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The Ghost of Moby-Dick and the Rhetorical Haunting of the Ninth Court's *Anderson v. Evans* Decision

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This essay explores the rhetorical consequences of the Ninth Circuit Court's deployment of literary allusions to Herman Melville's Moby-Dick in the 2002 Anderson v. Evans decision. Rather than operate as a rhetorical embellishment, the literary allusions guide the court's decision through the difficult legal conflicts created by multicultural difference in a globalized age. Marshalling fundamental tenets of Critical Race Theory (CRT) and Tribal Critical Theory (Tribal Crit), this essay argues that the allusions to Moby-Dick operate as a cultural technology of truth that rearticulates and masks how ideologies of whiteness operate as a guide for the court.

Introduction

Historically, federal courts have been viewed as champions of civil rights and progressive social change.[1] Particularly in Native American[2] affairs, the federal judiciary—due to the legacy of landmark decisions made by the Marshall court—were perceived to be the only branch that respected and protected Indian sovereignty.[3] For example, the judiciary was the first branch to boldly address the status of preexisting tribal political and property rights, giving the courts an "air of sanctity" and legitimacy in defining the scope and meaning of Indian sovereignty.[4] As a result, the courts began to exercise their own plenary power over matters of Native American affairs, especially in the last 25 years.[5] Subsequently, the legal system has attributed itself with a sense of authority over Native American legal rights and sovereignty.[6] However, the courts regularly downplay their increasingly influential role in Indian affairs. For example, courts regularly argue that they would prefer to have clear congressional or executive guidance to assist them in resolving sovereignty disputes.[7] Yet, even when they receive clear direction from the other branches, the courts are unwilling to follow this guidance. [8] Additionally, while their authority and influence over Indian affairs has dramatically increased, the courts have become more fearful of creating broad rulings that might make them appear to be interventionist. [9] Consequently, the courts have severely diminished Indian sovereignty over the last 25 years without acknowledging their role in the process.[10]

Yet, this legal anxiety is not solely confined to matters of Native American affairs. The legal system has historically been viewed by minoritarian groups as an authoritative forum where matters of

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multicultural difference can be properly resolved, even when the courts' rulings have had detrimental effects on ethnic minority rights.[11] Here too, much like in their handling of tribal sovereignty cases, the courts strive to appear impartial and non-interventionist. Despite their efforts, they haphazardly use selective precedence and unjustified interpretations of statutory language and decisions that establish new doctrines that undermine important cultural and legal rights.[12] In light of these legal patterns, this essay explores how courts discursively negotiate and reproduce their political authority to curtail Native American self-determination and sovereignty. To do so, the written opinion of the Ninth Circuit Court of Appeals' 2002 *Anderson v. Evans*[13] decision about the legality and environmental impact of the Makah tribe's efforts to reclaim a sovereign right to hunt gray whales is examined. This decision was chosen for close examination because it addresses highly controversial and complex conflicts between federal environmental regulations, international law and tribal sovereignty.[14] In particular, the decision asks the court to afford the Makah a treaty-based right to engage in an activity U.S. law has deemed dangerous and threatening to global whale populations and the ocean ecosystem. As a result, the case forces the court to confront the conflict that is created when treaty rights clash with national and international norms and laws. While the Makah example is a rather narrow instance, the conflict of issues before the court are ones that speak to a host of issues that affect the courts' ability to recognize and respect racial difference in a globalized era.[15]

Marshalling fundamental tenets of Critical Tribal Race Theory (Tribal Crit), this essay examines how the discourse of the *Anderson* decision forecloses an important opportunity for the Ninth court to recognize its colonialist authority to restrict Native American sovereignty. What is of particular interest is the way in which European American[16] cultural fears about the loss of legal authority and the sublime force of nature, as discussed through allusions to the terrifying whale in Herman Melville's *Moby Dick*, call forth and mask the operation of whiteness as a governing ideology throughout the decision. Specifically, Tribal Crit and rhetorical analysis are utilized in this essay to expose how the law discursively deploys European American fears of *Moby-Dick* and the sublime to constrain Native American beliefs, values and cultural practices in order to maintain legal legitimacy.

The Status of Makah Whaling and Treaty Rights

In the mid 1990s, the Makah Nation of northwest Washington state rose to national and international prominence when it announced that it would exercise its treaty rights and resume the practice of whale hunting in an effort to revitalize its community. The declaration came as a surprise to many as the Makah had not practiced whaling in over seventy years. This hiatus began in the 1920s when the California

gray whale was thought to be at risk of extinction. After being approached by the federal government to stop whaling until the species was no longer in danger, the Makah voluntarily stopped hunting the whale. In 1994, the gray whale was taken off the U.S. Endangered Species List and the Makah sought to reclaim their treaty-bound right. In recognition of this right the federal government, through the office of the National Oceanic and Atmospheric Administration (NOAA), supported the Makah's claim and offered to represent the Makah to the International Whaling Commission (IWC), the organization charged with authority to regulate all whaling practices.[17]

During the seventy year hiatus in Makah whaling, numerous domestic and international regulations and laws were passed that complicated the Makah's bid to resume whaling. In 1972, Congress passed the Marine Mammal Protection Act (MMPA), which heavily regulates any activities that threaten the sustainability of marine mammal populations. On the international level, the IWC passed a global moratorium on all commercial whaling practices and created strict regulations that govern all scientific and indigenous whaling activities.[18] Within this legal matrix, the Makah's request placed the government's recognition of treaty rights at odds with both national and international law.

In addition, the Makah's decision drew global backlash and resistance from whale conservation and citizen groups that resulted in a lengthy public relations and media battle between both sides.[19] These groups fought the Makah's efforts to resume whaling in two Ninth Circuit Court decisions. In 2000, the court ruled in *Metcalf v. Daley*[20] that the NOAA and National Marine Fisheries Service (NMFS) violated the National Environmental Policy Act (NEPA) by failing to conduct a proper legally-required assessment of how the Makah's plans could affect the environment. The factual issue before the court in *Metcalf* was not whether the Makah had a legal right to whale. Instead, the court questioned whether the NOAA and NMFS followed proper administrative procedures in working with the Makah. In making its ruling, the court's majority ruled that the government agencies had failed to properly file an Environmental Impact Statement (EIS) about the hunt when it made an agreement with the Makah and therefore a new agreement and EIS would need to be created.

In 2001, the existing agreement between the Makah and the NOAA and NMFS was dissolved and a new Environmental Assessment (EA) was issued. In entering this new agreement, the NOAA, NMFS and Makah Whaling Commission negotiated an agreement to reduce the number of non-migrating whales that the Makah could hunt. Shortly after the new EA was issued, the Makah changed their whaling management plan to no longer limit the number of attempted harpoon strikes the hunters could make on

non-migrating whales. Because the EA was filed prior to this revision, it did not consider the impact of these changes. As a result, the conservationist and citizen plaintiffs' filed suit in 2002 in *Anderson* alleging that the new EA violated NEPA and the MMPA.

To decide if the new EA and executive-Makah agreement violated NEPA and the MMPA, the Ninth Court considered the impact the hunt would have on public safety, the local whale population, and other conservation goals. Traditionally, the courts have ruled in favor of Native American's demands for special fishing and hunting rights due to the language of sovereignty treaties. Courts have also ruled that because of these rights, states cannot unduly regulate these activities. For instance, throughout the 1960s, both district courts and the Supreme Court ruled in *Sophappy v. Smith*, *U.S. v. Washington* and the *Puyallup* decisions that Native fishermen were allowed a "fair and equitable share" of local fish harvests. However, the justices also argued that these rights do not allow for unsustainable practices that threaten to endanger animal species and habitats.[21] Additionally, in terms of federal laws, the Supreme Court ruled in 1986's *Dion v. United States* that courts should presume that treaty obligations are not abrogated by federal law unless Congress explicitly states that these rights are terminated by new statutes.[22]

As a result, the court had to consider the appellants' claim that the federal MMPA applied to the Makah hunt and, in effect, abolished the right to hunt contained in the 1855 Neah Bay treaty. In its decision, the court ruled that the Makah's hunt could not continue because the new EA was inadequate and the MMPA did apply to the tribe's hunt. In reaching its decision, the court weighed the "uncertain" impact the hunt might have on local whale populations and the possible precedent the hunt would set for other indigenous groups and nations that want to resume their commercial whaling practices. In doing so, the court relied upon "state conservation necessity principles" to analyze whether or not federal statutes abrogated Makah treaty rights.[23] It is within this context that the Makah treaty right to hunt whales was decided in the two circuit court decisions: *Metcalf v. Daly* and *Anderson v. Evans*. To reach a decision, the court confronted the conflict created in recognizing multicultural difference in a globalized and environmentally anxious era. In order to understand the rhetorical effects that allusions to *Moby-Dick* play in this decision, I turn to Critical Race Theory and Tribal Crit Theory.

Critical Race Theory, Tribal Crit Theory and Communication Studies

Critical Legal Studies (CLS) began as an oppositional movement that primarily rose in the late 1960s to challenge the assumption that the law is coherent, fair, predictable and socially progressive. One of CLS' primary tenets is that the law is indeterminate; in other words, the law's precedent can lead to vastly

different decisions in different cases due to the context in which they are decided. Additionally, due to its Marxist origins, CLS positions the law as a social institution that constructs, maintains, and masks class hierarchies that favor the elite. More specifically, CLS scholars were interested in how seemingly straight-forward legal arguments, rules and precedents were used in rather unpredictable and contradictory ways to uphold class privilege.[24] As David Wilkins explains, the courts cannot make apolitical and objective decisions because their decisions,

> are based on different and often controversial moral and political ideas. Neither lawyers nor jurists can provide simple answers to complex political and legal questions because the legal system, like society at large, is unable to reconcile the contradictory instincts that arise when people confront social problems. Rather than deciding which of these conflicting instincts to follow, "the law" seeks to embrace them all…."Law" is really politics clothed differently.[25]

From a CLS standpoint, the legal system is highly political because it confronts a host of difficult cultural and political problems that cannot be simply resolved by objective fact-finding and proper legal reasoning. Instead, the courts must make subjective choices that are entangled with broader cultural, economic and political ideologies.[26] However, because they are perceived to have authority as a neutral arbitrator, the courts continually downplay their increasingly political role to maintain their legitimacy as a fair and politically insulated institution.

While CLS scholarship provides many valuable insights, it often does not acknowledge the force and role of rhetoric in producing, reproducing and masking the courts' legitimacy. For example, John Lucaites maintains that CLS scholarship often holds the discursive force of "the law" as "sheerly a function of its ability to manipulate the physical power of the state to mandate its will."[27] However, if "the law" is appreciated for its rhetorical nature, Lucaites contends that scholars can begin to understand how the legitimacy of "the law," "is in practice a direct function of its condition as a discourse of power, i.e., normative arguments designed to produce and reproduce dialectics of control."[28]

In addition to the failure to appreciate the rhetorical nature of legal authority, CLS also faced a challenge in the mid-1970s, when a Critical Race Theory (CRT) movement emerged from within CLS led by a group of activists and scholars that were unsatisfied with the pace and nature of the progressive change that CLS sought. More specifically, CRT was born to more directly challenge societal and legal structures by positioning race and racism at the center of concern.[29] In breaking from CLS, CRT borrowed the idea that the law is indeterminate and hierarchical. Additionally, CRT drew from critical philosophy an understanding of power as constructed by and contained within social roles.[30] However, CRT scholars

differentiated themselves from CLS by focusing primarily on issues of race and racism, unlike CLS' strict focus on economic social class.[31] CRT also distinguished itself by arguing that racism is a factor in both law and everyday experience. In other words, new and subtler forms of racism were emerging that could not be combated with traditional legal solutions or civil rights.[32] To combat the pervasive nature of racism, CRT scholars critically interrogate whiteness as an invisible, normative power that operates in daily interactions as a form of privilege. Cheryl Harris explains how whiteness is normalized as the status quo when she argues, "After legalized segregation was overturned, whiteness…evolved into a more modern form through the law's ratification of the settled expectations of relative white privilege as a legitimate and natural baseline.[33] Additionally, CRT scholars contend that race is a social construction that has no inherent essence, but rather is socially assigned meaning and purported substance. Finally, CRT critiques liberalism as a legal framework by maintaining that legal notions of color-blindness and race neutrality function as falsities and subsequently ignore both racialized power and systemically embedded racism. Given these emphases, CRT calls for new critical approaches to understanding race and racism that promote and utilize the voices of people of color to create a new race consciousness.[34]

Despite its critical exploration of whiteness and racism, CRT does not provide a nuanced means to address historical and contemporary struggles concerning rights, sovereignty and land that Native American communities face.[35] As a result, Tribal Crit emerged from the CRT movement as a deliberate response to the colonializing discourses and practices that remain endemic to European American society. According to Tribal Crit scholars, colonialization encompasses the European American ideological systems and power structures that dominate and dismiss indigenous values and beliefs.[36] This definition of colonialism borrows from CRT's notion of racism as socially constructed and defined by a white and European American epistemology. Additionally, Tribal Crit argues that federal and state policies are "rooted in imperialism, White supremacy, and a desire for material gain."[37] Thus according to Tribal Crit scholars, the foundation of law and policy is problematic for numerous reasons. First, imperialism and White supremacy are positioned as institutionalized social constructions that highlight real and imagined differences between European American society and Native cultures. Likewise, these constructs assign value to those differences privileging European American values and beliefs. Second, Tribal Crit contends that colonial ideologies are justified and constantly rearticulated through purported neutral and color-blind institutions like the courts.[38] Third scholars argue that European American culture views tribal lands as material property, which ignores the indigenous beliefs that forefront a strong connection between land and

people.[39] Fourth, Tribal Crit contends that indigenous people occupy a unique luminal space in European American society as both racial and legal/political beings that lack proper legal and political status. Put differently, Native Americans are defined as a racial and distinct group, yet they are often criticized for their unique cultural, political and religious rights that were codified in treaty agreements. Lastly, Tribal Crit's political telos is to obtain indigenous autonomy, self-determination and sovereignty.[40]

In communication studies, scant attention has been paid to Native American identity in general and Tribal Crit in particular. However, a small group of rhetorical scholars have examined representations of Native American culture and the political efficacy of Native American discourse. One of the more prominent scholars is Randall A. Lake, whose work examines the effectiveness of the Red Power Movement's protest rhetoric. Lake concludes that through appeals to past and present and to a common identity, the movement was successful in articulating the goals and aspirations for future indigenous politics.[41] Like Lake, Richard Morris and Phillip Wander assess the effect of Native American protest rhetoric at the 1973 Wounded Knee protests.[42] Examining the discursive strategies used by several Native American groups at the protest, Morris and Wander contend that the rhetoric succeeds in creating a pan-Indian political coalition. Also, scholars have examined the construction and re-articulation of racist and monolithic representations of Native Americans in educational, popular culture or museum settings. For instance, Morris illuminates the ways that the United States educational system uses a mimesis rhetorical process to assimilate and acculturate Native American students.[43] Additionally, S. Elizabeth Bird and Derek Buescher and Kent Ono explore the construction of static, racist, neocolonial and gendered images of Native Americans in popular films and television.[44] Also, work by Greg Dickinson, Brian Ott, and Eric Aoki investigates how Native American museums deploy a rhetoric of reverence that encourages European American visitors to adopt a respectful, yet distant perspective towards the history of Western conquest which allows visitors to resolve themselves of social guilt.[45]

This body of work is noteworthy in its common interests with Tribal Crit scholarship. For example, both sets of scholarship are attentive to the racist representations of Native American identity that manifest via a variety of social and cultural institutions. Additionally, they note the ways that discourse assigns and privileges difference between European and Native American communities. However, while quite valuable, communication research has yet to deeply explore how the law as a social institution functions in contemporary society to constrain and arguably destroy Native American beliefs, values, and cultural practices. More pointedly, given that the courts are increasingly asserting their influence over Native

American culture and politics, there is a need to respond to Lucaites' call to rhetorically investigate the law's influence and how it maintains its authority in Native American affairs.

Many Tribal Crit scholars have explored the problematic nature of colonial and legalized control over Native American lands and culture.[46] However, Lucaites points out, the shortcoming with this type of work is that it often understands the law merely as an extension of the power of the federal government. This is problematic because it presumes that the legal system has a predetermined authority that it does not possess. Instead, as Lucaites contends, the judiciary must frequently rearticulate its legitimacy through the discourse of its decisions. Thus, a critical reading of the courts' rhetorical deployment of legal precedence and rules provides a more nuanced understanding of how the law constitutes and maintains its influence over Native American affairs.[47]

Propelling this inquiry, the tenets of Tribal Crit coupled with a rhetorical exploration of the law's rearticulation of its legitimacy provide an excellent foundation to critique the underlying politics of colonialism and whiteness in the Makah's case. Particularly, this essay examines how the court's discourse about conservation principles, scientific knowledge and sublime awe of nature leads to a decision that constructs and privileges cultural difference in ways that ultimately undermine Makah sovereignty. In doing so, this discourse operates as a "strategic rhetoric" of whiteness—an invisible and universalized norm that positions European American values and concerns as civilized, normal and important.[48] Thus rather than exposing an overtly colonial and racist decision, the court's discourse reveals a deeply anxious and haunted court; one that is troubled by the specter of whiteness presented by the sublime nature of Moby-Dick.

The Introduction of *Moby-Dick*

In the opening of the *Anderson* decision, Judge Martha Berzon's makes a rather surprising and unusual allusion to the classic American whale story, *Moby-Dick*.[49] Specifically, Berzon recites the following from Chapter 69 entitled, "The Funeral," "While in life the great whale's body may have been a real terror to his foes, in his death his ghost became a powerless panic to the world."[50] Berzon also makes two additional allusions to *Moby-Dick* within the first paragraph of the decision:

> The worldwide hunt for whales in the years of the real-life Captain Ahab roamed the high seas…seriously depleted the worldwide stock of the cetaceans. As a result of the near extinction of some species of whales, what had been a free realm for ancient and not-so-ancient mariners became an activity closely regulated under both federal and international law. This case is the second in which we have considered whether the federal government's approval of the Tribe's plan to pursue once again the Leviathan of the deep runs afoul of that regulation.[51]

It would be easy to dismiss Berzon's allusions as innocent rhetorical embellishments. However, the parallel between the hunt and *Moby-Dick* registers in many accounts of this dispute. For example, a major commercial book detailing the events of the Makah's hunt contains an extensive subplot that traces parallels between Melville's life and the story of *Moby-Dick* and the hunt.[52] In addition, several newspaper reports made allusions to Melville's work in their headlines and coverage of the hunt. For example, *The Times* coverage of the story featured this headline, "Modern Captain Ahab Wins Whaling Quota." Similarly, Giles Whittell's coverage for *The Australian* relied on *Moby-Dick* to describe the Makah's hunting methods: "The Makah Indians plan to resume whaling using traditional methods that have been known to make Herman Melville's *Moby Dick* look like a lazy afternoon in the park."[53]

Why does the ghost of *Moby-Dick* repeatedly surface in European American attempts to understand the Makah's hunt? Do these references to *Moby-Dick* speak to something larger that haunts the contemporary European American imagination in general and the court in particular? In response to these questions, I situate *Moby-Dick* as a culturally significant allusion that warns European Americans of the risk they face in challenging the sublime. First published in 1851, Melville's story describes the adventures of Captain Ahab, a tyrannical whale hunter who seeks to destroy Moby Dick, a vicious and giant white sperm whale. Ahab seeks revenge on the whale because in a previous encounter, the whale wrecked the captain's boat and bit off one of his legs. As a result, Ahab's desire to kill Moby Dick is relentless. So much so that he is driven by his insanity into a highly destructive pursuit of the whale that leads to the destruction of the ship and the death of himself and all but one member of the crew. Told from the vantage point of the character Ishmael, a wandering sailor who joins the crew of the *Pequod* and later survives its destruction, the story examines issues of class and social status, the nature of good and evil, and the power of the sublime.[54] With regard to race, *Moby-Dick* examines racial difference through the description of the multicultural collection of harpooners on the *Pequod* who are all non-Christian and non-white. For instance, Queequeg is a Polynesian cannibal, Daggoo is a noble and giant African, Tashtego is Native American, and Fedallah is of Indian decent. All of these characters are described as "noble savages," untainted by corruption. While Melville portrays the primitive ways of the "savages" as superior to the ways of European American civilization, it is the act of whale hunting that ultimately corrupts and destroys the harpooners.

Considered the first American literary classic, *Moby-Dick's* lessons about nature, status, morality and the sublime have been evoked throughout history for a wide range of purposes. For instance, *Moby-Dick* has been used to predict and warn against the consequences of a wide range of historical events such as, the

Jewish Holocaust, the potential fall of American economic hegemony in the 1950s and the events of 9-11.[55] When this culturally significant work is alluded to in Berzon's decision, one of the Makah's attorneys argued that the reference was "blatantly Anglo-centric" and illustrative of a "weak background in setting the context of [the *Anderson*] opinion."[56] While the references to *Moby-Dick* might act as a poor legal context for the opinion from a Tribal Crit standpoint, the allusions expose the courts difficultly in negotiating its own authority concerning Indian sovereignty and multicultural difference.

The Melancholic Contemporary National Moment

To understand how the allusions to *Moby-Dick* operate within the court's discourse, it is necessary to first examine the broader context that sparks a need for this allusion. Beginning in the 1950s and early 1960s, there was an alleged national consensus and confidence "united in a celebration of democracy and the rule of law."[57] However, the increased calls for rights by previously disenfranchised groups, the assassinations of John F. Kennedy, Martin Luther King, Jr., and Robert F. Kennedy, and the political mistrust generated by the Cold War, Vietnam and Watergate "left Americans shaken with self-doubt and 'tore [the national] consensus to shreds.'"[58] Later, the twin forces of multiculturalism and globalization increasingly eroded the epistemological foundations of concepts like progress, rights, sovereignty, and truth. For example, the rise of multicultural concerns revealed the exclusive character of political and legal institutions, which placed the legitimacy of the current political and legal order in question. Additionally, globalization challenged notions like national sovereignty and increasingly exposed the porous nature of sovereignty, which continued to undermine the nation's ability to maintain a sovereign legal order.[59]

All of these aforementioned occurrences affected the legitimacy of the U.S. legal system. As minoritarian and disenfranchised groups increased their demands for legal rights, it created a host of new critiques and perspectives that challenged the authority and normative foundations of the legal system. Consequently, legal scholars and justices are more anxious about the loss of the foundations of legal knowledge and the authority of the law. In response to this anxiety, legal discourse constantly attempts to rearticulate a strong legal foundation to avoid confronting the challenges advanced by multicultural difference. However, efforts will inevitably fail, which in turn produces more anxiety and creates haphazard and conflicting legal decisions. [60]

It is this anxiety that I argue creates a melancholic moment for European America. I refer to this moment as melancholic because the nation at large and legal system in particular are unable to accept the loss of a unified national character and an authoritative legal system. As a result, the moment is marked by

an effort to cling to these idealized notions while continuously grieving about the loss of these foundations. In his exploration of the process of grieving, Sigmund Freud differentiated melancholy from mourning. Mourning is the process in which a specific love object is lost and the grieving subject accepts that what they love about the specific object has been lost. Because of this acknowledgement, the subject can recover from the loss. In comparison, melancholia is a persistent condition or state in which the lost love object is unconsciously idealized, meaning that the subject believes that the love object is irreproachable, despite its failure to achieve this ideal state. [61] Additionally, because the object has been lost and was never ideal to begin with, the subject refuses to let go of the ideal and internalizes the loss in order to preserve an attachment to the unattained ideal. This persistent attempt to preserve what is lost prevents the subject from recovering from the trauma.[62] The significance of Freud's theory of melancholia in examining the court's discourse is rooted in its ability to explain how groups and institutions respond to trauma and loss. While Freud's primary focus was to understand how individuals psychically deal with grief, other scholars have explored how cultural fictions[63] and contemporary attachments to lost political foundations serve as sources of cultural melancholia.[64] Understanding how fiction and politics are sites of melancholic attachments allow us to explain how anxieties about a lost past and legal foundation constantly haunt the court.

For example, viewing contemporary politics as haunted by melancholic attachments allows us to understand how a host of contemporary anxieties are prefigured and articulated to limit political choices in the present and future.[65] In other words, instead of operating solely as a personal and individual psychic response to trauma, melancholic discourse also circulates as strategic "forces" that enhance and constrain certain political options. As a result, rhetorical artifacts and practices can serve as sites that articulate a range of cultural anxieties that compel our present and future actions. Additionally, understanding politics as a potential site of melancholy helps explain the rather arbitrary and incoherent ways in which we act towards past wrongs and cultural anxieties. While mourning implies that grieving is a somewhat rational process in which subjects understand the source of their anxiety, melancholy in comparison is far more irrational and ambiguous. More specifically, because anxieties have been internalized and evade our consciousness, subjects cannot properly absolve themselves of their guilt and anxiety. As a result, melancholic subjects often lash out destructively to recapture what they believe to be lost objects and sometimes destroy the objects in the hopes that they can overcome the pain—all to no avail.[66] This perspective illuminates how the law operates indeterminately, as CLS, CRT and Tribal Crit scholars contend. Thus rather than operating in a coherent and rational manner, the court in this melancholic

moment clutches onto anything that will provide it some explanation and guidance in the midst of confusion and anxiety.

From a Tribal Crit perspective, this moment is simply the legal system's partial and yet unconscious realization that the law has no essential authority and that the Makah's challenge to recognize multicultural difference exposes the false and racialized foundations of the law. However, what is important about the melancholic nature of this moment and its implications for Tribal Crit is that in acknowledging the critique offered by marginalized groups, the legal system cannot rationally or coherently respond because its entire foundation is called into question. Rather than submit to and embrace the critical challenge posed by multicultural difference, the law erratically reacts; clinging on to whatever norms still exist to guide its decisions. Although the courts cannot make overtly racist decisions while they rhetorically position themselves as race-neutral and respectful of multiculturalism, they do in effect latch onto any legal, cultural or literary precedent to negotiate their melancholic anxiety. For the Ninth court in *Anderson*, it responded to this situation by tethering itself to the ghost of Moby-Dick as a way to negotiate the melancholia that ultimately privileged the conservationist values of European America over the cultural and religious values of Native Americans.

The Court's Use of *Moby-Dick*

As previously mentioned in the opening epigraph to the decision, Berzon recites the following part of *Moby-Dick*: "While in life the great whale's body may have been a real terror to his foes, in his death his ghost became a powerless panic to the world."[67] This passage is found in the chapter "The Funeral," which describes a mock funeral that occurs while sinking a discarded whale carcass. Although the beginning of this short chapter starts as a descriptive account of the release of the carcass, the passage utilized by Berzon follows the rhetorical form of a sermon in which the narrator warns of the power of the whale, even in death. In the section of the chapter in which the epigraph appears, this form becomes more apparent:

> Desecrated as the body is, a vengeful ghost survives and hovers over it to scare. Espied by some timid man-of-war or blundering discovery-vessel from afar, when the distance obscuring the swarming fowls, nevertheless still shows the white mass floating in the sun, and the white spray heaving high against it; straightway the whale's unharming corpse, with trembling fingers is set down in the log- shoals, rocks, and breakers hereabout: beware! And for years afterwards, perhaps, ships shun the place; leaping over it as silly sheep leap over a vacuum, because their leader originally leaped there when a stick was held. There's your law of precedents; there's your utility of traditions; there's the story of your obstinate survival of old beliefs never bottomed on the earth, and now not even hovering in the air! There's orthodoxy!
>
> Thus, while in the life the great whale's body may have been a real terror to his foes, in his death

> his ghost becomes a powerless panic to a world.
>
> Are you a believer in ghosts, my friend? There are other ghosts than the Cock-Lane one, and far deeper men than Doctor Johnson who believe in them.[68]

This passage frames the whale—even in death—as a ghostly force that sets precedent and warns of danger and vengeance for those that hunt whales. In its white ghostly form, the whale represents a behemoth terror of incomprehensible power that both terrifies and demands respect from those that encounter it. In describing the dead body of the whale as "your law of precedents" and "your utility of traditions," Melville depicts the white ghost as operating like a law of precedents and tradition.

In the aforementioned passage, the image of Moby-Dick also represents a sublime object. According to Edmund Burke, the sublime is a terrifying materialization of power which, in its highest degree, induces astonishment so severe that it overwhelms the observing subject's mind with horror and leaves the subject immobilized, paralyzed and speechless in awe.[69] Additionally, Burke argues that the sublime object's power and terror is so magnificent that it entirely fills the mind of the subject, preventing it from engaging in any other thoughts.[70] Thus, Melville's Moby-Dick is not terrifying simply because it is a large mammal, but also because the white ghostly image from the mysterious depths of the ocean operates as a sublime force that is unfathomable.

In its deployment in the court's discourse, Moby-Dick is figured as a most formidable sublime force. For example, in her description of whales as "the Leviathan of the deep," Berzon figures both the gray whale and Moby-Dick as terrifying sublime objects. In its etymology, the leviathan is a "sea monster defeated by [God] in various scriptural accounts"—particularly in the biblical books of *Job* and *Psalms*.[71] Although biblical accounts and cultural mythology about the nature of this creature—either as a force of good or evil—are unclear, usage of the term implies that that the "leviathan" is a formidable European American, religious force. Later in the decision, Berzon also describes whales as "behemoths," which shares the same origin and meaning as "leviathan." When considering the use of these terms along with the passage from *Moby-Dick*, Berzon's discourse constitutes whales as more than just a once endangered species; they become a powerful force that the court must respect and behold. This same passage of the opinion also exposes how the figure of Moby-Dick operates within the court. In making the comparison between the Makah's hunt and Captain Ahab's pursuit of the "leviathan of the deep," the court positions the sublime image of the whale against contemporary federal-Indian relations and the need to respect multicultural difference. In this way, the allusions to *Moby-Dick* can be understood as an elevation above the melancholy

created by Native American and multicultural difference. In other words, the rhetoric of the sublime whale functions as a commanding norm that values the preservation of nature over the dissonance created by the call to respect cultural differences. Tribal Crit highlights how this discourse privileges whiteness over Native American concerns. Thus by evoking the fear of nature and past ecological wrongs contained within the allusions to *Moby-Dick*, the court is rejecting the consideration of past historical wrongs done to the Makah and Native Americans (e.g., taking of lands, the destruction of cultural and religious traditions, etc.) in favor of the consideration of past wrongs in confronting the sublime power of nature (i.e., the horrors caused by whale hunting).[72] Rather than confront the anxiety-producing narrative of the Makah, the sublime force of the *Moby-Dick* narrative allows the court to ignore arguments that might favor the Makah.

This mechanism that privileges whiteness can be seen operating in *Anderson* in several ways. First, the terrifying power of the whale becomes an anchor for the court's rulings when it is unclear as to what impact respecting Makah sovereign rights might have on the environment. For instance, in deciding whether the hunt violated NEPA, the *Anderson* court argued, "We conclude that there are substantial questions remaining as to whether the Tribe's whaling plans will have a significant effect on the environment. The government therefore violated NEPA by failing to prepare an EIS before approving a whaling quota for the Tribe."[73] Notice here that the court does not offer an argument as to why the hunt *will* have a substantial impact on the environment. Instead the standard for judgment becomes whether or not the necessary questions, according to national and international law, about the effect of the hunt have been asked and answered. As the court further explained:

> Critically for this case, to prevail on this claim that the federal agencies were required to prepare an [Environmental Impact Statement], the plaintiffs need not demonstrate that significant effects will occur. A showing that there are "substantial questions whether a project may have a significant effect" on the environment is sufficient.[74]

Viewing this comment through a Tribal Crit lens, the racialized standards used to produce this conclusion become apparent. For instance, there is no need for the plaintiffs to produce an argument as to why the hunt would harm the environment because the European American legal system creates a seemingly natural and legal presumption against this kind of use of environmental resources. As Harris argues, white privilege, born out of a long history of discriminatory policies and laws and unequal distribution of resources, allows historical injustices and harms to be naturalized and thus ignored by the law.[75] In this instance, whiteness allows the courts to overlook the historical wrongs against the Makah and the treaty rights granted in exchange for those wrongs because recognition of the Makah's treaty rights presumptively

might disrupt the "natural" status quo. For the court, this is simply a matter of following the "natural" letter of the law. In direct contrast for the Makah, the case is about recognition of fundamental cultural and religious rights guaranteed in exchange for their lands. However, through the rhetorical deployment of *Moby-Dick* as a presumption against whale hunting, the Makah's claims to sovereignty are rendered meaningless when compared to the sublime force of nature.

This presumption becomes further apparent in a section of the decision addressing the hunt's impact on local whale populations. For example, one of the critical questions in the case was whether the hunt would jeopardize local, non-migrating gray whale populations near Neah Bay. If the hunt did affect this population, then it would pose a risk to the local ecosystem. After evaluating numerous statements from experts on both sides of the dispute, the court declared that:

> No one, including the government's retained scientists, has a firm idea what will happen to the local whale population if the Tribe is allowed to hunt and kill whales… There is at least a substantial question whether killing five whales from this [local] group…could have a significant impact on the environment.[76]

Interestingly, the court further explained that the scientific experts were rather uncertain as to the fact that a "local" population of gray whales existed in this area of the Pacific. The experts did not know how many whales populated the area year round, if they stayed in the area or if they migrated, or how many new whales were "recruited" into the area each year. Thus, while it might be possible that the hunt could harm a local whale population, it is equally possible that migration patterns could replenish and maintain this population. Nevertheless, the court constituted this uncertainty as a reason to protect and respect the sublime whale. Operating from a Tribal Crit stance, the court's rhetorical response to the uncertainty of the hunt reveals how whiteness subtly operates to re-secure legal agency for the court.[77] Specifically, the discourse about uncertainty positions the Makah's actions as an unknowable yet certain threat because the hunt is markedly different from present European American cultural practices. It is unknowable because the court has no clear evidence that a threat to the local whale population exists. However, the threat is certain because the story of *Moby-Dick* has already taught European American culture that whaling is dangerous and morally unacceptable.

Via *Anderson v. Evans*, *Moby-Dick* is deployed as a kind of literary technology of truth that uses the cautionary precedent taught by the book as an authoritative reason to reject the Makah's hunt. According to Toby Miller, technologies of truth are "popular logics for establishing truth" embodied in communicative forms.[78] In the *Anderson* decision, the literary tale of *Moby-Dick* is used to caution against challenging the

sublime power of the whale and subsequently the norms of white European America. Hence, the epigraph of the court's decision evokes the doomed literary figure of Captain Ahab as a cautionary tale of European American's past mistakes. As a result, the sublime force of the whale gives rhetorical form to an otherwise invisible norm of whiteness which fuels a presumptive decision-rule against the uncertainty caused by recognizing cultural difference.

On a broader scale, this type of rhetorical move also operates in other cultural institutions such as museums, cultural centers and memorials that affect Native Americans. For instance, as previously mentioned, Dickinson, Ott, and Aoki note how the artifacts and narrative of European and Native American relations found at the Plains Indian Museum (PIM) should produce a "social guilt associated with the violent colonization of the West."[79] However once confronted with the traumatic narrative, the European American visitors can embrace a host of technologies of truth in order to guide their understanding of the PIM. For example, visitors are encouraged to play the role of anthropologist or curator who studies Native Americans but in reality remain quite distant from the harmful effects of such scientific practices since they can celebrate the marvel of early anthropology rather than confront the exploitation of those who were studied. Additionally, the PIM presents a narrative that constitutes Native American difference as so alien that visitors view colonial European American actions as helping to "civilize" rather than destroy indigenous cultures. Consequently, the exhibit offers European Americans numerous technologies of truth that help them cling to their white European American values without ever confronting the brutality of western colonialization. Also, cultural images such as those found in Disney's movie *Pocahontas* and the famous Keep America Beautiful and Ad Council "Crying Indian" anti-littering commercial act as technologies of truth that allow European Americans to superficially acknowledge difference without confronting the embedded assumptions of whiteness and neocolonialism.[80] What makes the *Anderson* decision so significant is that it contains an everyday cultural technology of truth masked in the decision of a supposedly neutral court. As CLS scholarship suggests, courts are always influenced by social context, but they typically refuse to acknowledge it.[81] However, what the CLS perspective cannot appreciate that Tribal Crit positions as significant is the way in which these cultural technologies reconstitute for the court a sense of normality rooted in white colonialism which positions Native Americans as culturally static subjects who should be stewards of nature, but have lost their way. In comparison, the courts and European Americans are cast as the neo-colonial "enlightened" warden who can help guide indigenous cultures back to the correct way of living.

Furthermore, the court's discourse sets dangerous precedent for Native American rights and sovereignty. In making its decision, the court can ignore consideration of sovereign rights and specific treaty language because the deployment of *Moby-Dick* allows the justices to privilege the underlying "conservation necessity" of the Marine Mammal Protection Act as their overriding reason to reject the cultural and religious reasons for the hunt. By deciding the case based on conservation principles made exceptionally visible by the literary allusion to *Moby-Dick*, issues of treaty abrogation were never fully considered. As the court explained, "because of our conclusion that the MMPA applies in light of the conservation purpose of the statute and the literal language of the treaty, we need not consider plaintiffs' alternative arguments that the MMPA applies by virtue of treaty abrogation."[82] As this statement makes clear, the court considered the question of treaty abrogation irrelevant once presumption was made in favor of species conservation. Illuminated by Tribal Crit, this shift in presumption is dangerous for Native American sovereignty. Due to its plenary power over all Native American issues, Congress can abrogate or amend existing Federal-Indian treaties. However, the Supreme Court has held that courts should adopt a strong presumption that federal laws generally do not veto treaty rights unless Congress expressly discussed the issue and chose to modify the treaty right.[83] Despite these measures to protect Native American sovereignty, in reaching its decision, the *Anderson* court ignored specific statements from members of Congress that outlined how the MMPA did not abrogate treaty rights.[84] Thus, once the court concluded that this was an issue of conservation necessity and not treaty rights, they were able to disregard a rather strong precedence in favor of treaty rights while increasing colonial interference and their authority to act against Native American interests.

Additionally, the discourse of the court exposes how little Native American values and traditions are considered by the court. When the court explains the background of the case, the*y* limited their description to the mechanical process through which the Makah made their request. There is only one paragraph that mentions the treaty-based reasons justifying why the Makah wanted to hunt. In this section the court stated, "The Treaty…is the only treaty…that specifically protects the right to hunt whales suggests the historic importance of whaling to the Makah."[85] Note here that whaling is cast as a historic and past need. Thus, even when the Makah have an opportunity to present their own voices and beliefs before the court, Makah culture is constituted as counter to the natural progression of European American culture and time.[86] In this particular instance, the court reaffirms whiteness as the basis for its decision and uses the law as a silencing agent fueled by racism when the Makah tribe and Native American culture are discursively situated as remote, distant and thus unimportant in comparison to the contemporary, eco-friendly and

civilized culture of European America.

Lastly, the only other substantive discussion of the treaty examined the treaty language "on its face" to conclude that the treaty gave equal rights to all citizens of the U.S. to use whale resources.[87] Because all citizens enjoy this right, the court concluded that it could not grant "special privilege" to the Makah to hunt when all other (European American) citizens are restricted from whaling. However, what the court fails to explain in this argument is that the "special privilege" is not something that the court would be creating as a result of its decision. Instead, the right to whale was given to Makah in exchange for their territory and sovereign independence. Thus, the privilege cannot be "special" when European Americans have not made similar sacrifices for this right. Here whiteness surfaces as a marker of racialized dismissal in that the underlying assumption in the decision is that everyone is equal, despite the long history of colonial relations between European and Native Americans that have relegated Native American identity and culture to a position of legal and social inferiority.[88]

Conclusion

A Tribal Crit examination of the discourse of the *Anderson* decision reveals several important insights about the court's negotiation of racial difference and its own whiteness. Overall, the court's use of literary allusions to *Moby-Dick* highlights the anxiety of the court in relation to the Makah's right to whale. Fearing that this recognition might cause great ecological harm despite any evidence of such a risk, the court turned to the lessons of *Moby-Dick* to remind itself of the tragic mistakes European America made in its whaling era. For the *Anderson* court, this lesson about white European American commercialism and environmental destruction becomes a universal norm that crystallizes the risk of any whaling, no matter the scale, purpose, or cultural meaning.

As a result of these rhetorical maneuvers, the *Anderson* decision could have devastating effects on Native American sovereignty. For the Makah, the court's logic could affect their sovereignty in matters outside of whaling. For instance, the Makah are highly concerned about the status of their salmon fishing rights, which is an important basis for their local economy. If the Ninth Court evokes *Anderson* as justification to use the "conservation necessity" standard to review other species conservation laws, it could undermine the Makah's and other Native American groups' fishing rights. As one Northwest Native American advocacy group contends,

> The Makah Tribe is deeply concerned about the effect of this ruling on its Treaty fishing rights and the Treaty fishing rights of all Indian tribes in the Northwest. The Tribes have carefully managed their fisheries and have been at the forefront of regional efforts to protect salmon and their habitat.

> Nevertheless, many runs of salmon have been listed as threatened and endangered under the Endangered Species Act due to widespread destruction of salmon habitat by non-Indian development. Today's ruling may lead to new, draconian restrictions being imposed on Tribal fishing notwithstanding the Tribe's treaty rights and regardless of the actual impact of the Tribal fishing on the resource.[89]

Consequently, the concern about this ruling and its discourse is not simply that a rejection of whaling rights will undermine Makah sovereignty. Instead, the problem is that the discourse and logic of the court could undermine a broad range of treaty rights.

While other Tribal Crit accounts of the law have noted how the law stabilizes and evokes whiteness to defend contemporary European-Native American relations, the analysis of the *Anderson* decision elucidates how important it is to reveal how whiteness infiltrates the court in seemingly small and unexpected ways. For instance, Tribal Crit scholars such as Robert Clinton and Robert Porter contend that the entire foundation of federal policy is rooted in white colonialism, which suggests a certainty and intentionality of racism within the legal system.[90] Yet, the reasoning found in the *Anderson* case and many other Native American decisions demonstrate that the courts act in very incremental, confusing and contradictory ways that "appear" far more accidental and hesitant.[91] In the presence of such confusion and uncertainty, whiteness emerges in a seemingly innocent fashion as a sense of normality that guides the courts' decisions. While Tribal Crit provides powerful means to evaluate the white colonial effects of broad and new judicial doctrine changes, it has yet to explicate the more subtle ways that Native American law is transformed through rhetorical maneuvers masked as sensible precedence and presumption. Furthermore scholars must avoid the common problem of treating the courts as impartial and politically-insulated entities. For too long, as Lucaites points out, the communication studies discipline has treated the law as a sacred cow.[92] In other words, communication studies has often failed to appreciate how the courts' discourse legitimates and masks its role in undermining Native American sovereignty. Instead, our discipline tends to examine the courts as a context in which certain speakers or genres of speech operate. Until we incorporate a more critical interrogation of the political nature of the legal system, communication studies' analyses of the law and its impact will be, at best, ineffective and, at worst, counterproductive.

These shortcomings found in Tribal Crit and Communication Studies suggest why a combined rhetorical/Tribal Crit approach, such as the one used in this study, is important to elucidate how the courts and the law undermine Native American sovereignty. In examining the discursive maneuvers made in *Anderson v. Evans*, we observe how whiteness appears and becomes legitimized within the courts' rhetoric.

What makes the *Anderson* decision quite fascinating is that whiteness in this court's decision is not hidden at all in actuality; instead, it surfaces as a large, terrifying (white) whale in the opening epigraph of the court's written opinion. While it could be tempting to dismiss the literary allusions to *Moby-Dick* as mere rhetorical embellishment, the analysis offered here demonstrates that the sublime discourse of *Moby-Dick* seems to be the only clear logic that the court is following. Furthermore, while the *Anderson* decision is a rather unique and narrow example of this type of discourse because it is only about one Native American controversy in one decision, it offers a rare and highly illustrative opportunity to see the court's response to multicultural difference in a globalized era. Obviously, not all courts or justices will utilize the same rhetorical technologies, but signs of allusions, metaphors, and other cultural references within legal decisions may give important clues as to how the court privileges whiteness to undermine Native American and other minoritarian attempts to secure legal remedies.

Future Tribal Crit and rhetorical studies should further examine how melancholic anxiety and the sublime discursively operate in other legal decisions. The *Anderson* decision was selected in this study because the rhetorical response (i.e., literary allusions to a whaling story) to the court's melancholy was so closely related to the content of the decision (i.e., a case on whale hunting). Other Native American and race decisions likely contain similar rhetorical manifestations of the law's melancholic anxiety in confronting multicultural difference. Once these types of discursive forms and technologies of truth are identified, critics and advocates can discover ways to subversively navigate within the melancholic logic of the courts. Without this work, there is little that can be done to curtail the gradual loss of Native American sovereignty.[93] Finally, as CRT and Tribal Crit scholarship suggest and the findings of this study support, the legal system is a problematic site for the advancement of Native American claims to sovereignty. Although we expect the courts to utilize a clear logic based on the historic foundations of Native American jurisprudence, this is not the case. Instead, the court is plagued with problems due to its melancholia over its authority in the face of the challenges that movements like CLS, CRT and Tribal Crit present. Consequently, the court must use rhetorical devices to appear color-blind, impartial and non-partisan. Ironically in its attempt to remain color-blind, impartial and non-partisan, the court evokes the culturally sublime object of *Moby-Dick* to make a rather white, colonial, and partisan decision.

[1] Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: The University of Chicago Press, 1991); Girarduea A. Spann, *Race Against the Court: The Supreme Court and Minorities in Contemporary America* (New York: New York University Press, 1993).

[2] Throughout this essay, I refer to the indigenous collective of people of the American continent as Native Americans. While I acknowledge that this term has been contested for its connotation, etymological origins and monolithic nature and is commonly replaced with the terms "Indian," "American Indian," "indigenous peoples" or "First Nation people," I primarily use "Native American" because it contains less critical baggage than the terms "American Indian" or "Indian." See Michael Yellowbird, "What We Want to Be Called," *American Indian Quarterly* 23, no. 2 (1999). Additionally, I use "Indian" in a few instances to refer to a body of federal-tribal law or the collective lands labeled "Indian Country." I clearly acknowledge that all of these terms—even the increasingly popular "indigenous"—are criticized for their European origin and monolithic nature. Whenever possible, I use the legal name of people (e.g., Makah) since this is the most commonly used name associated with the people studied here. However, even this name is inaccurate, as the name was inappropriately attributed to the tribe by federal negotiators during the negotiation of the Treaty of Neah Bay in the 1800s. According to the Makah, Qwidicca'atx is their proper name, which means "People Who Live by the Rocks and Seagulls." Patricia Pierce Erikson, "Welcome to this House: A Century of Makah People Honoring Identity and Negotiating Cultural Tourism," *Ethnohistory* 50 (2003): 523-42.

[3] Sarah Krakoff, "Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty," *American University Law Review* 50 (2001): 1177. LexisNexis® Academic (accessed September 14, 2004).

[4] David E. Wilkins, *Indian Sovereignty and the U.S. Supreme Court* (Austin, TX: University of Texas Press, 1987), 4.

[5] Joseph W. Singer, "Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty," *New England Law Review* 37 (2003): 641. , LexisNexis® Academic (accessed April 21, 2005).

[6] This ascendance of the judiciary is a strong point of contention and controversy for indigenous scholars. For example, Steven McSloy, assistant professor of law at St. John's University and member of the Oneida Nation, suggests that "Indian nations should stay out of the court" altogether. See "The Role of Jurisdiction in the Quest for Sovereignty: The 'Miner's Canary:' A Bird's Eye View of American Indian Law and Its Future," *New England Law Review* 37 (2003): 733 LexisNexis® Academic (accessed August 4, 2005), 739. Also see Singer, "Canons" and Krakoff, "Undoing."

[7] Jeremy R. Fitzpatrick, "The Competent Ward," *American Indian Law Review* 28 (2003/2004): 189. LexisNexis® Academic (accessed July 13, 2005).

[8] Krakoff, "Undoing Indian Law."

[9] By "interventionist," I mean that the courts fear making rulings that are perceived by the public to be based on personal or political considerations rather than current law.

[10] Krakoff, "Undoing Indian Law."

[11] David Kairys, *With Liberty and Justice For Some: A Critique of the Conservative Supreme Court* (New York: The New Press, 1993); Rosenberg, *The Hollow Hope*; Spann, *Race*.

[12] Ibid.

[13] *Anderson v. Evans*, 214 F.3d 1135, No. 98-36135, U.S. Court of Appeals for the Ninth Court, 2002, www.ca9.uscourts.gov/ca9 /newopinion.nsf/AE372986486F4B3F88256C9500670AA5 (Accessed May 26, 2003).

[14] William Bradford, "'Save the Whales' v. Save the Makah: Finding Negotiated Solutions to Ethnodevelopmental Disputes in the New International Economic Order," *St. Thomas Law Review* 13 (2000): 155. LexisNexis® Academic (accessed January 13, 2003).

[15] Ibid.

[16] I use the term "European American" to describe White citizens of the United States who are descendants of European immigrants or founding colonists. The term is generally synonymous with "Anglo American" or "White American." However, I prefer "European American" because it is more inclusive of all American European descendents (compared to Anglo American, which suggests British descent only) and focuses more on cultural background rather than race or skin color. However, any of these choices have disadvantages similar to my use of "Native American" because they are monolithic and imprecise.

[17] Robert Miller, "Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling," *American Indian Law Review* 25 (2000/2001): 165. LexisNexis® Academic (accessed May 26, 2003).

[18] Ibid.

[19] This media and public relations battle was rather intense and racially charged. For example, local editorial pages were filled with comments that wished for a "very slow and painful" end to the Makah. As one editorial put it, "I am anxious to know where I may apply for a license to kill Indians. My forefathers helped settle the West and it was their tradition to kill every Redskin they saw. 'The only good Indian is a dead Indian,' they believed. I also want to keep faith with my ancestors." Quoted in Patricia Pierce Erikson, *Voice of a Thousand People: The Makah Cultural and Research Center* (Lincoln: University of Nebraska Press, 2002). Additionally, animal conservation groups such as PAWS and Sea Shepherd had boats in Neah Bay and lined protestors along the Bay. Eventually, there were violent confrontations between the Makah and the protestors. For instance, several dockside fights occurred and rocks and other objects were hurled at each side's boats. Eventually, the U.S. Coast Guard had to be called into service to prevent further escalation. See Linda Mapes, "Rock-Throwing and Jeers in Battle Over Whaling," *The Seattle Times*, November 2, 1998, B1. LexisNexis® Academic (accessed May 30, 2005).

[20] *Metcalf v. Daley*. No. 98-36135. 214 F.3d 1135. U.S. Court of Appeals for the Ninth Circuit, 2000, LexisNexis® Academic (accessed May 26, 2003).

[21] Vincent Mulier, "Recognizing the Full Scope of the Right to Take Fish under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest," *American Indian Law Review* 31 (2006/2007): 41. LexisNexis® Academic (accessed October 27, 2009).

[22] *Dion v. United States*. 476 U.S. 734. U.S. Sup. Court. 1986. LexisNexis® Academic (accessed May 30, 2005).

[23] Zachary Tomlinson, "Abrogating or Regulating? How *Anderson v. Evans* Discards the Makah's Treaty Whaling Right in the Name of Conservation Necessity," *Washington Law Review* 78 (2003): 1101. LexisNexis® Academic (accessed June 10, 2004).

[24] Mark Tushnet, "Critical Legal Studies: An Introduction to its Origins and Underpinnings," *Journal of Legal Education* 36 (1986): 505. Hein Online® (accessed November 1, 2009).

[25] Wilkins, *Indian Sovereignty*, 7-8.

[26] C. R. B. Dunlop, "Literature Studies in Law Schools," *Cardozo Studies in Law & Literature* 3, no.1 (1991): 63-97.

[27] John Lucaites, "'The Law': Power, Legitimacy, and Social Change," *Quarterly Journal of Speech* 76 (1990): 446.

[28] Ibid.

[29] Bryan McKinley Jones Brayboy, "Toward a Tribal Critical Race Theory in Education," *The Urban Review* 37 (2006): 427; Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001).

[30] Delgado and Stefancic, *Critical Race Theory.*

[31] Ibid.

[32] Ibid.

[33] Cheryl Harris, "Whiteness as Property," *Harvard Law Review* 106 (1993): 1707. LexisNexis® Academic (accessed December 12, 2009).

[34] Delgado and Stefancic, *Critical Race Theory.*

[35] Brayboy, "Toward a Tribal Critical."

[36] Ibid.

[37] Ibid, 427.

[38] Robert A. Williams, "Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Tradition of Federal Indian Law," *Arizona Law Review* 31 (1989): 237. LexisNexis® Academic (accessed November 1, 2009).

[39] Brayboy, "Toward a Tribal Critical."

[40] Ibid.

[41] Randall A. Lake, "Between Myth and History: Enacting Time in Native American Protest Rhetoric," *Quarterly Journal of Speech* 77 (1991): 123-51;"Enacting Red Power: The Consummatory Function in Native American Protest Rhetoric," *Quarterly Journal of Speech* 69 (1983): 127-42.

[42] Richard Morris and Philip Wander, "Native American Rhetoric: Dancing in the Shadows of the Ghost Dance," *Quarterly Journal of Speech* 76 (1990): 164-91.

[43] Richard Morris, "Educating Savages," *Quarterly Journal of Speech* 83 (1997): 152-71.

[44] S. Elizabeth Bird, "Savage Desires: The Gendered Construction of the American Indian in Popular Media," in *Selling the Indian: Commercializing and Appropriating American Indian Culture*, ed. C. J. Meyer and D. Royer, (Tucson: University of Arizona P, 2001) 62-98; Derek Buescher and Kent Ono, "Civilized Colonialism: Pocahontas as Neocolonial Rhetoric," *Women's Studies in Communication* 19 (1996): 127-53.

[45] Greg Dickinson, Brian Ott and Eric Aoki, "Space of Remembering and Forgetting: The Reverent Eye/I at the Plains Indian Museum," *Communication and Critical/Cultural Studies* 3 (2006): 27-47.

[46] For example, see Robert Clinton, "Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law," *Arkansas Law Review* 46 (1993): 77. LexisNexis® Academic (accessed October 5 2004); Philip P. Frickey, "Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law," *California Law Review* 78 (1990): 1137. LexisNexis® Academic (accessed October 5 2004); David H. Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," *California Law Review* 84 (1996): 1573. LexisNexis® Academic (accessed August 1 2004); Krakoff, "Undoing Indian Law"; Nell J. Newton, "Federal Power

over Indians: Its Sources, Scope, and Limitations," *University of Pennsylvania Law Review* 132 (1984): 195. LexisNexis® Academic (accessed October 5 2004); and Robert B. Porter, "A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law," *University of Michigan Journal of Law Reform* 31(1998): 899. LexisNexis® Academic (accessed October 5 2004).

[47] Lucaites, "Between Rhetoric," 446.

[48] Thomas K. Nakayama and Robert J. Krizek, "Whiteness: A Strategic Rhetoric," *Quarterly Journal of Speech* 81 (1995): 295.

[49] Herman Melville, *Moby-Dick*, ed. C. C. Walcutt (New York: Bantam, 1981).

[50] *Anderson v. Evans*, 7.

[51] Ibid.

[52] Robert Sullivan, *A Whale Hunt: How a Native American Village Did What No One Thought it Could* (New York: Touchstone, 2000).

[53] Nick Nutall, "Modern Captain Ahab Wins Whaling Quota," *The Times*, June 29 1996, LexisNexis® Academic (accessed January 5 2005); also see Giles Whittell, "US Indians Insist on Right to Kill Whales," *The Australian*, 29 August 1995, LexisNexis® Academic (accessed January 5, 2005).

[54] Harold Bloom, *Herman Melville's Moby-Dick. Modern Critical Interpretations* (New York: Chelsea House, 1986).

[55] See Jeremy Harding, "Call Me Ahab," *London Review of Books* 24, no.1 (2002), http://www.lrb.co.uk/v24/n21/hard01.html (accessed July 28, 2004); Eyal Peretz, *Literature, Disaster, and the Enigma of Power: A Reading of 'Moby-Dick'* (Stanford: Stanford University Press, 2003).

[56] Lewis Kamb, "Court Rebuffs Makah's Appeal over Whaling," *Seattle Post-Intelligencer,* June 8, 2004, http://seattlepi.nwsource.com/local/176853_makah08.html.

[57] Stephen M. Feldman, "The Supreme Court in a Postmodern World: A Flying Elephant," *Minnesota Law Review* 84 (2000): 673 LexisNexis® Academic (accessed May 30, 2005).

[58] Feldman, "The Supreme Court," 681.

[59] Wendy Brown, *Politics out of History* (Princeton, NJ: Princeton University Press, 2001).

[60] Feldman, "The Supreme Court."

[61] Sigmund Freud, *The Standard Edition of the Complete Psychological Works*, ed. and trans. J. Strachey (London: Hogarth, 1957), 245.

[62] Brown, *Politics.*

[63] Tammy Clewell, "Mourning Beyond Melancholia: Freud's Psychoanalysis of Loss," *Journal of the American Psychoanalytic Association* 52 (2004): 43-65.

[64] Brown, *Politics.*

[65] Ibid.

[66] Ibid.

[67] *Anderson v. Evans*, 7.

[68] Melville, *Moby-Dick*, 289.

[69] Edmund Burke, *On the Sublime and Beautiful*, Vol. XXIV, Part 2, The Harvard Classics (New York: P.F. Collier & Son, 1909–14; Bartleby.com, 2001), www.bartleby.com/24/2/, (accessed August 11, 2005).

[70] Ibid.

[71] *Merriam-Webster Online Dictionary*. http://www.m-w.com/cgi bin/dictionary?book=Dictionary&va= leviathan&x=26&y=14 (accessed January 16, 2004), s.v. "Leviathan."

[72] Harris, "Whiteness as Property." Harris contends that whiteness operates through a denial of past wrongs to focus on the present. In this instance, past wrong is considered, but the narrative of the sublime whale trumps the anxiety producing narrative of the Makah.

[73] *Anderson v. Evans,* 10.

[74] Ibid, 22.

[75] Harris, "Whiteness as Property," 1777.

[76] *Anderson v. Evans,* 25.

[77] Nakayama & Krizek, "Whiteness," 295.

[78] Toby Miller, *Technologies of Truth: Cultural Citizenship and the Popular Media* (Minneapolis, MN: University of Minnesota Press, 1998), 5.

[79] "Spaces of Remembering," 29.

[80] Bird, "Savage Desires"; Buescher and Ono, "Civilized Colonialism." In *Pocahontas*, the title character is stereotypically portrayed as an exotic and noble other who is a caretaker of nature and humanity that can absolve the colonial settlers of their white guilt. Also, the "Crying Indian" public service announcement first aired in 1971 on Earth Day and featured Native American actor Chief Iron Eyed Cody. The PSA begins with Cody riding down a beautiful river in a canoe. As he paddles, he passes by pristine landscapes and sees numerous animals, including a whale. Eventually, he comes to shore, where almost immediately a bag of garbage is thrown at his feet from a car speeding by on a freeway. Cody looks at the garbage, and then looks into the camera and cries. See Advertising Education Foundation "Pollution Prevention: Keep America Beautiful -- Iron Eyes Cody (1961 - 1983)," 2003, http://www.aef.com/exhibits/social_responsibility/ad_council/2278 (accessed December 28, 2009).

[81] For example, Darren Lenard Hutchinson, Associate Professor of Law at Southern Methodist, notes that cultural opinions about heterosexuality create a judicial homophobia that informs legal decisions in a wide range of issues. For instance, gay and lesbian parents are frequently denied child custody, antidiscrimination laws are not upheld or overturned, and judicial opinions often constitute gays and lesbians as rich and powerful people that do not deserve "special" protection. As Hutchinson notes, Justices Scalia, Rehnquist and Thomas argued in *Romer v. Evans* that "those who engage in homosexual conduct ... have high disposable income ... [and] possess political power much greater than their numbers both locally and statewide," and they use this power to achieve "full social acceptance of homosexuality." "Homophobia in the Halls of Justice: Sexual Orientation Bias and Its Implications within the Legal System," *American University Journal of Gender, Social Policy & the Law* 11 (2003): 13. LexisNexis® Academic (accessed December 28, 2009).

[82] *Anderson v. Evans*, 44.

[83] Tomlinson, "Abrogating."

[84] Ibid.

[85] *Anderson v. Evans,* 12.

[86] For discussion of how European American progress is rhetorically privileged over static representations of Native American's histories, see Randall A. Lake, "Between Myth and History: Enacting Time in Native American Protest Rhetoric," *Quarterly Journal of Speech* 77 (1991): 123-51.

[87] *Anderson v. Evans,* 42.

[88] Harris discusses at length how the naturalization of oppression occurs and notes the denial of rights and privileges to marginalized racial groups as one of the ways whiteness is articulated as a property. See Harris, "Whiteness as Property."

[89] Northwest Indian Fisheries Commission, "Makah Tribal Council Reacts to Ninth Circuit Decision," NWIFC News & Information, December 20, 2002, http://www.nwifc.wa.gov/newsinfo/newsrelsdet.asp?ID=114 (accessed July 26, 2004).

[90] Clinton, "Redressing the Legacy of Conquest; Porter, "A Proposal to the Hanodaganyas."

[91] Krakoff, "Undoing Indian Law."

[92] Lucaites, "Between Rhetoric."

[93] As Krakoff, "Undoing Indian Law" suggests, the courts are continuously ruling in ways that slowly erode the scope of Native American sovereignty. It is imperative that critics and advocates identify strategies and tactics that take advantage of the accidental and incremental nature of the courts' decisions. The problem is not that courts make broad and intentional swipes at sovereign rights; rather the problem is that they are terrified to seem interventionist and rash.