIEVAL CRUSADES

It is an uncomfortable truth that the Puritan settlers of New England considered themselves racially superior to the Indigenous peoples of North America they conquered in the seventeenth century, so did the other Christian European settlers from Spain,

10. *See* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 32 (Daniel Heath Justice et al. eds., 2005).

Portugal, Holland, and Great Britain.[11] European colonization of New England and North America can only be properly understood as a continuation of the Catholic Church-sponsored Crusades to the Holy Lands and the Middle East of the eleventh through thirteenth centuries.

The Crusades were a broad-based campaign by the Catholic Church and Christian European military leaders to implement the papacy's theoretical universal authority over non-Christian people beyond Europe.[12] The Crusades generated legal doctrines that justified conquest of non-Christians.[13] Among the leading Church scholars who developed canon doctrine was Pope Innocent IV.[14] Pope Innocent, or as he was known before, Sinibaldo Fieschi, was a canon lawyer before he became Pope, and as a lawyer was one of the most influential figures in the development of Christian-infidel relations.[15] Fieschi became Pope Innocent IV in 1243.[16] As Pope, he wrote that the papacy had the authority, albeit an affirmative duty, to conquer and to punish infidels:

> [I]s it licit to invade a land that infidels possess or which belongs to them? . . . . [T]he pope has jurisdiction over all men and power over them in law but not in fact, so that though this power which the pope possesses I believe that if a gentile, who has no law except the law of nature, the pope can lawfully punish him . . . . Since, however, the judgements of God are examples for us, I do not see why the pope, who is the vicar of Christ, cannot do the same, and he ought to do it as long as he has the means to do so.[17]

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11. ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST 67–69, 88–89, 121–122, 220–221 (1990).

12. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 49 (7th ed. 2017).

13. *Id.* at 51–54.

14. JAMES MULDOON, POPES, LAWYERS, AND INFIDELS: THE CHURCH AND THE NON-CHRISTIAN WORLD 1250-1550, at 5 (Edward Peters ed., 1979).

15. *See id.* at 5.

16. *Id.*

17. JAMES MULDOON, THE EXPANSION OF EUROPE: THE FIRST PHASE 191–92 (1977).

Not long after the end of the Crusades, seafaring explorers like Italians Christopher Columbus,[18] John Cabot,[19] and Giovanni da Verrazano,[20] Adriaen Block of Holland[21] and Henry Hudson[22] of Great Britain embarked upon lengthy and difficult missions of exploration at the behest of European kings and queens.[23] It was a coordinated campaign between the Church, European governments and military leaders and the explorers.

The monarchs viewed the indigenous peoples their explorers "discovered" as inferior, as is evident in the description of the inhabitants of the Canary Islands, by Duarte, King of Portugal in 1436, who wrote that they:

> Are not unified by a common religion, nor are they bound by the chains of law, they are lacking normal social intercourse, living in the country like animals. They have no contact with each other by sea, no writing, no kind of metal or money. They have no houses and no clothing except coverlets of palm leaves or goat skins which are worn as an outer garment by the most honored men. They run barefoot quickly through the rough, rocky and steep mountainous regions, hiding . . . in caves hidden in the ground.[24]

So, the Vatican gave the explorers papal direction to conquer non-Christians and to seize their villages, which they promptly did. One example of papal direction and blessing is papal bull *Inter Caetera* written in 1493 by Pope Alexander VI, in which he stated:

> By the authority of Almighty God conferred upon us in blessed Peter and of the vicarship of Jesus Christ, which we hold on earth, do by tenor of these presents, should any of said islands have been found by your envoys and captains, give, grant, and assign to you and your heirs and successors, kings of Castile and Leon, forever, together with all their dominions, cities, camps, places, and villages, and

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18. GETCHES ET AL., *supra* note 12, at 58.
19. *Id.* at 62.
20. VAUGHAN, *supra* note 3, at 59.
21. *Id.*
22. *See* DOUGLAS HUNTER, HALF MOON: HENRY HUDSON AND THE VOYAGE THAT REDREW THE MAP OF THE NEW WORLD 2 (2009).
23. GETCHES ET AL., *supra* note 12, at 51–64.
24. MULDOON, *supra* note 17, at 54.

> all rights, jurisdictions, and appurtenances, all islands and mainlands found and to be found, discovered and to be discovered towards the west and south.[25]

II. A CAMPAIGN OF OPPRESSION IN THE COLONIAL ERA

The belief of Indian inferiority, dispensed by the Church and followed by European monarchs and military leaders, naturally continued to the colonies. In the first few years of settlement there was relative peace, but peace did not last long. In Southern New England, colonists and Indians clashed in the Pequot War[26] and King Phillip's War.[27] There were also brutal massacres, such as the Great Swamp Massacre, which occurred in Rhode Island in 1675.[28] These two wars decimated the Indigenous people of New England, and many of the survivors were enslaved.[29] Most of the warfare against the Indians of Southern New England ended by about 1680,[30] but conflict with the indigenous peoples of Northern New England, like the Wabanaki Confederacy, continued well into the 1700s.[31] In addition to war, there was one other very

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25. Pope Alexander VI, *Inter caetera Divinae, in* SIDNEY Z. EHLER & JOHN B. MORRALL, CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES 153–157 (1967).

26. JOHN UNDERHILL, NEWES FROM AMERICA (1638), *reprinted in* HISTORY OF THE PEQUOT WAR: THE CONTEMPORARY ACCOUNTS OF MASON, UNDERHILL, AND GARDENER 47, 60–63 (Charles Orr ed., 1897). *See generally* ALFRED A. CAVE, THE PEQUOT WAR (1996).

27. G. E. Thomas, *Puritans, Indians, and the Concept of Race*, 48 NEW ENGLAND Q. 3, 16 (1975).

28. JAMES DAVID DRAKE, KING PHILIP'S WAR: CIVIL WAR IN NEW ENGLAND, 1675-1676, at 119 (1999).

29. *See* VAUGHAN, *supra* note 3, at 148, 150. *See generally* YVONNE WAKIM DENNIS ET AL., NATIVE AMERICAN ALMANAC: MORE THAN 50,000 YEARS OF THE CULTURES AND HISTORIES OF INDIGENOUS PEOPLES (2016).

30. HOWARD HENRY PECKHAM, THE COLONIAL WARS, 1689-1762, at 20 (1964); *see also* JOHN GRENIER, THE FIRST WAY OF WAR: AMERICAN WAR MAKING ON THE FRONTIER, 1607-1814, at 32–33 (2005).

31. Wars fought against the Indians in Northern New England into the 18th century include The Wabanaki-New England War, Father Le Loutre's War, and many others. Further, there were numerous wars fought between European nations in subsequent years where Indian Tribes joined the battles on one side or another, like the French and Indian War, the American Revolutionary War, and the Deerfield Massacre in 1704. EVAN HAEFELI & KEVIN SWEENEY, CAPTORS AND CAPTIVES: THE 1704 FRENCH AND INDIAN RAID ON DEERFIELD 98 (2005).

substantial cause of death for the Indians: disease.[32] Tribal people did not have naturally developed immunities to European illnesses and died in large numbers due to epidemics of smallpox and influenza.[33]

As the colonies became better-established, they transitioned from military might—used to erase and dehumanize the American Indian—to law and legal processes. The transition was excellently summarized by George Washington, commander of the Continental Army. In 1783, Washington wrote to James Duane, a member of the Continental Congress from New York. He saw the pursuit of war as inefficient and expensive, whereas land could be purchased inexpensively from the Indians:

> [I] am clear in my opinion, that policy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return us soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expense, and without that bloodshed, and those distresses which helpless Women and Children are made partakers of in all kinds of disputes with them.[34]

Colonial era land purchases from the Indians evolved into the treaty process, the predominant diplomatic legal process for nation-to-nation agreements for nearly one hundred years, ending in 1871.[35] Far more revealing of colonial era political belief was that

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32. GETCHES ET AL., *supra* note 12, at 431.

33. VAUGHAN, supra note 3, at 336–37.

34. Letter from George Washington to James Duane, 7 September 1783, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/99-01-02-11798 [https://perma.cc/SW5Y-3987] (last visited May 5, 2022).

35. 25 U.S.C.A. § 71.

Washington, the pre-eminent colonial military leader and the new nation's first Commander-in-Chief, made a demeaning and racist comparison of the Indians to wolves and beasts.[36]

After the end of most of the military warfare in Southern New England in about 1680, the theater shifted to legal institutions. Colonial and then subsequently U.S. law dealing with the Indigenous peoples is a direct continuation of the philosophy of the European theocracy and monarchs outlined above. It is a straight line from the Popes to the Kings to colonial governments to the States.

U.S. policy thereafter in Southern New England had common attributes. While thoroughly inconsistent, the policy objectives were either designed to assimilate the Indians into white culture, erase them or make them invisible, separate them into what were either called "praying towns" in Massachusetts and other colonies, or "Plantations" in Rhode Island, or Reservations. Policies were implemented to either eliminate the Indians, deny their existence, or simply make them invisible.[37] Wholly consistent with the theme of colonization as a continuation of the Church-sponsored theocratic subjugation was a persistent attempt to convert remaining Indians to Christianity. The evidence of these policies exists in the colonial legislation enacted in Southern New England.[38]

In Connecticut, the policies of separation, domination and erasure took a slightly different approach. In 1650, the General Court enacted legislation to prohibit Indians from living with non-Indians, promoted Christian education of the Indians and like Massachusetts and Rhode Island regulated trade with the Indians.[39] The Court appointed Overseers, which it euphemistically said would "council and advise" the Indians.[40] In the early nineteenth century, the role of the Overseer expanded; an Overseer was appointed to

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36. Letter from George Washington to James Duane, *supra* note 34.

37. *See generally* Thomas L. Doughton, *Unseen Neighbors: Native Americans of Central Massachusetts, A People Who Had "Vanished"*, *in* AFTER KING PHILLIP'S WAR: PRESENCE AND PERSISTENCE IN INDIAN NEW ENGLAND 207 (Colin G. Calloway ed., 1997).

38. *See Appendix.*

39. 1650 CONN. CODE OF LAWS §§ 28–32, *reprinted in* THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT PRIOR TO THE UNION WITH NEW HAVEN COLONY, MAY 1665, 509, 529–33 (John Hammond Trumbull ed., 1850).

40. LAURENCE M. HAUPTMAN & JAMES D. WHERRY, THE PEQUOTS IN SOUTHERN NEW ENGLAND: THE FALL AND RISE OF AN AMERICAN INDIAN NATION 131 (1993).

each Tribe to ensure that the affairs of the Connecticut Indians were managed properly.[41] Some of the Overseers were Connecticut lawyers like William Williams, the prominent Attorney who was the Overseer for both the Pequot and Mohegan Tribes.[42] Williams, of Eastern Connecticut was a signer of the Declaration of Independence. Most Connecticut colonial Overseers showed very little interest in tribal matters.[43] Others were corrupt and profiteered from their appointments, as did Overseer William Morgan.[44] The Pequots sought Morgan's firing, claiming he was not a "suitable person to manage our affairs."[45] The abuses of the Overseers led the State Legislature in 1854 to pass a "An Act For The Preservation of Indians, And The Preservation Of Their Property."[46] That legislation unfortunately made it possible to eliminate much of the Mashantucket Pequot Reservation.[47] Morgan, with two other Overseers Isaac Gallup and John Gary, divided up Pequot lands, reserving just 180 acres for the Pequots.[48] The Pequots received very little from the sales, and protested, but the sales went through.[49]

III. EARLY AMERICAN LEGAL HISTORY: OPPRESSION CONTINUES IN THE COURTS

American courts and judges used law as a means of oppression of the Indigenous peoples. It is readily apparent that American law dealing with the Indigenous peoples is a direct continuation of the philosophy of the European theocracy and monarchs addressed in Part I. The United States Supreme Court was explicit about its belief of Indian inferiority as the legal justification for diminishment of the rights of the Indians.

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41. 1821 Conn. Pub. Acts 278 § 1.

42. HAUPTMAN & WHERRY, *supra* note 40, at 130.

43. *Signers of the Declaration of Independence*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/signers-factsheet [https://perma.cc/F93X-7HPU] (last visited May 4, 2022).

44. *See* HAUPTMAN & WHERRY, *supra* note 40, at 131.

45. *Id. See also Petition of William Morgan, Overseer to the Pequots, to Refund Taxes*, YALE UNIV, LIBR., https://findit.library.yale.edu/catalog/digcoll:2786504 [https://perma.cc/YR7X-U2SR] (last visited May 4, 2022).

46. HAUPTMAN & WHERRY, *supra* note 40, at 131.

47. *See id.*

48. *Id.* at 132.

49. *Id.*

In 1823, Chief Justice John Marshall and the Supreme Court invented a theory called the Doctrine of Discovery in the landmark case *Johnson v. McIntosh*.[50] Due to precedents established by the European exploration and subsequent conquest of the New World, the new rule the Court invented was that among the nations of Europe, property title properly belonged to the nation which "discovered" the new land. As a result, the natives' ability to dispose of their lands was severely diminished. While Indians were permitted to live on their aboriginal lands, they could not grant or transfer it; the nation that claimed discovery of the land and military conquest of its indigenous inhabitants asserted dominion and control.

The language of the decision itself, which clearly displays the Supreme Court's sentiment of European superiority, is quickly glossed over in most American law schools:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency.[51]

The Doctrine of Discovery is still the law in the United States and has since been exported to Canada, Australia, and New Zealand. *Johnson* is still frequently cited by the Supreme Court, lower federal courts, and state courts, although today they don't repeat the racist language. In fact, *Johnson*, along with two other cases authored by Chief Justice Marshall, *Cherokee v. Georgia* and *Worcester v. Georgia*, are referred to as the "Marshall Trilogy," or sometimes "the Marshall Model," and are the very bedrock of the vast body of Indian Law in the United States.

The Doctrine of Discovery, along with continued evidence of the Supreme Court's theocratic motives and its view of the Indians as racially inferior is found in another case more than fifty years later in *Beecher* v. *Wetherby*:

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50. Johnson v. M'Intosh, 21 U.S. 543 (1823).
51. *Id.* at 572–73.

> But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose . . . It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race.[52]

The Doctrine of Discovery influenced law in Southern New England as was apparent in *In re Narragansett*.[53] In 1898, the Rhode Island Supreme Court was asked to rule if the Narragansett Tribe still existed or were terminated by State law.[54] In the centuries-old tradition of trying to eliminate the Narragansetts, Justice Horatio Rogers, a former Rhode Island Attorney General, relied heavily on *Johnson v. McIntosh* when he ruled that the Narragansetts had been "terminated" as a Tribe and then in insulting language said they were: "properly speaking, not Narragansetts at all, but, at best, only a "*decayed remnant of the Niantics*."[55]

A few short years later, the United States Supreme Court said the treaties with the Indians, treaties the Indians considered sacred,[56] could be broken at any time as stated in the 1902 case *Lone Wolf v. Hitchcock:*

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress . . . .[57]

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52. Beecher v. Wetherby, 95 U.S. 517, 525 (1877).

53. *In re* Narragansett Indians, 40 A. 347, 349–50 (R.I. 1898).

54. *Id.* at 373.

55. *Id.* at 348 (emphasis added).

56. ROBERT A WILLIAMS, LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800, at 103 (1999).

57. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

Following *Lone Wolf*, the United States abrogated several treaties to further seize Indian land.[58] In *United States v. Kagama*,[59] the Supreme Court upheld the constitutionality of the Major Crimes Act,[60] a statute that stemmed from American dissatisfaction with the Indian justice system and imposed a Western system on the Indians instead. In *Kagama,* while deciding that indigenous criminal justice was unreliable, the Supreme Court again used demeaning language to refer to the Tribes:

> From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.[61]

IV. THE MODERN ERA: CREATION OF THE NEW ENGLAND EXCEPTION TO NATIONAL INDIAN POLICY

National legal policy in the twentieth century went through many wild swings of the pendulum, from periods of well-intentioned New Deal-era reforms like the Indian Reorganization Act of 1934, to a bitter retrenchment during the Cold War with a national policy of Indian Termination.[62] The pendulum swung back again in the current post-Civil Rights period of tribal self-determination.[63] But the American Indian Tribes of Southern New England seem largely unaffected by the national trends, unable to recover from the centuries of discrimination implemented under color of law.

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58. *See United States v. Sioux Nation, 448* U.S. 371, 388, 419–20 (1980). *See generally* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" – How Long a Time Is That?*, 63 CALIF. L. REV. 601, 623–45 (1975) (describing different judicial tests for abrogation, including (1) abrogation only upon a "clear showing" of legislative intent; (2) abrogation "not lightly imputed," (3) abrogation only after "liberal construction" of the statute in favor of Indian treaty rights; (4) abrogation only upon express legislative reference to Indian treaty rights; and (5) several miscellaneous tests); *Treaty of Fort Laramie (1868)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/fort-laramie-treaty [https://perma.cc/4PQ5-4GP3] (last visited May 4, 2022).

59. 118 U.S. 375 (1886).

60. The Major Crimes Act, 18 U.S.C. § 1153.

61. *Kagama*, 118 U.S. at 384.

62. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 188, 199–200 (5th ed. 2004).

63. *Id.* at 216–17.

National legal policy in the 1970s produced the federal recognition process. Nearly six hundred Tribes have benefitted from the nation-to-nation recognition process, but only five Tribes in Southern New England have been able to acquire federal recognition. Those five are the Mashantucket Pequots and Mohegans of Connecticut, the Narragansetts of Rhode Island, and the Mashpee Wampanoags and Aquinnah Wampanoags of Massachusetts.[64]

A. *The Federal Recognition Process: Working Against Historical Realities in New England*

As discussed in Part I, Indian Tribes in Southern New England were victims of several abuses throughout colonial and early American history. How have they been treated in the modern era by law and by lawyers? Gone is the overt racism and the dehumanizing language of racial inferiority that characterized legislation and judicial decisions of previous periods. The campaign to erase them continues in a much more subtle way. Federal and state legislators from the region employ scare tactics to play to their constituents' "savage anxieties," as esteemed Arizona law professor Robert A. Williams Jr. calls it.[65] The Indigenous people of Southern New England today are further victimized in two significant ways that legal institutions and lawyers sadly fail to acknowledge: federally imposed systems for defining who is an Indian, and the method by which a tribal community gets to be treated as an Indian Tribe.

1. Who is an Indian? Blood Quantum Policies Used to Make Indians Disappear

Gabriel Galanda, in his brilliant recent review of the current status of tribal membership law wrote[66] that peculiar notions of the "mixed blood" of indigenous persons eventually became matters of

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64. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4638, 4640 (proposed Jan. 28, 2022).

65. ROBERT A. WILLIAMS, JR., SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION 235 (2012).

66. Gabriel S. Galanda and Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 396–97 (2015).

their "blood quantum,"[67] all by colonial development[68] of a policy to further divide and negate American Indians.[69] Under the policy, Galanda writes, American Indians were deemed biologically inferior and required segregation.[70] At this time the United States government took an active interest in defining who exactly was an "Indian."

After centuries of discredited policies designed to assimilate Indians into American culture, referred to as the "allotment period," a period of reform began to take root in the 1920s.[71] The federal government's efforts to transform governance in Indian country were accelerated with the 1928 publication of an influential document called the Merriam Report.[72] A period of reorganization and reform culminated with the Indian Reorganization Act of 1934 (IRA).[73] During this period, the federal government took a more active role in Indian governance and in tribal membership rules.

The IRA specified that the U.S. Secretary of the Interior must approve all constitutions of tribes organized under its provisions.[74] The IRA did not actually mandate specific provisions for inclusion in tribal constitutions, but the Bureau of Indian Affairs (BIA) within the Department of the Interior (DOI) immediately developed boilerplate language and models that it advanced upon the more

67. The term "blood quantum" is defined as "the relative amount of ancestry one can trace back to one specific tribe." Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulation*, 37 N.Y.U. REV. L. & SOC. CHANGE 629, 646 n.123 (2013).

68. Galanda, *supra* note 66, at 396; *see also* Tommy Miller, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, 3 AM. INDIAN L.J. 323, 323–24 (2014).

69. Galanda, supra note 66, at 396; *see also* Cornel Pewewardy, *To Be or Not to Be Indigenous: Identity, Race, and Representation in Education*, 4 INDIGENOUS NATIONS STUDS. J. 69, 87 (2003).

70. Galanda, *supra* note 66 at 396–97; *see also* Margaret D. Jacobs, *The Eastmans and the Luhans: Interracial Marriage Between White Women and Native American Men, 1875–1935*, 23 FRONTIERS 29, 37 (2002).

71. James D. Diamond, *Who Controls Tribal Membership? The Legal Background of Disenrollment and Tribal Membership Litigation*, *in* BEST PRACTICES FOR DEFENDING TRIBAL MEMBERSHIP CASES: LEADING LAWYERS ON NAVIGATING TRIBAL MEMBERSHIP ENROLLMENT ISSUES 37, 37 (2013).

72. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04[3][a][i] (Nell Jessup Newton ed., 2005).

73. GETCHES ET AL., *supra* note 12, at 218–23.

74. 25 U.S.C. § 5123(a)(2).

than 150 tribes that opted for organization under the Act.[75] In fact, tribes could only reject the BIA constitutional model by a majority vote.[76] The IRA defined "Indian" for purposes of determining who could take advantage of the authority to establish a government under the IRA tribal constitutions,[77] and the BIA's policy on tribal "membership," or citizenship, became clear in 1934 after the Secretary of the Interior distributed a policy statement.[78]

The IRA definition granted membership to all persons of Indian descent who were members of federally recognized tribes, descendants of such members residing on any reservation as of June 1, 1934, or any other person "of one-half or more Indian blood."[79] The Secretary's policy statement expressed a "definite" Congressional policy "to limit the application of Indian benefits [under the Act] to those who are Indians by virtue of actual tribal affiliation or by virtue of possessing one-half degree or more of Indian blood."[80] The Secretary stated that the DOI's policy should be "to urge and insist that any constitutional provision conferring automatic tribal membership upon children hereafter born, should limit such membership to persons who reasonably can be expected to participate in tribal relations and affairs."[81] Indeed, notions of indigenous persons' "mixed blood" eventually became matters of their "blood

75. Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations,* 50 U. KAN. L. REV. 437, 446 (2002).

76. 25 U.S.C. § 476, *supra* note 74. For example, the Navajo tribe of the southwest (Arizona, New Mexico, and Utah), opted not to adopt the BIA model and to this day does not have a constitution. *Navajo Nation, Arizona, New Mexico, & Utah*, NATIONAL INDIAN LAW LIBRARY, https://narf.org/nill/tribes/navajo_nation.html [https://perma.cc/4LCS-E7KB] (last visited May 7, 2022).

77. OFFICE OF INDIAN AFFAIRS, DEP'T OF THE INTERIOR, CIRCULAR NO. 3123 (1935), *reprinted in* 2 AM. INDIAN POLICY REVIEW COMM'N, 94TH CONG., TASK FORCE NO. 9 FINAL REPORT APP. 334 (Comm. Print 1977) (describing the term "Indian" that authorizes the Office of Indian Affairs to limit membership benefits for Indians based on tribal affiliation or degree of consanguinity). *See* Goldberg, *supra* note 75 at 446.

78. Office of Indian Affairs, *supra* note 77.

79. *Id.*

80. *Id.*

81. *Id.*

quantum,"[82] all by the colonial advent [83] of a policy to further divide and negate American Indians.[84] Under such a policy, American Indians were deemed biologically inferior and required segregation.[85] That is when the federal government took an active interest in defining who exactly was an Indian,[86] primarily to determine a tribe's "chief" for the sake of legitimizing the transfer of lands to colonizers and settlers by treaty.[87]

The Secretary directed that where only one parent was a member and the parents lived off the reservation, the minimum blood quantum requirement for children's membership should be "one-half degree Indian blood."[88] The Circular authorized provisions for the adoption of non-members only upon Secretarial approval for each applicant, unless the person was of Indian descent and related by marriage or descent to a tribal member. To conclude, the Secretary declared that departmental agents, and the Indians themselves, must understand the importance of these limitations for "their own welfare, through preventing the admission to tribal membership of a large number of applicants of small degree of Indian blood."[89]

The definitions in the policy statement found their way into many of the tribal constitutions[90] that required BIA approval under

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82. Galanda, *supra* note 66 at 396 (citing Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. REV. L. & SOC. CHANGE 629, 669 n.123 (2013)).

83. Galanda, *supra* note 66 at 396 (citing Tommy Miller, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, 3 AM. INDIAN L. J. 323, 323–24 (2014)).

84. Galanda, *supra* note 66 at 396 (citing Cornel Pewewardy, *To Be or Not to Be Indigenous: Identity, Race, and Representation in Education*, 4 INDIGENOUS NATIONS STUD. J. 69, 87 (2003)).

85. Galanda, *supra* note 66 at 396 (citing Margaret D. Jacobs, *The Eastmans and the Luhans: Interracial Marriage Between White Women and Native American Men, 1875–1935*, 23 FRONTIERS 29, 37 (2002)).

86. Galanda, *supra* note 66 at 397 (citing George P. Castle, *The Commodification of Indian Identity*, 98 AM. ANTHROPOLOGIST 743, 744 (1996)).

87. Galanda, *supra* note 66 at 397 (citing FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES THE HISTORY OF A POLITICAL ANOMALY 170–80 (1994)).

88. *Id.* at 402.

89. *Id.* at 403 n. 139.

90. *Id.* at 403. The Tohono O'odham Nation of Arizona, formerly the Papago Tribe, is an example of a tribe that adopted the I.R.A. style tribal constitution.

the Indian Reorganization Act.[91] Even where tribal constitutional language was not based upon the policy statement, or there was no constitution at all, the policy statement had a pervasive influence, as it dictated eligibility for federal government benefits for Indians.[92] Congress further involved itself in membership decisions when it amended the IRA in 1988 to require the Secretary of the Interior's approval of all Indian tribal constitutional amendments unless amendments conflicted with federal law.[93] BIA policy preferences for tribal membership continued.[94] Thus, in 1934 the practice of quantifying "blood quantum" was launched.

With BIA approval, Indian tribes enacted their own membership requirements, and to this day requirements vary from tribe to tribe. Some tribal provisions call for a minimum of one-fourth degree of ancestry, and a few require one-half degree of tribal ancestry.[95] Some tribes have opted away from the blood quantum approach and allow tribal membership to any person who can tie ancestry to a descendant who was a tribal member.[96] Nonetheless, blood quantum is the predominant membership criteria among American Indian tribes. Seventy percent of tribal constitutions across the country now contain a blood quantum rule, up from forty-four percent of tribes enacting constitutions before 1950.[97]

After the vast diminishment of population discussed in Part I, the Indigenous peoples of Southern New England, today, face significant challenges in meeting modern tribal definitions of who qualifies as an Indian. Just as individual Indians face obstacles in qualifying, so do the Tribes themselves.

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91. *Id.* at 403. For an excellent review of the I.R.A. influence on tribal constitutions, *see* ELMER R RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT (2000).

92. Goldberg, *supra* note 75 at 447.

93. 25 U.S.C. § 476(c)(2).

94. Goldberg, *supra* note 75 at 448.

95. Cohen, *supra* note 72 at § 3.03.

96. *Id.*

97. Kirsty Gover, G*enealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 251 (2009).

2. Obtaining Federal Recognition: Nearly Impossible in New England

Recognition is a process of the United States establishing a nation-to-nation relationship with an Indian Tribe.[98] But before the United States was a nation, recognition started between colonial governments and the Tribes soon after contact. Tribes treated Indians as separate sovereigns in the U.S. constitution, and the constitution gives Congress the power to regulate commerce with Indian Tribes. So, "recognition" and establishment of the legal relationship was assumed by the U.S. government. Several states do recognize Indian Tribes. Recognition of Indian Tribes has occurred either by treaty, as analogous to the treatment of foreign nations, by Executive Orders, acts of Congress, or by the federal courts.

Treaties were negotiated and the result of a bargaining process. Typically, Indian Tribes received acknowledgement of their existence as a Tribe, gave up substantial land, and retained (or "reserved") rights of hunting and fishing over the lands, even lands that were given up.[99] Tribes became "wards" of the United States government and thus were subservient parties to a trust relationship. The benefits of the relationship included protections and services. The treaties were sometimes abrogated, as discussed earlier, and the United States stopped negotiating them as part of the recognition process in 1871.

In the modern era, both sides sought a clearer process, and so Congress adopted a new process for federal recognition. In 1978, Congress established the Office of Federal Acknowledgement and enacted 25 C.F.R. § 83, which set forth a petition process.[100] The petition imposed difficult criteria for tribes to satisfy, and as such the process was costly and lengthy.[101] In general, a petitioning tribe now must show they were a historic group or tribe from before

98. Cohen, *supra* note 72 at § 3.02.

99. *See generally,* RENÉE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT (2008).

100. 25 C.F.R. § 83.3 (2006).

101. *See* United States Bureau of Indian Affairs, Documented Petition Description with a Suggested Outline for Concise Written Narrative, https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/admin-docs/DocPetDescWithSugOutlineForConcWritNarr.pdf [https://perma.cc/97R2-K5E5].

European contact, they maintained a continued existence after contact, and they have been geographically tied to one place without interruption.[102] The petitioner does not necessarily have to still have a land base, but land is important. The petitioners must also show ancestry, community, ritual, and political organization.[103]

Unfortunately for the Indigenous people of New England, the Office of Federal Acknowledgement will not consider a tribe for recognition if the tribe dispersed, merged, or moved away in its prior history.[104] The difficulty the Mashpee Wampanoags had in achieving success with their petition for recognition is illustrative.[105]

The Narragansetts[106] and the Aquinnah Wampanoags[107] obtained federal recognition through Congressional legislation. The Mashantucket Pequots and the Mashpee Wampanoags[108] obtained federal recognition through the petition process with the Office of Federal Acknowledgement.[109] The Mohegans were recognized by an Executive Order of President William J. Clinton.[110] Many more Tribes, and Tribes that undoubtedly existed before the warfare of the colonial era, such as the Pokanokets of Rhode Island, the Paugusetts and Schaghticokes of Connecticut, the Massachusetts (also known today as the Mattakeesetts) and Nipmucs of Massachusetts, and many more, remain unrecognized.

An organic movement exists in Southern New England where Indigenous people with legitimate ancestral ties to historic Tribes and tribal communities are attempting to revitalize and

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102. *See generally* 25 C.F.R. § 83.20–21 (2021).

103. 25 C.F.R. §§ 83.21(a)(3), 83.11(a)(4), (b)(1)(vi), (c) (2021).

104. BUREAU OF INDIAN AFFS., THE OFFICIAL GUIDELINES TO THE FEDERAL ACKNOWLEDGEMENT REGULATIONS, 25 CFR 83, at 38 (1997).

105. Tribal Leaders Consultation and Listening Session at the Mashpee Wampanoag Tribe Community and Government Center Gymnasium 7 (July 29, 2014) (transcript available at https://www.bia.gov/as-ia/raca/revisions-regulations-federal-acknowledgment-indian-tribes-25-cfr-83-or-part-83 [https://perma.cc/YVT7-AMZH]).

106. *See* 25 U.S.C. §§ 1705–06.

107. 25 U.S.C. § 1771(7).

108. D. Elliotte Draegor, Losing Ground: Land Loss Among the Mashantucket Pequot and the Mashpee Wampanoag Tribes in the Nineteenth Century (Ph.D. dissertation, University of Connecticut) (ProQuest).

109. Mary Lawlor, *Identity in Mashantucket*, 57 AM. Q. 153, 154 (2005).

110. Final Determination That the Mohegan Tribe of Indians of Connecticut, Does Exist as an Indian Tribe, 59 Fed. Reg. 37,144 (July 20, 1994).

reconstitute their Tribes. Examples of this abound in the region and Indigenous culture is very much alive in Southern New England. Nonetheless, the historic role of the U.S for determining "who is an Indian" and the policies for federal recognition are both significant impediments to revitalization of Tribes in Southern New England.

B. *Tribal Litigation: Failed Remedial Efforts of Reversing History*

In the 1970s, when several of the New England Tribes filed lawsuits to try to reverse the land abuses of previous centuries, politicians conjured up notions of Indians coming to take away New Englanders' homes, rather than lead a thoughtful public discourse about Indigenous rights and aboriginal land.[111] Hostility to Indigenous peoples from state and local politicians often reflect and mirror the hostility of the non-indigenous general population. Law reflects social values.[112]

The Trade and Intercourse Acts prohibited states and private citizens from purchasing Indian land without federal approval.[113] In the nineteenth and most of the twentieth centuries, the prevailing legal theory was that the Tribes in the northeast were outside the protections of the Trade and Intercourse Acts.[114] This theory was espoused by the New York State Court of Appeals in *Seneca Nation of Indians v. Christy* and was called the Thirteen Original States Doctrine:

> The original states, before and after the adoption of the Federal Constitution, assumed the right of entering into treaties with the Indian tribes for the extinguishment and

111. *See* George Judson, *Land Claim by Indians Is a Tactic in Casino Bid*, N.Y. TIMES (June 21, 1993), https://www.nytimes.com/1993/06/21/nyregion/land-claim-by-indians-is-a-tactic-in-casino-bid.html [https://perma.cc/23VG-DQLY].

112. Marcia L. McCormick, *The Equality Paradise: Paradoxes of the Law's Power to Advance Equality*, 13 TEX. WESLEYAN L. REV. 515, 516 (2007).

113. *See generally* Jack Campisi, *The Trade and Intercourse Acts*, *in* IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 337 (Imre Sutton ed., 1985).

114. Jack Campisi, *The New England Tribes and Their Quest for Justice*, *in* THE PEQUOTS IN SOUTHERN NEW ENGLAND: THE FALL AND RISE OF AN AMERICAN INDIAN NATION (Laurence M. Hauptman & James D. Wherry eds., 1990).

> acquisition of their title to lands within their respective jurisdictions. They exercised the power, which had before been vested in the crown, to treat with the Indians, and this they did independently of the government of the United States.[115]

Northeastern Tribes mounted many challenges to the Thirteen Original States Doctrine, such as a challenge by the Tuscarora Indians of New York in the late 1950s.[116] The doctrine and its use to excepting the original states from the protections of the Trade and Intercourse Acts was finally put to an end in 1974 when the Supreme Court decided *Oneida Indian Nation et al v. County of Oneida*.[117] The *Oneida* Court held that "[o]nce the United States was organized and the Constitution adopted, tribal rights to Indian lands became the exclusive province of federal law. Indian title recognized to be only a right of occupancy, was extinguishable only by the United States," and such rule applies in all the states, including the original thirteen.[118]

Accordingly, in the 1970s many northeastern Tribes—including five in Southern New England—sued to reverse colonial era land transactions on grounds of Trade and Intercourse Acts violations. Suits were filed by the Mashpee Wampanoags, the Aquinnah Wampanoags, the Narragansetts, the Mashantucket Pequots and the Mohegans.[119] In Maine, similar suits were filed by Tribes in Northern New England, the Passamaqoddy and Penobscot Tribes.[120]

The nonintercourse suits filed during this period in New England were bold and innovative. They were developed by the Tribes in consultation with the Native American Research Fund (NARF), a Colorado-based legal advocacy organization devoted to justice for Indigenous peoples. NARF knew the suits would not be easy to win:

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115. Senecea Nation of Indians v. Christy, 126 N.Y. 122, 137 (N.Y. 1891).
116. Fed. Power Comm'n v. Tuscorora Indian Nation, 362 U.S. 99 (1960).
117. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).
118. *Id.* at 667.
119. *E.g.,* Mohegan Tribe v. State of Connecticut, 483 F. Supp. 597 (D. Conn. 1980).
120. *E.g.,* Joint Tribal Counsel of the Passamaqoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

> One of the most serious problems with the claims," said Thomas Tureen, a N.A.R.F. attorney who worked on the suits, "was their sheer size and the threat they posed to non-Indian Interests." The claim in Maine included some twelve and a half million acres, nearly two thirds of the State. The Mashpee claim threatened real estate development in one of the most rapidly growing resort communities in New England.[121]

The Mashpee Wampanoag in Massachusetts refused to settle the litigation, and the case ultimately went to trial in October 1978.[122] The presiding judge was federal judge Walter J. Skinner. Southern New Englanders' savage anxieties were exacerbated by the Mashpee strategy, which included a class action suit against the actual non-Indian private property owners in Mashpee.[123] Notions of Indians coming to take peoples' homes excited anger and resentment. The legal battle brought to the forefront a common strategy employed against Indigenous peoples of Southern New England, that of denying their existence and often on racial grounds, for example "we don't have any Indians here anymore" was a common sentiment.[124] The Mashpee were required, in the lawsuit, to show that they were Indians and that they were a Tribe.[125] The defendants in the suit argued that since the land claim was based on an alleged violation of the 1790 Nonintercourse Act, Judge Skinner was bound by the definition of Indian tribe under the Montoya Test, which defines a tribe as "a body of Indians of the same or similar race, united in community under one leadership or government, and inhabiting a particular, though sometimes ill-defined territory."[126]

During the trial, which included thirty-eight days of testimony, the all-white local jury heard confusing testimony about Mashpee history since European contact. The defendants challenged the Mashpee claims of sustained political leadership over tribal

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121. Thomas Tureen, *Afterword* to PAUL BRODEUR, RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AD PENOBSCOT INDIANS OF NEW ENGLAND, at 144–45 (1985).

122. BRODEUR, *supra* note 121, at 41.

123. Tureen, *supra* note 121, at 143, 145.

124. *See* Doughton, *supra* note 37, at 208.

125. BRODEUR, *supra* note 121, at 41.

126. *Id.*

members, among other challenges.[127] The jury decided that the Mashpee were a Tribe in 1834 and 1842 but not in 1790 when the Nonintercourse Act was passed.[128] They further found that the Mashpee voluntarily abandoned tribal status between 1842 and 1869.[129] As a result of these evidentiary findings, in March 1979 Judge Skinner dismissed the lawsuit. According to Skinner the Mashpee could not sustain their burden of proof as plaintiffs, which was a "particularly heavy burden."[130] Skinner wrote further that "[t]he standards of that Act, at least as I interpret it, require that a tribe demonstrate a definable organization before it can qualify for the extraordinary remedy of the total voiding of land titles acquired in good faith and without fraud."[131]

After the trial, Earl Mills, who was the Chairman of the Mashpee Wampanoag Tribe at the time, spoke with writer and journalist Paul Brodeur.[132] Mills reflected on the trial and the results. He saw the trial as a reflection of attitudes of non-Indians in Mashpee about Indians. His comments were prescient. Referring to the community sentiments of the non-Indians of Mashpee about the suit, he stated that "[w]hat the lawsuit did was bring us the true depth of their hatred, their guilt and their rage. We realize now that they would just as soon we disappeared off the face of the earth. Only we aren't going to disappear. We're going to be here forever."[133]

The Mashpee continued to fight for their lands, their sovereignty, and their recognition. In 2007 they finally prevailed by petition process and obtained federal recognition as an Indian Tribe.[134] As painful as the experience was, having to suffer the indignities of having their Indian identity questioned, in going to trial and refusing to settle, the Mashpee Wampanoag did not cede aboriginal title or give up sovereign rights.

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127. *Id.* at 43.
128. *Id.* at 49.
129. *Id.* at 50.
130. *Id.* at 52.
131. *Id.*
132. *Id.* at 65.
133. *Id.*
134. BUREAU OF INDIAN AFFS., SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR FINAL DETERMINATION FOR FEDERAL ACKNOWLEDGMENT OF THE MASHPEE WAMPANOAG INDIAN TRIBAL COUNCIL, INC. 3–4 (2007).

Rather than go to trial and risk an uncertain outcome like that of the Mashpee Wampanoags, the Narragansett, Mashantucket Pequots, Mohegan, and Aquinnah Wampanoag Tribes all negotiated and settled. The suits all resulted in passage of federal "Settlement Acts" which permanently ended, the States hoped, all future land claims from the Tribes.[135] However, the Acts and the litigation settlements also resulted in extremely small New England Reservations; they also resulted in clear state court judicial jurisdiction and power over Indian lands, something atypical in U.S. Indian Law.[136] National policy in the U.S. reflects a very distinct tradition of excluding state governments from Indian Country, dating back to the Constitution.[137] This is not the case in New England, however, and it was permanently etched in stone in the Settlement Acts. New England is the *de facto* exception to national Indian policy and practice.

C. *States Fight Tribal Efforts To Place New England Land Into Trust*

In 2008–2009, the Rhode Island Attorney General led state attorney generals across the United States in a successful battle in the federal courts to undermine the ability of the federal government to aid Tribes in expanding their land base.[138] It started after the Narragansetts sued Rhode Island and the Town of Charlestown

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135. *See generally* Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (1978); Maine Indian Settlement Act, Pub. L. No. 96-420, 94 Stat. 1785 (1980); Mashantucket Pequot Indian Land Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (1983); Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act, Pub. L. No. 100-95, 101 Stat. 704 (1987); Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 (1991); Mohegan Nation of Connecticut Land Claims Settlement Act, Pub. L. No. 103-377, 108 Stat. 3501 (1994).

136. MATTHEW L. M. FLETCHER, FEDERAL INDIAN LAW 5 (2016).

137. *Id.*

138. With Connecticut State Attorney General Richard Blumenthal as the primary signatory, 21 State Attorneys General filed a brief as Amici Curiae urging the Narragansett defeat in the *Carcieri* case. Those State Attorneys General were from Alabama, Alaska, Arkansas, Connecticut, Florida, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, and Utah. Brief for Richard Blumenthal et al. as Amici Curiae Supporting Petitioners, Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007) (No. 07-526), 2008 WL 2445505.

over land use regulation. Rhode Island claimed it was protecting State sovereignty.[139] The suit resulted in the Supreme Court decision, *Carcieri v. Salazar*. The *Carcieri* Court narrowed the definition of Indian Tribe for purposes of a criteria for the Federal Government, under its historic trust responsibility, to take land into trust for Indian Tribes.[140] In *Carcieri*, the Court ruled that Tribes must demonstrate that they were "under federal jurisdiction" in 1934 when the Indian Reorganization Act was enacted, in order for them to qualify for a land into trust application.[141] The case had a profound impact on Tribes across the United States and it put a hold on the process to take lands into trust for Southern New England Tribes.[142]

Today, the heart of much protracted litigation over Southern New England tribal land is opposition to Indian gaming and casinos. Tribes across the country look with wonderment at the success of two tribal gaming operations in eastern Connecticut, those of the Mashantucket Pequots and the Mohegans, which are among the most successful Indian gaming operations in the country.[143] In Southern New England, though, savage anxieties now have a new twist, what this writer refers to as "casino gambling anxieties."[144] Local politicians excite their constituents with the horrors of traffic and crime likely to result from Tribal gaming and casinos.[145] Those horrors usually prevail, while those same traffic and crime fears do not prevail when non-Indian development is proposed.[146]

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139. Brief for the Petitioner State of Rhode Island at 1–2, Carcieri v. Salazar, 555 U.S. 379 (2009) (No. 07-526).

140. *Carcieri*, 555 U.S. 379 at 395.

141. *Id.*

142. Bethany C. Sullivan & Jennifer L. Turner, *Enough Is Enough: Ten Years of Carcieri v. Salazar*, 40 PUB. LAND & RES. L. REV. 37, 37 (2019).

143. Tom Wanamaker, *Anti-Gamers Rail Against Recognition: Threaten Tribal Economics*, INDIAN COUNTRY TODAY (Sept. 4, 2002), https://indiancountrytoday.com/archive/anti-gamers-rail-against-recognition-threaten-tribal-economics [https://perma.cc/CLU8-RMJJ].

144. Phillip Marcelo, *Tribe Breaks Ground on Massachusetts' Latest Casino Project* (Apr. 5, 2016), WBUR https://www.wbur.org/news/2016/04/05/tribe-breaks-ground-casino [https://perma.cc/V5LT-PN2Q].

145. Rick Green, *How Many Casinos Does the State Really Need?*, HARTFORD COURANT (Apr. 29, 2010), https://www.courant.com/news/connecticut/hc-xpm-2010-04-29-hc-green-casinos-blog0429-artapr29-story.html [https://perma.cc/8EL6-7LYH].

146. *Id.*

Large scale non-Indian building and development plans are welcome as urban revitalization. Examples of this in Southern New England include the vast waterfront projects in Stamford, Connecticut like Harbor Point of Building and Land Technology[147] or Mashpee Commons in Cape Cod, Massachusetts.[148] In fact, Cape Cod, which is the site of much traditional Mashpee Wampanoag land, has been the focus of considerable real estate development.[149] Indian gaming is not a panacea for the economic woes of Indigenous people or American Indian Tribes, but nationally it represents the best hope for economic survival.

D. *Apologies, Forgiveness and Reparations*

Is it possible to begin to repair the deep wounds and tears in the social fabric that accompanied colonization? Traumatic injury, calamity, atrocity, and other cataclysmic events produce great human suffering that have plagued people through the ages.[150] In *After The Bloodbath: Is Healing Possible In The Wake of Rampage Shootings*, this writer wrote about Indigenous inspired restorative justice.[151] A process of revealing the truths about historical oppression of children in Maine is underway where The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission has been listening to the Wabanaki peoples and considering a path forward to healing.[152] It is a start.

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147. *Harbor Point*, BLDG. & LAND TECH., https://bltliveworkplay.com/apartments/stamford/harbor-point/ [https://perma.cc/LD8Q-N5H7] (last visited May 6, 2022).

148. MASHPEE COMMONS, https://mashpeecommons.com/lookingaheaddraft/ [https://perma.cc/U9QK-2R94] (last visited May 6, 2022).

149. Doug Fraser, *'The Only Path Forward': Debating Affordable Housing, Cape Town Ask If Bigger is Better*, CAPE COD TIMES (Aug. 27, 2021), https://www.capecodtimes.com/story/news/2021/08/27/affordable-housing-ma-cape-cod-construction-large-rental-developments-debated/8158189002/ [https://perma.cc/HJE5-8KEQ].

150. WALTER R ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 258 (2013).

151. JAMES D. DIAMOND, AFTER THE BLOODBATH: IS HEALING POSSIBLE IN THE WAKE OF RAMPAGE SHOOTINGS?, 37–45, 61–74 (2020).

152. Bennett Collins, Siobhan McEvoy-Levy, & Alison Watson, *The Maine Wabanaki State Child Welfare Truth and Reconciliation Commission: Perceptions and Understandings*, *in* INDIGENOUS PEOPLES' ACCESS TO JUSTICE, INCLUDING TRUTH AND RECONCILIATION PROCESSES 140 (Wilson Littlechild &

Mayor Jorge Elorza, a lawyer and the Mayor of Providence, Rhode Island, deserves credit for thoughtfully pursuing a plan of truth and reconciliation about how discrimination and oppression affected the descendants of African slaves and the Indigenous peoples of Providence.[153] The first step was to accept responsibility and it is a profound first step. Not only did he commit to completing a study of the problem in Rhode Island,[154] but he has embarked on a plan to take steps to make changes for the future.[155] What should the New England states and states across the country do with respect to Indians? Is it too late? Restorative justice offers a model for at least a beginning of a path forward for the descendants of the Algonquin Indigenous peoples of Southern New England.

In *After the Bloodbath: Is Healing Possible in the Wake of Rampage Shootings?*[156] this writer wrote at length about the importance of apologies and forgiveness to the healing process. Researchers have come to a consensus that forgiveness can include: (1) a reduction in "vengeful and angry thoughts, feelings, and motives," which may coincide with (2) an increase in "positive thoughts, feelings, and motives toward the offending person."[157] In other words, forgiveness refers to a voluntary behavioral change toward a perceived transgressor, and includes the reduction of negative thoughts, emotions, and motivations toward the transgressor, which might cause eventual changed behaviors.[158] The concept of forgiveness has roots in the history of religious belief. Forgiveness and justice are

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Else Stamatopoulon eds., 2014). Since time immemorial the Wabanaki People inhabited what is now Vermont, New Hampshire, Maine, Massachusetts, and parts of broad territories in Eastern Canada. *Id.* at 141 n.3. They include the Passamaquoddy, Penobscot, Maliseet, and Mi'kmaq peoples. *Id.* at 140.

153. KEITH W. STOKES & THERESA GUZMAN STOKES, A MATTER OF TRUTH, THE STRUGGLE FOR AFRICAN HERITAGE & INDIGENOUS PEOPLE EQUAL RIGHTS, IN PROVIDENCE RHODE ISLAND (1620-2020), at 1 (2021).

154. *Id.* at 1–2.

155. Dan McGowen, *Providence Hires Roger Williams University to Lead Next Steps of Reparations Process,* BOSTON GLOBE (Sept. 21, 2021), https://www.bostonglobe.com/2021/07/08/metro/providence-hires-roger-williams-university-lead-next-steps-reparations-process/ [https://perma.cc/XX2L-BXUP].

156. DIAMOND, *supra* note 151, at 45–60.

157. Don E. Davis et al., *Research on Religion/Spirituality and Forgiveness: A Meta-Analytic Review,* 5 PSYCH. OF RELIGION AND SPIRITUALITY 233, 233 (2013).

158. *Id.*

central tenets of many of the world's religions.[159] In fact, the three major monotheistic religions—Judaism, Islam, and Christianity—promote forgiveness and justice not only as aspirations of religious adherents, but also as qualities of God.[160]

Does forgiveness have a theoretical framework? Direct communication allows for a dialogue, for negotiation. It allows for community involvement in the disposition of a case. It makes possible understanding, confession, reconciliation, and forgiveness.[161] Sociologist Thomas J. Scheff calls this process "symbolic reparation."[162] Symbolic reparation accompanies "material reparation"; such as restitution or compensation or can take on other attributes.[163]

After witnessing the gruesome murder of George Floyd by Minneapolis police officer Derek Chauvin, has the nation's collective soul moved closer to a spirit of reconciliation?[164] Over the last two decades, world leaders have begun to move toward making amends for injustices. Britain's Queen Elizabeth apologized to the Māori people, Australia apologized to the stolen aboriginal children, the Canadian government apologized to the Canadian Ukrainians, former South African president F.W. de Klerk apologized to victims of apartheid, French and Czech notable authorities apologized for human injustices perpetrated during World War II.[165] In the United States, President William J. Clinton apologized to Native Hawaiians, and to survivors of the Tuskegee, Alabama syphilis experiment.[166] President Barack Obama acknowledged U.S. mistaken

159. D. R. Van Tongeren et al., *Forgiveness and Religion: Update and Current Status*, *in* MAPPING FORGIVENESS 49, 53–70 (Malika Maamri ed., 2012).

160. Mark S. Rye et al., *Religious Perspectives on Forgiveness*, *in* FORGIVENESS: THEORY, RESEARCH AND PRACTICE, 17, 17 (Michael McCullough, Kenneth Pargament, & Carl Thoresen eds., 2000).

161. Thomas J. Scheff, *Working with Shame and Anger in Community Conferencing*, *in* JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 231, 231 (Bruce J. Winick & David B. Wexler eds., 2003).

162. *Id.*

163. *Id.* at 235.

164. Nicole Daniels & Natalie Proulx, *How Much Have You and Your Community Changed Since George Floyd's Death?*, N.Y. TIMES (May 26, 2021), https://www.nytimes.com/2021/05/26/learning/how-much-have-you-and-your-community-changed-since-george-floyds-death.html?searchResultPosition=12 [https://perma.cc/B6VL-L6QQ].

165. ROY L. BROOKS, WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 3 (1999).

166. *Id.*

policies of the torture of prisoners at the Guantanamo Bay Detention Center.[167]

What can the governments of the States of Connecticut, Rhode Island and Massachusetts, their public officials, attorneys, legislators, and judges do now? They can engage in a real and productive dialogue and listen to the Indigenous peoples of their states, recognized and unrecognized. They can acknowledge with specificity the wrongs of the past and the pain they caused, which continues to be felt today.[168] Then they can apologize and ask for forgiveness. They can begin to chart a course of repealing and repudiating doctrines and policies based on notions of racial superiority. They can cease being obstacles to the federal recognition process. They can cease denying they have Indigenous peoples in their states. They can employ strategies to assist Tribes to build strong tribal court systems.

Rather than opposing the Federal government taking land into trust for Southern New England Indian Tribes, the States can seek collaborative solutions with Indigenous peoples and local governments to find land to give back to Tribes. It is imperative that an inventory be completed of available parcels of land in Southern New England that is suitable to be returned to the Indians. There are parcels of land held sacred to Indigenous peoples in New England that are undeveloped. They may include known Indian burial grounds or public parks.

There are also parcels of land owned by private landowners that border Indian reservations which are well suited to charitable giving. For example, in 1906, a private landowner donated a five-acre parcel of land believed to be the site of the Great Swamp Massacre in South Kingstown, Rhode Island, to the Rhode Island Historical Society.[169] In October 2021, the Historical Society worked with the Narragansett Indian Tribe and the Rhode Island Attorney

167. Barack Obama, President of the United States, Remarks at Strasbourg Town Hall (Apr. 3, 2009) (transcript available at https://obamawhitehouse.archives.gov/the-press-office/remarks-president-obama-strasbourg-town-hall [https://perma.cc/79BG-QQPR]).

168. ECHO-HAWK, *supra* note 150, at 99–100.

169. ROBERT A. GEAKE, A HISTORY OF THE NARRAGANSETT TRIBE OF RHODE ISLAND: KEEPERS OF THE BAY 116 (2011).

General for the Tribe to be given access to the site.[170] This is a small but meaningful step toward reconciliation.

There are many parcels of land throughout Southern New England that are ripe for return to the Indians. Massachusetts is named after an Indian Tribe, the Massachusetts Tribe, also known today as the Mattakesett Indian Tribe, an unrecognized Tribe.[171] The leaders of the Tribe describe many parcels of land where land records clearly establish Indian title. One historian, Jeremy Dupertuis Bangs, formerly the Chief Curator Plimoth Plantation, has done extensive research to unearth seventeenth century deeds which document the land transfers of Josias Wampatuck, the Chief Sachem of the Tribe. In the seventeenth century Wampatuck created the Titicut Reserve by deed for the Indians.[172] The Titicut Reserve is on lands now encompassed by the Town of Bridgewater, Massachusetts. Portions of the Titicut Reserve are undeveloped protected wooded lands and waters now controlled by the Town of Bridgewater Conservation Department and are called Camp Titicut by the Town.[173] Those lands include an Indian burial ground that is held sacred by the Tribe.[174]

Part of the Titicut Reserve includes a parcel deeded in 1664 by Wampatuck to two Indians, Peter (also known as Pomponho) and Thomas Hunter (also known as Waweus).[175] What is most noteworthy about the deed is that Wompatuck specified the land could never be validly transferred to non-Indians.[176] The deed specified that any transfer to the English would result in the land reverting

170. Edward Fitzpatrick, *'Great Swamp Massacre' Site Returned to the Narragansett Indian Tribe*, BOSTON GLOBE (Oct. 26, 2021, 5:15 PM), https://www.bostonglobe.com/2021/10/26/metro/great-swamp-massacre-site-returned-narragansett-indian-tribe/ [https://perma.cc/MYX4-2BMV].

171. The author is Mattakesett Council Chief Justice and Judge of the Tribal Court.

172. JEREMY DUPERTUIS BANGS & NEW ENGLAND HIST. GENEALOGICAL SOC'Y, INDIAN DEEDS: LAND TRANSACTIONS IN PLYMOUTH COLONY, 1620-1691, at 106–108 (2008).

173. *Camp Titicus Plans*, TOWN OF BRIDGEWATER, https://www.bridgewaterma.org/DocumentCenter/View/2438/Camp-Titicut-Parkland-Plans [https://perma.cc/R5KU-7JG2] (last visited May 7, 2022).

174. BANGS & NEW ENGLAND HIST. GENEALOGICAL SOC'Y, *supra* note 172, at 108.

175. JEREMY DUPERTUIS BANGS, JOSIAS WOMPATUCK AND THE TITICUT RESERVE OF THE MATTAKESETT / MASSACHUSETTS TRIBE, 37–38 (2d ed. 2020).

176. *Id*. at 39.

to the Indians' heirs and assigns.[177] The Town of Bridgewater should work with the Mattakesett Indians and the State of Massachusetts to return the land to the Indians, in accordance with the language of the deed. If historians, conservation officers, lawyers, law professors, and law students probe deeply into land records throughout Southern New England they will find more examples of lands like the Titicut Reserve in Massachusetts and the Great Swamp in South Kingstown, Rhode Island that, with a bit of ingenuity, can be returned to local Indigenous peoples.

CONCLUSION

Colonization was a product of a sustained campaign of cooperation between Western European Popes, Western European monarchs, and Christian explorers. Puritan settlers and other Christians arrived in Southern New England from Western Europe with beliefs of the racial inferiority of the Algonquin Indigenous inhabitants of the region they encountered, beliefs they inherited from the Popes of Rome, Christian European explorers and military leaders and the Western European monarchs. Upon arrival, they found peaceful cooperative relations with the Algonquin inhabitants. In Southern New England, after a period of about fifty years of peace, the Europeans waged brutal military battles and massacres on the Algonquin inhabitants of the region. Further decimated by infectious diseases, by the late seventeenth century there were few Algonquin indigenous inhabitants remaining. Some of the survivors were taken into slavery, others dispersed or joined up with other allied native nations.

After the conclusion of military battles and wars the colonial governments employed law as a weapon of oppression against the Indigenous peoples. With law as a weapon, they continued the persecution of the American Indians based on their beliefs of racial superiority. The campaign of persecution was accomplished with colonial and later state statutes and municipal law, and with judicial decisions. Judicial decisions by the United States Supreme Court evidenced an obvious belief of racial superiority and the inferiority of the American Indians which became the bedrock of American Indian law. Incorporation of Papal canons of Indigenous inferiority into American law has never been repudiated nor repealed.

177. *Id.* at 39–40.

Southern New England became and remains a *de facto* exception to much of Indian law, with progress sustained by Indigenous peoples in the region at a bare minimum.

Perhaps few lawyers, legislators and judges in New England are aware of how law has been used over the centuries as a weapon of oppression. Perhaps lawyers, legislators and judges in New England are unaware of how their actions, today, continue to perpetuate the racial injustices against the American Indians.

Lawyers at every level, the organized Bar, law professors, the State Legislatures, Attorneys General, town and village lawyers, and the Courts, yes, the Courts, should all follow this example. The place to start is by exposing the uncomfortable and hidden truths. Only then can the deep wounds inflicted by law begin to heal.