OYSTER WARS AND THE PUBLIC TRUST

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SUBTITLE?: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY.

Piscary:

1. The right of fishing (as a thing owned); now used in phr. common of piscary; se quot. 1880.

1474. Rolls of Parli. VI. 166/2 Markettes, Warens, Piscaries, Fre Customes.
1607. Cowell, Interpr., Piscarie (piscaria)...signifieth in our common law, a libertie of fishing in an other mans waters.
1766. Blackstone. Comm. II. xvi. 26 That the eyotts or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and the soil.
1837. Macauley, Ess., Bacon (1887), 377. That the most profound thinker..of the age..confounded the right of free fishery with that of common of piscary.
1880. Williams. Rights of Common. 259. Common of piscary is a liberty of fishing in another man's water, in common with the owner of the soil, and perhaps also with others, who may be entitled to the same right.

2. A place where fish may be caught; a fishing ground, fishery.

...
1628 Coke, On Litt. 198. Breaking their Closes,...cutting their woods,...fishing in their Pischary [Fr. pischarie].

3. Attrib., as adj. pertaining to...

...1869 Daily News 23 July. When the humbler tenants of presumed piscary properties were being impoverished.
1883. Fisheries Exhib. Catal. 273. The piscary laws and customs were severe.

——The Compact Edition of the Oxford English Dictionary. Glasgow, New York, etc.: Oxford University Press, 1971.

CHAPTER 1: OYSTER WARS AND THE PUBLIC TRUST

This book is about "oyster wars" and other conflicts over property rights in 19th and 20th century New Jersey and about the resulting court cases and how they shaped local and American common law. It is also and necessarily, given the particulars of this history, about culture. North American culture includes the idea of the free and equal right to go fishing and to use waters and beaches for transportation and pleasure. Yes, we might have to pay for parking, buy a license, and follow regulations imposed by our governments' "fish and game" agencies and the Coast Guard, but otherwise no one can keep us from the great rivers, bays, and oceans of our continent. It seems natural to claim these rights as human beings and as citizens.

By and large, Americans also accept the idea that problems flow from this situation: there may be too many speedboats in the bay to make sailing safe, the beaches will be too crowded on holiday weekends to be pleasurable, and fish are getting scarcer because too many people are going after them. This "open access" problem, somewhat misleadingly titled the "tragedy of the commons" (Hardin 1968; cf. Ciriacy-Wantrup and Bishop 1975; McCay and Acheson 1987a), has become one of the most influential ideas proposed for why humans harm or destroy much that is valuable to them. It underpins policies in natural resource and environmental management which use the powers of government to limit how many people can be involved and how much they can do to or take from natural systems. It also supports policies that privatize some or all aspects of the use of natural resources.

Contemporary examples include proposed sales of public lands, the creation of tradeable permits for emission of pollutants, and carving up fisheries and forestry quotas into individual, transferable units. These are all new and controversial.

Why is privatization of natural resources so controversial? Properly the answer would depend on the specifics of the situation, but there are general answers as well, including the social, cultural, and economic values of maintaining some resources, places, and opportunities as "common property," to be used in common by members of a community. The goal of this book is to explore this contested terrain through the lens of history and anthropology. By examining a series of conflicts —some involving enough planning, actors, and violence to be called "wars"— that have taken place over property rights in oysters, fish and waterfront, I show the strength, persistence, and contours of claims for both common property and private property. I show how "un-natural" the notions of free and equal access to certain "common" resources are, by pointing to the long history of attempts to articulate and defend them against privatization.

As the oyster wars and other conflicts I describe moved into the legal system —which most did, orchestrated as they were to that end— these notions about natural rights were linked with other ideas by lawyers and judges, becoming "the public trust doctrine." This doctrine took shape in New Jersey and surrounding states in the early 19th century, based it was claimed on Roman law, natural law, and English common law. However, it was a specifically American creation, and very problematic at that. The court cases reviewed show

clearly that this doctrine could be re-interpreted and contorted to support privatization, as well as the notion that state governments "own" certain properties in trust for the people.

Legal doctrines are sets of symbols and the meanings attached to them at different points of time and place; accordingly they are what anthropologists mean by culture. The book is therefore squarely in the tradition of cultural anthropology. In the spirit of the lineage of American anthropologists that includes Boas, Sapir, and Kroeber, I focus on one fairly specialized domain of culture —sets of symbols structured through a special tradition concerning the bases for claiming property in oysters or other shellfishes and the broader notion of "public trust." To many people, "public trust" and even oysters are as obscure as the recipes for oulachen oil soup or smoked salmon collected by Franz Boas and his Kwakiutl assistant George Hunt (Boas 1966). However, social and cultural researchers long ago rejected the cataloging and diffusionary approaches of the early ethnologists for more holistic studies. In that tradition, I try to contextualize the legal decisions in relation to the social and ecological relations that they touch upon, namely the fisheries, shellfisheries, shipping, and other activities using the river banks, beaches, channels, oyster beds, and fishing grounds of New Jersey. Moreover, I work within the more recent tradition in social analysis and cultural studies that insists upon the importance of social relations, conflict, and individual action in the construction of culture and the environment. The historical perspective taken is enhanced by appreciation of the dynamic and elusive nature of "tradition" and the extent to which culture is intentionally constructed by historical actors (Wagner 1981; Hobsbawn and Ranger 1983; Ohnuki-Tierney 1990a). Surely the culture of

the law is a worthy object for study in these regards: legal doctrines are historically contingent social constructs. They are powerful symbols of a professional elite that may clash or resonate with symbols, social meanings, and sentiments found elsewhere in society. They underpin and create structures that inform action, and in turn they are molded and transformed by contests over right, meaning, and things.

The Public Trust Doctrine

> *There is little controversy about the existence of the public trust historically in the United States. But what, exactly, is it?* — Plater, Abrams and Goldfarb, 1992, Environmental Law and Policy, p. 375.

In the U.S. there are two major instances of public claims to ownership of natural resources: federal ownership and control of most of the land in the, West and the public right of access to the reaches and resources of tidewaters and navigable rivers and lakes. Neither derives from the American constitution. Federal land ownership comes from acts of Congress. Rights to fish, sun-bathe, swim, sail, bird-watch, and push baby-strollers across the sand (Salkin 1991:78, citing a New York case, *Tucci* v. *Salzhauer,* 1972) derive from the common law and what has come to be known as the public trust doctrine.

The public trust doctrine is a very difficult and hence intriguing cultural artifact. It is about largely unarticulated (Reis 1991: 6) and diffuse rights (Sax 1980: 193) of the public, itself an unarticulated, amorphous, and elusive entity (Rose 1986). The general meaning of public trust is self-evident: something is held by the government in trust for the public. Its original form, and in law courts its more precise rendering, concerns patently slippery,

muddy, and elusive subjects: waterways and the shores lapped by them, usually tidal and navigable. With roots in Roman and English law, it grants common use-rights for some purposes to the public. Here is how it was introduced in an important case of the Supreme Court of California, *National Audubon Society* v. *Superior Court (Mono Lake),* in 1983: ""By the law of nature these things are common to mankind —the air, running water, the sea and consequently the shores of the sea." (Institutes of Justinian 2.1.1.). From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns "all of its navigable waterways and the lands lying beneath them 'as trustee of a public trust for the benefit of the people.'...." (as excerpted in Plater *et al.* 1992: 386). The doctrine has been expanded in recent decades to emphasize the responsibilities of governments to protect public interests in recreation, water quality, and fragile and highly valued ecosystems.

The public trust doctrine was created over centuries of conflicts over fishing rights and ownership of tidal and navigable waterbeds. It was created through the assertions of fishermen and other people with common rights against those claiming exclusive rights, and through the thinking, writing, and persuasive skills of scholarly, imaginative, and sometimes nefarious specialists in the law. The common law is tradition in the making, constructed through the peculiar set of social relations and culture known as case law, and the public trust doctrine is a particularly apt example of legal invention and reinvention. Eventually the notion —acknowledged as a legal fiction (e.g., *Browne* v. *Kennedy* 1821: 208)— emerged in English common law that the tide-washed littoral and tidal rivers (and/or the beds of

navigable rivers, a frequent matter of dispute) were owned by the monarchy. However, this was not as private property *(jus privatum)*. Rather, the king or queen's ownership was in their capacity as sovereign, and they held these places as *jus publicum,* subject to the common rights of fishing and navigation held by subjects of the kingdom. Some jurists also maintained that if these properties were granted to private persons, public use-rights remained.

For Americans the clincher, created by American courts deliberating on the conflicts over shellfish described in this book, is that after the American revolution, the people became sovereign. Therefore the people, through their representatives in State governments, hold not only certain common use-rights but the property itself.

The public trust doctrine also came to be known as the "state ownership" doctrine and played a role in how the management of fisheries, as well as oil and gas and other matters (Burrowes 1988), would be carried out. American courts recognized that the submerged lands of all navigable waters below high tide mark, out to the three-mile limit of the territorial sea, are the property of the individual states rather than the federal government. In legal theory the state does not own the fish and shellfish of those waters because they cannot be owned by anyone until captured, but U.S. policy is that the individual states have management jurisdiction over the fisheries and shellfisheries and other extractive industries, within three miles of the coastal baseline. The state governments should manage the public trust for the benefit of the people. Until 1977, when the U.S. joined other nations in

declaring a 200-nautical mile band of extended fisheries jurisdiction and thereby created a zone of federal control, the states were the major players in fisheries management.

Like much else cultural and symbolic, the doctrine is ambiguous and multivalent. It is peculiar in challenging the dominance of private property in ways that would seem to favor the relatively poor and powerless at times when great fortunes and properties were being accumulated, during the rise of industrial capitalism. It is an "unusual legal doctrine" (Sax 1980: 483, Stevens 1980, Rose 1986) in continuing to support public interests and claims that are often vague, ill-defined and customary against private property claims that are more definite and precise. Historically, as students of common rights in agrarian England have shown, the latter won out over the former in courts of law (Thompson 1976: 339-340). On the other hand, the doctrine can be used to argue that Parliament and State legislatures are "fee simple" owners of foreshores and tidewater lands, and may grant, sell and otherwise alienate the public trust to private owners.

The public trust doctrine would seem to be a "backstage" principle in Western culture. It is rarely codified in legislation. In addition, most often it exists, in legal terms, only by implication:

> … [The public trust doctrine] has always rested on implication. No legislation imposed it as common law, though the Magna Carta made reference to eliminating obstructions in coastal rivers. The doctrine was applied to the original states, and later to the western states through the equal footing doctrine, by implication. Thus *Illinois Central* itself [the landmark federal Supreme Court case] rested on an implied trust [Wilkinson 1980: 299]!

It also appears in implied obligations to private property, including the idea, expressed in an

1887 case involving the State of Kansas *(Mugler v. Kansas),* that "property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community" (cited in Belsky 1992: 73).

Another reason for seeing it as a background principle derived from more general notions of Western culture is that although it is expressed and given shape in legal arguments and opinions, the public trust doctrine cannot be easily pigeon-holed. In the leading environmental law text, it is treated as co-equal with federal and state constitutions as among the "fundamental environmental rights" (Plater *et al.* 1992: 57). However, whether it is constitutional law, or whether it is common law, or whether it is something else is an open question. Common law is supposed to be subject to statutory law, but the public trust doctrine been used to overturn a statutory enactment. "A number of courts and commentators have indicated that neither the federal government nor the state governments can act to abolish the public trust doctrine. . . . As trustees, the state sovereignties and federal government are bound by the terms of the trust" (Plater *et al.* 1992: 375). Does this mean that it is a principle of federal constitutional law? Is it a federal doctrine or just a state doctrine? Does it apply to federal government actions? In either case, what is its scope? It has already gone beyond the tidal waters and navigation and fishing issues, but how far can it go? *{Ibid:* 376). These are all matters of uncertainty and dispute. Another set of questions concerns terms of the trust, particularly the degree to which a legislative body can change and alienate the use of public trust resources, a question central to the cases reviewed in this book.

In context, the persistence and revival of common property through the public trust doctrine is remarkable. From the 16th century on, *res communes* gradually but definitely disappeared as legally recognized property in England and America (Coquillette 1979: 807-809; Rose 1986). Rights of common pasture, rights of fishery, rights of estovers, and rights of way might still be claimed but their chances in court against more "substantive" exclusive property rights were poor (Thompson 1976). Property increasingly became identified with exclusive possession, hastened by the success of the enclosure movement in England, and contributing to the enclosure and sale of municipal common-lands in colonial America (Coquillette 1979: 808-809). This made it more difficult for those with common or public use rights to bring action on others for harming the resources on which they depended. The air, running water, seas and seashores became *res nullius,* owned by no one and thus free to untrammeled exploitation by everyone, particularly growing industries and municipalities. Legal protections for common use-rights, as well as other traditional and essentially agrarian uses, called "natural uses" in the courts, were replaced by utilitarian pro-development arguments for priority and the balancing tests of economic efficiency (Horwitz 1973). As common resources became *"no one's property,"* many of the costs of development were then forced on society and the ecosystem, and there were few incentives to develop technologies to control pollution or over-harvesting (Coquillette 1979: 820; see also Horwitz 1977: 77-78).

The public trust doctrine concerns the *res communes,* or law of the commonalty which historically also included recognition of the inalienable property rights of freeholders against damages done by others to that property. The main English common law rule was *sic utere tuo ut alienum no laeda* (so use your own property as not to injure your neighbors) (Coquillette 1979: 775). The scope was eventually broadened to those with common rights, making it possible to think, at least, of the possibility that common right fishermen and others might be able to go to court against those whose activities fouled the fishing grounds, on nuisance grounds, a topic that will appear in some of the cases to be discussed in this book. However, in the 18th and 19th centuries the status of common rights had declined precipitously. And more utilitarian ways of thinking made their way into law chambers and courts, making it possible for owners of furnaces and factories to successfully argue for the greater social benefit of their activities against the acknowledged harm caused to adjacent property owners, much less common use-right holders. These changes played a role in sundering relationships between individuals and their environments, which helped pave the way, as it were, for neo-classical "tragedies of the commons":

> The older common law,... constantly concerned itself with the concrete relations between individuals, especially in its development of property doctrine. Lime kilns, tallow furnaces, pig sties, and dyeing vats, although important to the social well-being of seventeenth century England, were viewed by the courts in the context of the costs they inflicted on neighboring property owners and not as isolated under ideal conditions. Similarly, the earlier common law protected certain things of importance to the entire community from private exploitation by individual owners. These *res communes,* in theory, gave even the humblest person a legal interest in a part of his environment [Coquillette 1979: 820-821].

The public trust doctrine played a role in this process, particularly during the mid-19th century when, as will be seen in the cases to be reviewed, courts interpreted state ownership to mean the right to alienate trust lands for private uses, and when courts accepted "local custom" as adequate tests for making exception to the doctrine. On the other hand, the public trust doctrine, as well as the sentiments and actions of "commoners," such as the shellfishermen who appear in the "oyster wars" of New Jersey, helped keep alive the notion of state trusteeship as well as the idea that some things were too important to the society and the people within it, for sustenance, navigation, and trade, to allow anyone to create barriers to their use. Ironically, it took an extreme act of alienation to revive the public trust doctrine and give it major stature in federal law, with reverberations for state courts: the giveaway of Chicago's waterfront on Lake Michigan to a railroad company.

Today as always the public trust doctrine is capable of different readings. To some it means strictly that the states own the lands and waters below high tide-water mark, and the legislatures of the states may dispense with these lands if they deem it in the public interest. To others the trust part is more important than the state ownership part. State ownership is really a trusteeship to protect public use-rights for fishing, navigation, sunbathing, and other valued activities in coastal areas. In this reading, the people are the real owners; their elected representatives in the state are acting on their behalf, and public rights of fishing, navigation, etc. are inalienable rights.

The Public Trust and the Commons

My interest in the public trust doctrine is incident to my research on common property regimes in marine fisheries and my concerns about the analytical model known as "the tragedy of the commons." Dissatisfied with the assumption that the "natural" state of marine fisheries was the highly competitive, open access scenario that resource economists and biologists saw as inevitably leading to resource decline and poverty, I joined many other social scientists in criticizing the model (McCay 1979, McCay and Acheson 1987a, McCay 1995). In her important book, *Property and Persuasion* (1994), Carol Rose has emphasized the importance of story-telling, of vivid narrative, to the task of persuading others about property relations. She pointed to the narrative of the tragedy of the commons as a case in point, objectified in the image of rustic village herders deciding to put cattle and sheep on the village commons, and led by their lack of exclusive property rights into the tragedy of trodden and sparse over-grazed meadows (Hardin 1968, based on a similar analogy given by Lloyd (1968 [1833]).

Economists and biologists are more likely to use graphs for persuasive power, including the now iconic one showing how increases in the number of boats in a fishery would continue beyond the point of diminishing returns under open access conditions, whereas a private owner would stop adding boats at the point of maximum profitability, or "rent," which was likely at some point before the line representing the state of the fish population began to go down (Gordon 1954, Scott 1955) (Figure XX). The language of this

analysis also underscores an implicit argument about the immorality of the situation. Numerous fishing boats compete for a limited resource with little incentive to conserve it because what is not taken today by one, is likely to be taken today or later by another. Accordingly, as long as there is any profit at all to be made, more boats come into the fishing grounds, and soon there is none left; the "rent" created by nature is "dissipated" (Gordon 1954). The power of the fishery narrative is suggested in the facts that the social dilemma of open access systems has come to be known as "the fisherman's problem" (McEvoy 1986), and a simulation game called "Fish Banks, Ltd." has become a popular tool for teaching about global environmental problems (Meadows *et al.* 1991). Within fisheries, the narrative has played a powerful role in defining both problem —open access— and solution —increasingly one of privatizing fishing rights.

I am among those whom Rose (1994: 289) defines as "neo-communitarians," who posit another image, of people coming to terms with each other and the resources upon which they depend, to make the point that the "tragedy of the commons" argument essentially ignores and in practice often thereby weakens communal systems of using and managing common resources (McCay 1979; McCay and Acheson 1987; see also Ciriacy-Wantrup and Bishop 1975; Berkes 1989; Ostrom 1990; M.E. Smith 1984). The images and narratives used to give life to this argument include manorial courts agreeing on rules for "stinting" the number of animals allowed on village commons (Cox 1985; Hanna 1990), Swiss mountain villagers maintaining common rights and regulation of the high *alp* pastures and forests (Netting 1976; Ostrom 1987), inshore fishermen who successfully claim and

defend exclusive territories (e.g., Acheson 1987), and the often elaborate systems of "sea tenure" found among the reefs and lagoons of the Pacific Islands (Johannes 1978, 1981).

There are, however, dangers in this neo-communitarian movement, dangers of "romancing the commons" and ignoring other realities. Most of the commercial fishing I have observed in both Canada (Newfoundland) and the United States (New Jersey) has a long history of open-access fishing, which only within the last decade or so has been curtailed by limited licensing. Moreover, many of the problems experienced in declining fish stocks have as much to do with "outside" factors, such as un-manageable climatic and oceanographic changes, poorly regulated foreign fishing and coastal development out-of-control, as they are caused by open access in the local fisheries. Although there are important, often informal, systems of local-level and self-governance in these fisheries, including the management systems of small cooperatives in New Jersey (McCay 1980; McCay 1987), an exclusive focus on these systems is unfair to the reality of the majority of fisheries and, as I try to show in this book, the long history of struggle for freedoms to fish. Open access can be recast, and likely tempered with regulations, as a "common use right," and the fisheries as cases of common property management, where the principle of equality is combined with notions of the need for flexibility and freedom on the part of those dependent on marine resources. As I have argued elsewhere (McCay 1989a) open access is Janus-faced: it can also be understood as a means of breaking down barriers on behalf of capitalist expansion in colonial development, trade, and fishing, with the help of consultants such as Hugo Grotius, working for the Dutch East Indies Company. In any case, it is rarely "natural." Although

freedoms to fish and use the foreshores of tidal waters and navigable rivers are claimed as natural rights, they arise from specific political, social, and legal experiences. They have been created and recreated, shaped and challenged and reshaped, in human encounters and deliberations. In the courts these claims became part of debates that led to the public trust doctrine.

In order to make my point, I too offer narratives, these of people fighting about common versus private rights in the "oyster wars" and other encounters in New Jersey.[1] In the chapters that follow, which are organized around court cases, I tell many stories where common rights of fishing and state ownership of tidewater resources are challenged. Sometimes they are successfully defended, sometimes not. Sometimes they played a direct and important role in the process of crafting the public trust doctrine. Sometimes their outcomes were influenced by truncation of the "trust" part of that doctrine to allow alienation of the riparian commons to private hands. The stories are also about the push toward privatization, accompanying the practice of oyster "planting" and as a way of creating the incentive structure for improved management of deteriorating resources and habitats. In a sense, the book is about conflict and contradiction within the moral economies of rural, fishery-dependent communities.

[1] I present these accounts as stories for other reasons too. First, the requirements of causal explanation are very difficult to meet in social and historical research, and narrative explanation, within a framework that recognizes the roles of both interpretation and rational choice in social action (cf. Little 1991), is about all that we can do well. More to the case at hand, information about the "oyster wars" and other conflicts comes almost entirely from legal arguments and court reports, which are stories themselves. Story-telling is a powerful tool in legal persuasion (Weisberg 1992; La Rue 1995), and it can be very risky to use such accounts as sources of information on "what really happened" without recognizing their rhetorical functions.

The major actors begin with the "commoners": poor fishers and others dependent on common use-rights for at least part of their living, who used poaching, piracy, and test cases to protect their stakes in the resources of the tidal rivers, bays, and seas with their vehement claims to common fishery rights. The language of "rights" does not arise unless something is threatened, and in these stories, the commoners felt threatened by a second kind of actor, the expanding class of oyster planters and shippers, whose business depended on enclosure of parts of the marine commons as well as continued access to naturally-produced shellfish. They too were often found engineering test cases as a way among several to seek protection for their claims against the common right fishers. A third set of actors is made up of lawyers and judges, who had to make sense of these conflicts within the inherited framework of common, constitutional, and state law, and to articulate reasons for their interpretations. Somewhere in these stories, lurking in the background, perhaps found in the clubs and offices and very persons of the lawyers and judges, are politicians and business investors. They are also in the background of a final group of actors, the peculiar people known as the Proprietors of East New Jersey, who claimed to be the real commoners, "tenants in common" of all the un-allocated land, including the foreshores and tidewater lands, with the right and duty to survey and sell those properties to private owners.

The book contributes to the study of institutional change, a topic defined and claimed by "new institutionalists" in economics and economic history (e.g. North 1981), among others but which is much broader than that (Powell and DiMaggio 1991; Douglas 1986, 1994). The emphasis on information and transaction costs — the costs of knowing what is

happening, of making decisions individually and collectively, particularly with unreliable or spotty information, of monitoring behavior and gaining compliance with the rules, etc.— re-opened economics to political economy, (Williamson 1985, North 1990, Anderson and Hill 1976). It helped create incentives for collaboration among the many social sciences, economics, and history in exploring the causes and implications of institutional change, based on the axiom of rational action (see Little 1991). The "public choice" branch of political science, which brings economic tools to political issues, has emerged as a center of work on property rights institutions, through the analytic and synthesizing work of Elinor Ostrom (1990) and the Workshop on Political Theory at Indiana University (see also Bates 1983, 1992). Anthropologists are full-fledged participants in this discourse, particularly those like myself and James Acheson (McCay and Acheson 1987) who have worked within the paradigms of economic and ecological anthropology. For example, using the logic of new institutionalist economics, Acheson (1987) argues that the reason why the lobstermen of Maine, well accustomed to fiercely defended territoriality, are unwilling to go the next step to privatize lobstering grounds has much to do with the transaction costs and ecological uncertainty of making this change. I have applied a similar approach to the explanation of illegal activities in a New Jersey fishing community (McCay 1981).

In her discussion of the power of narrative imagery, Rose (1994: 287) describes the "scarcity story" of institutional economics. In this story about the evolution of property rights, a resource becomes scarce in Act 1; in act 2 people scramble to get it; in act 3 they get tangled up in conflicts about who gets what; "...and, finally, (Act 4) they create property

rights regimes, which make the conflicts go away, while the rights holders happily invest and trade" (Rose 1994: 287). The story is given vivid and persuasive life in narratives about the development of territoriality among Canadian Indian tribes within the North American fur trade (Demsetz 1970) and accounts of frontier conflicts over land, water, and mineral rights (Anderson and Hill 1977; Umbeck 1981).[2]

The "tragedy of the commons" variant is one with no Act 4, or an Act 4 where failure to come up with a private property regime results in worsened scarcity and conflict, bodies lying about the stage and the scenery in tatters. But if the play is about oystering communities, this need not be so. Privatization of shellfish beds, like enclosure of common fields and meadows and placing barbed wire fences around the rangelands of the West, is more feasible than privatization of fin-fishing grounds. Moreover, it also has a long history of enthusiastic recommendation. In America (and the Old World), enclosure of oystering lands was deemed essential for the new practice of oyster culture, just as the enclosure of agrarian lands had long been advocated as necessary for agricultural progress. Some of the New Institutionalists in the general sense do this today, as "free market environmentalists" (Anderson and Leal 1991) who advocate privatization or quasi-privatization of rights to use natural resources and ecosystem services.

[2] **The "scarcity story" has a much longer history in Western thought, and is well represented in the work of 18th and 19th century social theorists who imagined property-less or communal property relations early in human experience, transformed into individual, clan, royal, state and other forms of private property through one or another mechanism (see Maine 1884; Marx 1946). The fictional movie "The Gods Must Be Crazy" develops another familiar variant, where scarcity is created by new items of value, and transforms social relationships and culture thereby.**

From this perspective —which has a long history in the shellfisheries— the persistence of common property claims is problematic. I agree, but I also situate the problem in relationships of social class and political power, and in the contested moral economies they engender, following more recent work in legal anthropology (Starr and Collier 1989a, 1989b), political economy (e.g., Scott 1985), and a longer tradition in social history, where my indebtedness to E.P. Thompson is most obvious (Thompson 1966, 1975, 1978, 1991; see also Sider 1980, 1986).

The phrase "tragedy of the *commoners"* is useful in highlighting the disregard of many natural resource management policies for social consequences. An appropriate narrative is Parliamentary Enclosure of the English commons as well as accounts of the roles of colonization and Westernization in destroying local sea tenure systems (Johannes 1978, 1981; Cordell 1989; McGoodwin 1990). Enclosure of common fields, pastures, wastelands, and even fish ponds in England occasioned distress, protest, and covert and 'illicit' claims on privatized lands (e.g. Reaney 1970; Hammond and Hammond 1920; Seebohm 1926; Tawney 1912; Turner 1984; Thompson 1966). Even more so, and more persistently, did the Game Laws of the late 17th to 19th centuries, which made the taking of everything from deer to rabbits the exclusive privilege of the elite and at times made poaching a hangable or transportable offense (Thompson 1975; Howkins 1979; Munsche 1981; Archer 1990). In the law courts of New Jersey these images, as well as that of the signing of the Magna Carta, the Great Charter of English Liberties, at Runnymede, played a major role in arguments for the public trust doctrine. Another story used by lawyers and judges who reflected on the

consequences of privatization was the sweeping and dramatic evictions of Scots crofters in the great "clearances" of Highlands properties for sheep raising. These and other stories and images were important parts of the evolving and never singular culture of the commons in New Jersey, a culture that played a major role in constricting privatization, even of oysters.

Outline and Themes of the Book:

The structural core of the book is a series of court cases about conflicts over fishing rights. The courts that figure in this narrative are mainly the higher courts of the State of New Jersey (its Supreme Court, sometimes sitting as the Court of Errors and Appeals),[3] federal district courts, and the Supreme Court of the United States. The time span is from 1806 to about 1920, with excursions backwards, to the colonial era and even Roman times, and forward to the post-World War II period. The approach is twofold. The first is to follow major court cases both for their content and contributions to an evolving common law. By itself, that would constitute little more than a law review exercise. The second approach, more anthropological, is to explore the events, issues, and people behind the cases and decisions and how they might be connected with one another. Anglo-American case law treats court cases as discrete, chronologically related to one another through holdings and

[3] **In the period under study, the higher courts of New Jersey were the Court of Errors and Appeals; the Supreme Court; a Court of Chancery; and a Court of Impeachments. The Supreme Court had the powers of the court of King's Bench in England, for both civil and criminal law: "the great prerogative writs of the King's Bench: certiorari, mandamus, and quo warranto..." (Bebout 1931: 13). It included a Chief Justice and 8 Associate Justices. They sat as the Court of Errors and Appeals as well (see also Clevenger 1903).**

dicta and rulings but otherwise without connective tissue. This work, on the other hand, assumes and asserts the inter-dependence of the law and the lives and events that touch the law and are touched by what it does. This approach is similar to the extended case analysis, or situational analysis, that came to dominate the social anthropology of law in the 1960s and 1970s (see Greenhouse 1986; Starr and Collier 1989b). The approach uses disputes —here about rights to oysters and clams and fish— to gain access to larger or cross-cutting domains of social structure or culture norms in conflict and consensus.

I. Introduction

The introductory section continues with Chapter 2, about an 18th century episode of conflict over ownership of coastal property in Cape May County. It shows the importance of common-rights to fish, shellfish, and hunt to coastal inhabitants but also shows how easy it was to lose those rights in a colonizing society that had commodified just about everything (Cronon 1983; cf. Appadurai 1986). Creating the fiction of ownership of "natural privileges" was one thing; determining who the owners were and should be was another. That was the major political, social, and legal question in the conflicts and court cases of this book. This chapter also introduces the "proprietors" of New Jersey. New Jersey was one of the colonies of the Middle Atlantic region, where individuals or organizations were granted sole proprietorship by the English Crown or its favorites, such as the Duke of York who got most of New York and New Jersey to charter to colonists or to turn over to proprietors. The proprietors in turn granted or sold land to others. Colonial New Jersey was divided into East

and West Jersey, each with its groups of proprietors. The Proprietors of East New Jersey, in particular, played major roles in many of the court cases discussed, providing as they did a contested basis for private title in lands brushed and covered by the tides.

II. Oystering in 19th Century New Jersey: Nature, Culture, and Property Rights

One of the contributions of this book is to bring human ecology to the study of the law. I do not pretend to be a legal historian, but I recognize parallels with and have benefited from the work of J. Willard Hurst (1960, 1964, 1982) and others (e.g., Gordon 1975; Horwitz 1971, 1977: Friedman 1973, 1985) who emphasize the embeddedness of American law in economic and social relations. The study of fishery and wildlife law, as Lund (1980), Tober (1981), and McEvoy (1986) have shown, brings ecological relations into the analytic framework as well. The ecological relations of oystering are central to this book, and thus the second section of the book gives an overview of oystering and oyster-planting (Chapter 3) and analyses of two court cases in Chapters 4 and 5, introducing major themes and providing geographical and historical context.

Chapter 3 describes oyster planting based on 19th century reports, locating the practice in the coastal geography of New Jersey. Oyster planting is a kind of aquaculture, and as such it calls for enclosure and private rights to the oysters that have been transplanted from their natural beds to "cultivated" beds. Responses to oyster planting by fishermen who challenged any inroads on their opportunities to take oysters and clams "in the wilds"

generated most of the major fisheries court cases in the post-revolutionary history of New Jersey's higher courts.

My point of entrance to the human ecology of oystering is the question of privatization of marine resources and resistance to it, a question which was front and central in most of the court cases. Many observers, especially from the last quarter of the 19th century to the present, have argued that privatization is required for effective management of shellfish, given the tendencies for "tragedies of the (open-access) commons" where rights to harvest are public and widely shared. I pose a question that sets a major theme of this book: why was privatization in the oyster-business as halting and limited as it was. This question is an instance of a larger question of how institutions respond to individual incentives and choices; the somewhat narrower one of the actual processes by which property rights are changed; and the more specific one of "[t]he persistence of seemingly perverse property rights in the face of what would appear to be obvious alternatives" (Libecap 1989: 3).

The topic was and is interesting. I suggest in Chapter 3 that this is less because of its role as yet another instance of a "tragedy of the commons" than because the shellfish industry of the region did not fit the basic requisites of modern capitalist industry. Expanding upon that argument also gives more of the contextual information about the political economy of the shellfisheries that is required to make sense of the court cases.

In Chapter 4, I take some chronological liberty by offering a court case from 1822 before I move to a case of 1808. The 1822 case of *Keen* v. *Rice* (and its more famous successor, *Corfield* v. *Carrall,* 1825), from the federal District Court in Philadelphia, had nothing to do with oyster-planting but everything to do with the rights of a state, and its citizens, to regulate the fisheries. The context of the case includes a long history of colonial and state attempts to manage access to the valuable oyster and shad fisheries, with closed seasons, restrictions on technology, and residency rules, a history that is central to the rest of the book. The case, which centered on battles between New Jerseyans and Pennsylvanians over oystering rights on the rich beds of Delaware Bay in Maurice River Cove, highlights another theme of the book: collective action to protect the commons. Virtually all of the shellfishery court cases that made it to the higher courts are demonstrably "class acts," rather than simply incident to conflicts over oysters or clams. The actions were intended to "try the right," whatever that right might be. My term "class act" is a pun, of course, on the other meaning of class, for most often the issue of right was tied to problems conceptualized as ones between rich and poor, between one social class and another.

The law plays a central role in any political economy, and what was most notable in the history examined is the extent to which the law could be used to protect common rights. The 1808 New Jersey Supreme Court case discussed in Chapter 5 is the first of many where private rights to planted oysters were challenged. This earlier oyster "war" (actually more a skirmish) took place on the Shrewsbury River in the northern part of the state at a time when oyster-planting was just getting started. Popular sentiment that the salt-water rivers were

"common highways" was set against claims of exclusive rights to the fruits of one's labor, in this case oysters that had been planted in the river from elsewhere. The common law principle recognized and shaped in *Shepard and Layton* was the rule that protected the rights of commoners to natural shellfish grounds, allowing claims of private property in shellfish only in areas where oysters did not naturally grow. This principle set the stage for everything else. It became the sacred rule of the shellfisheries, and remains so to this day. Many of the violent episodes recounted later in the book come about because someone allegedly broke it. Chapter 5 concludes by following the history of oystering on the Shrewsbury River to the early 20th century. The story is an instance of the complex and ultimately tragic social and ecological processes that led to the demise of oystering.

III. Shaping the Public Trust Doctrine in America

Wherever it is possible and seems important, I explore events leading up to and following from the cases, who was involved, what the issues meant in context, and how those contexts and events connect the cases, rather than simply identify and follow links between holdings, dicta, etc. from one court opinion to the next. In the third section of the book, I do this for two famous public trust cases, *Arnold* v. *Mundy* (1821) of the New Jersey Supreme Court, and *Martin v. Waddell* (1842) of the U.S. Supreme Court. They provided much of the legal basis for the landmark public trust case in the U.S., *Illinois Central* (1892). The "oyster wars" that gave rise to the cases took place in the Raritan River and Bay, part of the larger complex known as the New York Bays and hence the subject of

boundary disputes between New Jersey and New York which colored and shaped the events depicted.

An important and anachronistic institution is involved in the events and my narrative of them: the Board of General Proprietors of East New Jersey, whose attempts to make good on their investments in New Jersey real estate after the major tracts had been surveyed and granted provided opportunities for those who wished to carve private property out of the riparian commons. But the major point of this section is that in the middle decades of the 19th century American legal treatise writers, particularly Roger Angell (1847: 124-141), interpreted English tidewater and riparian law as if it were settled when in fact they, their colleagues on and before jurisprudential benches, and ordinary people fighting over resources and rights were helping create that law.

Chapter 6, then, describes the 1818 attempts by oystermen to "try the right" on the Raritan River against a farmer who had fenced off the oyster bed in front of his farm. This led to the state supreme court case of *Arnold v. Mundy* (1821), where the Chief Justice, Andrew Kirkpatrick, brought his understanding of the "public trust" doctrine to the common law of New Jersey. The "sovereign" was the owner of lands under mean high tidewater; since the American revolution the people were sovereign, and thus they were owners, through their representatives in state government. Hence the "state ownership" thesis. What the meaning of this ownership was, particularly to what extent the state legislature could convert this property to private uses, was open to disagreement, although Kirkpatrick saw it

as very tightly circumscribed by "public trust" obligations to the citizens. As is shown in later chapters, the subsequent trend in the 19th century was toward a reading of state ownership as virtually *jus privatum:* the legislature, like Parliament in England, was seen as free to dispose of public lands as it chose.

Chapter 7 analyzes the text of *Arnold* v. *Mundy* in greater depth, showing the contested views of law and history in it. What was the meaning of the colonization of New Jersey? Was it a business transaction, through the proprietors? Or was it also the creation of a society and recognition of a culture which included "birth right" such as the liberty to obtain food and livelihood from the waters? This chapter also recounts the argument that the public trust doctrine, in its American form, was indeed a cultural invention although at the time legitimized as English common law.

Chapter 8 shows the tight, planned linkage between *Arnold v. Mundy* and the U.S. Supreme Court case of *Martin v. Waddell* (1842), as the Proprietors and their associates tried to establish property rights to waterfront and submerged lands as against the state. My attempt to contextualize these cases also came up with another "oyster war," in 1827, over the question of inter-state boundaries and residency rules which had also figured in the 1822 case of Chapter 4, but this time between New Jersey and New York. Although the Proprietors were successful in lower federal court against the state-ownership rule of the public trust doctrine, at the U.S. Supreme Court, Chief Justice Roger Taney repeated most of what the state court had said, recognizing state ownership of the submerged soil and

foreshore of all navigable and/or tidal bodies of water. The chapter concludes with a discussion of a much later, 1881, attempt by the Proprietors to re-open the issue.

IV. Local Custom and Enclosure of the Commons

The fourth section of the book adds shad fishing and waterfront development to the topic of oysters and oyster-planting. The "wars" were conflicts over private property rights to shad fishing on the Delaware River; over the source of title to rights to cut grass and build docks on the Hudson River; and, again, over common versus private rights in oystering. The "plot" of the 3 chapters of this section is how legal interpretations under the rubric of "local custom" evolved such that a court could agree to enclosure of oystering commons despite the public trust doctrine, as it did in a case involving oystering in the Shark River.

One might expect an anthropologist to focus on "local custom," especially an anthropologist who has written about local custom and collective action in the management of fisheries and other common pool resources (McCay 1978, McCay and Acheson 1987). Chapter 9, on the intricate organization of the haul-seine shad fisheries of the Delaware, and Chapter 11, on the local-level oyster-leasing management system of Shark River, meet those expectations in so far as they reveal the existence and workings of such systems. However, to leave the matter there would be to ignore the fact that these and other cases, and the very concept of "local custom," could be used to legitimize rulings that went against the public

trust doctrine. One of the arguments made by the losing side in the 1821 *Arnold* v. *Mundy* case was that English common law on fisheries was "local" to English specifics, and that New Jersey conditions should shape the "folk law," including the local custom of private "fisheries" for seining shad and sturgeon. Three cases reviewed, *Yard* v. *Carman* (1812), *Bennett v. Boggs* (1831) and *Fitzgerald* v. *Faunce* (1884), support those "local customs." As Chapter 10 shows, the construct of a "local common law" or "local custom" became a major tool in bending the public trust doctrine to allow riparian landowners along the Hudson River to profit from filling in the wetlands and build wharves, piers, and bridges, as this region became a center of industrial development. Major court cases reviewed are a series known as *Gough* v. *Bell* (1847, 1850. 1852, 1858) and *Stevens v. Paterson and Newark Railroad Company* (1870).

Thus, in 19th century New Jersey, the doctrine of local custom was used to extinguish public rights and establish private ones. Chapter 11 reviews two oystering cases, *Townsend v. Brown* (1853) and *Wooley v. Campbell* (1874), that were heard by the state supreme court in the context and aftermath of the Hudson River cases. Both clearly show development of the idea that "state ownership" was more that of fee simple proprietor than that of public trustee. However, the U.S. Supreme Court case *Illinois Central Railroad Company* v. *People of State of Illinois* (1892) helped restore the notion of public trust by requiring that there be greater care in determining whether the public interest was served in a particular waterfront grant. In New Jersey, the state gradually regained its claims to ownership over submerged tidal and navigable lands, at least in the courts, and a series of "riparian

commissions" were established to grant out state lands to private individuals. These became the vehicles for privatizing tidal lands and the subject of more "oyster wars."

V. Defending the Commons: Class Acts and the Shellfish Wars

The fifth section of the book focuses less on the law per se than on larger situations of often violent conflict over riparian property rights in the bays of New Jersey, the big "oyster wars" of New Jersey's history. They took place at the end of the 19th century and in the very early 20th century in the Delaware Bay, the Mullica River and Tuckerton regions, and again, although more in the form of guerilla warfare, in Raritan Bay.

Chapters 12 and 13 are about situations where some oyster-planters gained title to oystering lands from the Riparian Commission despite rules against the use of riparian grants for this purpose. The rub in both cases, one in the upper bay of the Delaware, the other in the mouth of the Mullica River on the Atlantic coast, was that these were in areas known or alleged to be the sites of natural oyster beds. In both cases, assertions of exclusive property rights were met by large-scale, organized, and violent resistance, "trying the right." The court cases that emerged from them in the Delaware Bay case were *Polhemus v. State* (1894) and *Polhemus* v. *Bateman* (1897); in the Mullica River episode the major case was *Attorney General* v. *Sooy Oyster Company* (1909), and a related case was reported as *State* v. *Mott* (1906). However, the law was less important than responses by the state legislature, which created a state agency for management of the shellfisheries and through that agency came out

with clear policy directives supporting the rights of common fishing on natural shellfish beds.

The conflicts had been dominated by opposition between "planters" and "tongers," but at the turn of the century and particularly in the Atlantic coast and northern bays, it increasingly became one of "oyster-planters" versus "clammers." Chapter 14 shows this for the Raritan Bay, and explores court cases arising from incidents where oyster-planting grounds were raided by people claiming that the oyster beds encroached upon natural clam beds: *Metzger* v. *Post* (1882), *De Graff v. Truesdale* (1887), *Brown* v. *De Groff* [sic] (1888), *State v. Abraham Post* (1893). Decline in the natural seed beds of the region prompted investigations and attempts to privatize them, as incentive to restore them. Objection to this, or to any restrictions on the natural beds, on the part of fishermen known as "seeders" is explored as a more nuanced view of the notion of "social costs." In 1917 the unthinkable —privatizing the natural shellfish beds— became fact; around the same time a familiar analysis of the causes of problems in the shellfish industry was repeated: failure to expand oyster planting ground was blamed on "...the people who want to depend on nature to furnish them a livelihood, and [a] more or less sympathetic public" (N.J. Board of Shell Fisheries 1918:8). The real villain, though, was unbridled industrialization which polluted and dredged the shellfish beds.

VI. Conclusion

The last section of the book includes an update on the oystering saga, in Chapter 15's discussion of co-management within those fisheries, particularly after World War II. That chapter also discusses another appearance of privatization in the fisheries: limited entry, and an even larger step toward privatization of the very right to fish, individual transferable quotas. Discourse and action on the matter suggest the existence of very different perspectives and rationalities about the commons.

I address two topics in the final chapter. The first is a question that scientists and other observers of the situation in shellfishing in New England, the Chesapeake Bay region and New Jersey have asked over and over for the past century and longer. It is why it has been so difficult for oyster fishermen, courts, and legislators to agree to change the dominant system of common rights to tidewater resources.

The second part of Chapter 16 deals with the public trust doctrine. It is summarized as as having had three major meanings in the period under study: the first emphasizing common use rights, the second supporting the notion of state ownership and a weakened sense of the inalienability of public rights, and the third a revival of the doctrine and expanded use with the rise of public advocacy and environmental law, pioneered by Joseph Sax (1970, 1971, 1980). Indeed, I was introduced to the public trust doctrine as an interesting and problematic cultural entity when I came upon the Rutgers Law Review

articles of Leonard Jaffee (1970, 1971), who delved into the arcane and complex history of the doctrine apparently in order to clarify major legal and political controversies in New Jersey over beach access on the popular "Jersey shore," severe pollution of some of the state's rivers, and property claims in the swampy "meadowlands" of the otherwise industrialized northeastern corridor of New Jersey.

The two topics are related in that both concern policies about privatization of marine resources. They are causally related too, in the intersection of contested claims to oystering and fishing rights and the deliberations of lawyers and judges about those claims and about others concerning waterfront property. That is what this book is about.

CHAPTER 2: THE "NATURAL PRIVILEGES" OF CAPE MAY

"Why do the heathen rage, and the people imagine a vain thing?" — Psalms 2: 1, King James Version of the Bible.

One of the processes to which fishermen and courts reacted in the colonial as well as post-revolutionary periods was commodification of rights to hunt, fish, and fowl in the marshy and sandy lands and saltwater fringing the forests and cleared farms of the region. As William Cronon emphasized in *Changes in the Land* (1983), a special European touch with immense implications for what happened,to the ecological and social systems of North America was to perceive and treat natural landscapes and resources as commodities. The consequences for native Americans and landscapes were profound, as Cronon and others have chronicled and as was only too tragically evident for New Jersey's native groups. Less well appreciated are their implications for the European settlers and their descendants, and the ways that the moral economy of rural people dependent on natural resources bounded the range and extent of commodification.

The importance of "moral economy" and its role in resistance to hegemonic and violent forces of change has been emphasized by many people (e.g. Scott 1985) and largely taken for granted, under other names, by anthropologists. More recently, anthropologists

have focused on reactions of villagers, non-Western nations, and other social entities to the commoditization of material goods, natural resources, and labor (Appadurai 1986). A few are also bringing this perspective to a main topic of this book, privatization of rights in the fisheries (Helgason and Palsson 1996). The following story shows the ultimate power of resistance to commoditization, within a specific moral economy. It also shows a moral dilemma of an entrepreneur within a frontier community in the 18th century.

In the course of searching for examples of communally-managed natural resources in New Jersey I came upon Acts of the New Jersey legislature of 1839 and 1844 that established corporations of the citizens of townships of Cape May County, New Jersey, for the purpose of managing fishing, hunting, fowling, and shellfishing activities. An Act to Incorporate the Owners of Certain Fisheries in the Upper, Dennis, Middle and Lower townships, in the county of Cape May (N.J. Laws, 1839, supplement 1844) states that the legislature approved the incorporation of "general associations" for Upper, Dennis, Middle, and Lower Townships which were to last for 20 years (and could be renewed), and to "have and enjoy all the rights, powers and privileges incident to a body politic and corporate, for use, enjoyment, management, and preservation of their said common property and for no other intent or purpose whatever" (N.J. Laws 1839: 76). I was ready to use the case to suggest that communal management was indeed common in the 19th and perhaps 18th centuries when I stumbled upon more information that helped me understand how singular

and telling was the story behind those acts.[1] The clue was in the 1839 Act: that "certain fisheries and rights of fishing and fowling, and privileges" had been granted as common property to inhabitants of each of the townships by one Jacob Spicer, Jr. in 1795. How strange, that someone should give such property to the public and that someone should have such property to give. This turned out to be a genuine "tragedy" of the commons.

An amateur history (Stevens 1897) and reprints of old diaries (Stevens 1934, 1935) show that county control over the "natural privileges" did not arise simply out of concern about managing commonly held resources, as the legislative acts imply and I at first thought. Instead, they came about after a long, stormy period of dispute over rights to hunt, fish, and take shellfish in which people vehemently contested the privatization of such rights. In this saga, Jacob Spicer, the father of the man of the same name who gave the rights to the citizens in 1795, is the key figure. He was a public-minded citizen who turned coat, as it were, and became the single, exclusive proprietor of what were called "the natural privileges" of Cape May County, at the southern tip of New Jersey.

Spicer's father was a great-grandson of New England Puritans. Among the first English-speaking settlers of the region, he came from Long Island to Cape May in 1691, like others attracted by prosperous whaling and good prospects to obtain land (Stevens 1897: 44). He was a very active man, colonel of the local regiment and a member of the colonial

1 The research was done prior to the publication of a book by Thomas L. Purvis, *Proprietors, Patronage, and Paper Money* (1986), which covered much of the same sources and material. I have retained my original analyses and bibliographic references, which are not contradicted in Purvis' treatment.

assembly from Cape May. He was among the handful of local men who had special commissions from representatives of the king to take whales, wreck and "other royal fish" along the New Jersey shore (Stevens 1897:68) and was a commissioner for Cape May to carry out the 1719 oyster bill of New Jersey, the first protective measure on record for oyster beds.

Jacob Spicer was born in 1716 and entered the colonial assembly in 1745, remaining in it until his death in 1765. Spicer is best known for having worked with his friend and political colleague Aaron Learning to compile 126 volumes of the original grants, concessions and other state papers concerning New Jersey (Learning and Spicer 1758). Like Learning, Spicer was by almost all counts a successful, public-spirited and accomplished colonist. He was also one of the two "really rich men in the county" (Stevens 1897: 137). He was a thrifty, clever merchant, a fact helpful to understanding his behavior. Stevens says that he "had the faculty of acquiring wealth and of grasping every opportunity which presented itself" which during difficult times meant household economies and encouraging knitting and wampum manufacture as local industry.

Spicer became a tragic figure. When he was dying, in 1765, he was very unhappy and felt himself to be much maligned. In his will he complained of unjust treatment by the populace, of being villously defamed and grossly abused. All of this "on account of the natural privileges" (Stevens 1897: 139). Understanding what they were and how they figured in Spicer's troubles requires a brief diversion to the subject of the Proprietors of New Jersey,

some of whom participated in Spicer's tragedy.

The Proprietors

Various individuals and groups known as the Proprietors are central to many of the tidewater property cases in New Jersey. Not only were their actions and rights the subject of legal inquiry, but they were important sources of the historical record, publishing court opinions and soliciting legal opinions from time to time to protect their interests. The following brief sketch is based on several historical treatments of the proprietorships of New Jersey (Whitehead 1875; Pomfret 1964; Fleming 1977; Purvis 1986) as well as what can be surmised from the more meager historical treatment of the New Jersey proprietors in the 19th and 20th centuries. The 19th century history of the Proprietors has not, to my knowledge, been written, and most of the records remain in manuscript (Purvis 1986:337). The cases reported here are part of that history, as are legal opinions the Proprietors commissioned, especially in 1825 (Board of General Proprietors of the Eastern Division of New Jersey, 1825) and 1881 (Anonymous 1881), and state investigations into their operations (N.J. Riparian Committee 1882; Parker 1885).

New Jersey, divided into the provinces of West and East New Jersey, was one of several "proprietary" colonies of England, largely settled through real estate ventures organized through groups of shareholding investors. In 1664, given the chance to restore the Stuart monarchy in England and needful of a show of strength as well as money, King

George II gave his brother James, the Duke of York, all the land between the Connecticut and Delaware Rivers in North America. Within a short while Dutch colonists in what is now New York and New Jersey, as well as small groups of Swedes and Finns on the Delaware River, gave over to the English claim of discovery. They were convinced by a fleet of four ships led by Richard Nicolls. who quickly set up an English enterprise and granted land in New Jersey, attracting settlers from Long Island and New England as well as Quaker and Baptist refugees from England who, in turn, had to negotiate with the Indians (Fleming 1977: 6-8). But the new settlers were soon surprised by news that James had given half of his domain, south of the Hudson River, to two of his close friends who helped him during the English civil war: Lord John Berkeley and Sir George Carteret. They became "proprietors" of the new land.

Berkeley, who had no interest but financial in the gift from the Duke of York, sold his half to pay off debts incurred in building a London mansion. The buyers were two Quakers whose financial affairs were in such a tangle that a group of trustees, led by William Perm, was formed. They formed the Council of the Proprietors of West New Jersey in 1683, taking over from the colonial assembly the responsibility for allocating vacant lands in West Jersey in 1688. Another group of speculators in London formed a trading and land company called the West Jersey Society, which vied for power with Perm's group and controlled land sales in the area that became Cape May County (Stevens 1897).

proprietors did a poor job managing the allocation of unappropriated lands: they failed to prevent overlapping surveys, sometimes neglected to register important transactions,, and misplaced deeds in their possession (Purvis 1986: 10). In the eighteenth century, the volatile claims and the very poor management of their business and surveys led to periods of agrarian unrest (Purvis 1986) and decades of "titanic legal battles and dubious court verdicts that neither side accepted" (Fleming 1977: 14).

In West Jersey proprietary shares were progressively subdivided and dispersed, although some of the West Jersey proprietors amassed huge tracts of land and exercised great influence in the colony —e.g. Aaron Learning and Jacob Spicer of Cape May. In East Jersey, on the other hand, proprietorship remained fairly concentrated, and the proprietors were among the wealthiest and most influential people of the colony (Purvis 1986: 58-59). Their prestige and influence waned rapidly, however, during the Revolutionary period when most of the proprietors either tried to remain neutral or were loyalists to the British crown (Purvis 1986).

The Proprietors of East New Jersey are central to the major public trust cases featured in later chapters. The West Jersey Society is central to Jacob Spicer's tragedy in Cape May County.

When Carteret died in 1680, his trustees auctioned off East Jersey to make money for Carteret's widow. Twelve people bought the proprietorship, among the wealthiest being Quaker Friends, led by William Penn, from the province of West Jersey. To encourage immigration, the twelve proprietors "...went into the real estate business, selling off 'twenty-fourths' to twelve other speculators, mostly Scotsmen" (Fleming 1977:14). Each of the Proprietors had a twenty-fourth interest in the property "inheritable, divisible, and assignable as if it were a farm instead of a province" (Parker 1885: 10). They were tenants in common. In 1684-85 local representatives of these Proprietors were designated as land commissioners, the Board of Proprietors, with offices in the town of Perth Amboy on the Raritan River, which also became the center of the province of East Jersey. They had responsibility for allocating vacant lands.

Thus, the proprietors were shareholders in either the East Jersey Board of Proprietors or the West Jersey Council of Proprietors. They were entitled to participate in the division and allocation of what was viewed as vacant land. The term proprietor was also used for individuals performing business or legal services for these bodies (Purvis 1986: 58).

The Proprietors tried to attract immigrants and sell them land. They claimed rights of government and rights to quit-rent, even from land title to which settlers said they obtained from the Indians through Nicolls or from other ventures such as the Elizabeth-Town Associates. They also laid claim to huge tracts of land and forced settlers to either repurchase lands they had developed or be evicted. Both the East Jersey and the West Jersey

The West Jersey Society, as it was called, was constantly battling with William Penn's group of speculators, the Council of Proprietors of West Jersey, which had taken responsibility for allocating lands in 1688. Nonetheless, land sales were brisk. For 64 years the Society sold off the lands (Stevens 1897:43), and the Spicers were major buyers. In 1696 the original Jacob Spicer bought 400 acres (Stevens 1943). Fifty years later the Jacob Spicer estate (probably that of the grandson of the original settler) was vast: in 1751 a Jacob Spicer owned 2342 acres of unimproved land in Lower Precinct of Cape May, far more than anyone else; the next largest estate was about 600 acres (Stewart 1940).

By that time most of the land had been sold by the Society. There was nothing much left but "vacant lands" and the so-called "natural privileges" to use the sounds, marshes, and bays. Investors in the society wished to liquidate it. In 1749 a Dr. Johnson of Perth Amboy, agent of the West Jersey Society based in London, got instructions to sell off as much as possible of the society's remaining lands at Cape May (Stevens 1897: 105).

In 1752, residents of the area prepared to claim and manage the "natural privileges" as common property. One hundred and forty one freeholders formed an association and proposed to buy from the West Jersey Society "the natural privileges of fishing and fowling and all the articles of luxury and use to be obtained from the bay and sounds, which were held in high estimation" (Stevens 1897: 112). The men argued that although the "broken and sunken marshes, sounds, creeks, barren Lands" involved in the proposed purchase were of very little monetary value, something had to be done to prevent an individual from buying

Selling off the Natural Privileges of Cape May

The situation in Cape May County was based on an aborted attempt to create a landed manorial estate in the wild new land: in the 17th century, Daniel Coxe of London, amassed over 90,000 acres of what is now known as Cape May County. Although he never came to America, he tried, among other things, to create a manor complete with quitrents and feudal services at Town Bank, Cape May (Pomfret 1964: 72-73). Coxe's plans included a winery, glassmaking, and whaling industry. He claimed that he had invested £2000 in whaling and sturgeon fisheries in Delaware Bay and initiated salt panning in hopes of developing salt fish trade with the West Indies and the Mediterranean (Pomfret 1964: 72). This all came to naught except that some New Englanders settled in Town Bank to prosecute whaling.

The manorial impulse was strong and Coxe was not the only one to try. But settlers had no intentions of becoming tied to feudal systems of obligation, as disputes over quitrents demanded by the proprietors in East Jersey showed (Pomfret 1964). Conflicting land claims because of disputes between various proprietary and other groups claiming jurisdiction played a large role in the reluctance of settlers to come to New Jersey during the 17th century. Indeed, settlement on Cape May was extremely sparse until 1691, when most of Daniel Coxe's interest in the area was sold to a large trading and land company formed by a group of speculators in London.

The association proceeded very slowly and lost the main chance. There was trouble getting people to agree on the value of "a right so endeared to the people as this" (Stevens 1897: 114) —a problem that is recognizable today in the challenge of finding ways to create monetary value for ecosystem goods and services. For this and other reasons, including the simple challenge of keeping everyone in agreement on the matter —the "contracting costs" that have made it so difficult to get major institutional changes (Johnson and Libecap 1982) — the association missed the opportunity to buy the natural privileges.

In 1756 subscribers were dumbfounded and angered to find that Jacob Spicer, who was one of the subscribers to the scheme, had bought not only the "natural privileges" but also all of the "vacant land" in the entire county including much that had been surveyed and which many people thought they owned or had rights to. He purchased of the West Jersey Society all that remained of their lands and privileges, consisting of:

> . . . uplands, beaches, swamps, savannahs, cripples, marshes, meadows, oyster beds, oyster grounds, clam flats, shores, bays, sounds, thoroughfares, creeks, guts, rivulets, brooks, runs, streams, pools and ponds of water, and finally all fast lands and waters, etc., woods, trees, mines, minerals, royalties, quarries, hawkings, huntings, fishing, fowling, etc. [Stevens 1897: 115].

Spicer bought this estate —all that remained of the West Jersey Society's proprietary holdings— from Dr. Johnson, the agent of the West Jersey Society, for only £300. How this happened was a matter of speculation. When Dr. Johnson died, he willed the West Jersey Society £1000. It was rumored that the reason he did this was remorse at having sold out the land and use-rights "at a time when the influence of the wine bottle had usurped the place of reason" (Stevens 1897: 115, quoting an account by Dr. Maurice Beesley). But this

them up because that person would thence be in a position "...to monopolize the Fishery, oystering & which nature seems to have intended for a General blessing to the Poor, and [for] others who have bought the Lands and settled contiguous thereto..." (quoted in Stevens 1897: 112). Their motives were not entirely altruistic. They also noted that "...many of us the Subscribers having already given advanced prices for our Lands by reason of the vicinity of the said privileges, are now unwilling to be deprived thereof...." (Ibid).

The association would maintain the common property nature of the coastal and tidal lands, at least for its members. It would buy "the natural privileges" —with or without the land— and hold them "…in equal Shares amongst all and every of us the Subscribers Our heirs and Assigns in common and undivided forever, as Tenants in Common" (quoted in Stevens 1897: 112). To pay for them, subscribers would tax themselves according to the size of the estates and also sell off parts of the lands that were "at the head or foot" of privately held lands, allowing owners to expand their holdings. However, "commonages of fishing & oystering" would remain attached to the lands that were sold: that is, people would still have common property rights to fish and hunt on them:

> … the above said Commonages of Fishery & oystering shall be construed to remain and extend to all the Children of us the Subscribers & all their children & the children's children and so forever — And in any marshes that we Shall Sell the aforesaid commonages Shall be reserved thereout and not transferred but remain and above, [as quoted in Stevens 1897: 112].

From 1756, when Spicer bought the land and privileges, to his death in 1765, Spicer and various groups argued about the issue and negotiated possible sales. News that Spicer had purchased from the West Jersey Society all of its remaining property in Cape May County seems to have surfaced in 1759; that is the year that his memorandum book is dominated by requests from people that he sell them swamp, sedge, marsh, and other lands that they wanted, and in many cases that they had already had surveyed (Stevens 1934).[2] In 1761, Spicer barely got enough votes to be elected again to the colonial assembly; although re-elected, his popularity was waning, and according to Stevens, he "..was being severely condemned by the people for what they believed were a usurpation of their rights in purchasing the natural rights of the West Jersey Society" (Stevens 1897: 128-129).

A public meeting at the Presbyterian Meeting house on March 26, 1761 was held to ask Spicer to sell to the communal association the land and privileges. It was described by Spicer in his diary and by learning in his, both accounts showing the mercantile capitalist's pride and selfishness that, in this case, kept Spicer from doing the public-spirited thing.

[2] An example: "Octr 5th 1759 Mr. John Mackey informed me he had heard I have purchased the Society's Right to the County of Cape May I told him I had so he then Told me had a piece of Land under Survey & there was another piece of Land adjoining to his Land at Tuckahoe which he was Inclinable to purchase I told him in Case I sold he should have the preference of the above he then told me he knew of a piece of Cedar Swamp which he believed was Vacant & he inclined to purchase This I think I gave no assurance of because Cedar Swamp is likely to become so valuable I much doubt whether it will be for my Interest in any shape to dispose of" (Stevens 1934: 169).

did not help in relations between Jacob Spicer and the rest of the people of Cape May County (including his colleague Aaron Learning, who had been competing with him to buy the privileges and land but lost).

Those relationships soured. Jacob Spicer did not, Stevens says, try to prevent people from using the "natural privileges," from fishing, shellfishing, or hunting on the sounds and tidal creeks of the county. Nonetheless, he received "...a large amount of obloquy and hostile feeling, which required all the energy and moral courage he possessed to encounter" (Stevens 1897: 114). The local historian may have made Spicer look overly generous. Spicer's memorandum book, later reprinted by the Cape May Historical Society (Stevens 1933, 1934, 1935), suggests that he gained much value from the cedar swamps on these lands, which were harvested on sharecropping arrangements, and that he owned land ranging from Little Egg Harbor on the Atlantic Coast over to Maurice River on Delaware Bay. The salt marshes of the Maurice River area were being enclosed for salt hay meadows, and he had various sharecropping arrangements with people for that property too. He made money wherever he could, and was disinclined to give away anything.

Fishing privileges were not always free, and Spicer did not want to give up any oystering privileges; on May 17, 1760 he told someone that he might sell a Marsh but would not sell the "Oyster Privilege;" on February 2, 1760 he recorded with approval that the wife of a neighbor made people who used their land for fishing "pay one third of the Fish" (Stevens 1935).

derided for his simplicity [in Stevens 1935: 186].

Spicer was caught between his desire to do the right thing for the community at large, including his reputation as a citizen in that community, and the fear of being thought a fool. His greater inclination was, however, to care for his own posterity and his reputation as a calculating, sensible businessman. If the price was right, both could be accomplished, as he wrote in response to the Upper Precinct bid:

> ...could I see a prospect of making a good foreign purchase & thereby exchange a Storm for a Calm to equal advantage to my Posterity I should think it advisable & in that Case I should have no great objection against selling the natural Privileges & If I sold should by all Means give the publick a preference but at Present did not Incline to Sell.... [Stevens 1935: 185].

The next year, in 1762, Jacob Spicer gave the "natural privileges," by then described as rights to the "Shell, Scale and Fin Fisheries" (Anon. 1881: 8), to his son, Jacob. When he died in 1765, at the age of 49, his will was read at the Baptist meeting house per his instructions (Stevens 1897: 139). In his will he complained of having been unjustly treated by the public on account of the natural privileges. He also asked that the people of the county be given a pamphlet with a sermon based on the text from Psalms 2, verses 1 and 2 (Ibid). Verse 1 is as follows (King James Version of the Bible): "Why do the heathen rage, and the people imagine a vain thing?"

First, from Spicer's diary:

> Went to hear myself arraigned by Mr. Learning and others before the publick... for buying the Society's Estate at Cape May, and at the same time desired to know whether I would sell or not. I said not. He then threatened me with a suit in chancery to compel me to abide by the first association, though the people had declined it, and many of the original subscribers had dashed out their names. I proposed to abide the suit and told him he might commence it. If I should see a bargain to my advantage, then I told the people I should be inclined to sell them the natural privileges, if I should advance myself equally otherwise; but upon no other footing whatever, of which I would be the judge [in Stevens 1897: 129].

And here is Aaron Learning's account of the same meeting:

> About forty people met at the Presbyterian Meeting-house to ask Mr. Spicer if he purchased the Society's reversions at Cape May for himself or for the people. He answers he bought it for himself; and upon asking him whether he will release to the people, he refuses, and openly sets up his claim to the oysters, to Basses' titles, and other deficient titles, and to a resurvey, whereupon the people broke up in great confusion, as they have been for some considerable time past [in Stevens 1897: 129].

Spicer became ever more obstinate, fussing about whether it was legally possible that fishing and hunting rights could be "taken off" the land and sold, and raising the price he wanted for the whole estate, land and all, excepting his farm and rights for his family, to £7000. The offer was declined by members of the association, but he made it again.

In his diary entry for April 15, 1761, in response to a request to sell the Natural Privileges of the "upper precinct" of the county to its residents for a small amount, Spicer showed how torn he was about the matter:

> ...this was a delicate affair, that I did not know well how to conduct myself, for I was willing to please the people, and at the same time to do my posterity justice, and steer clear of reflection. Recollecting that old Mr. George Taylor, to the best of my memory, obtained a grant for the Five-Mile Beach and the Two-Mile Beach, and, if I mistake not, the cedar-swamps and pines for his own use and his son John Taylor reconveyed it for about £9, to buy his wife Margery a calico gown, for which he was

Cape May as evidence of the ability of proprietors to own, and sell, tidewater resources (Anon. 1881: 9). However, by 1897, when Stevens wrote his history, it was understood that associations could not hold title in tidewater resources. That was the prerogative of the state (Stevens 1897:140). By that time, as we will see, both state and national courts had decided that the relevant commoners in areas brushed by the tides were all citizens, the "public trust doctrine." The state was then owner, as trustee to protect the fishing, navigation and other "natural privileges."

Eighteenth century citizens of Cape May, New Jersey, reacted strongly to Jacob Spicer's prideful acquisition, and he suffered personal ignominy for his eager conversion of the common to the private. Spicer might be viewed as a truly modern man, a bit ahead of his time, doing what by many standards was the proper thing, taking advantage of a good deal to profit thereby. He had trouble reading the cues of his time and place, believing that credit should be given to someone like himself who sought "a bargain to my advantage," and aware that some people who behaved otherwise might be derided for their "simplicity." He was very skeptical about the ability of the rest of the community to cooperate, and he claimed not to understand why they turned against him over the matter of the natural privileges. Evidently, the rest of his community was not yet ready to abandon a moral economy that combined private property and its acquisition with respect for the need to maintain some things and places as open to everyone who needed them. As we shall see, the technology of oyster-planting intensified this dilemma.

Reversion to the Commons and the Public Trust

Over thirty years later, in 1795, the state Supreme Court confirmed that the Spicers held the estate in fee simple,[3] that young Jacob had indeed full private property rights in the "natural privileges" of Cape May. Ironically, this was done to clarify the much-disputed title so that he could return it to the community. Two months later, on November 9, 1795, in what must be one of the most remarkable reversions of a privatized commons to a communal one in history, Jacob Spicer, Jr. deeded to "a company or association of persons of the lower precinct and Cape Island, his entire right to the natural privileges, which were viewed and used as a bona fide estate..." (Stevens 1897: 139). One hundred and twenty-two named inhabitants of Lower Township became tenants in common of the "natural privileges:" He did the same for the other two townships of the county.

The new associations, made up of all freeholders in the precincts and their descendants, probably did little but enjoy the natural privileges at first. The Act of 1839 was the first evidence of state recognition of these associations as corporations with the power to enact and enforce laws and regulations concerning the use and conservation of the property held in common. In 1844 the legislature redefined some boundaries. In 1859 and again in 1879 the legislature extended the term of the communal associations, and in 1881 a spokesman for the Proprietors of East New Jersey used the case of the "natural privileges" of

[3] I was unable to find a report of this case; many of the early state supreme court cases were not reported in published form.