March 2016

Patriotic Racism: An Investigation into Judicial Rhetoric and the Continued Legal Divestiture of Native American Rights

Andrea Wallace

Follow this and additional works at: https://via.library.depaul.edu/jsj

Recommended Citation

Available at: https://via.library.depaul.edu/jsj/vol8/iss1/6

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal for Social Justice by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
Patriotic Racism: An Investigation into Judicial Rhetoric and the Continued Legal Divestiture of Native American Rights

Andrea Wallace*

“It is difficult to get a man to understand something when his salary depends on his not understanding it.” —Upton Sinclair

Introduction

Americans live in a country where race was once legally institutionalized. In fact, it was only 50 years ago that the United States’ legal system officially ceased to operate as a mechanism

* Ph.D. Candidate in Cultural Heritage Law, University of Glasgow School of Law, Expected 2017; LL.M. in European Business Law, cum laude, Radboud University, May 2014; J.D., magna cum laude, DePaul University College of Law, May 2014; B.F.A, The School of the Art Institute of Chicago, May 2006. Thank you to Professor Susan Bandes for her invaluable consultation throughout the writing process and for her guidance and editorial suggestions, and to Professor Zoe Robinson for her advice and comments on the topic of the article. A special thanks to Sarah Wilson for providing feedback as a sounding board during this article’s development.

1 UPTON SINCLAIR, I, CANDIDATE FOR GOVERNOR: AND HOW I GOT LICKED 109 (1934).
that explicitly condoned racism. Yet, the passage of 50 years has
done little to mute a historic pattern of racial oppression vested
centuries ago amid this country’s conception. Nor does it imply
an eradication of racism, regardless of how unpopular racial dis-
crimination may have become. As one historian has stated,
“[t]here is not a country in world history in which racism has
been more important, for so long a time, as the United States.”
Today, racism may be discouraged and socially abhorred, but it
remains an important emotional component of the United
States’ recent and traditional history. As evidence of apparent
racism grows scarce due to progressive social efforts to expunge
its existence, the study of emotions underlying racial bias be-
comes fundamental in understanding how racism continues to
permeate and shape societal values.

Naturally, problems occur with even assigning a definition to
racism. Merriam-Webster defines racism as “a belief that race is
the primary determinant of human traits and capacities and that
racial difference produces an inherent superiority of a particular
race.” Other sources describe it as hatred of one person by an-
other because of skin color, language, customs, place of birth, or
any other factor that supposedly reveals the basic nature of that
person. Modern characterizations have expanded racism to en-
compass practices and actions in addition to individual or social
views. To further complicate the matter, assigning an appropri-
ate definition requires an initial analysis of what qualifies as

QUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN
AMERICA (2005).
3 HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES 48-52
(2005).
4 MERRIAM-WEBSTER’S ONLINE DICTIONARY, http://www.merriam-webster
5 RACISM, ANTI-DEFAMATION LEAGUE, http://archive.adl.org/hate-patrol/ra-
cism.asp (last visited Jan. 15, 2015).
15, 2015). I chose to specifically refer to Wikipedia in this instance, because
the website operates by social contributions and aims to draw from contem-
porary norms.
“race” and what does or does not constitute discrimination.\textsuperscript{7} This paper finds the following definition particularly useful: “culturally sanctioned beliefs which, regardless of the intentions involved, defend the advantages Whites have because of the subordinated positions of racial minorities.”\textsuperscript{8}

Regardless of how racism is defined, the strong emotional reactions to being labeled a “racist” are unavoidable. Today, racism is undesirable in any form. Even identifying racism inevitably invokes a defensive reaction. So, then, how do we initially become comfortable enough to confront its existence in order to promote social progress, especially where such progress is long overdue? Do we assign a different term to describe contemporary racism? Or do we change the system by which we evaluate race?

It must be stressed at the outset that this paper focuses on unconscious racism and the psychological dynamics of traditional attitudes toward Native Americans.\textsuperscript{9} It does not attempt

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item DAVID WELLMAN, PORTRAITS OF WHITE RACISM xvii (1977).
\item Throughout this article, I use “Native American” for a neutral and more historically accurate classification of indigenous peoples to the United States. Assigning the proper term is an ongoing dispute, which dates back to the first individual to encounter American peoples. Erroneously, Columbus thought he had arrived in the “Indies,” but in actuality he had set foot in the Caribbean Islands. Thus, the term “Indian” developed out of a misunderstanding of the indigenous people’s actual identity. Id.

Objectors to “Indian” or “American Indian” point to the fact that the term does not accurately reflect the identity of the person, or tribe, to whom it refers. An ideal approach would identify indigenous persons by tribal affiliation; however, for the purposes of this paper, such a task becomes inundating since there are more than 550 federally recognized tribes in existence. Nor is it sufficient when referring to indigenous persons as an organized, collective group. It was the U.S. government that coined the term “Native American” in the 1970s as an alternative to “American Indian.” Clyde Tucker, Brian Kojetin, & Roderick Harrison, A Statistical Analysis of the CPS Supplement on Race and Ethnic Origin (May 1995), BUREAU OF LABOR STATISTICS, BUREAU OF THE CENSUS. Yet, the term “Native American” is over inclusive in that it refers to indigenous persons of North and South America, as well as Alaskan and Hawaiian Natives. Those who prefer “American Indian” to

\end{enumerate}
\end{footnotesize}
to accuse or label persons as "racist," but rather to reveal how perceived prejudices toward Native Americans have become rationalized and imbedded in legal discourse. This specific dimension of emotion in legal attitudes, particularly in racially sensitive cases, has not been adequately examined. In the past, courts have eradicated racism reaching obvious levels under political pressure or during periods relevant to popular social movements. People commonly associate "racism" with a historical understanding of slavery and Jim Crow forms of de facto and de jure racial discrimination against African Americans. However, civil rights movements regarding Native Americans and other minority groups have never reached the effective levels of those by African Americans. Native Americans comprise...
less than one percent of the United States population and, as a result, are required to advocate perceived injustices before the court, instead of hoping to assemble enough social momentum to effectuate change.

Even so, these legal challenges have been largely unsuccessful due to enduring historical misunderstandings or pursuant to a legal denial of justice. By their very purpose, suits brought by Native Americans often challenge a nationalist perception of the United States’ conception, its legal foundation, and related patriotic sentiment. As these notions are advocated, responsive negative attitudes can become repressed and transform into background emotions. To fully understand any emotional impact, the role played by the non-conscious processes in judicial attitudes is initially considered. These attitudes disclose a variety of underlying emotions difficult to relinquish in the pursuit of neutral cognition. Among these emotions, this paper specifically addresses the appearance of resentment, loyalty, and shame evolving in the legal discourse regarding Native Americans. Emotions underlie the rhetoric intentionally selected to address a legal issue; such language becomes dicta, precedents, and ultimately law. Focusing on reoccurring themes of resentment, loyalty, and shame, this paper examines three legal opinions, under an emotional lens, in relation to the judicial course of action taken and the ultimate legal outcome of each case.

Consequently, this paper seeks to make evident how legal rhetoric in discussions of Native American rights is “extraordinarily negative, focusing mainly on the threat posed by recognizing such rights.” Such rhetoric resists challenges posed to traditional values, beliefs, and prevailing customs, while sus-

---

14 See United States Census, supra note 12.
taining a vested interest in building upon precedent established by centuries of Federal Indian Law. This unintentional administration of racism has become an unconscious practice that continues to create a real-life impact on Native American culture, with real-life consequences. As our social conception of racism has evolved, the evolution of racial prejudice has followed suit, becoming more implicit and undistinguishable, thus harder to confront. Judicial rhetoric becomes significant because it shows how racism situates itself in cultural understandings of race—and in this case, both how racism appears in legal observations of Native American culture and how rhetoric portrays the histories of Native Americans that, while blatantly false, were presented as factual and engendered substantial legal consequences. Such an examination is proper and long overdue, considering that historically, the legal process has placed Native Americans in the circumstances for which they appear before the court.

**OVERVIEW**

“Our nation was born in genocide when it embraced the doctrine that the original American, the Indian, was an inferior race. Even before there were large numbers of Negroes on our shore, the scar of racial hatred had already disfigured colonial society. From the sixteenth century forward, blood flowed in battles over racial supremacy. We are perhaps the only nation which tried as a matter of national policy to wipe out its indigenous population. Moreover, we elevated that tragic experience into a noble crusade. Indeed, even today we have not permitted ourselves to reject or feel remorse for this shameful episode. Our literature,

---

our films, our drama, our folklore all exalt it. Our children are still taught to respect the violence which reduced a red-skinned people of an earlier culture into a few fragmented groups herded into impoverished reservations.” —Martin Luther King, Jr.17

All forms of racism, which are specific to each race, merit their own emotional and historical analysis. This paper investigates emotions that underlie racism by focusing on how unconscious racism has affected the legal regulation of Native American inequality. In order to understand this country’s foundational history with Native Americans, Part I describes the historical treatment and cultural misunderstanding of this nation’s first inhabitants. Part II discusses theories of emotions as a plausible approach to understand how racism has been established and rationalized into the unconscious, and to suggest an attempt toward how these emotions could be confronted and used to actualize progress. Part III then examines the specific emotions of resentment, loyalty and shame present in judicial opinions assessing Native American rights. The paper concludes with suggestions for future attempts to bring racism into the foreground without creating a reaction that is counter-productive.

I. UNIQUE HISTORY WITH NATIVE AMERICANS

“The study of history is a powerful antidote to contemporary arrogance. It is humbling to discover how many of our glib assumptions, which seem to us novel and plausible, have been tested before, not once but many times and in innumerable guises; and discovered to be, at great human cost, wholly false.” —Paul Johnson18

17 Martin Luther King, Jr., Why We Can’t Wait 120 (1964).
Before turning to the focus of this paper, it is necessary to consider the indigenous race in its historical and foundational context, originating from the first contact with Europeans over 500 years ago. Traditionally, racism was a fact of life. It was intentional and consciously practiced. Like other forms of racism, explicit racism toward Native Americans has become implicit over time and under changing societal values. This section discusses how the founding of this country was based on racial assumptions that were historically recorded as fact, and still have not been redefined as personal, or societal, racist opinions. Most racism in its present form has become unintentional and unconscious. Until these assumptions are brought forth as incorrect and blatantly wrong, they will continue to underlie the United States' historical foundation.

Persons inhabiting the Americas have been misrepresented from the moment of its “discovery” in 1492. Reports from the New World such as that of the Dominican Tomas Ortiz to the Council of the Indies in 1525 claimed that:

On the mainland they eat human flesh. They are more given to sodomy than any other nation. There is no justice among them. They go naked. They have no respect either for love or for virginity. They are stupid and silly. They have no respect for truth, save when it is to their advantage. They are unstable. They have no knowledge of what foresight means . . . They are incapable of learning. Punishments have no effect upon them. Trai-

torous, cruel, and vindictive, they never forgive. Most hostile to religion, idle, dishonest, abject, and vile, in their judgments they keep no faith or law. . . They eat fleas, spiders, and worms raw, whenever they find them. They exercise none of the humane arts or industries. When taught the mysteries of our religion, they say that these things may suit Castilians, but not them, and they do not wish to change their customs. . . The older they get the worse they become. . . I may therefore affirm that God has never created a race more full of vice and composed without the least mixture of kindness or culture. . . We here speak of those whom we know by experience. Especially the father, Pedro de Cordoba, who has sent me these facts in writing . . . the Indians are more stupid than asses and refuse to improve in anything.19

Even the founding fathers promoted cultural racism toward natives. In 1779, George Washington referred to Native Americans as “beasts of prey,” and instructed his subordinate to “attack the Iroquois and lay waste all the settlements around” and not to consider “any overture of peace before the total ruin of their settlement is effected. (sic)”20 Thomas Jefferson instructed his Secretary of War in 1807 to use “the hatchet” against Native Americans who resisted westward encroachment into their tribal lands writing, “[a]nd if ever we are constrained to lift the hatchet against any tribe, we will never lay it down till that tribe is exterminated.”21 Jefferson became the first president to pro-

21 Id. at 120.
pose relocating Native Americans out to the newly acquired territories comprising the Louisiana Purchase.22

Andrew Jackson, who pioneered the mass removal of Native Americans, referred to Indians as “savage dogs” and scalped those he killed in his purge of the Cherokee.23 In his campaign against the Creek, Jackson personally oversaw “the mutilation of 800 or so Creek Indian corpses—the bodies of men, women, and children, that he and his men massacred—cutting off their noses to count and preserve a record of the dead, slicing long strips of flesh from their bodies to tan and turn into bridle reins.”24 Under Jackson’s encouragement, Congress passed the Indian Removal Act in May of 1830, allowing States to forcefully relocate Native Americans living within their borders by divesting them of their property rights and protections under State law.25 Historical accounts of the Indian Removal Act describe it as authorizing Jackson to “negotiate” with Native Americans. These negotiations resulted in their forced relocation to Federal territory west of the Mississippi in return for their fertile homelands.

Even prior to the enactment of the Indian Removal Act, States actively sought the removal of Native Americans in order to appropriate their tribal land. States had begun implementing laws that divested Native Americans of rights, expecting that the Federal Government would not enforce the promised removal. For example, in 1828, the Georgia legislature enacted a series of statutes stripping the Cherokee Nation of all rights and protections.26 In protest, the Cherokee Nation sought access to the Su-

---

22 Id.
23 Baker, supra note 20, at 319.
24 Id.
25 Id.
26 Cherokee Nation v. Georgia, 30 U.S. 1, 7-14 (1831). Chief Justice Marshall even recognized, “[t]he effect of these laws, and their purposes, are stated to be to parcel out the territory of the Cherokees; to extend all the laws of Georgia; over the same; to abolish the Cherokee laws, and to deprive the Cherokees of the protection of their laws . . .”
preme Court to obtain an injunction against Georgia’s laws.\textsuperscript{27} However, the Court dismissed the case for lack of jurisdiction despite explicitly recognizing Georgia’s injustices.\textsuperscript{28} In his opinion, Chief Justice Marshall wrote:

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.\textsuperscript{29}

Nevertheless, Marshall determined the Cherokee Nation lacked constitutional standing, explaining, “‘foreign nations’ is a general term, the application of which to Indian tribes, when used in the American constitution, is at best extremely questionable.”\textsuperscript{30} He explained that the Framers had not intended for the actual meaning of “foreign nation” to attach, as it was plainly perceived that the Constitution presumed a tribe could not be a nation because it was not foreign to the United States.\textsuperscript{31} Accordingly, Marshall rationalized “[i]f it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been

\textsuperscript{27} Id. at 2.
\textsuperscript{28} The Cherokee Nation sought redress as a foreign nation, under the original jurisdiction granted to the Supreme Court by the Constitution. Id.
\textsuperscript{29} Cherokee Nation v. Georgia, 30 U.S. at 15.
\textsuperscript{30} Id. at 19.
\textsuperscript{31} Id.
inflicted, and that still are greater to be apprehended, this is not the tribunal which can redress the past or prevent the future.”

_Cherokee Nation v. Georgia_ closed the courthouse doors to the Cherokee Nation because it was not a “foreign nation” entitled to bring suit under the original jurisdiction of the Supreme Court—nor were the Native Americans considered citizens of the United States. Finding that the Removal Act had ultimately authorized the Cherokees’ ejection, Marshall wrote, “[t]hey occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.” The court enforced removal opened up more than 25 million acres for predominantly white settlement, and Jackson’s efforts to “negotiate” resulted in the 1838 death march famously known as the Trail of Tears.

Historically, overt and obvious racism existed in Federal Indian Law due to the general acceptance of Native American stereotypes both in the courtroom and in society. Courts repeatedly rejected claims of sovereignty, finding Nations and individuals lacked standing, and contended they were “nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state.” Even in the twentieth century, courts referred to Native Americans as an “ignorant and dependent race.” Justices felt that the “uncivilized Indians” lacked a recognizable nationhood, “[o]wing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint,

32 Id.
33 Id.
34 Id. at 17.
35 Id. at 20. Even in criminal courts, Native American women had no legal standing; ‘an Indian woman’s testimony regarding rape meant nothing in a white court of law. Her testimony could not convict a white man.’ See also David V. Baker, _American Executions in Historical Context_, 20 CRIM. JUST. STUD. 315, 317-373 (2007) (citing Brownmiller, 1975, p 162). This would also require that the State brought suit on behalf of the woman.
36 Cherokee Nation v. Georgia, 30 U.S at 27 (Johnson, J., concurring).
their mutual jealousies and animosities, their nomadic habits, and lack of mental training . . . .”38

The Executive supported this attitude. In 1900, Theodore Roosevelt wrote, “the settler and pioneer have at bottom had justice on their side; this great continent could not have been kept as nothing but a game preserve for squalid savages.”39 In 1913, the Supreme Court ruled that the Federal Government’s power over Native American affairs extended to tribes because of their “racial” characteristics, including intellectual and moral inferiority.40 Even today, both Congress and the executive branch, particularly the Bureau of Indian Affairs, continue to rely upon foundational doctrine from the 1830s in regards to trust responsibility, domestic dependent nations, tribal sovereignty, limitations on state powers and the supremacy and sanctity of treaties.41

These judicial views have continued to affect how Native American rights are regarded in the present century. Though slavery was abolished in 1865, and freedmen were granted the right to vote in 1870,42 with women following in 1920,43 none of these rights extended to Native Americans44 until they were finally granted citizenship in 1924 with the Indian Citizenship Act.45 Even so, their right to vote was not completely resolved until 1975.46 This full legal recognition of Native American

38 Montoya v. United States, 180 U.S. 261, 265 (1901).
42 U.S. Const. amend. XV.
43 U.S. Const. amend. XIX.
46 See Goodluck v. Apache County, 417 F.Supp. 13 (D.Ariz. 1975). Until the 1965 Voting Rights Act, states determined whether Native Americans were
rights is a modern concept that has only recently begun to be embraced by current society.

II. EMOTIONS UNDERLYING CULTURAL RACISM

“That tradition — the song, the cheer — it mattered so much to me as a child, and I know it matters to every other Redskins fan in the D.C. area and across the nation. Our past isn’t just where we came from — it’s who we are . . . The name was never a label. It was, and continues to be, a badge of honor. I respect the opinions of those who disagree. I want them to know that I do hear them, and I will continue to listen and learn. But we cannot ignore our 81-year history, or the strong feelings of most of our fans as well as Native Americans throughout the country. After 81 years, the team name ‘Redskins’ continues to hold the memories and meaning of where we came from, who we are, and who we want to be in the years to come. We are Redskins Nation and we owe it to our fans and coaches and players, past and present, to preserve that heritage.” —Dan Snyder

“Embedded in the idea of race is a socially constructed debate over what it means to be a human being; embedded in the idea of racism is a debate over what it means to be a just democratic

---

allowed to vote. Even after enacting the VRA, states continued to disenfranchise the Native American vote by hinging the right on the payment of taxes within the state.

community.”48 Hence, arguments regarding racial justice and appropriate remedies represent the “clash of competing” White American49 visions of the causes and effects of disparate outcomes toward Native Americans, and the portrayal of what the good and just response to those disparities is through the law.50 In school, children are taught that Native Americans were mere inhabitants of the vacant land discovered and conquered by righteous European settlers. These colonialists brought peace, religion and civilization to the Native Americans who, in exchange, willingly gave up their land for modern technology and an opportunity to live an improved and educated life. Yet, in reality, Native Americans engaged in wars to keep their lands, challenged State acts in court and risked extermination to protect their culture.51 Thus, extreme competing visions perpetuate as to what a Native American is, and what rights a Native American is accorded under the law.

It remains unclear how such race-related concerns may manifest in individual tendencies, but analyzing emotional responses within reflexive understandings of race may shed light on this issue.52 Judicial questioning during Supreme Court oral arguments does provide some evidence of inherent racial assumptions. To illustrate, in Bryan v. Itasca County, a Chippewa Native American brought suit claiming the State of Minnesota lacked authority to impose a personal property tax on his mo-

49 The term “White American” is capitalized throughout this paper in an effort to distinguish the phrase from its surrounding text and to draw attention to the classification where it is used.
50 Id.
52 See, e.g., Samuel R. Sommers, Race and the Decision Making of Juries, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171 (2007) (Sommers examines the relationship between race and jury decision-making, which is relevant here).
bile home located on reservation property. As part of his oral argument, the Chippewa posed this question: should he be penalized for purchasing a mobile home because “he is not rich enough to put a foundation in, and concrete in the ground,” making the mobile home the Chippewa’s primary and only residence, where a wealthier person owning a mobile home in addition to a permanent home would not be penalized? In response, Justice White tentatively asked the Native Americans’ counsel for confirmation as to whether the use of trailers was “consistent with Indian tradition too, isn’t it, to keep mobility?”

Within the complex context of contemporary racism, what becomes important to individual tendencies is what is not being said, rather than what is. “Law is a central vehicle for the articulation of the terms” and the method of debates on important Native American issues—but as a means of addressing emotionally charged social issues, the law has its limits. The judicial system has instituted concrete standards of review upon recognizing racial discrimination in legislation. When a law lacks obvious discrimination, the court will examine its purpose and effect. The mere fact that courts recognize that both overt and implicit racism can exist in legislation demonstrates the likelihood that it may also exist in the decision tendencies of judges. However, this same system also empowers justices—who may be hesitant to identify a racially motivated purpose—to rationalize away a discriminatory law’s purpose and effect, thereby desensitizing the racial consequences.

It follows that before racism can be eradicated, it must first be generally recognized. Yet, racism is based on a wide variety of

---

55 Magee, supra note 48, at 263.
56 Richard McCulloch makes a provocative argument that we should rethink the notion of racism and give it a positive meaning. McCulloch suggests a
opposing emotions. Experiencing one emotion can simultaneously produce its opposite: love for patriotic White American culture accompanied by hate for Native American injustices that challenge the popular truth of how the great States were founded. These contrasting emotions require a certain amount of cognitive mitigation to harmonize. Such mitigation may engage denial, rationalization or willful indifference to subdue the original, racially inspired emotion. The more subdued these racial emotions become, the more difficult it becomes to root out its source and the easier it is to deny its existence. As an effect of this cognitive process, overcompensation [during attempts to reason away these personal emotions] transforms into justification. Thus it becomes important to recognize the emotions behind racial perceptions to understand how racism functions in order to eventually extinguish it—or at least to generate a significant difference in how the legal system approaches racial disparity in the law.

Equally important, it seems that the oppressor and the oppressed can simultaneously experience racially related emotions, such as shame, loyalty, self-righteousness and resentment. For example, both parties may experience shame: shame internalized by the White American as being responsible for racial oppression, and the shame experienced by the Native American upon being identified worthy of oppression. White Americans boast an intense passion for their land and loyalty to their republic, as do Native Americans, though the underlying values regarding land and property could not be more different. Thus form of “moral racism” in which allowing the recognition of race in a positive manner opens up discussion looking toward change. But McCulloch points out that the very concept of recognizing racism is viewed with suspicion and doubt, or outright denied, in a culture like ours long conditioned to prohibiting racial ideology. Thus, the only forms of racism commonly recognized as existing, or even being possible, are immoral forms, and these usually are of the most extreme varieties. Richard McCulloch, Right and Wrong Racism, http://www.racialcompact.com/rightwrongracism.html (last visited Jan. 15, 2015).

57 Id.
pride and loyalty are emotional counterparts in both Native and White American society. But for White Americans, a certain amount of denial facilitates these strong emotions: a denial for the original sin of how the United States was constructed, and how the legal system was used to justify the sin and paper over the theft of land. Justices continue to rely on problematic factual histories and overtly biased precedent to support legal conclusions.

The United States has taken steps to admit and address historic racism toward African Americans, yet racism toward Native Americans still has not gained sufficient recognition despite the fact that it remains this country’s oldest and most original form of racism. For these reasons, the law should acknowledge the prominent role of both conscious and unconscious processes in shaping moral responses. Finding the courage to make these acknowledgements raises ethical considerations and takes mental and emotional energy. As individuals struggle with cognitive dissonance, the racial emotions become repressed and transform to background emotions inhibiting the capacity to experience empathy and perspective—important emotions that situate actors in relationships and shape their social interactions.

In furtherance, courts engage in motivated reasoning and create legal fictions to rationalize unjust outcomes. Similar to legal precedent, these emotions become perpetual in legal reasoning. Before turning to this precedent, the next section will briefly address the emotions of resentment, loyalty and shame—emotions that are highly relevant within judicial opinions.

Resentment

Resentment cultivated the initial conception of the legal divestiture of Native American rights. Native Americans inhab-

58 Magee, supra note 48, at 263.
59 Id.
60 Id.
ited the United States long before any European settler landed on its shores. These settlers viewed land as relative to wealth, and in the New World land was immensely available. Initially, there seemed to be plenty for everyone. But as the population grew and colonies expanded, colonists realized that Native Americans possessed some of the most luscious and coveted areas: land that White Americans felt entitled to through Divine Providence and Manifest Destiny. According to the colonists’ cultural beliefs regarding land and property, the Native Americans took the land for granted and let it lay idle. This resentment played a key role in White and Native American conflicts. The colonists’ resentment infected how social values developed and became a catalyst in conflicts with the indigenous peoples.

Dr. Catherine West-Newman argues that resentment is one of the many emotions said to arise out of “real, imagined, or anticipated outcomes in social relationships.” Often seen as an emotional response to an immoral act, resentment is also described as “an emotional apprehension” that ‘acceptable, desirable,

61 As one author has stated, “The subject of Indian rights is also highly controversial. Everyone familiar with it seems to have a strong opinion about it. Some people resent the fact that Indians have special hunting, fishing and water rights, for example. Others feel that Indians are simply exercising rights which have always been theirs.” Stephen L. Prevar, The Rights of Indians and Tribes (4th ed. 2012).

62 Cameron McCarthy, et al., Danger in the Safety Zone: Notes on Race, Resentment, and the Discourse of Crime, Violence, and Suburban Security, 11 Cultural Stud 274-96 (1997). McCarthy and his colleagues draw on a recent ethnographic study to show the material impact of the resentment discourse on crime and violence as relevant to the daily lives of black and Latino youth. While the study’s findings are contemporary, its reasoning is relevant to historical social clashes with minority races, especially with Native Americans.


64 West-Newman contends that resentment emerges from a moral belief that one has been treated wrongly. Id.
proper, and rightful outcomes and procedures’ permitting access to capabilities, entitlements, and desired social outcomes have not been followed.” As such, it has been strongly advanced that resentment is the key emotion that motivates people to claim their social and legal rights. Resentment also arouses apprehension that others are receiving an undeserved advantage, possibly “gained at the expense of what is desirable or acceptable from the perspective of established rights.” From a Western perspective, it is assumed that resentment is felt most strongly upon a personal loss, but it is also universally accepted that people may resent what they recognize as loss to their group.

Resentment has enabled justices to establish legal fictions that resolve land distribution conflicts between White and Native Americans. As White Americans came to resent Native Americans for inhabiting the land, the latter came to resent the former for expelling them from it. Legal fictions also served an equally important purpose within the judiciary. After all, the first cases bought by Native Americans that challenged the seizure of their lands effectively petitioned a judge to undermine the judiciary’s newly secured authority by declaring such actions invalid. An unpopular decision in favor of Native Americans would surely be disregarded. To justify such seizure, and to protect the exercise of judicial review, judges used rhetoric to convey a belief of inherent and outright superiority over the Native Americans they saw as challenging White Americans’ entitlement to the land—and their own authority in the judiciary. This specific

67 West-Newman, supra note 63.
68 Id.
emotion will be investigated in the seminal land divestiture case of *Johnson and Graham's Lessee v. M'Intosh.*

**Loyalty**

Loyalty is a faithfulness or devotion to a person, group, country or cause. It has empowered the judiciary to rationalize away bad law, ignore previous injustices and remain faithful to deeply-rooted misinterpretations of history. As Americans, justices experience loyalty to their nation, its history and the establishment of law, their livelihood and their own race.

Professor Susan Bandes studies loyalty to one’s convictions in the context of prosecutorial tunnel vision. She argues that in many cases, prosecutors refuse to concede that the wrong person was convicted even when evidence may exonerate the defendant and prove his innocence. This “refusal to accept that an injustice occurred is often preceded by the refusal to admit problems with the case or to remain open to additional evidence during the investigative stage.” Importantly, it also deprives the public of an apology. Bandes specifically focuses on the prosecutor’s tendency to develop a fierce loyalty to a particular version of events and the guilt of a particular suspect or group of suspects.

---

69 Johnson and Graham’s Lessee v. M’Intosh, 21 U.S. 543 (1823).
71 Susan Bandes is known for her scholarly work in areas of federal jurisdiction and criminal procedure, and more recently for her research in the emerging study of law and emotion. *See Susan Bandes, The Passions of Law* (1999).
73 *Id.* at 475.
74 *Id.*
75 *Id.*
76 *Id.* at 479.
This study is relevant in the context of Native American rights, since White Americans continue to rationalize away injustices based upon a refusal to admit historic inaccuracies and remain open to uncomfortable facts as truth. As Bandes proposes, loyalty is shaped and continually reinforced within a social context: in the relevant context, White Americans have an intense passion for their land and republic. To recognize that blatant injustices occurred, and are still occurring, would pose an emotional threat to the romantic understanding of how the United States was formed. Loyalty to one's country and its perceived foundation prevents recognition that what actually happened was fundamentally wrong, and that the shaping of the legal system continues to accommodate for Native American injustices based on those falsehoods. Instead, loyalty to those fictions and perspectives of justice enables motivated reasoning when a court constructs justifications around intuitive judgments, thereby creating an illusion of objective reasoning. Thus, loyalty becomes a psychological mechanism to justify where the law stands today.

This notion begins with loyalty to one's own group, determined by skin color, culture or tribe. As Native Americans feel loyal to their tribes, religion and culture, Justices also exhibit loyalty to their own race, religion and patriotic vision of their country. This specific emotion will be investigated in Lyng v. Northwest Indian Cemetery Protective Association.

77 Id. at 480.
Shame

Shame is defined as a painful emotion caused by consciousness of guilt, shortcoming or impropriety.\(^{80}\) In the author’s opinion, shame is the most important underlying emotion to racism: it can be experienced personally or projected onto another. Often, the absence of shame becomes important in judicial rhetoric, especially where such shame seems proper.

Dr. Elspeth Probyn\(^{81}\) asserts that individuals tend to want to overcome or avoid shame in favor of pride.\(^{82}\) Experiencing shame is important: it arises out of a personal interest in the world and an obligation to society and stems from a desire for a connection to that society which remains unfulfilled.\(^{83}\) Probyn contends that people feel shame because they want that interest to continue.\(^{84}\) White Americans may experience shame or guilt after engaging in racism. But unlike guilt, “shame requires a deeper evaluation of the self because it concerns how others think of us, but also how we see ourselves.”\(^{85}\) Further, guilt may


\(^{81}\) Elspeth Probyn is a professor of gender and cultural studies at the University of Sydney.


\(^{83}\) Slocum, supra note 82; “[O]ne might say that shame is the deeply felt and highly motivating experience of the fear of being judged defective. It is the anxious experience of either the real or anticipated loss of status, affection or self-regard that results from knowing that one is vulnerable to the disapproving gaze or negative judgment of others. It is a terror that touches the mind, the body, and the soul precisely because one is aware that one might be seen to have come up short in relationship to some shared and uncontested ideal that defines what it means to be a good, worthy, admirable, attractive, or competent person, given one’s status or position in society.” See West-Newman, supra note 63, at 323, (quoting Richard A. Shweder, Toward a Deep Cultural Psychology of Shame, 70 SOC. RES. 1109, 1115 (2003).

\(^{84}\) Slocum, supra note 82.

\(^{85}\) Id. at 37.
be satisfied by apology thereby relieving a sense of personal responsibility, but shame has the ability to solidify internally and remain indefinitely.\textsuperscript{86} Though a difference remains between shaming by others and having one’s own sense of shame, both forms exist in the context of racism.

Other theorists characterize shame more generally as a response to “the tension between one’s ego ideal and one’s actual performance, that is, between what one desires and what one can actually attain.”\textsuperscript{87} Thus, Native Americans may experience shame at the denial of justice in court. Simultaneously, judges may experience shame upon a desire to effectuate change, but a realization that true justice is unattainable due to the historical legacy or constraints on the law. These frustrations give rise to shame, which can provoke externalization of blame or other responses\textsuperscript{88} toward Native Americans, as well as a reduced capacity for empathy.\textsuperscript{89} Thus, shame is a basic emotion that motivates social and moral line drawing,\textsuperscript{90} especially considering how individual judges rationalize the presence of racial injustice in the law.

Shame has had its own repercussions on Native American society: experiencing repetitive injustices and apparent social disdain can precipitate negative motivations for not pursuing future legal action. Even if legal action is desired, claimants may forgo

\textsuperscript{86} Id.
\textsuperscript{90} Slocum, \textit{supra} note 82.
its pursuit and assume that justice is unattainable based on prior experiences. This specific emotion will be applied to State v. Williams\(^9\) and opinions regarding Native Americans in criminal law.

**III. JUDICIAL EMOTIONS IN NATIVE AMERICAN LAW**

"Justice will not be served until those who are unaffected are as outraged as those who are."

---Benjamin Franklin\(^9\)

Legalized forms of racial discrimination are deeply rooted in history and a cultural attachment and devotion to one’s country. This underlying patriotism demonstrates that there is strong emotional component to the practice of racism toward cultures that conflict with our own. However, instead of pointing any finger at the judicial system, this section aims to examine rhetoric through a cultural lens of "emotional racism" in an effort to reveal how unconscious processes have shaped judicial responses to Native American rights. Because prevailing economic and political interests often determine courses for judicial action, questions of how Native Americans should be treated are shaped by the contextual considerations of that time—as are the judges, who are a product of this culture. Accordingly, this section will examine the emotions of resentment, loyalty and shame as foundations for recurring themes relevant to patriotism and its entrenchment in judicial rhetoric as contextual justification.

**Resentment: Johnson v. M’Intosh, (1823)**

As the population in the New World grew, so did its need of more land. This property crisis between White and Native Americans culminated in 1823, during Johnson and Graham’s

---


\(^9\) Benjamin Franklin was a founding father and leading politician during the original development of the United States.
Lessee v. M'Intosh. In Johnson, two parties purchased the same parcel of land. The plaintiffs purchased the parcel from Native American landowners prior to the Revolutionary War, and the defendants purchased the same land from the United States after the conclusion of the peace treaty between the United States and Great Britain.

At issue in Johnson, was “the power of the Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.” Chief Justice Marshall was therefore challenged with balancing the claims of a new, fully recognized country against the rights of a native—but faltering—race. Consequently, Marshall had to take into account the “speculative’ rights of the earlier European monarchs, the ‘juridical’ rights of their successor American states and the ‘practical’ economic and political demands of the millions who now populated the continent.

Marshall premised his reasoning on the popular theory of the time, that territories were originally “vacant.” Under this theory, the Native Americans were now coming forward asking for legal title to land that they had never owned. However, such a request proved legally unattainable. Rather, Marshall advocated that his hands were tied under the doctrine of “discovery,” which consisted of the exclusive right to extinguish the Native American’s title to land through purchase or conquest. Appealing to this doctrine, Marshall stated:

---

93 Johnson v. M’Intosh, 21 U.S. 543 (1823).
94 Though neither party before the court was Native American, the underlying legal issue considered whether the Cherokee Nation had previously possessed the right to sell to a White American land it had “owned” prior to the treaty’s formation.
95 Id. at 572.
97 Id.
98 Johnson, 21 U.S. at 594.
Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has successfully been asserted . . . it is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.\textsuperscript{100}

Marshall further opined that Native Americans lacked unconditional sovereignty regardless of the centuries of relations conducted in pursuit of treaties and diplomatic agreements.\textsuperscript{101} Their right to “complete sovereignty, as independent nations” was diminished or denied by “the original fundamental principle that discovery gave exclusive title to those who made it,”\textsuperscript{102} which was “excuse[d], if not justifi[ed], in the character and habits of the people whose rights have been wrestled from them.”\textsuperscript{103} This principle “was a right which all asserted to for themselves, and to the assertion of which, by others, all assented.” He further dismissed rhetorical opposition, rationalizing that:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the

\textsuperscript{100} Johnson, 21 U.S. at 588.
\textsuperscript{101} Id.; Washburn, supra note 19, at 66.
\textsuperscript{102} Johnson, 21 U.S. at 574 (emphasis added).
\textsuperscript{103} Id. at 589.
community originates in it, it becomes the law of the land and cannot be questioned.\textsuperscript{104}

Had Marshall applied common law and recognized the plaintiffs' ownership claim over the defendants', he would have legitimized the equal rights of Native Americans to own and transfer title in property.\textsuperscript{105} Instead, Marshall held that the Native American tribes possessed qualified enforceable rights only to the soil and the previous title of occupancy, rather than the disputed land.\textsuperscript{106} It seems to have escaped Marshall that Native Americans might actually have been first to assert this fundamental principle of discovery. Thus, a problem with Marshall's reasoning is that it disregards the open risk of succession. Under Marshall's rationale, any new "finder" could assert discovery over the United States at any time.

Chief Justice Marshall's resentment for the Native Americans' underlying claim to title could have been motivated by an anticipated outcome of what could happen to the lands of his country should the Cherokee Nation prove successful in Court.\textsuperscript{107} Marshall's desire to protect the property rights of the conquerors was sustained by his own economic self-interest in the controversy as a landowner.\textsuperscript{108} The Cherokee Nation was, in effect, 

\textsuperscript{104} \textit{Id.} at 591.
\textsuperscript{105} Washburn, \textit{supra} note 19, at 67.
\textsuperscript{106} \textit{Johnson}, 21 U.S. at 594.
\textsuperscript{107} Marshall reasoned that the through treaties, "the Indian nations whose title the plaintiffs claim... has been ceded to the United States without any reservation of [the Indians'] title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to the American citizens... They ceded to the United States this very property, after having used it in common with other lands as their own, from the date of their deeds to the time of cession, and the attempt now made, is to set up their title against that of the United States." \textit{Id}.
\textsuperscript{108} Marshall had been granted ownership to extensive acreage near the disputed Illinois and Wabash tracts in the late 1700s. Whether Marshall still held title to this specific land at the time of \textit{Johnson} is unknown. See \textsc{Walter R. Echo-Hawk, In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided} 69-70 (2010).
challenging his own title to land. In fact, Marshall had previously recused himself over a similar controversy for lack of impartiality, but Marshall’s personal interests were not the only interests at stake this time.\textsuperscript{109} By this standard, most judges, who also were privileged White Americans, also would consequently have been deemed unqualified to perform these legal duties. Equally likely is that Marshall realized a decision in favor of the plaintiff’s rights would substantially undermine the Supreme Court’s authority and risk censure by other branches of the government.\textsuperscript{110}

The \textit{Johnson} opinion served to formally define Native American rights as well as how “Indians” fit into the American community.\textsuperscript{111} The opinion explained that, ordinarily, a conquered group is assimilated into the triumphant nation and, consequently, becomes subjects or citizens of the new government—thus, the rights of the conquered to their property should remain unimpaired.\textsuperscript{112} However, in this case, such a policy was impossible because “the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsis-

\textsuperscript{109} Marshall recused himself in a similar case, \textit{Martin v. Hunter’s Lessee}, just seven years prior. There too, two landowners claimed title to the same land: the British plaintiff, Martin, claimed title by inheritance to land that Virginia claimed it had seized during the Revolution, and subsequently sold to the defendant, Hunter, a Virginia citizen. Though the case is widely regarded for its assertion of Supreme Court authority over State courts in matters of Federal law, Marshall recused himself, citing a financial conflict of interest. Marshall and his brother had signed a contract with Martin to purchase the land in dispute. See \textit{Martin v. Hunter’s Lessee}, 14 U.S. 304 (1816).


\textsuperscript{111} Washburn, \textit{supra} note 92, at 67.

\textsuperscript{112} \textit{Johnson}, 21 U.S. at 589.
tence was drawn chiefly from the forest. To leave them in pos-
session of their country was to leave the country a
wilderness."113

Like many opinions of the time, Marshall’s negative emotions
toward Native Americans were sustained by the claim that it
was “impossible to mix” with the indigenous peoples in order to
achieve a common society.114 Nor could they be permitted to
retain exclusive control over their territories, as these “savages”
were merely “perpetual inhabitants with diminutive rights.”115
Since coexistence was impossible, transferring title by the fiction
of discovery was the only option—and the outcome of Johnson
was not only warranted, but also justified.

Not surprisingly, Marshall is not the only Supreme Court Jus-
tice to have relied on the sympathies of his culture for justifica-
tion. More than a century later, in 1955, after oral arguments
regarding exclusivity tribal land in Tee-Hit-Ton Indians v. United States, Justice Reed wrote to Justice Douglas that “a mo-

113 Id. at 590.
114 Id.
115 Id. at 569.
116 See Joseph William Singer, Erasing Indian Country: The Story of Tee-Hit-
Ton Indians v. U.S., in INDIAN LAW STORIES 229, 240 (Carole Goldberg et al.
eds. 2010) (quoting WILLIAM O. DOUGLAS, THE COURT YEARS, 1939-1975:
117 See Echo-Hawk, supra note 108, at 78; Tee-Hit-Ton v. United States, 348
118 Id.
economy of a growing reservation population, and for which it presented substantial empirical evidence in support.119 There, Justice White, an avid fly-fisherman in Montana, played an instrumental role of challenging the tribal claim during oral arguments.120 With only two Justices dissenting, the Supreme Court declared the Crow Tribe had no authority to regulate hunting and fishing access to certain reservation lands by non-members,121 and ended its discussion by suggesting it might have found for the tribe if fishing had been important enough to them since “at the time of the treaty the Crows were a nomadic tribe dependent on buffalo, and fishing was not important to their diet or way of life.”122 Such rhetoric masks resentment to a possible outcome divesting valuable government land and natural resources from those claiming superior title to the property, property which had once “legally” been secured by conquest.

Moreover, in United States v. Sioux Nation of Indians, Chief Justice Rehnquist authored a dissent denying any wrongdoing committed by the government against the Sioux Nation, and instead relied on his own views of history and Manifest Destiny.123 Prior to U.S. v. Sioux, Congress had passed a law allowing Native Americans to relitigate previous claims in hopes of rectifying prior unjust land disputes.124 As a result, the Sioux brought suit to litigate their due process rights impinged upon in the 1870s. The Supreme Court reviewed the distressing account of the government’s acquisition of the Black Hills upon the Sioux’s military defeat and confinement to a reservation after the Great Sioux War of 1876-77.125 Hard evidence exposed that the Sioux

121 Washburn, supra note 19.
122 Montana, 450 U.S. at 554.
123 Echo-Hawk, supra note 108, at 33.
125 Echo-Hawk, supra note 108.
had been living under starving conditions and were driven to "sell" the Black Hills in exchange for government food rations. The Supreme Court held that in such circumstances, rations alone could not constitute adequate payment for the territory and required the Government to provide retroactive fair compensation. However, Chief Justice Rehnquist declared it unfair to judge facts "by the light of 'revisionist' historians or the mores of another era." Instead, Rehnquist inserted into the dissent his own recitation of the facts, based upon the Court of Claims' factual interpretation of the events in 1877. By Rehnquist's account, "the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties."

Paving the way for decades of similar precedent, Johnson v. M'Intosh sanctioned conquest and discovery as justifying the United States' legal authority over Native Americans and the use of their lands. The opinion secured "respectable" and defendable principles of "the inferior status of Indian property rights . . . the allegedly inferior cultural standing of tribes, the impaired ability of tribes to sell their incomplete title," and settled the qualified political status of tribes. Marshall premised his reasoning on the legal fiction of discovery and its fundamental importance to the United States. His decision established a holding that has had lasting implications for indigenous relations, and remains the basis of law for federal dispossession.

126 Id.
127 Id.
128 Id.; Sioux Nation, 448 U.S. at 425, (Rehnquist, J., dissenting).
129 Id. at 426, (Rehnquist, J., dissenting).
131 Even today, Native American tribes must be federally recognized in order to receive protections afforded to tribes by law. See NATIVE AMERICAN
Early Federal Indian Law failed to contemplate whether it might be unfair, let alone unnecessary, to expect Native Americans to entirely assimilate and set aside any loyalties to practiced centuries of their own cultural identities. \(^{132}\) Rather, courts continuously promoted the notion that prevailing social values required Native Americans to adopt the national identity of their new conquerors—something, however, which had been legally determined to be impossible. Since coexistence could not be achieved, entitlement to the land vested in White Americans. Such outcomes were also well-received and desired by other governmental bodies, which, consequently, served to reinforce the Court’s authority. In theory and in practice, foundational Federal Indian Law was sustained by the emotion of resentment to the Native Americans by their White American conquerors. As a product of its time, this resentment materialized in judicial rhetoric, which has reinforced a long history of conquest, relocation and usurpation of a people. Such foundational precedent continues to deprive Native Americans of the right to control their culture and identity. \(^{133}\)


Loyalty to one’s convictions or group can inhibit the capacity to experience perspective and empathy. In the context of religion, loyalty becomes especially instrumental to the practice of faith. However, the United States’ historical record toward Native American religious practices cuts sharply against the na-

---


\(^{133}\) See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (The Court refused to let tribal courts try White Americans for crimes committed on Native American reservations. Justice Rehnquist explained tribal courts are *not really* a part of the American judicial system, because tribes lost their sovereignty and gave up “their power to try non-Indian citizens.”).
tion's image as a proponent of religious freedom. Even today, legal conflicts arise involving the complex nature of indigenous religious practices in regards to the ceremonial use of protected endangered species,\textsuperscript{134} consumption of peyote\textsuperscript{135} and access to historically religious sites.\textsuperscript{136}

Arguably, the most famous political act taken against Native Americans in their exercise of religion occurred during the Ghost Dance and massacre at Wounded Knee Creek, South Dakota, in late December of 1890. The Ghost Dancers believed the earth would be wiped out during a cataclysmic earthquake in which only the dancing believers would be spared.\textsuperscript{137} Fearing that the ceremony would lead to an uprising, Federal agents banned the Ghost Dance and proclaimed it a threat.\textsuperscript{138} The Natives ignored the order and began dancing. U.S. troops responded by using rapid-firing Hotchkiss guns to massacre 256 Sioux Indians.\textsuperscript{139} A Sioux survivor recounted the tragedy:

Dead and wounded Indian women and children and little babies were scattered all along where they had been trying to run away. The soldiers had followed along the gulch, as they ran, and murdered them in there. Sometimes they were in heaps because they had huddled together and some were scattered all along. Sometimes bunches of them had been killed and torn to pieces where the wagon guns hit them. I saw a little baby try to suck its mother, but she was bloody and dead.\textsuperscript{140}


\textsuperscript{138} Id. at 344.

\textsuperscript{139} Id.

\textsuperscript{140} \textit{Arrell Gibson}, \textit{The American Indian: Prehistory to the Present} 479 (1980).
After the incident, the Federal Government awarded 20 Congressional Medals of Honor to the soldiers that fired upon the dancing Native Americans at Wounded Knee, including the soldiers who operated the four Hotchkiss machine guns. Though the Wounded Knee massacre might be the most famous of such events, other repeated denials of access to religious freedom and failures to accept the various forms of Native Americans' religious culture precipitated centuries of religious injustices.

In an effort to remedy these injustices, in 1978, Congress enacted the American Indian Religious Freedom Act to protect and preserve Native American religious cultural rights and practices. The Act states:

Henceforth it shall be the policy of the United States to protect and to preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sacred sites, use and possession of sacred objects and freedom to worship through ceremonials and traditional rites.

Congress's Act required policies of all governmental agencies to eliminate interference with the free exercise of Native reli-

---


gions based on the First Amendment, and to accommodate access to, and use of, religious sites to the extent that the use was practicable and not inconsistent with an agency’s essential functions.\textsuperscript{143} It also acknowledged the prior violation of that right. While the Act seemed to promise religious accommodation and legal acknowledgment of religious freedom, its interpretation in \textit{Lyng v. Northwest Indian Cemetery Protective Association} revealed the disappointing reality.

At issue in \textit{Lyng} was whether the Free Exercise Clause prohibited the Government from harvesting timber and constructing a road through a portion of the Chimney Rock area of the Six Rivers National Forest.\textsuperscript{144} The Yurok, Karok and Tolowa tribes\textsuperscript{145} used the proposed site for religious rituals. These rituals required “privacy, silence, and an undisturbed natural setting.”\textsuperscript{146} A study completed in 1979 had concluded such a road “would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples.”\textsuperscript{147} But the Forest Service decided to build the road anyway. Accordingly, the California District Court issued, and the Ninth Circuit affirmed, an injunction holding that the First Amendment prohibited the Government’s construction of the road.\textsuperscript{148}

Though Justice O’Connor’s language is much more neutral than the language of her predecessors, it inherently communicates a loyal effort to hold on to colonially established beliefs

\begin{footnotesize}
\begin{enumerate}
\item[143] \textit{Id.}
\item[144] \textit{Lyng v. Northwest Indian Cemetery Protective Ass’n}, 485 U.S. at 441.
\item[145] The three tribes lived on the Hoopa Valley Indian Reservation, which adjoined the Six Rivers National Forest and the Chimney Rock area that had historically been used for their religious purposes. \textit{Id.} at 442.
\item[146] \textit{Id.}
\item[147] Writing for the majority opinion, O’Connor acknowledged other evidence finding that alternative routes avoiding the Chimney Rock area altogether would have required acquisition of private land with serious stability problems. However, the holding was based on a finding that no cognizable burden existed on the tribes’ religious practice. \textit{Id.}
\item[148] \textit{Id.} at 444.
\end{enumerate}
\end{footnotesize}
and precedent that satisfy current goals in society. Christianity deems land and location irrelevant to the practice of its faith, which occurs in a church. Thus it becomes hard to imagine how a specific parcel of land could control the existence of a religion from a Christian perspective. As part of their strategy in the District Court, the plaintiffs appealed to the Christian values of church. On the first day of trial, a young Native American took the stand, explaining, “[t]he High Country was placed there by the creator as a place where Indian people could seek religious power . . . This area is our church: [it] cannot be moved or disturbed in anyway.” He continued, “any adverse changes in the High Country will have a direct impact on the practice of our religious beliefs,” which constituted “the very core of our cultural identity.”

Yet, the majority did not agree. The opinion specifically distinguished Lyng from cases with White American plaintiffs brought under similar, but Christian, concerns. And though Congress explicitly intended that the Native American practices receive religious protections, the majority found a way to sidestep the American Indian Religious Freedom Act and the First Amendment entirely. To justify a burden on religion under the Free Exercise Clause, the Government’s objective needed to present a compelling interest that was narrowly tailored to achieve its purpose: in this case, to harvest and haul timber under a management plan adopted by the Government itself.

Yet, the Court preempted justification and held federal manage-


150 Justice O’Connor delivered the opinion in which Chief Justice Rehnquist, and Justices White, Stevens, and Scalia joined. Justice Kennedy took no part in consideration or decision of the case. Lyng, 485 U.S. at 441.

151 Lyng, 485 U.S. at 450.

152 Id. This test has now been supplanted by Employment Division v. Smith, 494 U.S. 872 (1990).
ment of public lands imposed no burden on the Native Americans’ practice of religion whatsoever.\textsuperscript{153} Citing the Court’s prior rejection of a Native American religious claim in \textit{Bowen v. Roy},\textsuperscript{154} O’Connor explained, “[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government’s internal procedures.”

In doing so, Justice O’Connor analogized the aggregate religious burdens of three separate Native American tribes with that of one couple personally concerned with the adverse affect that a Social Security number would have on their child’s soul.\textsuperscript{155} The majority rejected the tribes’ distinction between the subjective parents’ desire and the present objective circumstances in which the road would physically destroy the environmental conditions and the essential privacy, without which the religious practices could not be conducted.\textsuperscript{156} During oral arguments, the Tribes’ counsel spent most of her time responding to numerous factual hypotheticals regarding the limits of the religious practice—specifically, whether the tribes also sought to prevent “Boy Scout encampments” or Forest Service Rangers from conducting “fire protection.”\textsuperscript{157} The Court could not empathize with the practice of a religion so ancient and unfamiliar in order to recognize the adverse and permanent effects of an industrial logging road as different from the trivial disturbances of potential campers. Nor could it perceive the inherent similarities between the Natives’ religious claim and prior claims brought under Judeo-Christian concerns.

\textsuperscript{153} \textit{Id.} at 476.
\textsuperscript{154} \textit{Bowen v. Roy}, 476 U.S. 693 (1986) (The plaintiff parents contended religious beliefs prevented them from acceding to the use of a Social Security number for their 2-year-old daughter because the use of a numerical identifier would “‘rob the spirit’ of [their] daughter and prevent her from attaining greater spiritual power”).
\textsuperscript{155} \textit{Lyng}, 485 U.S. at 448.
\textsuperscript{156} \textit{Id.} at 449.
\textsuperscript{157} Bowers and Carpenter, \textit{supra} note 54, at 521.
Instead, O’Connor found the tribes’ efforts to distinguish Roy “unavailing,” calling any effects the lawful road would have on the Natives’ religious beliefs, merely “incidental.” The majority went on to distinguish the tribes’ complaint from other Free Exercise challenges that resulted in a substantial burden on a Judeo-Christian religion. In Yoder, the challenged compulsory school attendance state law—the criminal violation of which subjected a parent to a $5 fine—had threatened to undermine the Amish community and religious practices. To avoid violating that law, adherents would be forced to “abandon belief . . . or . . . to migrate to some other and more tolerant religion.”

Considering that even if the Court were to accept that the Government’s project could “virtually destroy . . . Indians’ ability to practice their religion,” Justice O’Connor nonetheless found the Constitution “simply does not provide a principle that could justify upholding [the tribes’] religious claims.” This was because the “Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.”

In essence, the majority’s opinion argued that the “government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.” Despite O’Connor’s use and repetition of “simply,” the road’s repercussions on the indigenous religious rituals were not simple at all.

Relying on the fact that the road would be removed from the religious sites by a half mile, Justice O’Connor rationalized the intrusion saying, “[n]o sites where specific rituals take place were to be disturbed.” The majority further justified the in-

---

158 Id.
159 Wisconsin v. Yoder, 406 U.S. 205 (1972) (The Amish were criminally fined $5 for failing to provide traditional education to their children after the 8th grade. The criminal nature of the statute was problematic as adherence was coercive in nature).
160 Lyng, 485 U.S. at 451-52.
161 Id. at 448.
162 Id. at 453.
junction's reversal under a concern for hypothetical future suits brought by Native Americans seeking to exclude all human activity from all religious areas. Justice O'Connor concluded saying, "[e]xcept for abandoning its project entirely, and thereby leaving the two existing segments of road to dead-end in the middle of a National Forest, it is difficult to see how the Government could have been more solicitous."

Denial and loyalty is demonstrated by the majority's refusal to accept that injustices occurred in the original divestment of the Native Americans' land. Its tone further discloses a rejection of the tribes' religion as legitimate. Not only does the rhetoric display a refusal to recognize previous religious injustices, but it also demonstrates loyalty to a religious belief on which this country was founded. To illustrate, the majority states:

The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. *Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land.*

How the majority failed to realize the irony of that statement is unclear. Nor does it explain why the Supreme Court granted certiorari and reversed an issue that both lower courts had decided in favor of the Native Americans. The lower courts held and affirmed that "the proposed logging and construction activities will destroy respondents' religion, and will therefore necessarily force them into abandoning those practices altogether."

No circuit splits on the issue or other similar motivations for

---

163 Id. at 452.
164 Id.
165 Id. (emphasis added).
166 Id. at 467.
exercising review were present. To the contrary, Congress passed an Act explicitly requiring the accommodation these religious practices. Yet, the Supreme Court heard, and reversed, a case questioning the Government’s right to use its own land even if it infringed upon Native American religious practices—a case which should not have proceeded to court, given express Congressional intent on the matter.

In the majority opinion, Justice O’Connor distinctly refers to the indigenous tribes as “Indians.” To call them anything else would have undercut the ownership and usage rights of the land. Imagine the previously italicized provision using “Indians” replaced by any of the following phrases: “Native Americans,” “indigenous peoples of America,” or more specifically, “those who inhabited this land centuries before we eventually arrived and took it by force”:

Whatever rights the [insert preferred phrase] may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land.

Inherent in each combination lies the information that Native Americans are the original inhabitants of the North American continent. Compare this language to Justice Brennan’s rhetoric in the dissent. Writing for Justices Marshall and Blackmun, Justice Brennan expressed frustration finding the conflicting concerns regarding use and exclusion of activity of the land represented, “yet another stress point in the longstanding conflict between two disparate cultures—the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that hold lands sacred.” In further contrast to the majority’s rhetoric,
sistently using an alternative term and rejecting this view are based upon a loyalty to its own culture and patriotic vision, which associates the European groups who ejected the Native Americans from their land with "America," rather than with the persons who first inhabited America.170

The Supreme Court's decision can be understood as a materialization of the dominant, cultural majority's continued subjugation, both spiritually and culturally, of Native Americans. The majority used discourse as persuasion in an effort to justify its legal judgment, which effectually eliminated a centuries-old religion. The *Lyng* decision served several "loyal" purposes: it exhibited a loyalty to the historical establishment of our country; it showed loyalty to the decision in *Johnson* transferring all titles of land to the U.S. government; it proved loyal to the original views discouraging recognition of Native American rights and legitimate religious practice; and, most importantly, the opinion maintained its loyalty to envisioned values of its own culture, religion and patriotic vision of this country. This loyalty in *Lyng*

Justice Brennan consistently refers to the tribes as "Native Americans," a term more accurate to their description of origin.

170 During oral arguments, the following exchange occurred between Justice Brennan and the Government's counsel:

*Justice Brennan:* Is there anything in the record to show how long the Indians have been using the land?

*Mr. Pincus:* There is testimony in the record indicating the use is quite... has been quite long, but Your Honor, I think—

*Justice Brennan:* Weren't they using it before we arrived?

*Mr. Pincus:* I don't think that the record evidence goes back that long, Your Honor. I'm not sure. It certainly goes back to the 1800s.

*Justice Brennan:* It could be so, couldn't it?

*Mr. Pincus:* It certainly could be, but let me say that any rule that makes the protections of the free exercise clause depend on how long a religion has been in existence is the very type of government preference for religion really that the clause is specifically designed to prevent. It would elevate traditional religion over a new religion and give it more protection against government action.

However, herein lies the bias: the Native Americans were not asking for superior rights of religion. They merely requested same rights afforded to others under the Free Exercise Clause of the First Amendment.
demonstrates how our legal system still preserves fictions of law to the detriment of Native Americans.\footnote{The Lyng decision was extremely controversial and provoked an outcry of social responses from both religious organizations and environmentalists. As a result, the road was never built; regardless, the decision's legal implications on Native American religion will remain law until it is overturned.}

Even today, controversy continues to surround the land on which the Wounded Knee massacre occurred. In the late 1800s, the Wounded Knee site passed into private hands through government allotment to non-Native Americans. The current private owner of the Wounded Knee site, who has held title to the 40-acre plot since 1968, wants to sell and is asking $3.9 million for the property valued at $14,000 by the county assessor.\footnote{In an ironic twist, the owner, James Czywczynski, claims no restitution was ever made for the seizure of his trading post, home, and vehicles for 71 days during the infamous American Indian Movement occupation of 1973. For this reason alone, he has set the asking price at almost four million dollars for the Oglala Sioux tribe, in effect, holding the land hostage. Mark Johanson, Wounded Knee for Sale: Should Oglala Sioux pay $3.9M to Save Massacre Site From Developers? INTERNATIONAL BUSINESS TIMES, http://www.ibtimes.com/wounded-knee-sale-should-oglala-sioux-pay-39m-save-massacre-site-developers-1224999 (last visited Jan. 15, 2015).} He offered the Oglala Sioux the opportunity to purchase under right of first refusal by May 1, 2013. However, the Oglala tribe of the Pine Indian Reservation maintains one of the highest poverty rates in the United States.\footnote{Joseph Brings Plenty, Save Wounded Knee, NEW YORK TIMES (April 11, 2013), http://www.nytimes.com/2013/04/12/opinion/save-wounded-knee.html?smid=fb-share&_r=2& (last visited Jan. 15, 2015).} The owner has been considering offers from private developers as well as the possibility of public auction.

In March of 2012, President Obama authorized the purchase of five parcels of land around the country to be designated and preserved as national monuments, including one in Maryland honoring Harriet Tubman and the Underground Railroad.\footnote{The White House Office of the Press Secretary, President Obama Designates Five New National Monuments (March 25, 2013),
of the United States Army who acted as superintendent over the Sequoia and General Grant National Parks, and established a monument in Delaware to commemorate the English settlement of the first state's colony, but the purchase of Wounded Knee was not considered. The United States acknowledges and makes legitimate efforts to pay tribute to the wrongs committed against minorities; however, more can, and should, be done to right the wrongs suffered by Native Americans.

Legislative developments echo this climate of neglect. In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act protecting religious sites of worship and defining "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." The Act extends broad religious protections to incarcerated individuals, who have had their religious rights severely burdened through the government's act of incarceration, and to those who maintain "an ownership, leasehold, easement, servitude, or other property interest in the regulated land." However, nothing in the Act addresses the unique circumstances of Native American religious practices on holy, but federally owned, land. Until the legal system adequately reflects a system that accommodates Native practices—let alone acknowledges and accepts accountability for injustices committed against Natives—the emotion of loyalty will continue to finance well-reasoned justifications that sustain the cultural majority's preferred version of history. Loyalty as a psychological mechanism will continue to shape society and endorse falsehoods in history until society collectively accepts certain troublesome facts as true and


175 Id.


takes the necessary steps to prevent future mischaracterizations and injustices.


As previously discussed, this paper proposes that shame can be the most powerful, and perhaps the most useful, emotion occurring within the context of racism. Shame is both an internal and external emotion: it can be personally experienced or it can be imposed upon another, and recognition of one’s own shame can signify an acceptance of personal responsibility, becoming a catalyst for progressive change.

This psychological dynamic can be seen through progressive social efforts taken to remedy White Americans’ prior subjugation of African Americans, but such levels of “shame” have not yet evolved within the context of the Native American race. Thus, the absence of shame becomes particularly relevant in a justice system holding Native Americans to the legal standard of one culture, when it has historically designated them as inferior. Repercussions of such disparate treatment continue to place Native Americans in the specific circumstances for which they appear before the court—a system that fails to accept social responsibility or permit those circumstances to mitigate the court’s considerations. As illustrated below, this denial is especially relevant in a court’s objective consideration of “the reasonable man” in criminal law.

In the late 1970s, the Washington legal system subjected two disadvantaged Native American parents to that reasonable man standard. Walter and Bernice Williams could be the only parents ever to have been convicted for the involuntary manslaughter of their child where a court has deemed it necessary to record a legal finding of parental love and ignorance. Despite recognizing the fact the Williamses had not realized their son’s life was in danger, the court convicted the parents of allowing
their fourteen-month-old son die of pneumonia. The opinion in State v. Williams is rich with emotion, both within the court’s legal finding of “love” and its rationalization of the Williamses’ “willful” indifference. Even on appeal, these emotions were recited and affirmed by the reviewing court.

The court described Walter Williams as a “24-year-old full-blooded Sheshont Indian with a sixth-grade education,” who worked as a laborer. Walter was the child’s stepfather. His mother, Bernice Williams, was described as a “20-year-old part Indian with an 11th grade education.” In the fall of 1968, Walter and Bernice’s son became ill.

To alleviate their son’s pain, the Williamses gave him aspirin, believing that was what was required, until it became too late. In reality, the child was suffering from “an abscessed tooth,” which “develop[ed] into an infection of the mouth and cheeks, eventually becoming gangrenous.” The infection produced an odor, and the child’s check “turned a bluish color.” Unable to eat, the boy became malnourished and eventually died of pneumonia. Expert testimony revealed that the child would have survived had he received adequate care at least one week before his death. Despite this, the trial court expressly made a find-

179 In the opinion, the Court of Appeals held evidence sufficient to sustain finding that the parents, who were “ignorant,” loved their child, fed their child aspirin, and believed the child was suffering from a simple toothache, had been put on notice concerning the symptoms of their child’s true illness. Thus, the lack of improvement in the baby’s apparent condition during a period when medical attention could have saved the baby’s life constituted negligence, which sustained their conviction for involuntary manslaughter.
180 Williams, 484 P.2d at 1169.
181 Id. at 1174.
182 Id. at 1173.
183 Id.
184 Id. at 1173-74.
185 Id.
ing that the Williamses “did not realize how sick the baby was.”

Believing the child was suffering from a painful toothache, Walter testified that, given “the way the cheek looked, . . . and that stuff on his hair, [the welfare authorities] would think we were neglecting him and take him away from us and not give him back.” Bernice shared Walter’s fear and rightfully so. In the 1970s, welfare authorities were quick to remove Native American children from their families and place them with non-Native families. At the time of State v. Williams, one in four Native American children were separated from their parents and placed with non-Native families, foster homes, or in other environments. Both of the Williamses were well aware of this probability.

Whether criminal courts were aware of this statistic is unclear. Yet, the opinion’s rhetoric seems to convey shame: shame for the unfortunate circumstances, shame for the social situation of the parents, and shame at the loss of a child. Defined as a painful emotion caused by consciousness of guilt, shortcoming or impropriety, shame has been characterized as a response to a realization that a desired outcome is unattainable: in this case, going back in time to remedy a number of regrettable events. Accordingly, using such dry legal language to discuss the parental emotion of love, when such a finding was not required in a manslaughter case, may have been a recognition of the unique circumstances involved:

The defendant husband assumed parental responsibility with the defendant wife to provide cloth-

186 Id. at 1170.
187 Id. at 1174.
188 ECHO-HAWK, supra note 108, at 217.
189 Id.
190 Placement cases would have occurred in family court, rather than in criminal.
191 See Part II of this article titled “Shame,” supra notes 80-91.
ing, care and medical attention for the child. Both defendants possessed a great deal of love and affection for the defendant wife’s young son.\textsuperscript{192}

Despite their love for their son, the Williamses’ failure to realize his life was in danger when a “man of reasonable prudence under the same or similar conditions” would have realized the risk, coupled with their failure to take the baby to the doctor when they were obligated to do so, culminated in involuntary manslaughter. As the lower court stated, and the appellate court affirmed:

The defendants were ignorant. They did not realize how sick the baby was. They thought that the baby had a toothache and no layman regards a toothache as dangerous to life. They loved the baby and gave it aspirin in hopes of improving its condition. They did not take the baby to a doctor because of fear that the Welfare Department would take the baby away from them. They knew that medical help was available because of previous experience. They had no excuse that the law will recognize for not taking the baby to a doctor.\textsuperscript{193}

Interestingly, the Washington Court of Appeals conducted its own factual examination of the evidence in determining whether “willful misconduct” existed to support the lack of excuse for failing to seek medical attention: “[t]he conclusion, in light of the findings, means merely that the conduct, although not intentional, was without lawful excuse and therefore willful . . . Defendants willfully violated the duty owing their deceased child.” To justify conducting its own factual consideration, the appellate court wrote, “[b]ecause of the serious nature of the charge against the parent and step-parent of a well-loved child, and out

\textsuperscript{192} Williams, 484 P.2d at 1170.
\textsuperscript{193} Id.
of our concern for the constitutional rights of the defendants, we have made an independent examination of the evidence . . .

This interpretation relied on an evaluation of "ordinary caution" compared to gross negligence, defining ordinary caution as the "kind of caution that a man of reasonable prudence would exercise under same or similar conditions." Yet, in a legal system that has continually placed Native Americans at a disadvantage, by denying their constitutional rights, by restricting the practices of their culture, and by holding them accountable for the products of these unjust impositions, what "conditions" should, in fact, be considered? A long history of legally authorized injustices placed the Williamses in their unique position, and, at the time of the case, the State practiced the frequent removal of Reservation children from their families. The opinion even indicates that Bernice recognized this threat, testifying, "[i]t’s just that I was so scared of losing him." The practiced habit of Native children removal became so common that by 1978, Congress declared an "Indian child welfare crisis of massive portions." To counter this crisis, Congress enacted the Indian Child Welfare Act of 1978, requiring state courts to apply Native American cultural values as minimum standards during placement and transfer cases to tribal courts upon request. Congress took action to investigate causes and intervened to protect Native American families and tribes and their cultural integrity. Government agents had been removing children from reservations for almost an entire century, placing them into state run assimilation programs. As part of those programs, children were sent to Federal boarding

---

194 Id.
195 Id. at 1174.
198 ECHO-HAWK, supra note 108, at 218.
199 Id.
schools, often hundreds of miles away from their tribes.\textsuperscript{200} Parental suits were often unsuccessful; some courts upheld government custody of Indian children, even when the custody was against the parents’ wishes.\textsuperscript{201}

Under the United Nations definition, such acts constituted genocide. The UN defines genocide as an act “committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group,” such as “[f]orcibly transferring children of the group to another group.”\textsuperscript{202} The 1978 House report showed that 34,538 Native American children were living in institutional settings in 74 boarding schools apart from their families.\textsuperscript{203} Congress blamed the State systems and courts for creating this crisis, stating, “[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.” Much of that blame was then transferred to non-Native American social workers, who were unfamiliar with Native cultures, and their misunderstanding of the Native nuclear family and social structures on reservations.\textsuperscript{204} In addition, the agents’ uninformed assessment of such family structures rendered it nearly impossible for other Native American couples to qualify as foster or adoptive parents for displaced Native children.\textsuperscript{205}

The legal system placed families, like the Williamses, between a rock and a hard place. Taking the baby to the doctor may have saved the Williams child’s life, but doing so was weighed against

\textsuperscript{200} Id. at 221.

\textsuperscript{201} Id.; see In re Can-ah-couqua, 29 F. 687 (D. Alaska 1887).


\textsuperscript{204} ECHO-HAWK, supra note 108, at 222-23.

\textsuperscript{205} Id.
what the Williamses believed was a guarantee that their son would be taken away. And, had the baby been removed and placed in a foster home, it is unlikely the Williamses could have successfully sought redress in court. Thus, courts held Native Americans, like the Williamses, accountable for the mistakes they made in fear of losing their children to the White American welfare system: a risk they weighed more inevitable, but just as permanent, as death.

This absence of shame when evaluating a Native American under the standards of a “reasonable” White American has echoed throughout criminal law. However, some instances exist in which the law has more recently taken cultural considerations into account. Patrick Croy, a Native American from northern California, was raised in an area that suffered from discrimination due to long-standing conflict with White Americans. As a result, he grew up distrusting white authorities. When Patrick and two friends became involved in a dispute over change in a liquor store, “twenty-seven police officers responded in pursuit of the three men.” During his retreat, Pat-

---


208 Id.; Renteln, supra note 132, at 37.

rick killed a police officer in what he claimed was self-defense. In his 1979 trial, Patrick was convicted of murder and sentenced to death, but six years later the California Supreme Court overturned his conviction and remanded for consideration of the "individualized objective standard of reasonableness, which includes the individual's perception of both apprehension and imminent danger from the individual's own perspective." And upon retrial, the jury acquitted Patrick Croy.

Though the Williamses were not afforded this individualized objective standard, the Washington Court of Appeals seemed to express remorse for the devastating facts in its own way: the Williamses were sentenced to three years imprisonment with their sentences suspended. In fact, the neither parent served a day behind bars. What, then, is the purpose for such emotional legal analysis contrasted with the traditional purposes of retribution? Did the justice system's obligation to retribution override its capacity to express empathy and find a greater social accountability? The Court of Appeals elaborated at length on the legal duty of parents, more than what an evaluation of ordinary negligence requires. Even so, the court was constrained by the law. It seems that such rhetorical overcompensation was an effort to rationalize the lamentable circumstances and outcome and functioned as a justification for the court's ultimate holding.


210 People v. Croy, 710 P.2d 392. (Cal. 1985)

211 Id.
to uncomfortable facts revealing the truth of this country's past. Such lack of shame has perpetuated a legacy of denial. An example of this emotional vacancy was presented earlier in Chief Justice Rehnquist's dissent in *U.S. v. Sioux Nation*. Chief Justice Rehnquist defended and justified the Army's actions across thirteen pages in which not an ounce of shame is personally expressed. Instead, he wrote:

> Different historians, not writing for the purpose of having their conclusions or observations inserted in the reports of congressional committees, have taken different positions than those expressed in some of the materials referred to in the Court's opinion. This is not unnatural, since history, no more than law, is not an exact (or for that matter an inexact) science.212

Thus, Chief Justice Rehnquist points out an insightful paradox: the study of law, similar to the study of history, is a fluid and inexact science. Those who control the experiment control the outcome. This outcome becomes a legacy and a foundation upon which certain societies are built and other societies are destroyed.

**Conclusion**

"Though many non-Native Americans have learned very little about us, over time we have had to learn everything about them. We watch their films, read their literature, worship in their churches, and attend their schools. Every third-grade student in the United States is presented with the concept of Europeans discovering America as a "New World" with fertile soil, abundant gifts of nature, and glorious mountains and  

---

rivers. Only the most enlightened teachers will explain that this world certainly wasn’t new to the millions of indigenous people who already lived here when Columbus arrived.” —Wilma Mankiller

United States policy has struggled to propose solutions as to how our society should approach race. To the extent that any solution may some day be possible, a society and its individuals must first confront the uncomfortable possibility it may harbor racial tendencies. Emotion within rhetoric reveals compelling evidence of how racism continues to prevail in the law and shape our society. Throughout history, the Supreme Court has relied upon outdated doctrines of colonialism when deciding contemporary issues relating to indigenous rights. As Native American author and attorney Walter Echo-Hawk points out, it becomes increasingly unseemly for courts “to wield such an outmoded, inherently unjust, and oppressive set of legal doctrines against a tiny minority of indigenous Americans.”

Racism has no place in the legal system. As social psychologists and professors Samuel Sommers and Phoebe Ellsworth argue, an “explicit demonstration of racism is frowned upon in most circles. But Whites’ outward acceptance of a nonprejudiced value system has not led to the end of racial bias. Instead . . . many modern Whites express [racial] sentiment through more subtle, symbolic, or ‘acceptable’ means.” These uncon-

213 Wilma Pearl Mankiller (November 18, 1945 – April 6, 2010) was the first female Chief of the Cherokee Nation.
214 ECHO-HAWK, supra note 108, at 21. As previously mentioned, the Native American and Hawaiian Natives population represents less than 1 percent of the United States’ population. Today, Native Americans are the most economically disadvantaged group in the United States. The poverty rate for Native American populations is more than double the poverty rate for the overall US population. David V. Baker, American Indian Executions in Historical Context, 4 CRIM. JUST. STUDIES 351 (2007).
scious processes of racism should be combated with emotional intelligence. But acknowledging racial bias in rhetoric comes with its own risk: such revelations could further enable the legal system to hide behind proper manipulation of language while still encapsulating discreet racism. Despite this possibility, it is this author's hope that the social debt owed to Native Americans will someday be recognized and paid in full. Given the limitations on our legal system, the best odds may be to begin with individual education in hopes of effectuating a large-scale societal reform.

study racism within the context of "black" and "white," which is why [racial] was used to replace "anti-Black," though its message is relevant to all forms or racism.).