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CONTINUING AN AMERICAN LEGACY OF RACIAL AND CULTURAL INJUSTICE: A CRITICAL LOOK AT *BONNICHSEN V. UNITED STATES*

By Ashley Young

~ Law is embroiled in the politics of identity[1] ~

I. INTRODUCTION

Since the days the first European settlers landed on the eastern shores of North America and began to displace the indigenous population, Native Americans have been both culturally and physically subjugated. This can be seen most clearly in the acceptance of both the desecration and looting of Native American graves as well as the trafficking in and exhibition of Native American human remains. While every state has long had established laws recognizing and preserving the sanctity of the dead, allowing the removal of buried human remains solely for limited and very important purposes, the desecration and pillaging of Native American burial sites was allowed until 1990.[2] This double standard in the treatment of Native American human remains and cultural objects has been one of the shameful chapters of American history. The United States government's failure to recognize Native Americans' right to own and control the remains and sacred objects of their kin, both contemporary and ancestral, dishonored Native Americans' cultures.

With the passage of the Native American Graves Protection and Repatriation Act ("NAGPRA" or "the Act") on November 16, 1990, the United States government took a major step towards

1. Carla D. Pratt, *Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. 1241, 1241 (2005).

2. James Riding In, *Without Ethics and Morality: A Historical Overview of Imperial Archeology and American Indians*, 24 ARIZ. ST. L.J. 11, 12 (1992).

recognizing the rights of Native Americans to control their own culture.[3] Although the enactment of NAGPRA was an important step in recognizing and protecting Native American values, norms, and cultural practices, the Act's impact has recently been undermined by the Ninth Circuit's decision in *Bonnichsen v. United States*. Not only did the court deny the claimant tribes the right to rebury their ancestors, but it also denied them the right to have their culture and identity recognized as they defined it, a common and unfortunate result of U.S.-Native legal relations.

Part II of this article will lay a foundation and provide the historical, social, and legal context necessary to examine the dispute over the Kennewick remains. Part III will then lay out the basic purpose and components of NAGPRA as it pertains to *Bonnichsen*. Part IV will outline the Ninth Circuit's decision in *Bonnichsen* and provide a traditional account of the court's reasoning. Part V will inquire into why the court's decision was erroneous and will analyze the decision from the perspective of Critical Race Theory, an unconventional and progressive analysis that can provide insight into the historical, racial, and cultural relationship with Native Americans. Finally, Part VI will establish why the Ninth Circuit's decision is best understood as a reflection of white society's continued domination, both physically and culturally, over Native Americans and how the Critical Race Theory perspective captures this reality where traditional legal analysis has not.

II. BACKGROUND

Why Was NAGPRA Necessary?

A. Historical and Social Context

Native American culture has historically been subjugated by white culture. Over the long history of interaction between whites of European descent and the Native populations of North America,

3. *See* Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* (2006).

this subjugation has taken many forms. Despite some early alliances and trading that occurred between European nations and Native tribes, as the Europeans explored and settled into North America, Native Americans have never enjoyed a fair and equal relationship with the immigrants.[4] Indeed, European colonizers used numerous methods other than subjugation by military conquest as one of their tools to gain control of Native Americans and their land.

Besides the use of force, dominant society also utilized more "legitimate" means to vanquish the Indian. One such method was the dominant society's exercise of their control over the legal infrastructure of the courts and the legislature to usurp Native Americans' land, power, and culture. For example, in 1823 the Supreme Court's decision in *Johnson v. McIntosh* held that although Indians could occupy lands within the United States, they could not hold title to those lands.[5] The Court reasoned that the Indians' "right of occupancy" was subordinate to the U.S. government's "right of discovery."[6] The doctrine of discovery referenced by the Court had its origins in European Christianity and was brought to the Americas in the theology and traditions of the colonists.[7] Despite the purported separation of church and state, the court affirmed that the subordination of Indians' authority and integrity was directly related to their status as non-Christian "heathens."[8]

Through the federal courts' sanction of the doctrine of discovery, the U.S. government and white Americans were authorized and encouraged to appropriate millions of acres of land

4. *See* S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 13 (1973).

5. Johnson v. McIntosh, 21 U.S. 543 (1823); *see also* Steve Newcomb, Five Hundred Years of Injustice: The Legacy of Fifteenth Century Religious Practices, http://ili.nativeweb.org/sdrm_art.html (last visited August 21, 2007).

6. *Johnson*, 21 U.S. at 543; *see also* Newcomb, *supra* note 5.

7. Newcomb, *supra* note 5. The doctrine of discovery stems from a papal document issued by Pope Nicholas V to King Alfonso VI in 1452, in which the Pope declared war against all non-Christians in the world and specifically authorized and encouraged the conquest, colonization, and exploitation of them and their territories. *Id.* Specifically, the edict told Christians to "capture, vanquish, and subdue the saracens, pagans, and other enemies of Christ," to "put them in perpetual slavery," and "to take all their possessions and property." *Id.*

8. *Id.*

previously owned by Native Americans.[9] This doctrine also provided legal and philosophical underpinnings for the U.S. government's Indian Removal Policy.[10] While European descendents attempted to live with Native Americans in the Eastern states initially, hostility grew as Native American tribes tried to retain control over their ancestral lands. Eventually, the white settlers' drive for more land pushed the U.S. government to initiate a policy by which it attempted to move Native American tribes to territory west of the Mississippi.[11] As a result of government-sanctioned removal treaties, the United States gained control over three-quarters of Alabama and Florida in addition to parts of Georgia, Tennessee, North Carolina, Kentucky and Mississippi.[12] After the codification of this policy in the Indian Removal Act of 1830, Native Americans who chose to stay in the East became citizens of the state in which they resided, essentially replacing their Indian identity with that of their state of residence in the eyes of the federal and state governments.[13]

In addition to the dominant culture's attempt to remove Native Americans from their midst and appropriate their lands for their own use, the dominant culture has also subjugated Native Americans through their reservationist policies and efforts at Christianization. As white settlers migrated West in search for more land, it was soon evident that the Indian Removal Policy's goal of relocating the Indians in order to allow them to live freely and govern themselves would not come to fruition. President Grant's "Peace Policy", initiated in the 1860s, called for the relocation of Native Americans onto specifically defined parcels of

9. *Id.*

10. *Id.*

11. Indian Removal: 1814-1858, http://www.pbs.org/wgbh/aia/part4/4p2959.html (last visited August 21, 2007). Some Native American tribes signed removal treaties for strategic reasons, such as appeasing the government in the hope that they would retain some of their land or avoid the harassment of white settlers. *Id.* However, the government also used coercive tactics in order to get some treaties signed, such as negotiating with unauthorized tribal representatives or factions of tribes and then holding the entire tribe to the agreement. *Id.* Therefore, although the Indian Removal Policy purported to be voluntary, exactly how voluntary it was is debatable.

12. *Id.*

13. *Id.*

land and the replacement of government administrators with church officials to oversee Indian affairs and encourage the natives to convert to Christianity.[14] The ultimate aim of Grant's policy was to "civilize" Native Americans and ultimately prepare them to join the dominant society as true citizens.[15]

Through this long history of conquest, relocation, and usurpation of authority, federal Indian policy has also deprived Native Americans' of the right to control their culture and identity. Although Indian policy no longer overtly attempts to civilize Native Americans, the subordination of Indian culture and identity continues.

B. Brief History of Native American Grave and Human Remains Desecration

Since the arrival of Europeans to North America, the colonists have found the allure of Native American remains and burial sites irresistible. The reasons behind European interest in native bones have varied, and some rationales were more insidious than others; however, the end result was the same. Native graves were desecrated, and the deceased's remains were studied and displayed with complete disregard and disrespect for native values and practices. It is estimated that "raiding parties have disrupted the resting place of tens of thousands, if not millions, of Indians[16]," and now "[m]useums and universities . . . hold booty consisting of human remains and burial offerings, which stand as vivid monuments to this legacy."[17] In short, these practices represent violations of the most basic human rights of both individuals and entire cultures.

One of the most common rationales for Native American grave desecration was the pursuit of science. Among the intellectuals that encouraged digging up Indian graves in the name of science was Thomas Jefferson.[18] Jefferson even excavated an

14. *Id.*

15. *Id.*

16. I will use the terms Indian, American Indian, and Native American interchangeably in this article.

17. Riding In, *supra* note 2, at 12.

18. *Id.* at 15-16.

Indian burial mount near his home at Monticello merely for the sake of curiosity.[19] Jefferson was not even deterred by the fact the Indians had visited the burial site less than thirty years before'.[20] In addition to his personal involvement in unearthing native graves, President Jefferson initiated the Indian Removal Policy, which displaced tens of thousands of eastern Indians, relocating them west of the Mississippi River.[21] This removal policy left unprotected numerous burial sites on the land formerly occupied by those tribes, and without any obstacles to impede them, whites desecrated native graves by digging up the buried remains and robbing the graves.[22]

Apart from excavating Indian graves and removing their contents to satisfy a scientific curiosity, the mid nineteenth century saw the emergence of the new "scientific" discipline of craniology, which purported to study human skulls and deduce moral and psychological traits of an entire race.[23] Anthropologist Samuel Morton, one of the leading proponents of craniology, wrote in the 1839 piece, *Crania Americana*, that based on his research, the cranial capacity of white Europeans was 87 cubic inches, whereas the cranial capacity of Africans was 78 cubic inches and that of Native Americans was 82 cubic inches.[24] Therefore, Morton concluded that, based on this larger brain capacity, Europeans were more intelligent than other race.[25]

Later in the nineteenth century, the federal government officially endorsed the practice of searching for and collecting Indian remains in the Surgeon General's Order of 1868.[26] This order directed those employed by the U.S. Army to locate and bring to the Army Medical Museum any Indian skulls and other body

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 16.
23. *See* SAMUEL GEORGE MORTON, CRANIA AMERICAN (1839).
24. *See id.*
25. *See id.*
26. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 40 (1992) (citing the Surgeon General Order of 1868 *as reproduced in* ROBERT E. BIEDER, A BRIEF SURVEY OF THE EXPROPRIATION OF AMERICAN INDIAN REMAINS 36-37 (1990) [hereinafter BEIDER REPORT]).

parts.[27] American museums, newly founded, also engaged in and sponsored the disinterment of Indian graves in an attempt to find "interesting" bones and artifacts.[28] Franz Boas, a notable nineteenth century anthropologist, captured the prevailing attitude when he commented, "it is most unpleasant work stealing bones from graves, but what is the use, someone has to do it."[29]

C. Why Did Existing Law Not Protect Native American Remains and Burial Sites?

Many Americans of European descent are no longer surprised by the human rights violations inflicted on Native Americans by their ancestors. Although they may not know the precise details of the atrocities, most whites now recognize that grave robbing took place, and in the process, Native Americans' rights and cultures were trampled. However, many in the dominant society may not realize that it took the federal government until 1990 to genuinely do something about rectifying the problem of the excavation and removal of Native American remains and other cultural items from gravesites.

Although both European and Native American belief systems value respect for the deceased, there was a significant gap in the laws enacted to protect burial sites. Specifically, graves of white European-descendents were protected from desecration while most Native American graves were not. While some of this disparity may have originally stemmed from notions of racial or cultural superiority, the offensiveness of the disparity was typically not that extreme. Rather, because white Europeans and European-descendents came to dominate the cultural norms and the legal infrastructure, their norms and practices were reflected in legislation where those of Native Americans were not.[30] Thus, state laws tended to protect only against the desecration of marked burials, not the unmarked burial sites often utilized by native tribes.[31] Legal protection for the deceased's remains also did not

27. *Id.* at 40.
28. *Id.* at 41.
29. *Id.* (quoting BIEDER REPORT, *supra* note 26, at 30).
30. *Id.*
31. *Id.*

contemplate burial practices unique to Native Americans, such as scaffold, canoe or tree burials.[32] Furthermore, rights to the deceased were often limited to the next of kin, revealing the law's failure to recognize native tribes' religious beliefs concerning the deceased.[33] Finally, the then-existing legislation refused to account for the tribes' forced relocation away from their original homelands and burial sites, and the government's complicity in leaving those graves unattended and ripe for desecration.[34]

In fact, not only was legislation to protect Native American burial sites conspicuously absent, the federal law that was on the books actually worked against such protection.[35] The 1906 Antiquities Act granted the federal government exclusive jurisdiction and control over any remains found on government land.[36] Furthermore, the Archaeological Resources Protection Act (ARPA) defined Native American remains over 100 years old as archaeological resources and granted ownership of these resources to the U.S. government.[37] Thus, with a proper ARPA permit, archaeologists could excavate such Native American remains for the purpose of study or public display.[38]

III. THE INS AND OUTS OF NAGPRA

NAGPRA is a complex piece of legislation that encompasses two principal objectives: (1) the protection of Native American ownership rights to items of cultural significance and to burial sites on tribal or federal land, and (2) the repatriation of those culturally significant items currently in the hands of federal agencies or museums.[39] The following description of NAGPRA will focus on its first objective - the protection of ownership rights to newly-discovered objects or remains - because it is most relevant to a discussion of *Bonnichsen*.

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32. Trope & Echo-Hawk, *supra* note 26, at 46.
33. *Id.*
34. *See id.*
35. *See* American Antiquities Act of 1906, 16 U.S.C. §§ 431-33 (2006); *see also* Archaeological Resources Protection Act, 16 U.S.C. § 470aa-mm (2006).
36. 16 U.S.C. §§ 431-33.
37. 16 U.S.C. § 470bb(1).
38. *Id.* § 470cc(a).
39. Riding In, *supra* note 2, at 32.

When Native American "cultural items" are excavated or discovered on federal or tribal land, NAGPRA provides that ownership of those items shall be accorded to certain individuals or groups according to a priority specified in the statute.[40] Before a discussion of these priorities can take place, however, a review of some definitions is in order. As will be seen, NAGPRA is constrained by its definitions of key terminology. Therefore, particular attention must be paid to how NAGPRA's language has been defined and interpreted. As may be inferred from the title of the Act, NAGPRA only applies to items that are "Native American."[41] The Act defines "Native American" as "of, or relating to, a tribe, people, or culture that is indigenous to the United States."[42] The pertinent section of NAGPRA also restricts the ownership rights it affords to "cultural items," which the Act defines as human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony.[43]

If the discovery is found to be "Native American" and a "cultural item," the analysis shifts to the priority ownership of the items as specified in the Act. NAGPRA mandates that first priority for the rights to own and control any newly discovered or excavated remains or associated funerary objects[44] extend to the

40. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3002(a) (2006).

41. *Id.* This section provides: "The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed-- . . . ." *Id.*

42. *Id.* § 3001(9).

43. *Id.* § 3001(3). This section also includes detailed definitions of the terms "associated funerary objects," "unassociated funerary objects," "sacred objects," and "cultural patrimony:" *See id.*

44. "Associated funerary objects" are defined as:

> . . . objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that the other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects. *Id.* § 3001(3)(A).

deceased's lineal descendents.[45] If no lineal descendents can be located, ownership rights are then granted to the Native American tribe or Native Hawaiian organization on whose tribal land the remains or items were uncovered.[46] Further, if the items discovered are not human remains or associated funerary objects, but rather are unassociated funerary objects,[47] sacred objects,[48] or objects of cultural patrimony,[49] priority ownership goes directly to the tribe.[50] However, if the items were not discovered on tribal land, NAGPRA grants third priority to the tribe with the "closest cultural affiliation" with the remains or cultural item.[51] NAGPRA defines cultural affiliation as "a relationship of shared group identity which can be reasonably traced historically between a

45. *Id.* § 3002(a)(1).

46. 25 U.S.C. § 3002(a)(2)(A).

47. "Unassociated funerary objects" are defined as:

> . . . objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe. *Id.* § 3001(3)(B).

48. "Sacred objects" are defined as: "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." *Id.* § 3001(3)(C).

49. "Cultural patrimony" is defined as:

> . . . an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than the property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. *Id.* § 3001(3)(D).

50. *Id.* § 3002(a)(2)(A).

51. *Id.* § 3002(a)(2)(B).

present day Indian tribe . . . and an identifiable earlier group."[52] The statutory language does not necessitate an exact correspondence between the earlier group and the modern tribe, but merely some type of cultural relationship. To that end, NAGPRA instructs that a cultural affiliation determination shall be based on evidence that includes "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional historical, or other relevant information or expert opinion."[53] Further, there is no indication that Congress valued any of these types of evidence greater than the other since the statute does not prioritize them as it does the ownership priorities.

Although the standard establishing cultural affiliation was intended to ensure that the "claimant had some reasonable connection to the objects," Congress recognized that establishing a link between a modern tribe and a historical or prehistoric group without some gaps in the record may be extremely difficult.[54] Therefore, Congress recommended using a totality of the circumstances approach, allowing for a finding of cultural affiliation even if certain gaps in the historical record exist.[55] In fact, a stricter definition of "cultural affiliation" contained in an earlier version of NAGPRA was specifically abandoned.[56] That standard would have required that "a continuity of group identity from the earlier to the present day group" be "reasonably establishe[d]."[57]

Finally, NAGPRA affords a fourth priority where the Indian Claims Commission or the Court of Claims has recognized the federal land on which the remains were found as aboriginal land of a particular tribe.[58] This priority, although similar to the second priority, does not require that the remains or artifacts be found on a reservation.[59] Rather, if the tribe was never allotted reservation land by the federal government, yet the tribe resides on what is

52. 25 U.S.C. § 3001(2).
53. *Id.* § 3005(a)(4).
54. H.R. REP. NO. 101-877, at 116 (1990).
55. *Id.*
56. S. REP. NO. 101-473, at 10 (1990).
57. *Id.*
58. 25 U.S.C. § 3002(a)(2)(c).
59. *Id.*

recognized as aboriginal land, priority ownership of remains found on such land will go to the inhabiting tribe.

NAGPRA's second objective, to repatriate Native American remains and cultural items already in the hands of federal agencies and federally funded museums follows a similar organization. Specifically, NAGPRA mandates that these institutions prepare detailed inventories of Native American human remains and associated funerary objects.[60] While NAGPRA also requires the recording of unassociated funerary objects, sacred objects, and objects of cultural patrimony, museums need only summarize these items and need not list them in detailed inventories.[61]

Only after Native groups know what objects or remains are held by which institutions are they able to make a claim for the return of those items. Similar to the provision covering ownership of newly discovered items, NAGPRA provides that Native American human remains and associated funerary objects shall be repatriated with first priority to the lineal descendents of the remains.[62] For all other items, and for those remains and associated funerary objects for which a lineal descendent cannot be determined, second priority again goes to the tribe "with the closest cultural affiliation" to the remains or cultural item.[63]

Even when cultural affiliation has been established, NAGPRA provides for two exceptions under which the museum is not required to "expeditiously return" the human remains or associated funerary objects.[64] The first exception recognizes the competing interest of institutions that wish to engage in scientific study of the remains or objects. With that in mind, NAGPRA provides that if the item is "indispensable for completion of a specific scientific study, the outcome of which would be of a major benefit to the United States," the federal agency or museum may retain the items in order to complete the study.[65] These items, however, must be repatriated no later than ninety days after study is completed.[66]

60. *Id.* § 3003(a).
61. *Id.* § 3004(b).
62. *Id.* § 3005(a)(1).
63. *Id.* § 3005(a)(2).
64. 25 U.S.C. § 3005(b), (e).
65. *Id.* § 3005(b).
66. *Id.*

The second exception addresses the inevitable situation when two or more groups can establish a cultural affiliation with the items by a preponderance of the evidence. If such a situation arises, the institution holding the items may retain the items until the competing parties agree upon the disposition of the items or the dispute is otherwise resolved.[67] If the parties cannot agree on a resolution themselves, the Review Committee can act as a mediator, or they can take the dispute to federal court.[68]

IV. THE DISPUTE OVER THE KENNEWICK REMAINS

A. The Facts of Bonnichsen v. United States

While NAGPRA was enacted in 1990, the story that would become the turning point of the legislation did not begin until 1996. In July of 1996, two college students walking along the banks of the Columbia River near Kennewick, Washington, stumbled upon a human skull.[69] The discovery of those remains began the long and fateful journey into the heart and the meaning of NAGPRA. Because the remains were found on federal land managed by the Army Corps of Engineers, the discovery was covered by the Archaeological Resources Protection Act and allowed a local anthropologist, Dr. James Chatters, to obtain a permit to further excavate the site, through which he discovered the nearly complete skeleton belonging to the earlier discovered skull.[70] ARPA then allowed Dr. Chatters to remove the remains for examination.[71] While anthropologists originally believed the bones to be the remains of an early European settler,[72] based

67. *Id.* § 3005(e).

68. Trope & Echo-Hawk, *supra* note 26, at 64.

69. Bonnichsen v. United States (*Bonnichsen IV*), 367 F.3d 864, 869 (9th Cir. 2004).

70. Robert W. Lannan, *Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains*, 22 HARV. ENVTL. L. REV. 369, 371 (1998); *see also* Archaeological Resources Protection Act, 16 U.S.C. § 470cc(a) (2006).

71. *Bonnichsen IV*, 367 F.3d at 869; *see also* 16 U.S.C. § 470cc(a).

72. Dr. Chatters conducted the initial research that found that the "'Kennewick Man' had a long, narrow skull, a projecting nose, receding

primarily on the shape of the skull and other facial bones, further study revealed that characteristics of the bones were not only inconsistent with those of European settlers, but also inconsistent with previously studied American Indian bone structures.[73] The anthropologists also found a stone projectile point embedded in the upper hip bone.[74] The design of this projectile point was one that was common before the arrival of the first Europeans to the area.[75] Study of remains also included radiocarbon dating, which revealed that the bones were between 8340 and 9200 years old, easily pre-dating the first documented arrival of Europeans to North America.[76] Based on this evidence, the Army Corps of Engineers (and the claimant tribes) concluded that these remains must be Native American.[77] Indian tribes, therefore, opposed the study and examination of the human remains, as it conflicted with their religious belief that "[w]hen a body goes into the ground, it is meant to stay there until the end of time."[78] The tribes believe that "[w]hen remains are disturbed and remain above the ground, their spirits are at unrest . . . To put these spirits at ease, the remains must be returned to the ground as soon as possible.[79] Pursuant to NAGPRA, five Native American tribes of the Columbia River region, the Confederated Tribes of the Colville Reservation, the Confederated Tribes of the Umatilla Reservation, the Confederated Tribes and Bands of the Yakima Indian Nation, the Nez Perce Tribe, and the Wanapum Band, jointly demanded that the remains be turned over so that they may be immediately returned to their

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cheekbones, a high chin, and a square mandible." BRUCE E. JOHANSEN, ENDURING LEGACIES: NATIVE AMERICAN TREATIES AND CONTEMPORARY CONTROVERSIES 286 (2004).

73. *Bonnichsen IV*, 367 F.3d at 869. Chatters also concluded that though "[m]any of these characteristics are definitive of modern-day Caucasoid peoples . . . others . . . are typical of neither race." JOHANSEN *supra*, note 73 at 287. "Dental characteristics . . . indicate possible relationship to the South Asian peoples." *Id.*

74. Bonnichsen v. United States (*Bonnichsen III*), 217 F. Supp. 2d 1116, 1120 (D. Or. 2002).

75. *Id.*

76. *Bonnichsen IV*, 367 F.3d at 870.

77. *Id.*

78. *Bonnichsen III*, 217 F. Supp. 2d at 1121 (citing Joint Tribal Amici Mem. at 4-5, *Bonnichsen III*, 217 F. Supp. 2d 1116 (No. 96-1481-JE)).

79. *Id.* (citing Joint Tribal Amici Mem., *supra* note 79, at 4-5).

proper place in the earth.[80]

The Army Corps of Engineers, then in possession of the remains, immediately ordered a stop to DNA testing of the remains and after an investigation determined that the remains should be returned to the tribes for burial.[81] Pursuant to NAGPRA requirements, the Corps accordingly published a "Notice of Intent to Repatriate Human Remains" on September 24, 1996.[82] Many scientists objected to the Corps' decision, arguing that these remains were significant nationally and internationally because of their extreme age and, therefore, should be studied for their scientific value.[83] The Corps, however, stood its ground and was not swayed by the scientists' arguments. The scientists then filed suit in the United States District Court for the District of Oregon requesting an injunction to allow them to study the remains.[84]

While the district court denied the plaintiff scientists' injunction motion, it also denied the Corps' motion for summary judgment.[85] Instead, the district court remanded the case back to the Corps for further proceedings and directed the Corps to evaluate the evidence further and consider "whether to grant plaintiff's request for permission to study the remains."[86] After much time and further physical study of the remains, the Department of the Interior (DOI) concluded that the remains were unlike any presently existing Native American population, or any other presently existing populations for that matter.[87] The experts at the DOI, however, did not draw from this evidence the conclusion that these remains were therefore not ancestral to modern Native

80. *Id.*

81. *Bonnichsen IV*, 367 F.3d at 870.

82. *Id.*

83. *Id.*

84. *See* Bonnichsen v. United States (*Bonnichsen I*), 969 F. Supp. 614 (D. Or. 1997).

85. *See Bonnichsen I*, 969 F. Supp. at 614; Bonnichsen v. United States, Dept. of Army (*Bonnichsen II*), 969 F. Supp. 628, 628 (D. Or. 1997).

86. *Bonnichsen II*, 969 F. Supp. at 645. On March 24, 1998, the Corps entered into an agreement with the Department of the Interior ("DOI") assigning the DOI as the lead agency to handle the case and determine the applicability of NAGPRA. *Bonnichsen IV*, 367 F.3d at 871.

87. *Bonnichsen IV*, 367 F.3d at 871.

Americans.[88] In fact, the DOI also found that, though the remains did not physically resemble the bone structure of modern American Indians, they were consistent with the physical traits of the small amount of human remains from that period that have been found elsewhere in North America.[89] Ultimately, however, the DOI based its final decision on the approximated age of the remains and their existence in the United States.[90] Because the individual's remains were found in the northwestern region of the United States, the experts presumed that he lived in the area, and based on the age of the remains, the individual occupied that area long before the first documented arrival of Europeans.[91] Therefore, the DOI, in its final decision, concluded that the remains were "Native American" within NAGPRA's definition of the term.[92] The DOI also determined that, based on a preponderance of the evidence, the remains were culturally affiliated with the five present-day Indian tribes requesting possession, and awarded the remains to the coalition of the tribal claimants.[93]

The plaintiffs again challenged the Secretary's decision in district court.[94] The district court found that the Secretary's decision regarding the definition of "Native American" and therefore the applicability of NAGPRA was arbitrary and capricious and therefore in violation of the governing Administrative Procedure Act.[95] Thus, the district court held that NAGPRA did not apply and, therefore, the plaintiff scientists should be allowed to study the remains under ARPA.[96] Defendant United States and the tribal claimants appealed, bringing us to the decision of the Ninth Circuit Court of Appeals.[97]

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88. *Id.* at 871-72.
89. *Id.* at 872.
90. *Id.*
91. *Id.*
92. *Bonnichsen IV*, 367 F.3d at 872.
93. *Id.*
94. *See Bonnichsen III*, 217 F. Supp. 2d 1116, 1116 (D. Or. 2002).
95. *Id.* at 1156.
96. *Id.*
97. *Bonnichsen IV*, 367 F.3d at 864.

B. The Ninth Circuit's Decision

After concluding that the plaintiffs did have standing to raise their claims, the Ninth Circuit focused the remainder of its consideration on the applicability of NAGPRA.[98] As the court noted, NAGPRA involves a two-part analysis.[99] First, the court must decide whether the remains at issue are Native American within the definition provided in the statute.[100] If they are Native American, then NAGPRA applies and the inquiry turns to which tribes are most closely affiliated with the remains.[101] If the remains, however, are not Native American (within the statutory definition), then NAGPRA does not apply at all.[102] If NAGPRA does not apply, ARPA applies and the claimant tribes have no statutory claim for repatriation.[103]

As previously discussed, NAGPRA applies only to remains and other items that are "Native American." Assuming no other priority categories are satisfied, NAGPRA gives ownership or control of the Native American remains to the tribe that is "most culturally affiliated" with those remains.[104] The Act defines "Native American" as "of, or relating to, a tribe, people, or culture that is indigenous to the United States."[105] Focusing its attention on this definition, the court then set out to determine whether the remains fit the definition of Native American. The court accepted the fact that the remains were upwards of 8,000 years old, and that this age predates the arrival of Europeans to North America.[106] However, it refused to interpret the meaning of Native American to include the remains.[107] The basis of the court's interpretation

98. *Id.* at 875.

99. *Id.*

100. *Id.*

101. This part of the analysis assumes that there are no "lineal descendants" and that the remains were not found on "tribal land," as those terms are defined by NAGPRA.

102. *Bonnichsen IV*, 367 F.3d at 864.

103. *Id.*

104. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3002(a) (2006).

105. *Id.* § 3001(9).

106. *Bonnichsen IV*, 367 F.3d at 879.

107. *Id.*

was the tense used in the statutorily provided definition of "Native American".[108] More precisely, the court hinged its conclusion on the definition's use of the word "indigenous."[109] The court inferred that Congress' use of the present tense when it defined "Native American" as "relating to . . . a culture that is indigenous" was intentional.[110] The court drew from this alleged intentional use of the present tense that in order to be "Native American" the remains must relate to a presently existing tribe, people, or culture.[111]

The court attempted to buttress its conclusion by relating it to the purpose of NAGPRA. According the Ninth Circuit's account, two primary purposes were behind the enactment of NAGPRA: 1) to respect the burial traditions of modern American Indians, and 2) to protect the dignity of the human body after death.[112] The court reasoned that "Congress's purposes would not be served by requiring the transfer to modern American Indians of human remains that bear no relation to them."[113] In support of this purpose, the court quoted part of NAGPRA's legislative history providing that "[f]or many years, Indian tribes have attempted to have the remains and funerary objects of their ancestors returned to them."[114] The court accepted the proposition that Indians should be able to control the disposition of the remains that "bear some significant relationship to them."[115] In the court's mind, however, this significant relationship required a biological link.[116] That is, it is clear from its analysis that the court understood the term "ancestors" to refer only to those from whom one has biologically descended.[117] Therefore, since the Kennewick remains were so old that the Indian tribes could not establish such a biological relationship, the court did not find it difficult to conclude that the

108. *Id.* at 875.

109. *Id.* (emphasis added).

110. *Id.* at 875 n.16. There is no legislative history, however, on the precise point of Congress's reasoning for defining "Native American" as it did.

111. *Bonnichsen IV*, 367 F.3d at 875.

112. *Id.* at 876.

113. *Id.*

114. *Id.* 879.

115. *Id.* at 877.

116. *See Bonnichsen IV*, 367 F.3d at 877.

117. *See* Rebecca Tsosie, *The New Challenge to Native Identity: An Essay on "Indigeneity" and "Whiteness,"* 18 WASH. U.L. POL'Y 55 (2005).

remains were not "Native American."[118]

V. WHY THE COURT GOT IT WRONG

A. The Court Neglected the Ultimate Purpose of NAGPRA

While the Ninth Circuit purported to uphold the underlying purpose of NAGPRA, it ignored and undermined the very principles behind the legislation and the concerns that led to its enactment. As previously stated, NAGPRA is first and foremost human rights legislation.[119] Despite whatever compromises and deficiencies that may have resulted from the inevitable political wrangling that ensued in passing the legislation, NAGPRA was a groundbreaking statute that could have been a turning point in our perception of, and respect for, American Indian identity. Unfortunately, *Bonnichsen* got in the way of such a moment.

While the push for the enactment of NAGPRA was in part an effort to protect the remains of American Indians' genetically determinable ancestors, the greater goal of those pushing for NAGPRA was to provide American Indians the right and ability to control and practice their own cultural identity.[120] By focusing on the precise words and tense Congress used to define "Native American" under NAGPRA, the Ninth Circuit's opinion hid the invidious realities that lie behind the court's decision. That is, behind the court's analysis lies white society's failure to respect a cultural group's own understanding of its identity.

B. The Court's Analysis Reflects the Cultural Hegemony of the American Legal System

For centuries, society has defined American Indian identity according to society's own values and norms. Throughout history,

118. *Bonnichsen IV*, 367 F.3d at 882.

119. *See* Daniel K. Inouye, *Repatriation: Forging New Relationships*, 24 ARIZ. ST. L.J. 1, 2 (1992).

120. *See* Angela M. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49, 55 (2002).

the white-majority culture has assigned labels and images of Indians as heathens, warriors, and noble savages. Though some of these labels are more kind then others, they all reflect society's history (and on-going) racist perceptions of American Indian culture and identity. For example, upon coming into contact with native tribes when the Puritans first immigrated to North America, captivity narratives indicate that the Puritans saw the natives as a test of faith to remind them of what they should not become, and they acknowledged that God's earth was still inhabited by "merciless [h]eathens."[121] The merciless warrior identity of the Indian also persisted. A description attached to a photograph of two Squaw women at the World's Columbian Exposition in Chicago, Illinois, in 1893 read:

> [a]ny superfluity of sentiment is wasted on the Indian. He prefers scalps to taffy, and fire-water to tracts. He is monotonously hungry to kill somebody, a white man, if possible, another Indian if the white man is happily absent. The Indian woman, or squaw, is a shade worse in human deviltry than the male. In the picture above mildness, docility, kindness, loveableness, seem impersonated. Yet the records of massacres, for captures show that the squaw is the apotheosis of incarnate fiendishness. These two, "Pretty Face" and "Mary Hairy-Chin," may have never scalped, nor built a fire around a prisoner, or flayed an enemy alive, but that does not signify that they would not do it if they had the chance. Serfs they always are; friends never; companionable in the inverse ratio of distance. They belong to no ethical societies, dress reform clubs or art cliques; nor are sewing bees or donation parties in their categories of enjoyments. Savages, pure and cunning they gave to the Midway the shadows of characters that cannot be civilized, and the solemnity of appearance as deceptive as the veiled claws of the

121. KATHLEEN S. FINE-DARE, GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA 18-19 (2002).

tiger.[122]

While somewhat later in American history the Indian was romanticized and looked at with more benevolence, the racism embodied in the identities bestowed upon them continued. Indians were put on display at world fairs. Their bones and cultural objects were excavated, studied, and exhibited in museums.[123] Historically, society has created and imposed on native groups its own understanding of what it means to be American Indian without looking to American Indians themselves to ask how they define themselves. Physical and cultural domination has allowed the United States to usurp both Indian identity and cultural property, modifying it until it fits white society's image of what American Indians should be.

Most people today no longer view American Indians in the negative light cast upon them by earlier generations. However, the act of fitting the American Indian identity into the boundaries of the society's norms still goes on today. In a discussion of "Being Indian" in the United States, Kathleen S. Fine-Dare describes four ways in which most Americans view Indians.[124] Most often, according to Fine-Dare, Indians are classified as a minority and perceived as an ethnic group, just like African Americans, Asian Americans, and Latinos.[125] This perspective "is based on the criteria of 'racial' difference, cultural deviance from a putative American norm, and some vague idea of demographic percentages."[126] Second, people think of Indians as special, based on their historical relationship to North America and their long struggle to create their own national identity.[127] Fine-Dare divides this perspective further into those that view the Indians as "noble, innocent victims of American progress" and those that see them as "atavistic throwbacks to a more savage, if pristine, era . . . ."[128] Third, although less common, some people view Indians as

122. *Id.* at 28.
123. *Id.* at 30-37.
124. *Id.* at 53-54.
125. *Id.*
126. *Id.* at 53.
127. FINE-DARE, *supra* note 121, at 53.
128. *Id.*

"deserving of whatever negative consequences their alcoholic, gambling, neglectful, violent, marginal, and lazy lifestyles have brought them."[129] Those with this twisted view see Indians as a drain on society, constantly demanding resources from the government and then wasting whatever is given to them in their laziness and neglect.[130] Finally, in addition to the above images, "Indian" is also a legal identity, which has been molded by centuries of federal Indian laws, policies, and practices.[131] The Indian identity as a legal concept can be seen in the Indian Reorganization Act of 1934, which defined three classes of people as "Indian."[132] The identity of Indians, however, is not derived soley from the Act of 1934. Rather, one must also consider the individual tribes' authority to establish their own criteria for membership. Further, many federal laws use the word "Indian" without providing a definition.[133] This allows the agencies charged with administering those laws to independently decide who is an Indian and who is not, creating the possibility that the term might be used differently by different agencies.[134] For example, an individual may be deemed to be an "Indian" for educational benefits, but not for health benefits.[135]

As Fine-Dare ultimately concludes, however, American Indians are, in reality, none of the images depicted in the perspectives above.[136] They are instead members of sovereign nations that exist within the boundaries of the United States. Fine-Dare and other scholars have, either implicitly or explicitly, embraced the Critical

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129. *Id.* at 54.

130. *Id.*

131. *Id.*

132. *Id.* The three definitions of "Indian" under the Indian Reorganization Act are: (1) All persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction; (2) All persons who are descendants of such members residing within the boundaries of Indian reservation (as of 1 June 1934), "regardless of blood"; and (3) All other persons "of one-half or more Indian blood, whether or not affiliated with recognized tribe, and whether or not they have ever resided on an Indian reservation." *Id.* (citations omitted).

133. FINE-DARE, *supra* note 121, at 55 (citing STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE BASIC AMERICAN CIVIL LIBERTIES UNION GUIDE TO INDIAN AND TRIBAL RIGHTS 12-13 (2d ed. 1992)).

134. *Id.* (quoting PEVAR, *supra* note 133, at 12-13).

135. *Id.* (quoting PEVAR, *supra* note 133, at 12-13).

136. *Id.* at 54-55.

Race Theory ("CRT") perspective and eschewed the notion that American Indians are a separate "race."[137]

1. A Primer on Critical Race Theory

Critical race theory as a legal perspective grew out the American post-Civil Rights Era and certain scholars' and activists' recognition that despite the gains of the civil rights movement, continued civil rights advancement had slowed if not stopped.[138] Some critical theorists even argue that we have slid backward, letting much of the progress toward increased civil and human rights slip away.[139] Specifically, critical race theory eschews, both descriptively and normatively, the notion of a color-blind approach to legal issues.[140] Critical race theory rejects color-blindness not because it favors any notions of racial superiority or inferiority, but because a color-blind ideology ignores the social and historical implications of race on today's legal, political, and economic framework as well as the relations of individual actors. Critical race theorists recognize that "race" is a social construction, not a biological determinant.[141] Although race is socially constructed, it is no less real. As critical race theory maintains, racism is alive and well in America. Further, it does not exist on the fringes of society, but rather is embedded in the very legal norms our courts, legislators, and administrative agencies use to make, administer, and enforce the law.[142]

Central to traditional legal analysis is the presumption that the law and this country's legal system are neutral.[143] Critical scholars challenge this presumption on several grounds. First, courts use the

137. *See id.*

138. Isaac Moriwake, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation*, 20 U. HAW. L. REV. 261, 289-90 (1998).

139. *See id.*

140. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 21-22 (2001).

141. *Id.* at 7-8.

142. *Id.* at 7-11.

143. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing that "ad hoc evaluation" based on individual outcome is "the deepest problem of our constitutionalism").

law to screen the facts at issue.[144] Courts decide which facts are "relevant" and which are "irrelevant." This decision, however, is inherently based on the norms valued by the dominant society and often does not reflect the values and practices of minority cultures. Once the "irrelevant" facts are screened out of the analysis, the court can then come to its "objective" conclusions, thereby affirming the false assumption of the neutrality of the American legal system. The high value placed on objectivity and neutrality is illustrated by traditional legal analysts' focus on the principles of color-blindness. Colorblind analysis assumes that if we do not consider factors of race, ethnicity or culture, the resulting laws will be racially, ethnically, and culturally neutral. Reality, however, belies this assumption. The application of neutrality and objectivity norms to the notion of colorblindness is particularly harmful to minority groups because it deems irrelevant facts that have a significant impact on how the law affects different people and groups.

The norms and legal principles, that govern the rights and duties of both the dominant and minority groups, however, are far from neutral. Influential critical race scholar Cheryl Harris argues that racial and cultural identity and property are interrelated, allowing courts to use property rights' regimes to effect one's legal identity.[145] Harris notes that whiteness is a property interest that is valued by the courts and utilized to define our rights and duties with respect to others.[146] Through courts' recognition of whiteness as a property interest, the dominant society further subjugates non-

144. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2428 (1989).

145. *See* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

146. *See id.* Although in common parlance, property is often used to describe a physical thing, both modern and historical jurisprudence contemplates property as rights in things (whether tangible or intangible), and not the thing itself. *Id.* at 1724-25. James Madison viewed property as "embrac[ing] every thing to which a man may attach value and have a right." *Id.* at 1726 (citations omitted). Based on this definition, whiteness clearly constitutes a property right. *Id.* "Whiteness defined the legal status of a person as slave or free." *Id.* "White identity conferred tangible and economically valuable benefits and was jealously guarded as a valued possession, allowed only to those who met a strict standard of proof." *Id.*

whites, withholding from them the privileges (i.e. rights) provided by being white.[147]

One of the ways in which the law adopts the whiteness property right is through the "bounded, objective, and scientific definitions of race," and its construction of whiteness as not merely race, but race plus privilege."[148] Specifically, the law of racial identity was historically determined by blood. Specifically, the law attempted to define how much "colored" blood was required to defeat a claim of whiteness, often concluding that even one drop of non-white blood precluded a person from being legally white.[149] Harris pointed out that this assumption that race is blood-based is a legal fallacy premised on several inaccuracies.[150] This fallacy, however, was predicated on the racist "science" of craniology that was popularized in the eighteenth and nineteenth centuries.[151] The scientific method on which these theories of racial identity were based provided both the law and the courts with the objectivity necessary to disclaim any racist motives. As Harris highlighted, however, this assumption of blood-based race is not objective.[152]

In contrast to the objectivity embraced by the jurisprudence of the dominant society, CRT scholars argue for an increased use and acceptance of subjectivity. Specifically, CRT advocates for the use of "narratives." Narratives, when used by suppressed groups, use an individual story to reveal a collective wrong.[153] Richard Delgado, a prominent CRT scholar, maintained that narratives are a powerful method for creating moral and social realities, which can vary from different perspectives.[154] Minority groups can

147. *See id.* at 1737-44.

148. *Id.* at 1737.

149. *See id.* While these hypodescent laws were applied more detrimentally to African-Americans than to Native Americans, the principle was the same. White blood was preferred and the courts utilized science to separate the white race from other races.

150. *See id.* at 1739-40.

151. Harris, *supra* note 145, at 1739.

152. *Id.* at 1740.

153. Brook K. Baker, *Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice*, 23 WM. MITCHELL L. REV. 491, 528-29 (1997).

154. Delgado, *supra* note 144, at 2415-16 (illustrating how the "reality" of an event can change with the perspective of five different stories); *see also*

utilize their own stories to illustrate their own realities in an attempt to counter the reality posited by the dominant culture. Delgado further argued that the stories of the dominant society are used to construct a "shared reality in which its own superior position is seen as natural."[155] The dominant society accomplishes this by selectively picking the facts that support and justify the reality that it has chosen.[156] Only counterstories that illustrate the differing realities of minority groups can pierce the veil of objectivity and neutrality within the dominant society's view of reality.

a. The Courts' Attempt to Define Native American Identity: An Early Look at the Mashpee Indians as an Example of What Can Go Wrong.

> "We have a mystery. We have a tribe that was in existence in 1834. What became of it? Did it go into orbit? It's hard to kill a tribe, even legally."[157]

Because Native Americans live within the dominant society – a society that defines their identity and imposes such identities on them – they are forced to deal with these identities in very concrete ways. The case of the Mashpee Wampanoag Indians of Massachusetts illustrates the identities the dominant society has imposed on Native Americans. The experiences of the Mashpee Indians also reveals how the dominant society expects the Native Americans to conform to these identities in order to receive the rights that the dominant society has chosen to provide to them.[158]

The dominant society defined the identity of the Mashpee Indians when the federal district court in Boston denied the Mashpee status as a Native American "tribe." This, in turn, denied

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DELGADO & STEFANCIC, *supra* note 140, at 39-46.

155. Delgado, *supra* note 144, at 2412.

156. *Id.*

157. JACK CAMPSI, THE MASHPEE INDIANS: TRIBE ON TRIAL 152 (1991) (quoting Lawrence Shubow, attorney for Mashpee Wampanoag Tribal Council).

158. *See* JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE AND ART 277-346 (1988).

them standing to pursue a land claim for the land on which their community lived.[159] In 1976, the Mashpee Wampanoag Tribal Council, Inc. sued in federal court for the possession of about 16,000 acres of land taken from them in violation of the Indian Non-Intercourse Act.[160] The Indian Non-Intercourse Act prohibits the transfer of Native American tribal land to non-Native Americans without the consent of Congress.[161] Before the court addressed the question of land ownership, however, it first had to decide if the Mashpee plaintiffs were indeed a tribe. Defendants argued that the Mashpee were not a tribe but simply Native Americans (and often of mixed ethnic heritage) living in close proximity that had assimilated into the dominant culture and no longer existed as a separate community.[162] Therefore, according to the defendants' reasoning, the plaintiffs had no standing to bring such a land claim.[163]

While the court's ultimate denial of the Mashpee's tribal status meant defeat for the plaintiffs, the harshest criticism came on a different level. The idea that a court could determine whether a tribe existed, coupled with the racism that pervaded the trial, was appalling.[164] The very idea that a court could define the existence of a tribe was foreign to both the Mashpee and many observers of the trial.[165] The Mashpee themselves were shocked that their claim was stalled at this seemingly obvious issue. They wondered why the court would not believe they were who they said they were.[166] The Mashpee knew that they were a tribe. They had been a tribe since before European settlement of Cape Cod and had considered themselves a tribe ever since.[167] Now, a court was challenging this perception of their own identity.

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159. *See id.*

160. *Id.* at 277.

161. Indian Non-Intercourse Act, 25 U.S.C. § 177 (2006).

162. CLIFFORD, *supra* note 158, at 294-301.

163. *Id.*

164. *See* Ming His-Sung, *When Would the Indigenous be Indigenous? A Self-Defining, Interest- Isolated, Multiculturalistic Approach to Facilitating Recognition of the Taiwanese Ping-Pu*, 5 ASIAN-PAC. L. & POL'Y J. 4, 133-36 (2004).

165. CAMPISI, *supra* note 157, at 151.

166. *Id.*

167. *Id.*

In order to determine if the Mashpee were indeed a tribe, the court adopted the so-called "Montoya requirements," which are externally defined factors that must be present in order to constitute a tribe.[168] Specifically, Montoya v. United States required that a tribe: (1) be the same or a similar race; (2) inhabit a particular territory; (3) be a discrete community with a defined boundary; and (4) be under one leadership.[169] Further, the trial judge required that the Mashpee possess all of these characteristics continuously from 1790 until the trial in 1976, leaving no room for gaps in the historical record or fluctuation in the character of the tribe.[170] This limited definition of a tribe "forces the Mashpee to demonstrate a ridiculous fact that they have an exotic (European) sense of tribal identity," which is "ethnically meaningless for within-group people claiming tribal status."[171]

Beyond being ethnically meaningless to the Mashpee, these Euro-centered requirements are the essence of cultural hegemony.[172] As commentator Ming-Hsi Sung points out, "[t]he axiom behind [this] [a]pproach is the forced imposition of a conception of indigenous culture as conceived by non-Native Americans without paying consideration to the perspectives of Native Americans."[173] The court's acceptance of these factors reflects the value the American judicial system places on objective and neutral evidence. Further, the use of such an objectivist approach reinforces the court's assumed role as an objective instrument of fairness. CRT scholars, however, recognize that one's identity is not objective and cannot be meausred by objectivist, externally constructed elements.[174] Rather, identity is internal and subjective. It is dynamic as groups interact and relate to one another, especially in a reality of dominance and subordination.[175]

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168. CLIFFORD, *supra* note 158, at 334.

169. *Id.*

170. *Id.*

171. *See* His-Sung, *supra* note 164, at 134.

172. *See id.* at 134-35.

173. *Id.* at 135.

174. *See* Harris, *supra* note 145, at 1764-65; *see also* His-Sung, *supra* note 91, at 133-36.

175. *See* Harris, *supra* note 145, at 1764-65; *see also* His-Sung, *supra* note 91, at 135-36.

b. A Challenge to the Legal Norms of Dominant Society: NAGPRA Illustrates Contrasting Values in the Hawaiian's Efforts to Reclaim the Ki'la'au

In his article addressing the Hawaiian people's efforts to reclaim the ki'i la'au[176] from the city of Providence (the "City"), Rhode Island, Isaac Moriwake describes how CRT challenged the property-law norms of dominant society and the law. Although relatively little litigation has arisen from NAGPRA, the dispute between the Hawaiians and the City is not atypical of Native groups and museums all over the country dealing with issues of repatriation. In the Providence dispute, as in most repatriation cases, the City's claimed rights to the ki'i la'au were premised in traditional property law norms that have existed in American and Anglo courts for centuries. The City's formal pleadings reflected this by using terms such as "property," "ownership," and "right of possession."[177] These terms emphasize the idea of the ki'i la'au as personal property. It further reveals a value system that only recognizes the ki'i la'au as an object to be commodified, with little or no cultural value.[178] Emphasizing that the ki'i la'au is merely a piece of personal property and avoiding all reference to the item's cultural context also reflects and reinforces the norms of "neutrality" and "fairness" in the City's argument. These are powerful norms that are highly valued by the American judicial system and, therefore, had the potential to carry significant weight with the court.

In addition to the values revealed by the pleadings, the City's interactions with the media also provided insight into the norms and values reflected in the City's legal argument. In an official statement to the local news media, City's mayor, Vincent A. Cianci, stated, "I guess I'm going to object to any pasta recipe or any marinara sauce that they're going to make in Hawai'i."[179] In a

176. "Ki'i la'au" directly translated means "wooden image." The city of Providence argued that this object was merely a utilitarian spear rest, whereas the Hawaiian claimants maintained the item was a ceremonial piece with significant spiritual meaning.

177. Moriwake, *supra* note 138, at 290.

178. *Id.*

179. *Id.* at 292.

separate statement, the mayor further remarked, "[i]t's not a religious object. If it were, I imagine that they would have been kneeling at it when they were here."[180] These statements reflect a complete lack of respect for the cultural and religious meaning bestowed upon the ki'i la'au by those that created it and used it.

In contrast to the City's approach, the Hawaiian claimants infused their statements and pleadings with the cultural and religious significance of the ki'i la'au. The claimants, pursuant to NAGPRA's statutory language, challenged traditional property right norms of possession and ownership by testimony asserting:

> No one had the right to trade such an item, not even the possessor . . . . He was a steward, and the appropriate thing was either to pass it on to the next generation or to see to it that it was left in a burial cave with the last person who used it.[181]

Other testimony by Hawaiian cultural practitioners presented to the NAGPRA Review Committee also directly challenged the legal norms embraced by society and put forth by the City. Specifically, certain testimony provided that although the ki'i la'au likely belonged to the warrior chief, "the relationship between the [warier chief] and the ki'i la'au was one of interdependency and responsibility rather than of ownership."[182] This testimony reflects a drastically different relationship between the chief and the ki'i la'au than the one of ownership over personal property put forward by the City. The norms and values embodied in the Hawaiian claimants' story, however, highlight community "ownership," and cultural heritage. As can be seen, there is quite a divergence between the norms and values of the dominant society and legal infrastructure on the one side, and Hawaiians and other Native groups on the other.

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180. *Id.*

181. *Id.* at 294 (quoting John Saltzman, Hawaiian Artifact at Center of Custody Dispute: Providence's Museum of Natural History Wants to Sell the Spear Rest, but Native Hawaiians Say the Object Should be Returned to Them, THE PROVIDENCE SUNDAY J., Jan. 19, 1997, at B1).

182. Moriwake, *supra* note 138, at 295 (quoting Statement of Pualani Kanaka'ole Kanahele Regarding the Significance of the *Ki'i La'au* (Oct. 1996)).

c. A Critical Race Theory Approach to Bonnichsen: A Revealing Glimpse Into Dominant Society Norms

CRT can also be applied to the dispute over the Kennewick remains. The critical analysis of the Kennewick dispute differs from that of the ki'i la'au dispute in that it goes to the heart of NAGPRA and Native identity. The battle over the Kennewick remains addresses not a sacred object or item of cultural patrimony, but actual human remains. Because the items to be repatriated were human remains and not religious or cultural objects, the battle over definitions turned not on what is or is not a "sacred object," but rather, what is or is not "Native American." This dispute, therefore, called into question the very identity of Native Americans. To be sure, the City of Providence challenged Native Hawaiian identity in their refusal to respect Hawaiian norms and values. However, the Bonnichsen scientists' objection to the very definition of "Native American" struck at the core of Native cultural identity.

The Ninth Circuit's decision in Bonnichsen, therefore, is the most lethal attack on Native American identity in recent American jurisprudence. The Ninth Circuit not only rejected the Indian claimants' request for the remains, but also questioned whether Native Americans were indigenous to the continent in the first place.[183] Both the court's ultimate conclusion and the language and method of its analysis reflect the white-majority society's norms that have dominated the law for centuries. These same norms were asserted by the City of Providence in the ki'i la'au dispute. However, here, the stakes are greater. Also, the Native norms were not successful in gaining acceptance and legitimacy as in the ki'i la'au dispute.

In contrast to the race-conscious approach advocated by critical race theorists, the Ninth Circuit's analysis reflects the traditional "color-blind" (and, therefore, race-oblivious) approach common in modern American jurisprudence. As Rebecca Tsosie, a prominent critical race theorist, points out, "[t]he court describes Kennewick Man not by his race, ethnicity, or culture, but rather as 'one of the most important American anthropological and archaeological

183. *Bonnichsen IV*, 367 F.3d 864 (9th Cir. 2004).

discoveries of the late twentieth century."[184] This description of the remains portrays the decedent as a piece of property rather than the human being that he was.[185] The court, and the plaintiff-scientists, commodify the remains, ignoring the cultural, religious, and even political significance and value they hold to those tribes that claim the deceased as an ancestor. The City of Providence commodified the ki'i la'au in terms of dollars; the court commodified the Kennewick remains in terms of scientific progress.[186] Both types of commodification uphold the dominant society's conception of property and close their eyes to contrary indigenous norms.

The opening paragraph of the court's opinion further illustrates the white-European perspective from which the court writes. In setting the stage for its analysis, the court observed:

> This is a case about the ancient remains of a man who hunted and lived, or at least journeyed, in the Columbia Plateau an estimated 8340 to 9200 years ago, a time predating all recorded history from any place in the world, a time before the oldest cities of our world had been founded, a time so ancient that the pristine and untouched land and the primitive cultures that may have lived on it are not deeply understood by even the most well-informed men and women of our age.[187]

These opening remarks give a clear indication of the values and viewpoint that lead to the court's ultimate conclusion.[188] First, the court pointed out that the deceased lived in a time that predated known writings, foreshadowing the court's later emphasis on concrete evidence, such as scientific data.[189] Because the remains

184. Tsosie, *supra* note 117, at 79.

185. *Id.*

186. *See Bonnichsen IV*, 367 F.3d at 864.

187. *Id.* at 868.

188. *See* Allison M. Dussias, *Kennewick Man, Kinship, and the "Dying Race": The Ninth Circuit's Assimilationist Assault on the Native American Graves Protection and Repatriation Act*, 84 NEB. L. REV. 55, 131 (2005).

189. *Id.*

predated "recorded history," there clearly could be no "record" of the deceased's culture by which to connect him to the tribal claimants. This perspective, however, ignores the evidentiary value of tribes' creation stories and their understanding of kinship that suggest they and their ancestors have lived in the area since the world was created. Allison M. Dussias also suggests that "[t]his dichotomy brings to mind past government policies aimed at 'civilizing' the 'primitive' Indian tribes, . . . in which the tribes' allegedly unsettled violent lifestyle, in contrast to the Euro-American agriculturists around them, was presented as a justification for depriving them of full title to their land."[190]

The court's opening description further belittled the identity of Native Americans by portraying the land on which they lived as "pristine" and "untouched" and contrasting such empty lands with "the world's oldest cities."[191] From the court's perspective, clearly no culture could have existed before the organization of the cities the dominant society has come to recognize as the beginning of western civilization. Therefore, the Kennewick remains embody or reveal no culture that could be understood to bear a relationship to the tribal claimants.

Finally, the court made its most revealing remarks when it stated that the remains were so old that "even the most well-informed men and women of our age" did not know which, or even whether, people lived on the continent at that time. If the court had even considered the tribal claimants' oral history as valued evidence, it could not have made this statement. However, the court did not believe the Native American tribes were "well-informed." Here, "well-informed" translated to scientists with "scientific" evidence.[192] The tribes relied on oral histories to establish their habitation of the land during the time in question, approximately 9000 years ago, and their connection with the Kennewick remains. Because this type of evidence was not "scientific" by the court's standards, it was deemed to be unpersuasive.[193] While the court purported to accept evidence of both genetic and cultural ancestry, the court refused to acknowledge the validity of the cultural

190. *Id.* at 130.
191. *Bonnichsen IV*, 367 F.3d at 868.
192. *Id.*
193. *See id.* at 881-82.

evidence offered by the tribes.[194] Because of the age of the remains and the little knowledge we have about how people may have lived in the Columbia basin 9000 years ago, "empirical gaps in the record preclude establishing cultural continuities and discontinuities."[195] Therefore, only a proven genetic relationship would satisfy the court's evidentiary standard and provide a sufficient connection to a present-day tribe in order to be deemed "Native American."

Scientific evidence allowed the court to retain the fallacy that it, and the law it interprets, are objective and neutral. After all, science is always neutral, is it not? Unfortunately, history has shown otherwise. The "scientific" method and hypotheses of craniology were seen as objective and neutral, but clearly they were not. Further, as Cheryl Harris noted, the law's attempt to define different races has been viewed in a scientific, and therefore, objective, light. Blood-based racial categories, however, are more of a legal fiction than a legal fact.[196] Although the *Bonnichsen* court did not explicitly enunciate a blood-based definition of race, its demand for a genetic relationship between present day Native Americans and any ancient remains has many of the same perils. Like the blood-based racial definitions of the nineteenth and twentieth centuries, the court's search for a genetic relationship is purportedly objective.[197] However, the court left many questions unanswered. How strong of a genetic link would the court require to establish Native American ancestry? Would this standard be applied consistently? By setting these parameters courts are, once again, creating legal definitions of race based on the norms and values of the dominant society.

The court's search for a genetic relationship between present-day Native Americans and the Kennewick remains presupposes a definition of Native American that is based on race. This presumption, however, is inappropriate. As Harris illustrated, such definitions and calculations of race are based on the legal fiction that a certain racial purity exists.[198] Such an expectation ignores

194. *Id.* at 879-82.
195. *Id.* at 880.
196. Harris, *supra* note 145, at 1739.
197. *Id.*; *see also Bonnichsen IV*, 367 F.3d 864, 868 (9th Cir. 2004).
198. Harris, *supra* note 145, at 1740.

the realities that subordinated groups of all types face living in the dominant society. Namely, it ignores the realities of intermarriage. In comparison, the Mashpee court effectively denied the Mashpee their identity in part because of significant intermarriage and "racial mixing."[199] As the Mashpee argued, however, Native American identity was not determined by racial purity.[200] Rather, tribal identity was grounded in a sense of history, community, kinship, and Native American values.[201] A search for a genetic link between the Kennewick remains and the tribal claimants, therefore, has the potential to repeat the tragedy of Mashpee and deny Native American ancestry due to lack of racial purity. Though NAGPRA intended to balance the interests of Native Americans with those of the museum and scientific communities, the court's analysis clearly reinforced the long-standing norm of the dominant society that science trumps culture.[202]

VI. CONCLUSION

A critical race theory approach to the Ninth Circuit's decision in *Bonnichsen* highlights the racism and inequalities that continue to exist within the dominant society's relationship with Native Americans. The traditional legal analysis of *Bonnichsen*, however, does not capture this unfortunate realization. While we have made great strides in recognizing the importance of Native Americans individually, culturally, and historically, we clearly have not come

199. CLIFFORD, *supra* note 158, at 297-98, 306-07.

200. *See id.* at 288-346.

201. *See id.* at 291-93.

202. *See id* at 881-82. As stated by the court:

> [R]eliance upon oral narratives under the circumstances presented here is highly problematic. If the Tribal Claimants' narratives are as old as the claimants contend, they would have been orally conveyed through hundreds of intermediaries over thousands of years. For ancient events, we cannot know who first told a narrative, or the circumstances, or the identity of the intervening links in the chain, or whether the narrative has been altered, intentionally or otherwise, over time. The opportunity for error increases when information is relayed through multiple persons over time. *Bonnichsen III*, 217 F. Supp. 2d 1116, 1152 (D. Or. 2002).

far enough in such an effort. The *Bonnichsen* decision illustrates that although the dominant society purports to acknowledge that Native Americans are a unique people, both culturally and historically worth protecting, the dominant society's jurisprudence is inadequate.

The Ninth Circuit's decision is best understood as a reflection of the dominant, white society's continued subjugation, both physically and culturally, of Native Americans. The CRT perspective captures this reality, whereas traditional legal analysis has not. The neutrality employed and valued by the American legal system is a façade. The law is not neutral. It is a reflection of the dominant society's legal norms. As reflected in the Mashpee trial, the ki'i la'au dispute, and the Ninth Circuit's *Bonnichsen* decision, Native Americans are further subjugated by the dominant society through the law's reflection of society's norms. The Euro-centric values that are embedded in these norms are alien to many minority cultures, including Native Americans. This, unfortunately, can lead to the unjust result exemplified in both *Bonnichsen* and the Mashpee trial.

There is no magical solution to rid the American legal system of the cultural hegemony it practices over minority groups. However, CRT's utilization of subjectivity and counterstories should be embraced and valued as a way to reveal the hidden biases and racist principles behind the law's alleged neutrality. While NAGPRA was intended to serve as a human rights legislation, it cannot fully do so if courts continue to interpret it through the lens of the dominant society. NAPGRA will not truly reach its goal of bringing human rights to the Native American community until the courts recognize Native American norms, values, and identity, as defined by Native Americans.