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Making Identity: Law, Memory, and Race in Comparative Perspective

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[When I learned I was an Indian] I suffered a very powerful emotional impact, very powerful because I was born and raised on that land. Being a day laborer without education, a manual laborer working the land and suddenly I came to know that I was a person belonging to a community that had a past and that now we had a history. History that I never knew. I had no idea.

These were the words spoken to me during an interview in 1998 in the north-eastern state of Sergipe, Brazil, with the former chief (*cacique*) of the Xocó Indians, a man in his late thirties who insisted upon the war name (*nome de guerra*) Apolônio Xokó.¹ At the end of a two-hour interview, Apolônio pointed to the typewriter on the otherwise empty desk between us. He explained that it had taken one year of typing on this machine in the offices of the State Secretary of Culture to complete his book on the story of the Xocó Indians, which he believed would soon be published.² This self-taught man had taken on the task of writing the history of his people's struggle for land and identity on the Island of São Pedro in the São Francisco River.

The Xocó tribe was legally recognized in 1979 by the Brazilian government through FUNAI, the National Indian Foundation, shortly after a group of 22 families of rural workers, including Apolônio, his grandfather and mother, illegally occupied the Island of São Pedro. The island is easily accessible from a section of the mainland known as Caiçara, added to the tribe's reservation in 1991 after a four-month sit-in by a group of Xocó families at the FUNAI regional headquarters in a neighboring state under the leadership of Apolônio. In both cases, the government had expropriated property owned by a family of landowners whose alleged violence against the sharecroppers and rural workers of the area was legendary.

During that same preliminary field trip, I also met Maripaulo, a 37-year-old

agricultural laborer and childhood companion of Apolônio from the neighboring village of Mocambo. People from Mocambo are afraid of talking to whites, to people from the outside, said Maripaulo. "It's a legacy of slavery," he explained to me, referring to the silencing of so many voices. As a leader of his community, this son of an *índio* (Indian man) and a *negra* (black woman) had been instrumental in the struggle to win legal recognition of Mocambo as a community of descendants of fugitive slaves (*remanescente de quilombo*), a rural black community that is recognized as dating to the days before the abolition of slavery in 1888.³ The results were striking both for the community and for individuals like Maripaulo: "Before the struggle, I used to be [silent] like that too. Now I can talk to anyone—even the Pope."

In the backlands (*sertão*) of northeastern Brazil, where cyclical drought and intense poverty continue unabated, discourses about collective identities as Indians and descendants of African slaves have begun to take on new meaning since the late 1970s when the military regime which came to power in 1964 began to open up political life under the pressure of massive protests. With the consolidation of political democracy, reinstated in 1985, peasants and rural workers have begun to struggle for land through newly available legal means, and in the process are reconfiguring community life on different terms. Along the banks of the São Francisco River, former day laborers like Apolônio and Maripaulo, with the support of local activists and the Catholic church, have used laws and new constitutional provisions to discover, and in many cases, to construct ethnic identities that give them the opportunity to overcome the physical and symbolic violence perpetrated by powerful landowners and the state those landowners have traditionally controlled.

This transition is marked, however, by dynamics and complications that require a close examination of the relationship among law, memory, and ethnic identity. Maripaulo's life story embodies the multifaceted nature of such an inquiry. Maripaulo's father was a key figure in the Xocó struggle, in which Maripaulo himself participated as a young man. In 1995, when Maripaulo's father died, there was a legal battle between his *negra* mother and his father's other wife, a Xocó woman (Apolônio's aunt), for the right to his father's pension. Although both weddings had been celebrated in the Catholic Church, Maripaulo's mother was granted a larger percentage of the pension, because she and his father had also been wed in a civil ceremony. Maripaulo's self-representation today as a descendant of fugitive slaves, and Apolônio's as a Xocó Indian, must be read in light of the complexities surrounding both personal and ethnic identities.

In this essay, I would like to focus on identity formation with respect to one of these groups—the Xocó community—especially the relationship between law, identity, and race. I hope to bring to light, if only in a tentative and sug-

gestive way, the broader significance of such an inquiry by narrating the story of the Xocó in dialogue with some discussions of similar issues in the United States. In particular, I will compare the successful struggle for recognition of the Xocó with similar struggles for recognition in the U.S. by the Lumbee and Mashpee Indians, who have not achieved full legal status as tribes. I am particularly interested in the question of who is an Indian when such an identity is legally defined and when the population in question is made up of people descended from both blacks and Indians. In the broader project, I am also concerned with the interpretation of narratives and representations of history when they are recounted and remembered in light of the knowledge that production of collective memory may lead to access to land.⁴

In the early 1970s, a Franciscan priest, with the support and encouragement of the local bishop known for his pro-worker activities, arrived in the area of Caiçara and began to talk to workers about their indigenous heritage. He based this on research in Church archives and local records regarding the mission that had been founded on São Pedro Island in the early 1800s and was abandoned by the end of that century. As recounted by anthropologist Beatriz Goíz Dantas, the federal Land Law of 1850 had mandated that lands of Indians who “do not live in villages, but have been mixed in with the civilized population” be incorporated into the national territory.⁵ By the end of the nineteenth century, official registries no longer made reference to Indians in Sergipe, but instead referred to *mestiços* and *caboclos* (mixed race categories that carried no rights to land or services).⁶ When the priest arrived in Caiçara in 1972, people living in the area were referred to, and referred to themselves as, *caboclos*, a term often signifying an Indian-descended person of mixed ancestry.

In fact, for many years, the organization and protection of the residents of the area had been the focus of the rural workers’ union, which also attended to legal needs of the people, providing assistance when they went to the Labor Court to claim pay or pension rights. What began as workers’ complaints in the labor court would become, over the next decade, struggles for ethnic identity and land. Church activists and anthropologists interviewed members of the Xocó community to develop a historical record that would hold up in court and administrative proceedings. Within a few years of the arrival of the priest, the rural workers living in the Caiçara area began to identify themselves as Xocó Indians.

The struggle for legal recognition by the people who had come to identify themselves as Xocó came at a time when the existence of remnants (*remanescentes*) of other Indian tribes were beginning to be discovered in greater numbers in the Northeast.⁷ Significantly, the work of the priest (and others conducting research on Indians in the Northeast) coincided with the enactment of the Indian Statute of 1973, defining “Indian” for the first time in Brazilian law.⁸ Prior to the

enactment of this provision, Brazilian Constitutions and statutory law referred only to forest dwellers and neither used the term Indian nor provided a definition. A statutory definition had not been necessary because lawmakers and anthropologists alike assumed that the only indigenous groups in Brazil were the isolated Amazonian tribes each with its own language and culture. However, in the early 1970s, while the military government's indigenous policy was undergoing revision,⁹ anthropology was beginning to reconsider the meaning of ethnicity. Most significant to the Xocó struggle was the portion of the new definition (Article 3) that identified an Indian as an "individual of pre-Columbian origin and ancestry who identifies himself and is identified as belonging to an ethnic group whose cultural characteristics distinguish him from the national society." Drawing on the then-recent work of anthropologist Fredrik Barth, boundary drawing and self-identification became a key test for indigenous identity.¹⁰

I view law as an expandable and prismatic phenomenon.¹¹ Therefore, I consider the statutory definition as presenting an opportunity that was used, acted upon, and whose meaning has remained elastic, even though there are aspects of the statute that retained certain indigenist concepts, such as "assimilation" and "civilized."¹² Significantly, the 1973 Indian Statute, as it was written, assumed that Indians had cultural distinctiveness, but did not explicitly mention race or racial characteristics as conditions of Indian categorization. Although Article 3 uses the language of "pre-Columbian origin and ancestry," the "origin and ancestry" clause has been largely ignored, at least in part because of the universal Brazilian belief that almost all rural people (and maybe all Brazilians) have some Indian ancestry along with African and Portuguese. The Indian Statute, therefore, introduced an expanded concept of Indian into the legal lexicon, and FUNAI, the government agency charged with protecting indigenous people, had recognized the Xocó, expropriated land on their behalf, and supported their tribal existence. In spite of all this, Apolônio nonetheless expressed his abiding distrust of FUNAI, founded on years of cajoling and negotiating with FUNAI bureaucrats over issues of recognition and land expropriation. Under FUNAI's rules of tutelage,¹³ Apolônio asserted,

the indigenous community would have been absorbed, we would no longer exist. Because the project of the Brazilian government in relation to the indigenous community is to make the Indians disappear slowly . . . its principal project is to eliminate once and for all this word Indian in Brazil. This is the big project of the constituted authority, only that they have not yet achieved it and I am absolutely certain that they will not. Know why? Because in spite of the Indian suffering all type of persecution within and outside of his community, he never quieted his voice, he never crossed his arms, would never allowed anyone to silence his yell.

A single positive action by the government (recognizing the Xocó) did not alter

the image of the law Apolônio carried with him. For Apolônio, the importance of self-determination by his people far outweighed any legal pronouncement. He further expressed his distrust of FUNAI, focusing on the words “law” and “justice” and asserting that their meanings should be re-keyed in light of the Xocó struggle:

If it depended on FUNAI to defend, orient, organize our community, [you], lawyer and researcher, at this moment would not here in the Secretary of Culture interviewing a representative of the Xocó. Do you know why? Apolônio Xokó would not exist, no one would know the Xocó community much less Apolônio, because FUNAI would not permit this. Now, all that was achieved, all that was conquered by the Xocó people, they had first to be blind to, to ignore that the word Law, the word Justice exists in this country, in this state, in this region. It did not function, it did not exist, why? The only justice that I saw function was the union of our community, was the force and determination of the brave warrior Xocó, because if justice exists here in Sergipe I don't know . . . the only law the only justice that I know that I saw that I participated in that I suffered was the law of the white collar. As for money, whoever has it, the law favors him and whoever doesn't have it, you suffer.

These two statements by Apolônio, taken together with his insistence on the name Apolônio Xokó, his writing of a book about the Xocó, and his pride in being self-taught, all illustrate the importance of language, words, and naming to Apolônio. By appropriating the written form of those who write the laws or the priest who brought information about the history of Indians in the region to the community, Apolônio obtained some of their power. He was able to convert himself from an impoverished rural laborer, working as a day laborer—waking at four in the morning—for those who owned the land that later was recognized as “sacred Xocó territory” not only into *cacique* of the Xocó Indians, but also into a writer with the ability to transform memory into history.¹⁴ The power Apolônio attributes to “the word” is an indication of his recognition of what Bourdieu has called “symbolic power” whether exercised by the state or by the Xocó Indians in a struggle over naming, the “power of creating things with words.”¹⁵ Apolônio's expressions of distrust and lack of belief in the efficacy of the Brazilian legal system even in light of the Indian Statute's new definition of “Indian” are also reflections of this linguistic contest.

The new definition of Indian was used by anthropologists and lawyers in arguing the case of the Xocó with FUNAI and in the courts. In the Northeast, generations of miscegenation have left few phenotypical traces of “Indianness” and generations of legal and practical restrictions (including Indian slavery) have left no trace of indigenous language and very little identifiably indigenous material culture. The Land Law of 1850, mentioned earlier, precipitated the legal dissolution of the few groups of people who were still identified as Indians in

early nineteenth-century Sergipe.¹⁶ The changes that had come about over the previous three centuries had created a population whose physical appearance and cultural world view reflected the reality of racial mixture often considered the hallmark of Brazil. As noted by U.S. anthropologist W.D. Hohenthal Jr., speaking of the people living along the banks of the São Francisco River when he did his fieldwork in the early 1950s:

All these surviving have been subject to the acculturated influences of so many generations that, superficially at least, they are culturally indistinct from non-Indian villages of the area. Physically, they show traces of a long and continuous racial mixture with individuals of the primary Negroid and Caucasoid races. No group conserved more than a few words of its original language, and even those words being of doubtful linguistic value.¹⁷ . . . Except for scanty and linguistically suspect native words, by and large, the aboriginal languages have been irretrievably lost.¹⁸

The category of “Indian” had become broad enough to encompass people like those who became the Xocó of Sergipe. An anthropological report filed with FUNAI in support of Xocó recognition, written *after* the 22 families had declared themselves Xocó and taken possession of the island, explains, “Those that survived [having to hide their indigenous identity from landowners for whom they worked] remained indigenes, without their habits and customs but in their self-identification as people distinct from whites and victims of their denomination as *caboclos*, i.e. people of Indian descent.”¹⁹ Another such report contains a listing of each person on the Island with their ethnic self-designations: “The *caboclos* are highly miscegenated, due to interethnic and intertribal marriages. It is difficult to make a full report of racial purity of the group because many are in doubt as to their indigenous group identification and others know only that they are Indians.”²⁰

The use of the discursive category of *caboclo* before the spate of northeastern Indian tribal recognitions began in the early 1980s²¹ and the use of other such categories that describe physical features (color, hair, nose, cheekbones) are ever shifting in Brazilian usage.²² In fact, the instability of “racial” categories in Brazil provides one clue as to how the transformation from *caboclo* to Indian could take place within ten short years. Apolônio himself felt the need to address this question and to explain the reasons for his own appearance, described by anthropologist Clarice da Mota as follows: “In folk Brazilian racial classification, he is more of a *mulato*, whose parents had been white and black, as he definitely had black features.”²³ Apolônio said,

[The Church] would have to pay in double for the misery and destruction they caused in this territory and in the culture of the Indians. Why does Apolônio not speak his language today? Why do I not have the characteristics of a pure Indian?

Why? Why are you not conversing with Apolônio today all painted with straight hair and a perforated nose and ear . . . An authentic Indian, a truly pure Indian? Why? Is it that I am to blame for arriving in this society in the way I arrived? Is it that my parents were to blame for this? I have said that it would be much easier for Brazil to pay its foreign debt to the International Monetary Fund than for the Catholic Church and the Brazilian authorities to pay the cultural debt that they owe the Indians . . . the Catholic Church is to blame for this because the state invaded the territory and the Church invaded the human being, it extracted my pure blood and brought in other blood that mixed with it. Now this [Indian] blood will never be separated, the blood that my ancestors mixed with blacks, mixed with whites themselves. In the same way that I will never stop being Indian just because I do not have those characteristics.

His explanation conveys the force of the emotional power of his self-experience, while at the same time summing up his attitude toward the Catholic Church (the representatives of which had initiated the rediscovery of Xocó identity), perhaps in an effort to assert Xocó agency and emphasize the importance and difficulty of their struggle.

This statement might also reflect certain aspects of indigenist ideology. As oral historian and anthropologist Elizabeth Tonkin has noted, “the voiceless very often can voice an opposition, but they are not immune to the structuring plausibilities which the genres of modern media can offer, and . . . to all the processes of self-construction in particular social circumstances.”²⁴ At the same time, one cannot help but imagine what Apolônio’s experience of self might have been like at indigenous meetings where the vast majority of people present were Amazonian Indians, dressed accordingly and with the “correct” physical features and skin color. This may in part account for Apolônio’s twist on Brazilian racial ideology, which celebrates the mixing of the “three races” to form a uniquely “Brazilian” type, and generally refers to skin color, facial features, and hair in colloquial speech to simply identify individuals.²⁵ Similarly, Apolônio taps into another strand of Brazilian attitudes toward race and color by referring to descent. Here, he explains the failure of his features to conform to indigenist stereotypes because the Church stole his “pure” blood, leaving behind a mixture. This, he claims, does not alter his identity as an Indian, an identity which for Apolônio embodies every battle he has ever fought. And as far as Brazilian law is concerned, he is right, as shown by the Sergipe state school teachers’ guide to the Xocó Indians. In her introduction to the guide, anthropologist Beatriz Dantas expresses the theory behind the Brazilian law’s flexibility:

These questions continue being repeated even today when the Xocó are discussed. They result from ideas and images that are part of common sense. Images of Indians that inhabited the area in the time when the first Europeans arrived: live in the for-

est, are nomads, hunt, gather and fish, walk around naked, paint their bodies and always carry bows and arrows. Associated with these cultural traces there is always the characterization of “indigenous race” with “straight and dark hair, slanting eyes and copper skin.” This simplified vision, transmitted by school and reinforced by other media, does not correspond to the reality of many indigenous communities of the present time. It impedes us from seeing the variety of lived situations by Indians and the diversity of their ways of life. Putting aside this crystallized image of the Indian, it is better to think of Brazil as a space where ethnic and cultural plurality is a reality that brings to the fore the question of diversity that also exists among the Indians.²⁶

Similar Struggles/Different Outcomes: Xocó, Lumbee, Mashpee

There are at least two well-known cases of Indian groups in the United States who have struggled for federal recognition without success—the Lumbee Indians of North Carolina and the Mashpee Indians of Massachusetts. In both cases, as with the Xocó, the people who constitute these groups are mixed-race and have had to piece together histories based on scant documentation. In the case of the more numerous Lumbees, there is a history of struggle for federal Indian status dating back to the nineteenth century. Like the Lumbee and the Mashpee, the Xocó lacked an ancestral language, typically Indian features,²⁷ material cultural manifestations, and genetic continuity. Yet the Xocó have been recognized and Indian status has been refused the Lumbee and Mashpee groups. Although these two North American groups are analogous in many ways to the Xocó, their trajectories differ, largely because of legal and cultural differences in the way Indians are defined and perceived in the two societies in the late twentieth century.

In the United States, as in Brazil, black, white, and Indian miscegenation has occurred for over three hundred years. However, in the U.S. the discourse that predominates discussion of this issue (including among those who advocate change) is characterized by such expressions as “mixed-blood,” “blood quantum,” “only one-eighth Cherokee by blood,”²⁸ and characterizations of late-nineteenth century great-grandparents as “full-blood” for the purpose of enrollment.²⁹ Although not without its critics, the standard of blood quantum remains a major consideration in determining tribal status in most cases, and is a source of dispute and discussion among those who are members of indigenous communities throughout North America.³⁰ The focus on blood quantum is particularly noteworthy in the United States where a vast majority of those who self-identify as Indians are of mixed-race heritage. In the 1980 census, for example, 84% of the 7.4 million people who reported their race and/or ethnicity as Indian considered themselves “Americans of Indian

descent" which meant that they listed their race as non-Indian but cite Indian ancestry as part of their ethnic backgrounds.³¹

To a large extent, this focus on blood quantum can be traced to the particular history of slavery and black-white relations in the United States. In the 1950s, prompted by the ambitious UNESCO project which studied race in Brazil, anthropologist Charles Wagley introduced the notion of "social race" to emphasize the constructed nature of "race" and then its variabilities across cultures and nations. He summarized the North American case by pointing out that in the U.S., unlike Latin America, ancestry is used almost exclusively in defining who is a Negro and who is a white. By the late nineteenth century "[t]he dominant whites were able to establish a rule of descent based upon ancestry which states that anyone who has a known Negro ancestor is a Negro."³² This is still the predominant view in the United States.

As of the mid-1990s, the Lumbee petition for full federal government recognition already took up two shelves in the room of the Bureau of Acknowledgment and Research (established in 1978) in the Department of the Interior, where it is one of 150 petitions for recognition.³³ Since 1978, ten have been recognized and 13 have been denied, including the Lumbee. In their petition, the Lumbees assert that their native ancestors were mainly descendants of the Cheraw tribe, a hazy grouping that may have been the "Xuala" encountered by De Soto in 1540.³⁴ Around the 1730s, the Cheraws disappeared from history, not unlike the Indians in Sergipe. The remnants of decimated Indian groups from around the area (Enos, Waccamaws) escaped into the swampy southeastern part of the state, adopted English as their lingua franca, Christianity as their religion, mingled with frontiersman, surveyors, and outlaws of all colors "in an era before color consciousness became a national obsession."³⁵

Like Apolônio and the Xocó, Claude Lowry, a leader of the Lumbee Indians, interviewed when he was in his 90s, remembered history as the Lumbees wish it to be, a story of white predation on Indians leading to Indians who look like whites or blacks.³⁶ By the time the question of Indians in North Carolina emerged in the nineteenth century, the people who later called themselves Lumbees were a demographic anomaly, dark-skinned but free, clearly not colonists yet farming, dressing, and praying like Europeans. Seeing no feathers or beads, the white authorities saw no Indians at all. In 1836, North Carolina's new constitution denied every "free negro, free mulattoe [sic], or free person of mixed blood" of the right to vote, serve on juries, to bear arms, and to attend white schools.³⁷ During the Civil War, the Confederacy drafted Indians to perform manual labor along with slaves and free blacks. Many deserted and were suspected of giving aid to Union troops. In 1864, a detachment of the Confederate army captured three Lowry brothers, charged them with desertion, made them dig their own graves, and shot them down. Henry Berry

Lowry, the youngest member of the family witnessed it, vowed revenge, and organized a band of men, including Indians, deserters from the Union forces, a white man, and several blacks, which became wanted criminals. To the Lumbees, Lowry is a martyr and a hero; he focused attention on Indians' problems in North Carolina. "He let the white man know that they would never accept classification as Negroes."³⁸

After reconstruction, with the advent of legally required segregation, the Indians were faced with a dilemma: if they proclaimed themselves to be Indians, they risked expulsion to West; while acquiescence to the new laws would require them to identify themselves as "colored." An influential white man took their cause to the state legislature, which in 1885 designated the self-proclaimed Indians "Croatan" and declared that they were to have separate schools with the right to select their own teachers. Over the years, because the name "Croatan" became associated with "colored," the name was changed first to Cherokee, then to Siouan. In the process of distancing themselves from being considered black, they began to vehemently deny their black ancestry and developed a discourse of distinction from blacks that sometimes took on a virulent form. "[T]hey became slaves to the terrible tyranny of genes and blood, the spread of a lip, the accidental angle of a nose, the tint of flesh that sealed one's fate."³⁹ Within Claude Lowry's memory even white-skinned Lumbees were barred from buying coke in the "whites only" drugstore, were required to sit with blacks in the movie theaters, and newborns were barred from hospital nurseries having to sleep in the bottom drawer of their mother's dresser. At the same time, Lumbees who married blacks were said to have "crossed the border."

The Census Bureau reported them as Indians for a while, but in 1950 they were classified as "Other Non-whites." Ten years later, however, they were classified as Indians.⁴⁰ In 1953, the state legislature formally designated them Lumbee Indians, which they say is an old Indian name for the river.⁴¹ Lumbee "blood committees" investigated to the fourth generation the race of every child and teacher who applied to the Indian schools.⁴² In fact, notions of blood taint are still prominent among Lumbee Indians. As reported by Fergus Bordewich in 1996, a young paralegal with the Lumbee River Legal Services said,

People get scared when you mention the word "black." I have this thing with blood quantum. I went a long time, I wouldn't enroll. You hear all your life you're not all Indian, that you're mixed with black. You keep thinking, reckoning, if I've got any black blood there, I think I don't want to know about it. Finally, it became real important to me to know whether I really am an Indian. When I enrolled, I was really surprised to see that I had a good blood quantum! It was quite high; I was so relieved!⁴³

Contrast this Lumbee woman's sentiments with those expressed by Apolônio,

who spoke with outrage at having his physical Indian features and blood “taken from him” through mixture with whites and blacks. However, he never expressed dislike for, or negative feelings about, *negros*.⁴⁴ In fact, while on São Pedro Island, I spoke with the current *cacique* of the Xocó who talked quite openly about the lessons to be learned by the neighboring blacks of Mocambo (*negros do Mocambo*) from the struggle of their kin, the Xocó.⁴⁵

Established Indian tribes have refused to support the Lumbees' claims, citing the potential weakening of the government-to-government structure of Indian-U.S. relations, with such statements as “It just don't seem right that the feds should make someone Indian by legislation.” The most vigorous opposition has come from the only federally recognized tribe in North Carolina, the Eastern Band of Cherokees. Citing “extensive inter-marriage with various races,” their Chief told Congress, “How then can the Indian people of this country (or the non-Indian community for that matter) seriously be expected to accept these people as full-blooded Lumbees?”⁴⁶

Although their neighbors have tacitly recognized the Lumbee Indians, they have not historically had a central government, unlike another group of North American Indians, the Mashpee, whose goal of legal recognition has also proven elusive. Historian James Clifford published an account of the federal court case in which the Mashpee Indians were denied recognition, even though a majority of the people living in the town of Mashpee had been known for generations as Indians.⁴⁷ Like the Lumbee, the image of the Mashpee Indians was complicated by the issues of race, and like the Lumbee, the Mashpee had been referred to, including by the government during the case, as “really blacks rather than Native Americans.”⁴⁸ Like the Xocó, the Mashpee owned no tribal lands, had no surviving language, no clearly distinct religion, and their kinship was much diluted. Unlike the Xocó, however, the Mashpee did have a place recognized by its neighbors as an Indian town, whose boundaries had not changed since 1665.⁴⁹ Moreover, unlike the Xocó, who according to Apolônio, did not know they were Indians before the priest appeared in their lives and the struggle for identity and land began in the 1970s, the Mashpee Indians had identified themselves as such for generations. Clifford's essay focusing on the disjuncture between law and Mashpee identity helps us remember that legal classifications are not the last, or only, word on collective perceptions. Mashpee identity, once thought nonexistent by state bureaucrats, has resurfaced in surprising ways; certainly, in Mashpee eyes, their sense of self and “Indianness” did not (and does not) concur with the legal definitions of the U.S. government. When we look at law and identity in this comparative way, it can help us gauge the significance of processes as well as point to domains and tangles of relationships that might otherwise be hidden. We can begin to mine the complexity and dialogic nature of the process of identity formation and change: “the intricate

dynamics of social hierarchy, power relations, formal categories, and implicit (even oppositional) cultural understandings.⁵⁰

The legal case against the Mashpee could have been made against the Xocó: The community was a creation of the colonial encounter, a collection of disparate Indians and other minorities, decimated by disease, converted to Christianity, people of mixed descent who had been assimilated into American [Brazilian] society. The Island of São Pedro had been an Indian mission in centuries past just as the land on which the Mashpee lived was a center for the first Indian church on the Cape.⁵¹ However, when the issue came before the law, the Xocó were recognized and the Mashpee were not. Even prior to full government recognition and acquisition of land for the Xocó, in a state lawsuit brought by the largest landowner, FUNAI attorneys successfully moved to dismiss the individuals who had occupied the island on the ground that they were Indians under FUNAI tutelage and thus were immune from suit.

The key to the Brazilian outcome may lie in the fact that the concept of “race” and the biological mechanism of “blood quantum” are not the defining characteristics of being Indian in Brazil. A fundamental difference between Brazil and the United States, for reasons which historians and culture critics have conjectured for years, is that “racial” identity has not, and does not, pass through the law, as it has historically done in the United States, with legal segregation and identification primarily through descent. Although many people of color in Brazil, particularly those who are poor, experience mistreatment and discrimination, especially if darker, the differences from the U.S. are nonetheless striking, and a deeper investigation into them will advance our understanding of how law influences the process of ethnic identity formation. A conclusion that can be drawn from this brief comparison is that law and its effects are not universal, but must be observed through the particular cultural and historical prism in each society. The comparison in this case was intended to provide the opening of an investigation into the differences between the way law is experienced, perceived, imagined, denied, incorporated, and used in Brazil and in the United States. A comparison of these cases sheds light on the multiple natures of law and denaturalizes or breaks the grip of the taken-for-granted categories of “law” and “Indian.”

As this paper has shown, law is not only a means of ordering society and resolving disputes, but must also be understood as a form of representation and a maker of meaning. The value of law’s discourse can be seen when a change in definition provides new opportunities to rural day laborers like Apolônio and Maripaulo. On the banks of the São Francisco River there are two communities of related people—on the Island of São Pedro and in the village of Mocambo—whose racial categorization, if they were in the United States, would be black. There are people in each community who appear as though

they belong in the other. Yet, today when we visit we dance the *samba de coco* with the descendants of fugitive slaves in Mocambo and the *torê* with the Xocó Indians on the Island—cousins all—with rights derived from different laws.

Notes

1. Writing, naming, and the spelling of Xocó (Xokó) were very important to Apolônio, whose ability to transform oral sources of knowledge into writing is an assertion of his authority to tell the story of “his people.” As we ended the interview, Apolônio had me wait while he typed a note to accompany his gift to me of a CD of Xocó singing. By insisting upon typing his note in my presence, Apolônio was, among other things, demonstrating his ability to reinforce his spoken words with the power of a written text. In Brazil, perhaps even more than in the United States, inscriptions and textuality often form the basis for validating identity claims and serve as material evidence of social existence. When I examined his note, I noted that he spelled Xocó with a “k” (Xokó). In a society such as Brazil where spelling is not taken very seriously this is a form of symbolic politics. Perhaps he prefers the “k” because it makes Xocó look more like the names of Amazonian Indians. He may prefer “k” as well to make the tribe seem more foreign since “k” is not found in the Portuguese alphabet, with an intention of returning the spelling as well as the people to their original identity. One page of the liner notes for the CD Apolônio gave me, dated April 1996, signed by the Secretary of Culture of the state reads: “Of all the indigenous nations that inhabited Sergipe’s territory . . . the Xocós (also written with K, as the chief Apolônio prefers) is the only surviving one.” The other page of the liner notes contains a statement by Apolônio beginning with the phrase, “The Xokó people have lived for a long time on Sno Pedro Island . . .” Under these circumstances, spelling has become a site of symbolic politics over which Apolônio was attempting to exert his influence.

2. According to Alcida Ramos, “In Brazil [the term] Indian has gone through phases of denigration and of regeneration. The indigenous movement of the 1970s and 1980s reappropriated the term and infused it with a substantial dose of political agency” (*Indigenism: Ethnic Politics in Brazil*. Madison: University of Wisconsin Press, 1998:5-6). Janet Chernela (Conversation with author, May 5, 2004) explains that the term *Indian* is imposed by the state and when it is accepted and used by indigenous people, it is a means of articulation with the state.

3. This is being done with support from a federal agency that promotes Afro-Brazilian identity and pride, founded on a 1988 constitutional provision known as the *quilombo* clause. The 1988 Constitution was promulgated as part of the transition to democracy after 21 years of military rule (1964-1985). Transitory article 68 recognizes “survivals of *quilombo* communities,” and calls for the granting of title to the land they occupy. Article 68, which aims to grant symbolic reparation for slavery, inspired by Benedita da Silva, the only black woman delegate to the Constituent Assembly, was passed without opposition or debate. The Ministry of Culture then formed the Palmares Cultural Foundation to implement the clause. The Foundation was named for the famous seventeenth-century *quilombo* in Alagoas, with an estimated population of 10,000 and a century of existence that ended through violent government intervention. In 1988, the centenary of the abolition of slavery, which also coincided with the promulgation of the new Constitution, Palmares and its most famous leader, Zumbi, were ubiquitous in the Brazilian media and a subject of intense discussion among black movement activists. A similar constitutional provision was enacted in Colombia in 1991, providing land to rural black communities without reference, however, to former slave status (Wade, Peter. “The Cultural Politics of Blackness in Colombia.” *American Ethnologist* 22, no. 2 (1995): 341-57, reprinted in Whitten

Jr., Norman E., and Arlene Torres, eds. *Blackness in Latin America and the Caribbean*. Vol. I. Bloomington: Indiana University Press, 1998).

4. Land rights, when granted, are different in each case. Recognized indigenous groups in Brazil do not own their land, but it is instead owned by the federal government and administered through FUNAI; while legally recognized descendants of fugitive slave communities hold their land collectively in the name of a nonprofit association, registered with the local court. While it is an important step to understand how the production of collective memory is required by legal process, we should not be content with examining such discursive formations at that level. We must also attend to the problematic relationship between collective memory and historical consciousness. Where reinvented traditions are based on interpretations of legal evidence, we cannot simply point to a tradition that is “invented” but must remain conscious of who invented it, how it has been used since its invention, who is using it now, and why. Interviews I conducted reveal that the collective memory of the Indian and black groups concerning their recent history is recounted as though they have always been separate.

5. Dantas, Beatriz Góis. *Xokó: Grupo Indígena de Sergipe*. Aracaju: Governo do Estado de Sergipe, 1997.

6. Oliveira, João Pacheco de. “Pardos, Mestiços ou Caboclos: Os Índios nos Censos Nacionais (1872-1980).” *Horizontes Antropológicos (UFRGS)* 7 (1997).

7. Oliveira, João Pacheco de. *Atlas das Terras Indígenas do Nordeste, Projeto Estudo sobre Terras Indígenas no Brasil*. Rio de Janeiro: Museu Nacional/UFRJ, 1993; Oliveira, João Pacheco de. “Cidadania, Racismo e Pluralismo: A Presença das Sociedades na Organização dos Estados-Nacionais.” *Revista do Patrimônio Histórico e Artístico Nacional* 24 (1996): 27-33:29.

8. For a full analysis of the definitional provisions of the Indian Statute of 1973 in relation to the question of race and ethnicity, see French, Jan Hoffman. “Mestizaje and Law Making in Indigenous Identity Formation in Northeastern Brazil: ‘After the Conflict Came the History.’” *American Anthropologist* 106, no. 4 (2004).

9. Indigenous land rights took shape only when the military government, at the height of its repressive period, began a concerted expansion into the interior. As the government was creating administrative means for defining indigenous areas (FUNAI was created in 1967 to replace the corrupt SPI), non-indigenous settlers were invading their territory (Schwartzman, Stephan, Ana Valéria Araújo, and Paulo Pankararú. “Brazil: The Legal Battle over Indigenous Rights.” *NACLA Report on the Americas* XXIX, no. 5 (1996): 36-43). It is generally accepted that the military was motivated by a perceived need to occupy the Amazon with Brazilians for fear that it would be overrun by foreigners (Albó, Xavier. “And from Kataristas to Mnristas.” In *Indigenous Peoples and Democracy in Latin America*, edited by Donna Lee Van Cott. New York: St. Martin’s Press and Inter-American Dialogue, 1994). The best way to rationally order Amazon development, they felt, was to remove Indians from the “path of progress” and to place them in specified, legally demarcated territories (Schwartzman, Araújo, and Pankararú 1996:37). Since property relations in that region were murky, the demarcation of indigenous land would also serve the purpose of creating marketable title (Schwartzman, Araújo, and Pankararú 1996:38). The success of the military’s policy is reflected in the increase of indigenous areas initiated under military rule: in 1967 only 10% of indigenous lands had been recognized; by 1996, 205 indigenous areas, covering 106 million acres had been registered (Schwartzman, Araújo, and Pankararú 1996:39). The military’s policy is considered an attempt to consolidate and centralize federal power vis-a-vis regional and state elites in traditional indigenous regions, such as Amazônia Legal (5 million kilometers or two-thirds of Brazilian national territory), historically considered “vulnerable to foreign invasion and communist infiltration” (Garfield, Seth. “Where the Earth Touches the Sky: The Xavante Indians’ Struggle for Land in Brazil, 1951-1979.”

Hispanic American Historical Review 80, no. 3 (2000): 537-63:542). Since the democratic opening in 1985, more land has been designated. The FUNAI website in 2001 included land that had been identified for demarcation as a total of 441 indigenous areas, covering 244 million acres (99 million hectares or 11.58% of national territory. Moreover, the indigenous population of Brazil had from 100,000 in 1970 to 350,000 in 2000.

10. Fredrik Barth is best known for his revision of ethnicity theory in "Introduction" in *Ethnic Groups and Boundaries: The Social Organization of Culture Difference*, edited by Fredrik Barth, 9-38. Boston: Little, Brown and Company, 1969. He critiqued the traditional notion of cultural traits as the defining characteristic of ethnic groups and instead proposed that boundaries and identification in opposition to other groups were key concepts in understanding how ethnic groups are constructed and maintained. Boundaries are constituted as people and cultural information cross them, while the character of the boundaries differ depending on which differences are being emphasized in a given situation. For Barth, ethnicity was the social organization of difference and hence had to be differentiated from a bounded notion of culture and culture traits. Barth was criticized for neglecting the role of power and the state, a critique he acknowledged in 1994 when he called for studies of ethnicity that treat the state as "a specifiable third player in the processes of boundary construction" (Barth, Frederik. "Enduring and Emerging Issues in the Analysis of Ethnicity." In *The Anthropology of Ethnicity: Beyond 'Ethnic Groups and Boundaries'*, edited by Hans Vermeulen and Cora Govers, 11-32. The Hague: Het Spinhuis, 1994:20). However, even in 1969 he proposed that the mobilization of ethnic groups in collective action is a political enterprise rather than a direct expression of a group's cultural ideology.

11. See French, Jan Hoffman. "Dancing for Land: Law-Making and Cultural Performance in Northeastern Brazil." *Political and Legal Anthropology Review (PoLAR)* 25, no. 1 (2002): 19-36.

12. Article 4 contains three classifications of indigenous communities: isolated, integrating, and integrated, reflecting the assimilationist perspective of the government at the time. The last of the categories, would allow FUNAI to "declare an entire community as integrated [into Brazilian society] upon the request of its members" (Singh, Priti. *Governance of Indigenous People in Latin America*. Delhi: Authorspress, 2002:60). This has never been requested by a tribe and has never been initiated by the government.

13. Since 1916, Brazilian Indians have been under the legal tutelage of the federal government, which means that their legal status was equivalent to minors, they could not be prosecuted for crimes, nor could they bring or be subject to lawsuits. The 1988 Constitution allows Indians to bring court actions, but only through a public prosecutor. See Allen, Elizabeth. "Brazil: Indians and the New Constitution." *Third World Quarterly* 10, no. 4 (1989): 148-165. Under the 1988 Constitution, Indians' "social organization, customs, languages, beliefs, and traditions" and their "original title over lands which they traditionally occupied" are recognized (art.129, 231). In the 1988 Constitution, the definition of Indian is left unchanged from the 1973 Indian Statute. Apolônio believes that Indians should be completely emancipated, a position that is much debated among anthropologists and indigenous leaders, many of whom are fearful that ending the status as wards of the state could result in loss of land rights and other benefits. See Ramos, Alcida Rita. *Os Direitos do Índio no Brasil: Na Encruzilhada da Cidadania*. Brasília: Universidade de Brasília, Instituto de Ciências Humanas, 1991.

14. As Patrick Hutton explains Philippe Ariès's essential point, "history emerges out of memory. As history transcends living memory in its scope and its abstractions, it nonetheless maintains its grounding there. The relationship between recollection and historical reconstruction in comprehending the past is always one of inverse proportions..." Hutton, Patrick H. "Collective Memory and Collective Mentalities: The Halbwachs-Ariès Connection." *Historical Reflections* 15, no. 2 (1988): 311-322:319.

15. Bourdieu, Pierre. "Language and Symbolic Power." ed. John B. Thompson. Cambridge: Harvard University Press/Polity, 1991; Bourdieu, Pierre. *In Other Words: Essays Towards a Reflexive Sociology*. Translated by Richard Nice. Stanford: Stanford University Press, 1990:138.

16. Oliveira, João Pacheco de. *Atlas das Terras Indígenas do Nordeste, Projeto Estudo sobre Terras Indígenas no Brasil*. Rio de Janeiro: Museu Nacional/UFRJ, 1993.

17. Hohenthal Jr., W. D. "As Tribos Indígenas do Média e Baixo São Francisco." *Revista do Museu Paulista* Nova Série, XII (1960): 37-71:59 (my translation).

18. Hohenthal Jr., W. D. "The General Characteristics of Indian Cultures in the Rio São Francisco Valley." *Revista do Museu Paulista* Nova Série, XII (1960): 73-86:77 (original in English).

19. Rick, Hildegart Maria de Castro. "Considerações Antropológicas sobre a Presença Indígena na Ilha de São Pedro—Sergipe." Brasília: FUNAI, n.d. [1979].

20. Melatti, Delvair Montagner. "Relatório de Viagem aos Xokós da Ilha de São Pedro." Brasília: FUNAI, 1979. The listing indicates that each person has some combination of "civilized (*civilizado*) [56 out of 169 people], Maromba, Urumãs, Fulniô, Xokó, unidentified Indian, or Kariri" (20).

21. At least thirty tribes were recognized and the process of land appropriation initiated, where before there had been only two or three. Oliveira, João Pacheco de. *Atlas das Terras Indígenas do Nordeste, Projeto Estudo sobre Terras Indígenas no Brasil*. Rio de Janeiro: Museu Nacional/UFRJ, 1993.

22. A classic treatment of this issue is Harris, Marvin. *Town and Country in Brazil*. New York: Columbia University Press, 1956.

23. Mota, Clarice Novaes da. *Jurema's Children in the Forest of Spirits: Healing and Ritual among two Brazilian Indigenous Groups, IT Studies in Indigenous Knowledge and Development*. London: Intermediate Technology Publications, 1997:11.

24. Tonkin, Elizabeth. *Narrating Our Pasts: The Social Construction of Oral History*. Edited by Peter Burke and Ruth Finnegan. Vol. 22, *Cambridge Studies in Oral and Literate Culture*. Cambridge: Cambridge University Press, 1992:132.

25. See Sheriff, Robin E. *Dreaming Equality: Color, Race, and Racism in Urban Brazil*. New Brunswick: Rutgers University Press, 2001.

26. Dantas, Beatriz Góis. *Xokó: Grupo Indígena de Sergipe*. Aracaju: Governo do Estado de Sergipe, 1997.

27. A fascinating treatment of this issue in the United States is provided by Katz, William Loren. *Black Indians: A Hidden Heritage*. New York: Atheneum, 1986. Katz reproduces a multitude of photographs as evidence of both the mixed-race heritage of Indians and African Americans and the incorporating of African Americans into Indian communities. The assumption behind this display of images is that it is possible to "tell" who is an "Indian" by looking at them. It is interesting to note that Katz does not mention the Lumbee Indians, referring once to "Croatan," the name once given to the people who lived in southeastern North Carolina, who by the early 1980s had become the "Lumbees." Sider, Gerald M. *Lumbee Indian Histories: Race, Ethnicity and Indian Identity in the Southern United States*. New York: Cambridge University Press, 1993, traces the names used by the people who now refer to themselves as Lumbee. Although one should not read too much into this omission by Katz, it might be an indication of the rapid process of identity transformation of the Lumbee Indians in mid-twentieth century.

28. Wilson, Terry P. "Blood Quantum: Native America Mixed Bloods." In *Racially Mixed People in America*, edited by Maria P.P. Root, 108-125. Newbury Park: Sage Publications, 1992. See also Sturm, Circe. *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma*. Berkeley: University of California Press, 2002, for an analysis of differential treatment between white and black Cherokee, historically and in the present.

29. Bordewich, Fergus M. *Killing the White Man's Indian: Reinventing Native Americans at the End of the Twentieth Century*. New York: Doubleday, 1996:73.

30. Bordewich, 1996; Strong, Pauline Turner, and Barrick Van Winkle. "'Indian Blood': Reflections on the Reckoning and Refiguring of Native North American Identity." *Cultural Anthropology* 11, no. 4 (1996): 547-576.

31. Wilson 1992:124.

32. Wagley, Charles. "On the Concept of Social Race in the Americas." *Actas del XXXIII Congreso Internacional de Americanistas* 1 (1959): 403-7.

33. Bordewich 1996:80.

34. Bordewich 1996.

35. Bordewich 1996:74.

36. Bordewich 1996:75.

37. Ibid.

38. Berry, Brewton. *Almost White*. New York: Macmillan, 1963:154-55.

39. Bordewich 1996:76.

40. Berry 1963:157.

41. In 1956, the U.S. Congress passed an Act recognizing that there were Indians living in Robeson County, North Carolina, who shared certain family names (Oxendine, Locklear, Chavis, Lowry) that were found in the roster of earliest English settlements and who "may, with considerable show of reason, trace their origin to an admixture of colonial blood with certain coastal tribes of Indians." The Act concluded by designating them "Lumbee Indians of North Carolina" while at the same time denying them any rights associated with such designation: "Nothing in this Act shall make such Indians eligible for any services performed by the United States for Indians because of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians" (Berry 1963:159).

42. Sider, Gerald M. *Lumbee Indian Histories: Race, Ethnicity and Indian Identity in the Southern United States*. New York: Cambridge University Press, 1993:72. See Blu, Karen I. *The Lumbee Problem: The Making of an American Indian People*. New York: Cambridge University Press, 1980.

43. Bordewich 1996:77.

44. See Warren, Jonathan W. *Racial Revolutions: Antiracism and Indigenous Resurgence in Brazil*. Durham and London: Duke University Press, 2001, for a discussion of preference for Indian over black identity, concluding that such a preference is not due to anti-black sentiment (Chapter 6).

45. This apparently altruistic statement on the part of the *cacique*, in light of the competitive history of the two communities, carries multiple meanings.

46. Bordewich 1996:82.

47. Clifford, James. "Identity in Mashpee." In *The Predicament of Culture: Twentieth Century Ethnography, Literature, and Art*, 277-346. Cambridge: Harvard University Press, 1988.

48. Clifford 1988:285.

49. Clifford 1988:289.

50. Silverblatt, Irene. A Lessons of Gender and Ethnohistory in Mesoamerica. *Ethnohistory* 42, no. 4 (1995): 639-650:642, 647.

51. Clifford 1988:291-95. Between 1905 and 1960 the category "Indian" disappeared from Mashpee's federal census records. The 200 individuals who had been so classified were listed as "colored" or "other" (300). Similar census changes have been noted for the Lumbee and the Xocó.