Bureaucracy as Kinship: Native Nations and the Allotmentality of U.S. Settler Colonial Marriage Law

By

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ABSTRACT

This dissertation intersects three main disciplinary threads—federal Indian law, intimate colonialism, and queer Indigenous studies—to develop theoretical tools and archival reading practices that describe the convergence and contestation of U.S. federal-state-Indigenous governance around marriage policy. Part I, "Bureaucratic Kinship," explores the framing of "domesticity" in Indigenous-settler relations in the U.S. Following this, Part I traces the development of Bureau of Indian Affairs policy influencing the proliferating categories of marriage, during the period 1900-1940. This analysis illustrates how the selective recognition and non-recognition of marriages became a key vehicle for settler theft of Indigenous lands. Part II, "Allotmentality," builds upon texts within Native American and Indigenous studies theorizing and critiquing settler colonial land relations, alongside a legislative genealogy of U.S. allotment policies. This section culminates in a case study of Carney v. Chapman (1918), where the U.S. Supreme Court deployed its authority to interpret marriage statutes to decide the contested ownership of a Chickasaw allotment. Part III, "The Overhead of Legitimacy," examines contemporary (2004-Present) legal documents and critical scholarship surrounding same-sex marriage policy in U.S. Indigenous jurisdictions, observing how civil marriage laws encode settler colonial ideologies about land, race, and gender. In sum, this study provides a theoretical and methodological backdrop that reveals how contemporary conflicts over marriage law in Indigenous jurisdictions emerge from the history of U.S. marriage policy as a central instrument of settler colonial land theft.

CONTENTS

INTRODUCTION

"Marriage is threatening to become a mere farce in many cases," writes Henry Westropp, a Jesuit missionary living on the Pine Ridge reservation in 1909.[1] Concerned with the apparently harrowing implications of Oglala Lakota people living according to their own kinship systems, Westropp demands the attention of the Commissioner of Indian Affairs and the President of the United States. "If an Indian is tired of his wife, he has only to go to Hot Springs or some other place and apply for a divorce. … This divorce fever is getting contagious, so that also some of our Catholics are affected."[2] His letter details the "divorce evil" that has so upset his sensibilities. But perhaps more damning than a missionary with his pathological fixation and hand-wringing about Indigenous peoples' marriages, is that his words carry enough influence to trigger a cascade of discussion between the Assistant Commissioner of Indian Affairs, several local Superintendents occupying reservations in South Dakota, and a state judge involved with granting divorces.

Responding to Westropp's criticisms, Superintendent John R. Brennan describes bringing non-married cohabiting Native couples to his office and unlawfully incarcerating them until they agree to accept a marriage license. He writes, "just as soon as our attention is called to a case of this sort, the parties are brought to the office, a license is made out and at the risk of having to defend a case in the state court for coercion or illegal imprisonment, they are compelled to marry

[1] Henry I. Westropp, Jesuit Missionary, Correspondence to William A. Ketcham, Director of the Bureau of Catholic Indian Missions, 16 October 1909, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

[2] Henry I. Westropp, Jesuit Missionary, Correspondence to William A. Ketcham, Director of the Bureau of Catholic Indian Missions, 16 October 1909, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

or go to jail and remain there until they agree to the marriage ceremony."[3] Despite Brennan's admission that he is in violation of the law in using incarceration to coerce marriages, Assistant Commissioner of Indian Affairs Robert G. Valentine replies, "The Office is gratified to know that you have taken such active steps to reduce the divorce evil among your Indians."[4] These turns of phrase—"our Catholics" and "your Indians"— demonstrate an assumed relationship of white ownership over Indigenous peoples' bodies. The assumption of authority to coerce a certain framework for marriage is seemingly unhindered by the absence of a lawful basis—even as written by the settler jurisdictions occupying Indigenous lands.

One hundred and ten years after this exchange, on August 16, 2019, National Public Radio's *All Things Considered* ran a story entitled "Native American Tribes are Wrestling with Decision to Legalize Same-Sex Marriage."[5] Host Mary Louise Kelly introduced the story, narrating, "While across the U.S. same-sex marriage has been legal for four years, Native American tribes still fail to recognize it. Tribes are empowered to make their own laws, and some are just now wrestling with new rights."[6] These few sentences concern same-sex marriages, which perhaps the missionaries and Indian agents would've deemed unimaginable or

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[3] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Frederick H. Abbott, Assistant Commissioner of Indian Affairs, 5 January 1910, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

[4] Robert G. Valentine, Assistant Commissioner of Indian Affairs, Correspondence to John R. Brennan, Superintendent of Pine Ridge Indian School, 21 February 1910, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

[5] Chynna Lockett, "Native American Tribes are Wrestling with Decision to Legalize Same-Sex Marriage," *All Things Considered, National Public Radio* (Washington, DC: National Public Radio, Aug. 16, 2019).

[6] Lockett, "Native American Tribes are Wrestling with Decision."

abhorrent—yet what lingers in this introduction to the radio segment is nonetheless a paternalistic ideology.

Kelly describes tribes as being in a state of "failure" for not recognizing same-sex marriage, suggesting that they are behind the progress of the United States at large. She implies that tribes are using their sovereignty incorrectly. In order to "succeed," under this logic, Native nations must apply their sovereignty to adhere to the precise model of marriage law that is hegemonic nationally. The fact that tribes are only "just now" addressing the issue extends the temporality of "lateness," as though these governments who are not bound by the Supreme Court ruling *Obergefell v. Hodges*—which found a right to same-sex marriage originating in the due process and equal protection clauses of the Fourteenth Amendment of the U.S. Constitution—have missed some imaginary deadline to get in line with that decision voluntarily.[7]

As the segment continues, the listener hears from Oglala Lakota couple Muffie Mousseau and Felipa Deleon, who pushed for their nation to legalize same-sex marriage. Mousseau explains, "There should be not any embarrassment of who you are as a person and who you want to be with and who you're attracted to or who you would like to kiss and who you fall in love with."[8] But as the segment continues, we also hear from correspondent Chynna Lockett, who explains that "Some reservations, including Pine Ridge, still have a large church presence, and that influences local policies."[9] From Lockett then, we get the briefest hint—"still have a large church presence"—that the ongoing religious presence is the source of the "failure" Kelly

[7] Obergefell v. Hodges, 576 U.S. 644 (2015).

[8] Lockett, "Native American Tribes are Wrestling with Decision."

[9] Lockett, "Native American Tribes are Wrestling with Decision."

described. Included after this is a soundbite from a bishop named James Wall who explains his moral opposition to same-sex marriage.

These two incidents—Westropp's intervention into the issuance and maintenance of marriage licenses on the Pine Ridge reservation, and NPR's coverage of Oglala Lakota legalization of same-sex marriage—span over a century, disjunct from each other in time. It is the central contention of this project that we must hear the echoes of the history left unsaid by contemporary discussions of same-sex marriage in Indigenous polities, and that we must read the deeper history of settler fixation on the bureaucratic control of Indigenous bodies and land through marriage in light of how it reverberates in the present. The legal history of marriage and its attendant cacophonies of settler colonial ideology can be brought to bear upon these recent and ongoing debates over tradition and nationalism, and the inter-sovereign conflicts over the legal authority to recognize marriage licenses.[10]

Project Origins and Central Questions

The first inkling I had about pursuing this study came in October 2014 when, in the midst of one of my first graduate seminars—Indigenous Sexualities, taught by Prof. Susy Zepeda—I read a number of articles about decisions by Native nations in the U.S. to legalize or ban same-sex marriages. As a white gay person from the Midwest who first became politically aware during the George W. Bush administration, I was steeped in corrosive rhetoric of the Christian right wing who fought to stigmatize all manner of queerness. This rhetoric has a virtuous mask—*family values*, *moral virtue*, *purity*, *religious liberty*, *tradition*—and a vicious underbelly—

[10] My use of the term "cacophonies" echoes Jodi A. Byrd's usage. Byrd describes ruptures and inconsistencies in settler colonial ideology and practice as "cacophonous," inviting our attention to places where the supposedly rational order it claims to produce is in fact, incoherent. For more thoughtful and incisive analysis of settler colonialism, see Jodi A. Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis, MN: University of Minnesota Press, 2011).

degeneracy, *perversion*, *sodomy*, *filth*. You might tune in to a political ad for the 2004 election and hear that it was paid for by—to invent an only slightly exaggerated name—the Foundation of Concerned Parents for the Promotion of Traditional Family Values—and feel the shame of what that language really meant.

What struck me about encountering versions of this rhetoric in debates within Native nations was how resonant they were with the language of the right wing Christian fundamentalism that is so politically powerful in the United States. Yet, even though the language sounds similar, when the Navajo Nation cites "tradition," it means something quite different from when the Alabama legislature cites the same term. That's how this project really started. I wanted to understand why Native nations were using their sovereignty to seemingly recreate the same debate about same-sex marriage that was happening on the state level and federally. What are the stakes for Native nations in setting their own marriage policies, and how does this fit within the larger picture of Indigenous sovereignty amidst U.S. settler colonialism?

At first, I intended to keep this project close to present-day, thinking that I could find enough information simply from the texts of those court cases, that legislation, the news articles and interviews and tribal council minutes. In the intervening eight years that I've been working on this project, there have been several well thought out studies by scholars working in the fields of Native and Indigenous studies, and in particular, federal Indian law, that have detailed recent tribal actions crafting and amending their marriage statutes.[11]

[11] For example, one of the most comprehensive studies on the topic of Indigenous same-sex marriage bans and legalization in the U.S. is Ann Tweedy's article on the topic. Her analysis is helpfully granular in the way it disambiguates different methods of marriage recognition, and discussing these actions in the relevant inter-sovereign context. Ann E. Tweedy, "Tribal Laws & Same-Sex Marriage: Theory, Process, and Content," *Columbia Human Rights Law Review* 46, no. 3 (2015): 104-162.

But as I continued to take seminars in Native American studies and to have my way of viewing the world constantly challenged—a process that is ongoing—I became dissatisfied that I could not find the books that I imagined should exist. Studies that built upon the much longer and more complicated history of U.S. settler colonialism, to describe how and why the settler state became so invested in imposing a particular model of kinship and legal marriage, and how Indigenous peoples shape and navigate that coercive pressure. I wanted to read the study that could take the two incidents I described at the outset and show at least some of the connections between them. I couldn't find what I was looking for. The current version of this study is an attempt to remedy that.

At the outset, I drew up four central research questions, as follows: (1) What is the institutional framework of marriage policy in the United States as it applies distinctively to Native Americans? (2) How does marriage policy function to reproduce the racial and gender hierarchy of settler colonial governance? (3) Under what conditions did/do Native Americans resist and co-create marriage policy? And (4) How do Native narratives of place and time disrupt the futures that settler colonial marriage policy aims to produce?

These proved to be big, difficult questions that couldn't be answered in the space of a dissertation. However, this study represents my best attempt to get started, drawing from all that I've learned from the incisive works of scholars in Native studies, gender studies, and legal history. As you'll see in the conclusion, there are many different directions toward which I could see this project extending. But, for now, let me take you through what's here.

Theoretical Framework and Disciplinary Threads

While articulated primarily under the purview of Native American studies, this study is transdisciplinary, engaging multiple bodies of theory across disciplines that provide mutual

interventions toward an overarching political project of dismantling settler colonialism. In their introduction to the anthology *Theorizing Native Studies*, Audra Simpson and Andrea Smith take up Robert Warrior's call for intellectual sovereignty, arguing "that intellectual sovereignty requires not isolationism but intellectual promiscuity."[12] A key component of the decolonizing power of Native American and Indigenous studies is a rejection of disciplinary cloistering, which frequently serves to re-settle logics of settler colonialism through imperial applications of academic boundary policing. Yet, in order to continue responding to Simpson and Smith's call for theoretical promiscuity, Native studies must also be wary of shallow modes of intersectionality that provide a decolonial gloss easily withered under scrutiny.[13] In an attempt to put the aspirations of theoretical promiscuity into conversation with the material investments that Native American studies has in decolonization, this study of marriage policy contextualized within U.S. settler colonialism foregrounds three (already interdisciplinary) bodies of theory: federal Indian law, intimate colonialism, and queer Indigenous studies.

Federal Indian Law. Grounding this study in federal Indian law and tribal governance is a gesture toward describing settler colonialism in more concrete terms. The legal architecture structuring the relationships between Native nations and the institutions of the U.S. nation-

[12] Audra Simpson and Andrea Smith, "Introduction" in *Theorizing Native Studies*, edited by Audra Simpson and Andrea Smith (Durham, NC: Duke University Press, 2014), 6. See also: Robert Allen Warrior, *Tribal Secrets: Recovering American Indian Intellectual Traditions* (Minneapolis, MN: University of Minnesota Press, 1994).

[13] For an explanation of "intersectionality," see Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," *Stanford Law Review* 43, no. 6 (1991): 1241-1299. For a sense of what I mean here, consider two different registers of "intersectionality" relating to gender in Native studies. A shallow register of intersectionality might be described as the "add women and stir approach," which leaves intact a non-gendered analysis of settler colonialism but sprinkles cameos for Native women at the peripheries of the study to appease whichever reviewer pointed out this elision. By contrast, a deeper register for intersectionality suggests that settler colonialism involves the co-production of racial and gender categories, thus constellating gender at the core of colonization. For an example of the latter treatment, a deeply intersectional look at federal Indian law, see Sarah Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* (Minneapolis, MN: University of Minnesota Press, 2015).

state—including Congress, state and federal courts, and the executive agencies that administer policy—is what gives settler colonialism its distinct shape. Tracing the ideologies, implementations, and inconsistencies in these policies provides concrete examples of how tribal sovereignty and settler colonialism collide, particularly around the topics of white supremacy, heteronormativity, and property relations. But remember, law is not some inalienable code—the decisions that sovereign actors make in the face of their material conditions tell stories, stories that imagine and shape futures.

While marriage policy has received some critical attention from federal Indian law, this attention has been largely decentralized and inconsistent. Bethany Berger's study on the status of American Indian women highlights important precedent-forming cases illustrating that while marriage is ostensibly a domestic, intra-tribal concern, the federal courts' surveillance and management of marriage around property distribution reveals federal Indian law as an intervening body of policy.[14] A few other studies focus in on specific examples of this intervention. For example, Vickie Enis tackles the subject of American Indian divorces and the property entanglements that ensue when the federal government adjudicates land claims deploying its selective recognitions of marriages and divorces.[15] Another such study is Matthew Fletcher's analysis of how a prospective federal marriage amendment might reorient the sovereign triangulation of federal, state, and tribal governments.[16] While these granular analyses

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[14] Bethany Ruth Berger, "After Pocahontas: Indian Women and the Law, 1830 to 1934," *American Indian Law Review* 21, no. 1 (1997): 1-62.

[15] Vickie Enis, "Yours, Mine, Ours?: Renovating the Antiquated Apartheid in the Law of Property Division in Native American Divorce," *American Indian Law Review* 35, no. 2 (2010-2011): 661-694.

[16] Matthew L. M. Fletcher, "Same-Sex Marriage, Indian Tribes, and the Constitution," *University of Miami Law Review* 61, no. 1 (2006-2007): 53-86.

of federal Indian law are generative, they are limited in scope and often elide the settler colonial underpinnings of racialization and heteronormativity, taking them for granted rather than exploring how legal precedents weave these logics into the legal system.

While studies on federal structuring of marriage and property relationships are critical, another significant vein of analysis focuses on how specific Native nations adjudicate marriage under their own legal sovereignty. Particular concerns range from how Native nations resist settler colonial jurisdiction over marriage, to how Native nations reproduce antiblackness, homophobia, and sexism, writing it into their own legislation. Antoinette Sedillo Lopez offers a case study of how the regulation of marriage is a legal site where the Navajo nation asserts tradition while rejecting settler definitions, which in this case included marriage licenses issued by the state of Arizona.[17] Christopher Kannady's detailed cased study on the Cherokee nation case of Dawn McKinley and Kathy Reynolds, whose application for a tribal marriage license triggered an intra-tribal legal dispute over whether the Cherokee legal definition of marriage included same-sex couples, illustrates the friction between state and tribal governments on this topic.[18] Adding a critique of Native antiblackness to the discussion, Carla Pratt's case study of tribal miscegenation laws promulgated by several Southeastern tribes displaced to Oklahoma illustrates how applications of tribal sovereignty can perpetuate the racial logics of the surrounding settler state.[19] Case studies for tribal marriage legislation and dispute resolution are valuable because they illustrate both flashpoints where white supremacy, homophobia, and

[17] Antoinette Sedillo Lopez, "Evolving Indigenous Law: Navajo Marriage, Cultural Traditions, and Modern Challenges," *Arizona Journal of International and Comparative Law* 17, no. 2 (2000): 283-307.

[18] Christopher L. Kannady, "The State, Cherokee Nation, and Same-Sex Unions: IN Re: Marriage License of KcKinley & Reynolds," *American Indian Law Review* 29, no. 2 (2004-2005): 363-381.

[19] Carla D. Pratt, "*Loving* Indian Style: Maintaining Racial Caste and Tribal Sovereignty through Sexual Assimilation," *Wisconsin Law Review* (2007): 409-462.

patriarchy bake into tribal sovereignty, but also the decolonizing potential for Native nations to disrupt settler law with their own jurisprudence.

Part of the value of looking at marriage through federal Indian law is that it can provide concrete steps for change, mapping pathways for advocacy deriving from the specific cases under consideration. In a study of Indian probate, for example, S. Gail Gunning highlights the inconsistencies in federal jurisdiction over probate cases, arguing that this probate policy is "one braid that should be unbound."[20] Another method of advocacy involves contextualizing federal Indian law within histories of dispossession. By placing the McKinley/Reynolds marriage case into the context of two-spirit history, Jeffrey Jacobi argues that tribal governments can deploy their sovereignty toward the creation of same-sex civil unions as a restorative move against the internalization of settler modes of homophobia.[21] Trista Wilson takes this further in her note juxtaposing tribal same-sex marriage bans and legalization, calling for tribal same-sex marriage legislation as a way to reject the marginalization of GLBTQ2 tribal citizens.[22] While a focus on specific legal cases and recommendations is not a quality exclusive to federal Indian law, it is nonetheless a discipline that orients scholarship toward material concerns, theorizing forms of redress against the conditions of settler colonialism.

Recently, there has been an increasing interest in applying Indigenous feminisms to the field of federal Indian law. Emily Snyder centers what she describes as "Indigenous feminist

[20] S. Gail Gunning, "Indian Probate: Can an Adopted Indian Child Receive Trust Property as an 'Heir of the Body' Under an Indian Will?" *American Indian Law Review* 16, no. 2 (1991): 573.

[21] Jeffrey S. Jacobi, "Two Spirits, Two Eras, Same Sex: For a Traditionalist Perspective on Native American Tribal Same-Sex Marriage Policy," *University of Michigan Journal of Law Reform* 39, no. 4 (2006): 823-850.

[22] Trista Wilson, "Changed Embraces, Changes Embraced?: Renouncing the Heterosexist Majority in Favor of a Return to Traditional Two-Spirit Culture," *American Indian Law Review* 36, no. 1 (2011-2012): 161-188.

legal theory" in her analysis of Cree law "as a site of gendered struggle."[23] A model that I've found particularly influential is Sarah Deer's application of Indigenous feminist legal theory to "the substance and practice of Indian law."[24] Deer highlights numerous case studies within federal Indian law and tribal law, articulating how Indigenous feminisms reveal the gendered dynamics that have gone under-remarked in these fields. Given the push for attention to gendered analysis in these areas of law, I extend that by bringing that analysis to marriage as a contested policy area.

Intimate Colonialism. Another key disciplinary engagement within this project is with works organized under the auspices of "intimate colonialism," which emerges at the intersection of women's history and postcolonial (and settler colonial) theory. The key contribution of intimate colonialism is that it frames domesticity as a site for reproducing colonial logics, troubling the public-private binary. By placing marriage policy under the theoretical scrutiny of intimate colonialism, this study highlights the production of privacy and its attendant enclosures as key processes of settler colonialism.

The term "intimate colonialism" builds upon what Ann Laura Stoler termed "the intimacies of empire."[25] Stoler's articulation acknowledged, at the time, the emergence of a trend in women's history and postcolonial studies highlighting gendered experiences of colonization in domestic spaces. For example, Anne McClintock foregrounds gendered analysis of imperialism, noting that domesticity is a crucial site articulating categories of gender, race, and class through

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[23] Emily Snyder, *Gender, Power, and Representations of Cree Law* (Vancouver, BC: University of British Columbia Press, 2018), 5.

[24] Sarah Deer, "(En)Gendering Indian Law: Indigenous Feminist Legal Theory in the United States," *Yale Journal of Law and Feminism* 31, no. 1 (2019): 8.

[25] Ann Laura Stoler, "Tense and Tender Ties: The Politics of Comparison in North American History and (Post) Colonial Studies," *The Journal of American History* 88, no. 3 (2001): 831.

colonial power relations.[26] On the topic of marriage, works like Nancy Cott's *Public Vows* have asserted marriage as a key policy site, interfacing public and private, that orients U.S. nationalism around legal mechanisms producing domesticity.[27] Since Stoler's framing, however, women's historians (in particular) have taken up projects illustrating comparative, intersectional, and gendered nexuses for settler colonialism.

Emerging from this body of literature are numerous studies of assimilation and education policies, particularly comparing the U.S. to Australia in the late 19th century. For these historians, the roles of white women as agents administering forms of colonial violence come into focus. Katherine Ellinghaus's study, focusing on interracial marriages between white women and Indigenous men during assimilationist periods, compares U.S. and Australia on the basis that these ex-British states, while distinctive, share genealogies of racialization administered through marriage policy.[28] A similar dynamic is present in Margaret Jacobs's work, which highlights the "maternalism" of white women in assimilation projects in the U.S. and Australia as way of critiquing the male-centered narratives of policies.[29] Adding to this body of comparative

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[26] Anne McClintock, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest* (New York, NY: Routledge, 1995), 5.

[27] Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000). For an outstanding study of how white supremacy inflects U.S. nation-building around marriage, see Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York, NY: Oxford University Press, 2009).

[28] Katherine Ellinghaus, *Taking Assimilation to Heart: Marriages of White Women and Indigenous Men in the United States and Australia, 1887-1937* (Lincoln, NE: University of Nebraska Press, 2006).

[29] Margaret D. Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia, 1880-1940* (Lincoln, NE: University of Nebraska Press, 2009), 89. Jacobs directly responds to works—like Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (Lincoln, NE: University of Nebraska Press, 1984)—that displace white women out of the frame as key agents of colonial administration.

literature, Ann McGrath offers her own study of interracial sex and marriage, which includes more substantial discussion of Native women as well as the politics of straightness.[30]

Like previous studies in this discussion, however, McGrath's focus on what she terms "early national periods" for the U.S. and Australia offers an important temporal question: what happens to intimate colonialism *after* the intensification of allotment and assimilation policies? The investments of intimate colonialism historians in this specific time period misses the theory's potential applications beyond other periods. Even landmark studies like Cathleen Cahill's deep reading of U.S. Indian Service archives through the lens of intimate colonialism more or less accept the periodization of U.S. history into a distinct "allotment/assimilation" period, taking for granted the "end" of allotment posited by the Indian Reorganization Act of 1934.[31] Thus, while acknowledging the important contributions of these scholars, this study aims to unsettle the temporal restrictions imagined on settler colonial administration. This administration is ongoing, and questions of marriage policy today should be understood as continuous with, rather than a departure from, intimate colonialism.

Queer Indigenous Studies. The recent proliferation of texts articulating a field of queer Indigenous studies belies the far deeper roots of Native gender studies.[32] Even so, the particular circulation of queer theory within Native American studies enlivens conversations around

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[30] Ann McGrath, *Illicit Love: Interracial Sex and Marriage in the United States and Australia* (Lincoln, NE: University of Nebraska Press, 2015).

[31] Cathleen D. Cahill, *Federal Fathers and Mothers: A Social History of the United States Indian Service, 1869-1933* (Chapel Hill, NC: University of North Carolina Press, 2011).

[32] Some of the recent collections theorizing this field: *Sexuality, Nationality, and Indigeneity*, the 2010 special issue of *GLQ*, ed. Daniel Heath Justice, Mark Rifkin, and Bethany Schneider; *Queer Indigenous Studies: Critical Interventions in Theory, Politics, and Literature,* ed. Qwo-Li Driskill et al. (Tucson, AZ: University of Arizona Press, 2011); and *Critically Sovereign: Indigenous Gender, Sexuality, and Feminist Studies*, ed. Joanne Barker (Durham, NC: Duke University Press, 2017).

temporality, place, and nationalism. Despite the political significance of marriage, it has remained only in partial focus for queer Indigenous studies. While marriage should hardly be the sum total of what queer Indigenous studies can critique, the move to step "beyond" marriage simply pivots around it. This study centers marriage in its analysis precisely because of its political and affective endurance at orienting the terms of settler colonialism. Sovereign conflicts over the terms of marriage frame a portrait of deep complexity within Indigenous responses to, rejections of, compromises with, and navigation of settler colonial kinship systems.

A generative site of analysis within queer theory orients around the temporality of empire. That is to say, many studies within this intellectual orbit focus on the organization of time, and particularly, the future. The future orientation of queer theory is significant because it provides conceptual tools for understanding what types of futures political configurations—in this case, modes of settler colonialism—seek to produce, and actually produce. Lee Edelman points to "reproductive futurism" as a state temporality around heterosexuality; that is to say, the reproduction of bodies and ideas is animated through a heteronormative logic.[33] Further, Elizabeth Freeman terms the temporal regulation of bodies as "chrononormativity," asserting that the periodization of life is a central aspect of political power.[34] Brian Massumi notes how the potentiality of threat—in the case of his analysis, the threat of future terrorism—rationalizes racialization and surveillance in the present.[35] If intimate colonialism is too entrenched in a

[33] Lee Edelman, *No Future: Queer Theory and the Death Drive* (Durham, NC: Duke University Press, 2004).

[34] Elizabeth Freeman, *Time Binds: Queer Temporalities, Queer Histories* (Durham, NC: Duke University Press, 2010).

[35] Brian Massumi, "The Future Birth of the Affective Fact: The Political Ontology of Threat," in *The Affect Theory Reader*, ed. Melissa Gregg and Gregory J. Seigworth (Durham, NC: Duke University Press, 2010).

particular historical past, queer theory often elides that same past as structuring settler colonialism in the present and future.[36]

Indeed, one of the key interventions that scholars in queer Indigenous studies make is to hold queer theory accountable to decolonization, by recognizing its investments in settler colonialism. For example, Andrea Smith criticizes both Edelman's stance of anti-relationality and Jose Esteban Muñoz's aspirational, utopian mode of queerness, observing that "Native peoples have already been determined by settler colonialism to have no future."[37] Rather than dismissing queer theory out of hand for the logics of white supremacy and settler colonialism that still animate it, scholars in queer Indigenous studies apply concepts in queer theory while simultaneously interrogating settler colonial frames. Mark Rifkin does this in *Beyond Settler Time*, where he develops a temporal critique through the critique of a "universal present" that promotes settler colonial aims through two interrelated projects: denying Native futurities altogether, and offering conditional Native incorporation into settler futurities.[38]

However, to actually advance a discussion that accounts for settler colonialism, settler colonial relations to land must anchor these temporal concerns. A land-centered critique is nothing new in Native American studies; one of Vine Deloria Jr.'s interventions in *God is Red* (1973) is that settler religious practices and historical frameworks favor temporal configurations at the expense of the sacredness of particular places.[39] Within Native gender studies, the critical

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[36] For more examples of queer temporalities organized around the future, see Lauren Berlant, *Cruel Optimism* (Durham, NC: Duke University Press, 2011); José Esteban Muñoz, *Cruising Utopia: The Then and There of Queer Futurity* (New York, NY: New York University Press, 2009).

[37] Andrea Smith, "Queer Theory and Native Studies: The Heteronormativity of Settler Colonialism," *GLQ: A Journal of Lesbian and Gay Studies* 16, no. 1-2 (2010): 48.

[38] Mark Rifkin, *Beyond Settler Time: Temporal Sovereignty and Indigenous Self-Determination* (Durham, NC: Duke University Press, 2017).

work of Native women at the intersection of land, law, and literature forms a rich theoretical and methodological framework for recognizing and dismantling settler colonialism. Mishuana Goeman foregrounds the poetics of Indigenous women as engaging a process of (re)mapping Native lands, counter-narrating against a "settler colonial grammar of place."[40] Along a similar trajectory, Stephanie Fitzgerald juxtaposes Native women's land narratives against colonial environmental policy, exposing land dispossession with a view toward centering Native perspectives.[41] Cheryl Suzack reads federal Indian law cases from the 1970s-1990s against Native women's novels, writing toward Indigenous feminist literary criticism.[42] These works place land, gender, and the law at the center of their analysis, countering the settler biases written into colonial archives by placing these materials alongside literature by Native writers.[43]

Scholars in Indigenous queer and gender studies take up these methodologies concerning time and place in a variety of ways. Nationalism is a significant site of critical concern, particularly as it circulates narratives of literature, law, place, and time. Jennifer Nez Denetdale's scholarship identifies the strains of militarism, patriarchy, and homophobia in Navajo nationalism.[44] Joanne Barker's work interrogates the gendered politics of authenticity that

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[39] Vine Deloria, Jr., *God is Red: A Native View of Religion* (New York, NY: Putnam, 1973), 62.

[40] For (re)mapping, see Mishuana Goeman, *Mark My Words: Native Women Mapping Our Nations* (Minneapolis, MN: University of Minnesota Press, 2013). For settler colonial grammar of place, see Mishuana Goeman, "Disrupting a Settler-Colonial Grammar of Place: The Visual Memoir of Hulleah Tsinhnahjinnie," in *Theorizing Native Studies*, edited by Audra Simpson and Andrea Smith (Durham, NC: Duke University Press, 2014).

[41] Stephanie J. Fitzgerald, *Native Women and Land: Narratives of Dispossession and Resurgence* (Albuquerque, NM: University of New Mexico Press, 2015).

[42] Cheryl Suzack, *Indigenous Women's Writing and the Cultural Study of Law* (Toronto, ON: University of Toronto Press, 2017).

[43] Other scholars who do this include Shari M. Huhndorf, *Mapping the Americas: The Transnational Politics of Contemporary Native Culture* (Ithaca, NY: Cornell University Press, 2009); and Beth H. Piatote, *Domestic Subjects: Gender, Citizenship, and Law in Native American Literature* (New Haven, CT: Yale University Press, 2013).

underwrite Native expressions of nationalism in the context of settler colonial relations.[45] In addition, Mark Rifkin's juxtapositions of federal policy papers with the works of Native writers, particularly those who might be understood as in some sense "queer" within their cultural and political contexts also provide methods for understanding mechanisms of settler colonialism.[46] Writing within this disciplinary convergence places this study into conversation with myriad other works engaged with the emplacement, temporality, and dismantling of settler colonialism through the assertion of Native narratives and futurities.

Methods: Archival Research, Reading Practices, and Stylistic Choices

Taking the above theoretical and disciplinary concerns into consideration, a study of marriage policy in the U.S. focusing on the interwoven sovereign relationships between federal, state, and tribal governments should do the following: (1) emplace marriage policy within the contours of settler colonial land relations and administrations; (2) attend to the past, present, and futurities of intimate colonialism with particular attention to Native women and queer/Two-Spirit voices; (3) reveal logics of white supremacy, antiblackness, and heteronormativity within Native nationalisms and federal Indian law; and (4) offer Native counternarratives against policy documents through Native storying, histories, and literature.

Textual analysis along those lines forms the methodological basis of this study. Literary criticism, granular attention to legal/policy implications, and historical archival work form the

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[44] See, particularly: Jennifer Nez Denetdale, "Securing Navajo National Boundaries: War, Patriotism, Tradition, and the Diné Marriage Act of 2005," *Wicazo Sa Review* 24, no 2. (2009): 131-148.

[45] Joanne Barker, *Native Acts: Law, Recognition, and Cultural Authenticity* (Durham, NC: Duke University Press, 2011).

[46] See, for example: Mark Rifkin, *When Did Indians Become Straight?: Kinship, the History of Sexuality, and Native Sovereignty* (New York, NY: Oxford University Press, 2011); and Mark Rifkin, *The Erotics of Sovereignty: Queer Native Writing in the Era of Self-Determination* (Minneapolis, MN: University of Minnesota Press, 2012).

basis of much of the Native studies and queer theory scholarship described above, and therefore form the methodological framework of this study. Thus, the curation and juxtaposition of texts—understood broadly to encompass a variety of formats—along the lines provided within these theoretical trajectories is a central organizational concern. Addressing this concern involves balancing the historical materiality of law and administration within intimate colonialism with the futurism of queer theory, without lapsing into either temporal stagnation or becoming hopelessly unmoored from spatial specificities. My negotiation of this tension within this study draws me toward a mosaic approach threading marriage through different times, as illustrated below in the chapter outline.

To a strict disciplinarian of law, history, or literature, perhaps this project will be infuriating to encounter. It feels to be at times too expansive, and at other times incomplete. There's a certain irony, I think, in the fact that I've assembled such a variety of ideas and approaches to critique settler colonial notions of bureaucratic standardization of marriage. Then again, what could be a better antidote to the desiccations of bureaucracy than something fluid and living?

For sections dealing with contemporary policy actions around same-sex marriage, I worked primarily with documents produced by tribal governments themselves—the minutes to council meetings, legislation, court decisions—as well as news articles on these topics as they were covered at the time. There are also a number of academic articles—mostly law review pieces—that discussed this body of law.

In addition to the relevant secondary literature and disciplinary focuses I previously described, I conducted archival research which constitutes a significant portion of the primary sources in this study. I conducted two research trips for this study, in September 2016 to the

National Archives and Records Administration in Seattle, and in September 2017 to NARA in Washington D.C. During these visits, my goal was to find files from the Bureau of Indian Affairs where marriage policy was discussed, contested, and implemented, to better understand how the federal government was attempting to reshape Indigenous kinship systems and use marriage law as a central part of settler colonial schemes to steal Indigenous lands and reconfigure them as property. I additionally sought files on Supreme Court cases where marriage laws related to Native peoples were contested.

As Seattle archivist Ken House explained to me during my visit, the National Archive and Records Administration preserves the filing system that an agency itself used when maintaining its files. This is true for the Bureau of Indian Affairs files. I was surprised, but perhaps shouldn't have been, that the BIA filing system has a pretense of rational order that devolves into labyrinthine chaos upon closer inspection.

The specific type of files I looked at are referred to as "decimal correspondence files." When the Office of Indian Affairs received a letter from someone—whether it be a member of Congress requesting information relating to their Indigenous constituents, Indigenous peoples demanding recourse from the unlawful actions of a Superintendent or Indian Agent, or a white man asking for advice as to where he could find a Native woman with a lot of land holdings to marry—the OIA employee would assign the file a number based on the topic, and then respond to the letter. Any future correspondence related to that exact query would get included, so a file might start because of a question about marriage, then drift to unrelated topics as the correspondence evolved.

In addition, the files are organized by agency first and then by decimal number. Since I was searching for a specific topic—I looked for decimal numbers 741 for "marriage," 742 for

"intermarriage," and 743 for "divorce,"—this meant that I had to specify the agency first (for example: Round Valley) and then find the files with the matching decimal numbers. This proved to be a bit of a guessing game—given my limited time at the archives, I focused on locations where I knew based on my preparation that marriage was likely to have come up as a flashpoint topic. But it's entirely possible—likely, I would argue—that especially revealing files about marriage were filed under an unrelated decimal number due to whatever the initiating correspondence was. These files contain a wide array of different types of text—memoranda, handwritten letters, typed drafts of responses that were never sent, notes within the department, telegrams, photographs, newspaper clippings, annotated copies of state and federal legislation, forms, and pamphlets. While the majority of file components were typed letters, I was frequently surprised by the range of what I encountered there.

Despite my feeling that the organization of these files was especially resistant to my goal of doing a cross-sectional analysis of the BIA's attitudes toward and influence over marriage policy, these files were nonetheless revealing. It's important to remember though, not to overdraw conclusions from archival research like this. These federal archives are deeply entrenched in a perspective that marginalizes the voices of Indigenous peoples, women, people without the means and resources to contact the BIA. What information is deemed valuable or relevant to preserve shapes the possibilities of the archive. In reading these files, I worked to read against the narratives and ideologies of the files as much as possible—pointing out gaps, assumptions, and limitations. I know that I made errors in doing so—as a person living in a particular time, with my own biases of interpretation, and incomplete information, the idea that I or anyone else could be a neutral reader is patently absurd. I've worked to make my perspective

on these files as clear as I can, but I encourage readers to ask their own questions both about my assumptions and about my analysis of these files.

The sources have heavily shaped the project. For instance, I never set out to specifically write a section about marriage licenses that were issued by Superintendents at Indian agencies. When I looked for instances where kinship and property were being contested via marriage recognition, though, this category jumped out at me as it was mentioned in files across many different agencies.

There is a particular way in which the sources themselves shaped my methods. Working with different types of sources, I realized that I was learning different reading practices in response to them. When I first opened the PDF containing the full transcript of record for the U.S. Supreme Court case *Carney v. Chapman*, I did not even understand what I was looking at.[47] I had to adopt a practice for reading these trial transcripts and court proceedings, but my training in analyzing other types of texts led me to consider how the format, performance, and transcription of a trial privileges certain narratives over others.

Instead of keeping my reading practices to myself, I decided to embrace that as a core feature of this study. I explicitly discuss my thoughts, emotions, and practices around reading different types of sources as they come up. Stylistically, my goal is to be present, rather than fabricating a sense of distance of objectivity. I want to be transparent and show you how and why I thought what I did about the texts I read. I found myself struggling against language that is highly theoretical and abstract, a struggle that I think is evident enough on the pages. There's a certain irony that the ideologies and narratives that parade themselves as the commonsense, rational, and normative ways of being in the world are often the most difficult to describe

[47] Carney v. Chapman et al., 247 US 102 (1918).

precisely and accessibly. Many works at the intersection of NAIS and queer/gender studies present a challenging reordering of language itself. I embrace that challenge, but still tried to pull away from that feeling of abstraction to say something that *feels* more.

This tension is not resolved in this work.

Chapter Overviews

In the process of piecing together this study from the many different types of sources and disciplinary influences I had, I decided early on that I wanted to have an approach that was not strictly chronological, hoping to resist the urge to "periodize" according to the way that federal Indian policy is often narrated. What I noticed as I worked on with each cluster of texts is that I found myself developing a keyword that encapsulated the narrative or patterns that I was observing. Each of these keywords—*bureaucratic kinship*, *allotmentality*, and *the overhead of legitimacy*—became the central organizing principle for one of the three parts of this project. These are chronological only in the roughest sense—the point is to draw connections across time and consider how marriage policy serves as a site of settler colonial and Indigenous contestation.

The three parts of this project serves as a kind of mosaic—an original art piece visualizing and representing each keyword, a discussion of how the keyword emerges from and responds to other scholarship, an exploration of the texts and sources using that keyword as a lens, and applied examples to relevant case studies. Each of these keywords is deeply intertwined—as I see it, facets reflecting from the same crystal, so I ordered the parts in such a way as to allow for a logical building of these connections.

In Part I, "Bureaucratic Kinship," I develop key theoretical frames and historical context that foregrounds the Office of Indian Affairs' efforts to reshape Native kinship systems into settler terms. I focus on archival research of the activities of the Office of Indian Affairs during

the early 20th century that encapsulates how a taxonomy of types of marriage recognition served settler interests in Indigenous land dispossession, but were also reshaped and disrupted by the futurities of Indigenous kinships. I start with a grounding in the theoretical frame of "domesticity," applying key insights from the intersecting fields of NAIS and gender studies to describe the often-contradictory settler ideologies of domesticity. Building further on this literature, I propose "bureaucratic kinship" as a way of describing settler state practices attempting to overwrite or contain existing practices of Indigenous kinship with its own supposedly rational bureaucracy. This involves narrowing the category of kinship, normalizing settler notions of white supremacy and patriarchal inheritance of property.

Next, I illustrate what bureaucratic kinship looks like in practice, based on case files from the Office of Indian Affairs during the early 20th century. A key focus of this analysis is to demonstrate how these attempts to impose rational order and standardized rules resulted instead in chaos and mismanagement. Further, I describe how that settler futurity of standardized bureaucratic kinship is shaped and disrupted by Indigenous resistance to, and at times, participation in, these processes. I highlight three thematically connected category clusters in these files—superintendent-issued marriage licenses; Indian custom marriages; and divorce—each of which demonstrate how actors within settler bureaucracy enacted violence and dispossession, but also how these systems lacked internal coherence and failed to stymie Indigenous kinship futurities.

In Part II, "Allotmentality," I build from a genealogy of works in Native and Indigenous studies toward a theory of allotmentality. If allotment itself is settler colonial policy fundamentally oriented around theft of Indigenous homelands and the imposition of private property, allotmentality is the cluster of ideologies developed co-constitutively with these

policies; the logics of land as settler property, white supremacist ideas about racialized citizenship, and heteropatriarchal notions of gender and sexuality. I lay the keyword "allotmentality" on a foundation of scholarship in the NAIS field, and examine how allotmentality has manifested in a curated set of U.S. legislation to illustrate how it functions in practice.

After defining the terms of allotmentality, I proceed with an in-depth case study of *Carney v. Chapman*, a case originating in Potontoc County court in Oklahoma in 1912, and proceeding up to the U.S. Supreme Court ruling in 1918.[48] This case concerns which of the litigants will hold onto the title of the allotment of a deceased Chickasaw allottee. Core to this case is the interpretation of which marriages the federal government will recognize as valid, and why. This case is significantly under-covered in the literature, and as I explain, has been mischaracterized as an affirmation of tribal sovereignty on "domestic" issues. I use this as a case study for allotmentality precisely because it is under the artificial scheme of allotment that directed this land to be parceled and hinged upon settler ideas about marriage, gender, and sexuality. This case serves as the core of Part 2, if not the entire study, because of the way that it demonstrates many layers of the inter-sovereign struggles over marriage policy and centers the redefinition of land in the process.

In Part III, "The Overhead of Legitimacy," I shift forward to look at the issue of same-sex marriage recognition in Native jurisdictions in the U.S., the original issue that sparked this project. Having situated state-recognized contractual marriage as constellating the ideologies of

[48] J.C. Chapman v. David Alberson, Sina Alberson, and Salina Alberson, Minors, and Their Guardians, Willie Monroe and Tom Jones, and Tom Pendleton and Lottie Carney, Defendants, in the District Court of Pontotoc County, OK (1912); Carney v. Chapman et al., 60 Okla. 49, (Okla. S. Ct., 1916); Carney v. Chapman et al., 247 US 102 (1918).

private property, white supremacy, and heteropatriarchy, I turn to these developments in tribal policy starting in 2004 extend some settler colonial logics encoded within civil marriage law while refuting others. Of special note here is the way that these internal community debates structure support of and opposition to same-sex marriage around questions of tradition, nationalism, and recognition. The "overhead of legitimacy" describes the costs associated with—in this case—Native polities rendering marriage laws legible and recognizable to the settler state. Put another way, I argue that the adoption of same-sex marriage bans and legalization under the terms set by the settler state incurs a cost—the overhead—that bakes into the day to day operation of tribal governments on multiple different registers.

In the first section of part three, I emplace my thinking around the term "overhead of legitimacy" within existing conversations in Native and Indigenous studies as well as queer and gender studies. After laying that groundwork, I examine several case studies of tribal legal decisions around same-sex marriage, drawing the tensions within these decisions to the surface to better understand how the settler colonial context of civil contractual marriage inflects tribal decisions, and simultaneously how these decisions can serve as adaptions to and resistance to settler colonial logics. Finally, I close out this part with an exploration of the politics of refusal of contractual civil marriage, and how (particularly) queer Indigenous and Two-Spirit peoples build futurities alongside and beyond the terms of settler colonial marriage policy.

With all that in mind, let's get started.

PART I: BUREAUCRATIC KINSHIP

ARTIST STATEMENT

"Bureaucratic Kinship," June 2022. The original photograph of a Monterey cypress tree has become indistinct, papered over by a scanned charcoal drawing that overlaps it. Images of paperwork from the Office of Indian Affairs clutters the landscape, but fails to obscure what can be seen past it. The tree is haunted by the imagined heteropatriarchal lineage, whose binary pink and blue, and symmetrical structure, convey a sense of artificiality in light of the tree with its wind sculpted trunk and survival even with broken branches.

PART I: INTRODUCTION

On April 12th, 1930, Edward C. Finney, the Solicitor of the Department of the Interior, submitted an opinion to the Department of the Interior concluding that, "as Congress, the courts, the department, and in many instances the States, have all recognized the validity of Indian custom marriage and divorce, it necessarily follows that they must be recognized and treated as being of equal validity with ceremonial marriage and legal divorce."[49]

Finney had been asked to consider a seemingly simple question: whether or not to reopen the Department's "finding of heirs" in a specific probate case concerning the lands of a Nez Perce allottee at Fort Lapwai. What follows departs quickly from the specifics of the case at hand, devolving into a sixteen-page ruling that synthesizes dozens of federal and state court decisions, references several pieces of federal legislation, and reviews past probate decisions. All this, to address this question: when and how does the Department of the Interior recognize marriages and divorces carried out according to tribal law?

My description of this decision so far should raise a few initial questions: (1) Why was it necessary for Finney to go to all this effort for the consideration of a single allotment? (2) Why is this person within a single federal agency empowered to make such a cross-jurisdictional analysis? and (3) Why is the Department of the Interior even involved in the business of determining who can and cannot inherit land belong to Native peoples?

Reviewing the decision further, the crux of the analysis focuses on the following procedural question: can a divorce under tribal law dissolve a marriage conducted under state

[49] Edward C. Finney, Solicitor of the Department of the Interior, Decision Reported to Ray L. Wilbur, Secretary of the Interior, 12 April 1930, General Records of the Bureau of Indian Affairs, Record Group 75, Klamath, Decimal Subject No. 743, File No. 55112-32 (Seattle, WA: National Archives and Records Administration).

law? Finney concludes that, yes, "an Indian custom marriage is of equal validity with a ceremonial one, and similarly an Indian custom divorce is of equal force with one procured through legal procedure."[50] Given the political context of the 1930s in the U.S., Finney's decision occurs amidst decades of the federal government's attempts to implement allotment policies, sever its recognitions of Native polities, and transform Native peoples into undifferentiated individual citizens of states to disappear their counter-colonial political, cultural, and land claims. Despite all these efforts by the settler state to erase tribal law, how did Solicitor Finney arrive at the position where, in his words, there was "no question as to recognizing the validity of Indian custom marriages and divorces"?

Under narratives of settler colonial futurity, policies under the general umbrella of allotment and assimilation are designed to accomplish the following aims: extend land theft to further redistribute Native land-as-property; erase Native cultural and political distinctiveness; and create a context in which the settler state can control land free of accountability to Native peoples, who no longer exist in any meaningful sense. In other words, this is a program of genocide, stewarded by a combination of legalistic maneuvers accompanied by the administration of state violence. Solicitor Finney's opinion, therefore, that there is "no question" as to the recognition of marriages and divorces under tribal law, illustrates the failure of the settler colonial state to arrive at that future. The fact that a divorce under tribal law could end a marriage conducted under state law transgresses this narrative of "progress" away from tribal sovereignty and toward "civilization." But Finney himself, a cog of settler bureaucracy working

[50] Edward C. Finney, Solicitor of the Department of the Interior, Decision Reported to Ray L. Wilbur, Secretary of the Interior, 12 April 1930, General Records of the Bureau of Indian Affairs, Record Group 75, Klamath, Decimal Subject No. 743, File No. 55112-32 (Seattle, WA: National Archives and Records Administration).

within the Department of the Interior, is hardly a beacon of anticolonial politics—quite the contrary. The fact that someone in his position felt obligated to continue recognizing Native legal and kinship systems, even if couched in the limited terms acknowledged under a settler colonial framework, illustrates that something went very wrong with settler colonial policy around land and marriage. What went wrong? And why?

The more I sit with this opinion, the more I see the ways that these initial questions make way for deeper ones. What does a decision like this reveal about the settler state's perceived relationship to Native peoples? What does it illustrate about the creation of the settler state's legal apparatus, oriented around the control of Native lands and bodies? Marriage policy, as Finney's opinion reveals, is a nexus for settler colonial law; an area tense with the internal frictions of the U.S. settler state. Settler state bureaucracy does not proceed efficiently or rationally; it does not move like well-oiled machinery. The gears of its power grind, crack, and break where the interests and actions of tribal, federal, and state governments and individual actors collide. Though it makes its dismal motions toward its white supremacist agenda, generating material injustices as it shambles about, it is not powerful enough to close off Native futurities and arrive at its dystopian fantasy of full nonaccountability.

In order to consider the questions raised by Finney's opinion, and many more, I invite you along on a journey through the everyday violence of settler colonial ideologies put into practice as individual agents attempt to surveil, manage, and control Native lands and bodies. Throughout this chapter, I curate correspondence files internal to the Office of Indian Affairs, where its officials attempt to navigate the legal quagmire their own settler institutions have generated around kinship, citizenship, and property. My point in highlighting these files is to show the settler state less as an abstract entity, and more as the grounded, placed-and-timed

operations of real individuals with material impacts. Thus, while I use theoretical frames like "settler colonialism," "narratives of domesticity," and "bureaucratic kinship," I would like to emphasize that these frames are tools to explore real strategies, failures, and inconsistencies. Indeed, the transformation of material issues into abstract legal terms is not coincidental; it is one of the core features of these systems.

Part I is organized as follows. In the first chapter, "Toward a Theory of Bureaucratic Kinship," I explore the theoretical frame of "domesticity" and how this concept has been applied in settler policy in the U.S., and critiqued by the intersecting fields of Native American studies and gender studies. I describe layered ideologies of public and private and how they work to construct settler colonial schemes of property, citizenship, and nationhood along the lines of white supremacy and cisheteropatriarchy. Narratives of domesticity steep the U.S. settler state's self-appointed status as "guardian" to Native "wards," inflected and carried out by the individual agents of its bureaucracy.

After this review of domesticity, I draw further from the existing critical literature in Native studies, gender studies, and queer studies to propose a theory of "bureaucratic kinship." I argue that the settler state aims to overwrite existing practices and protocols of Native kinship with its own bureaucracy, offering its rules and regulations as a standardized, supposedly "rational" alternative. This system functions by redefining kin as property, thus resulting in a thinning or narrowing of the category of "kin" that normalizes white supremacy and patriarchal inheritance systems.

Following this theoretical development, I demonstrate what bureaucratic kinship looks like in practice within the Office of Indian Affairs, sketching out a selection of documents ranging roughly from before allotment to after the IRA, to illustrate the ways in which the

departmental attitudes exceed, rather than follow, the periodization of federal Indian law. I show how attitudes about race, gender, and property guide settler decision-making as the Indian Affairs bureaucracy grows in its attempted surveillance and management of Native peoples' lives.

Notable throughout this process is that the "order" supposedly established by settler colonial rule is in fact disorganized and chaotic. The interfaces between various settler agencies, courts, and jurisdictions result in a policy quagmire that itself becomes justification for further surveillance and intervention. The settler state's vision of a future free of an obligation to recognize Native peoples and repatriate land and kin is thoroughly discredited by not only its internal inconsistencies, but also by the resistance and disruptions of Native peoples themselves as they variously reject, resist, and adapt to the impositions of bureaucratic kinship.

In Chapter 2, "The Jurisdictional Chaos of Standardization," I present a series of case studies organized around three key categories of marriage recognition: superintendent-issued marriage licenses; Indian custom marriages; and divorce. Each of these categories represents a cluster of thematically connected files from the day-to-day work of the Office of Indian Affairs as it fails to arrive at its ideal futures through a mix of ignorance, incoherence, and incompetence. The proliferation of these categories of kinship, and the muddled rules and procedures associated with each, demonstrate both the enactment of settler colonial violence and systemic failure of the settler colonial state.

At the conclusion of Part I, we will return to Solicitor Finney's opinion, in light of all of all the categories we have examined, and see where that takes us next. This won't be an easy journey, nor is it complete. This is the nature of this type of work; there are always going to be gaps, inconsistencies, dangling threads, and unanswered questions. My hope is that this work

contributes to a conversation that will continue on from here—perhaps something you find here will spark a connection elsewhere that I didn't or couldn't see.

CHAPTER 1: TOWARD A THEORY OF BUREAUCRATIC KINSHIP

This chapter is divided into three sections. First, I provide an analysis of the way that the concept of "domesticity" is central to U.S. settler colonial policy, and in particular how narratives of domesticity bring together a particular formation of nation-state identity, particularly through white supremacist and heteropatriarchal scripts. Put another way, if we are to interrogate how recognition of marriage is structured as a state power, it is important to foreground the association between marriage and "domesticity" in order to reveal the ruptures and inconsistencies in settler colonial logics. After building this foundation, I define and describe the concept of "bureaucratic kinship," exploring how the concept emerges from existing critical scholarship, especially within Native and Indigenous studies. Finally, I draw upon archival sources produced by the Office of Indian Affairs to apply the concept of "bureaucratic kinship" as a lens to the administrative state.

Narratives of Domesticity

There is perhaps no concept that better encapsulates settler colonial ideology around Native marriages than the notion of "domesticity." If one is to expose and describe the settler state power over Native kinship and land through the deployment and interpretation of marriage policy, it is critical to take stock of the many overlapping senses of "the domestic" that underwrite settler colonial governance. I identity five interlocking frames of domesticity: (1) the notion of a patriarchal household organized around a public-private binary; (2) the domestic on the nation level as the space contained "within" a nation-state contrasted with the external "foreign"; (3) the legal fiction of "domestic dependent nations" that frames Native nations as subject to U.S. federal guardianship; (4) the shift of this guardianship to individual employees of

the U.S. federal government; and (5) the devolution and recognition of policies over marriage and sexuality as reserved domestic powers of state and tribal governments.

One primary sense of the domestic—meaning "of or relating to the home"—operates politically under U.S. settler colonialism as the definition of a "household" as a "private" space governed by a patriarch. This sense of domesticity—the very concept that individual families are contained within politically sealed "households" that form the building blocks of the nation—is central to understanding individual private property. The state effectively assigns the citizen-patriarch jurisdiction over his wife, children, and land within the boundaries of home, imagining a zone of exclusion that the state doesn't reach within—contrasted with the "public sphere" where these citizen-patriarchs interact with each other outside the home.

In her study of U.S. developments of marriage as a public institution, historian Nancy Cott illustrates, for example, that a core concept under this frame of the domestic is "coverture." Under this practice, a woman was not a citizen in her own right, but rather an expansion of her husband's citizenship. This "meant that a wife could not use legal avenues such as suits or contracts, own assets, or execute legal documents without her husband's collaboration."[51] Her body, labor, and personhood became a form of property for the citizen-patriarch.

While in practice, women's sexuality and sociality cannot be fully contained in this way, it's important to recognize the ideological coding of "domesticity" as "feminine" and "private" which serves as a baseline for cisheteropatriarchal socio-political organization, the likes of which we can observe under U.S. settler colonialism. This fiction of the domestic as a private space has been thoroughly discredited by the fields of gender and sexuality studies. As queer theorist Jasbir Puar notes, "However irksome, [privacy] remains the guiding spatial paradigm of juridical

[51] Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000), 11.

discourse at large… informed by assumptions that private and public zones still function as operative ideological and spatial distinctions by which people organize their lives."[52] Narratives of domesticity-as-privacy, while not accurate in a practical sense, retain legal and cultural currency under U.S. settler colonialism.

A second frame of "the domestic" builds upon the previous, pitting domesticity not against "the public", but instead against "the foreign." That is to say, settler nation-states like the U.S. frame their geopolitical borders as akin to the contours of a household, with the federal government acting in the role of the patriarch as the manager of domestic affairs. Thus, when one sees political distinctions like "domestic policy" vs. "foreign policy," it should be read as an attempt to ossify nation-state borders, a logic of containment that assigns state bureaucracy its spheres of influence as analogous to the boundaries of a household.

With this frame of domesticity in mind, Supreme Court Justice John Marshall's invention of the category "domestic dependent nations" in *Cherokee Nation v. Georgia* performs a considerable amount of ideological work toward the under-recognition of Native nationhoods. Legal scholar Walter Echo-Hawk describes this as "a distinctly second-class political status since it meant that tribes would not have attributes of external sovereignty in international relations and are nations subjugated by and subsumed into the domestic political system of the United States."[53] This radical redefinition of Native nationhood—flying in the face, for example, of treatymaking between Native nations and several European nations as essentially co-equal

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[52] Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham, NC: Duke University Press, 2007), 129.

[53] Walter R. Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Golden, CO: Fulcrum Publishing, 2010), 104.

sovereigns—attempts to manifest this logic of containment by elevating the U.S. as the sovereign-patriarch over infantilized Native nations.

Offering a helpful framework for understanding the imbricated notions of the domestic, Beth Piatote argues that "from the perspective of the [I]ndigenous subject there exist not one but two national domesticities occupying the same contested space: the tribal-national domestic and the settler-national domestic."[54] Piatote represents Marshall's paternalistic framing as a version of domesticity (the "settler-national domestic") in conflict with the pre-existing and continuing sense of Native nations' internal political integrity ("the tribal-national domestic"). Piatote makes multiple registers of "domesticity" apparent, arguing that "the national domestication projects of settlement and expansion corresponded with the proliferation of domesticity as an ideology."[55]

Yet it would be remiss not to point out even more frames of "the domestic" that apply here. Marshall's decision frames Native polities on a national level as having a relationship like "that of a ward to his guardian."[56] But, this expands into the idea that individual Native persons are in effect wards to the federal government, a framing by which the U.S. settler state attempts to supersede the "tribal-national domestic" by claiming jurisdiction over Native people on an individual basis. The transformation of Native peoples from members of Indigenous polities to individual citizens (or quasi-citizens) of the U.S. is the central aim of assimilation policy.

Within this policy period in particular, historian Cathleen Cahill notes how federal employees like Indian agents, superintendents, and field matrons framed themselves as the "federal fathers and mothers" of Native individuals, "who would guide them by offering

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[54] Beth H. Piatote, *Domestic Subjects: Gender, Citizenship, and Law in Native American Literature* (New Haven, CT: Yale University Press, 2013), 4.

[55] Piatote, *Domestic Subjects*, 5.

[56] Cherokee Nation vs. Georgia, 30 U.S. 1 (1831): 2.

examples of 'civilized' behavior."[57] In these spaces of intimate colonialism, the many frames of domesticity overlap, imbuing agents of the settler colonial government with political and moral authority to "domesticate" Native individuals into undifferentiated citizen-subjects of the "settler-national domestic."

Taking a closer look at marriage policy, these many domestic frames become ever more incoherent as they overlap. Under U.S. federalism, which assigns jurisdiction of different categories of policy to federal and state governments, the regulation of marriage typically falls to state governments. This reflects the notion that marriage is a private, rather than public, relationship. In this way, individual states function as sites of policy deemed "domestic" in nature, beneath the frame of the federal-national public. As previously discussed, the notion of privacy and zones of personal space beyond the gaze of the state are legal narratives that fail to acknowledge the very "public" nature of such an imagined distinction. Even so, the narrative of laws around marriage and sexuality as "domestic powers" intersects with federal Indian law where the federal government recognizes Native nations as having reserved powers over domestic powers.

This is recognized, for instance, in the U.S. Supreme Court decision *U.S. v. Quiver*, which overturned the indictment of an Oglala Lakota man under federal adultery statutes. Writing for the majority, Justice Willis Van Devanter observes, "At an early period it became the settled policy of Congress to permit the personal and domestic relations of Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws."[58] Because marriage recognition is

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[57] Cathleen D. Cahill, *Federal Fathers and Mothers: A Social History of the United States Indian Service, 1869-1933* (Chapel Hill, NC: University of North Carolina Press, 2011), 6.

tethered so closely to private property under U.S. settler colonialism, we can quickly see how the multiple frames of the "domestic" become incoherently entangled under U.S. policy.

The U.S. has framed Native persons as individual wards of the U.S. federal state, which manifests—for an example that's relevant here—with the notion of plenary (exclusive) jurisdiction for Congress in regulating Native individuals in a quasi-domestic relationship to the patriarchal state.[59] However, U.S. federalism has also devolved marriage to individual states as domestic sub-units; where Native people are framed as subject to individual state laws, state marriage law would appear to apply. But the third domestic frame of Native nations having reserved domestic powers over "internal" affairs means that, in effect, these three different domestic-legal frames occur simultaneously, creating legal incoherence that various courts and agencies arbitrate on a largely ad hoc basis.

Theorizing Bureaucratic Kinship

The locus of settler state power organized around these intertwined notions of "domesticity" illustrate why it is important to think of settler colonial bureaucracy as itself a kinship system. By attempting to undermine and overwrite Indigenous kinship systems, U.S. federal policy promulgates layers of exclusion, containment, and abstraction that present settler colonial sociopolitical order as natural, inevitable, and desirable. When I say that bureaucracy is a kinship system, I mean that the state generates and maintains categories of family, linking people and property through paper trails that become a flattened archive of ancestral memory

[58] United States v. Quiver, 241 U.S. 602 (1916), 603-604.

[59] For a thorough discussion of the plenary power doctrine and its various interpretations (and misinterpretations) by the federal courts, see David E. Wilkins, "The U.S. Supreme Court's Explication of 'Federal Plenary Power:' An Analysis of Case Law Affecting Tribal Sovereignty, 1886-1914," *American Indian Quarterly* 18, no. 3 (1994): 349-368.

recorded along white supremacist and cisheteropatriarchal lines. It restricts and redirects the flow of kinship to maintain settler theft of Indigenous lands, bodies, and spirits.

Kinship's relationship to state power has been a generative line of critique for fields of settler colonial studies, queer theory, and Native American studies. On kinship, anthropologist Elizabeth A. Povinelli offers key theoretical insights that situate intimate coupledom as a central organizing technology of race, gender, and sexuality under settler colonialism. Drawing from her fieldwork in multiple communities—including the Belyuen Aboriginal peoples of northwestern Australia and (non-Indigenous) radical faeries communes in California—she theorizes "the intimate couple [as] a key transfer point between, on the one hand, liberal imaginaries of contractual economics, politics, and sociality and, on the other, liberal forms of power in the contemporary world."[60] Povinelli's grammar of intimacy articulates the possibilities of kinship within what she terms "liberal settler colonies."[61] She differentiates between "thick life" of Belyuen, where members are interwoven into dense kinship networks,[62] and "stranger sociality," which characterizes settler societies that articulate kinship as narrow, atomized through the logics of liberal freedom.[63] Despite the distant independence that this stranger sociality appears to afford, settler colonies forge dependencies upon actors within state-market bureaucracies. By contrast, thick life enmeshes an expansive array of people as kin.

Given this framework—a range of "thinness" and "thickness" that applies to kinship practices—the formation of bureaucracies as kinship systems represents an intentional thinning

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[60] Elizabeth A. Povinelli *The Empire of Love: Toward a Theory of Intimacy, Genealogy, and Carnality* (Durham, NC: Duke University Press, 2006), 17.

[61] Povinelli, *The Empire of Love*, 10.

[62] Povinelli, *The Empire of Love*, 45.

[63] Povinelli, *The Empire of Love*, 61.

of intimate social ties. The papering of marriages into licensed documentation archived under the U.S. settler colonial state is an express attempt to standardize kinship by flattening relationships into segments whose temporal borders attempt to enclose legitimate expressions of sexuality. The "paperless" dimensions of relationships might arise organically from a web of community ties and responsibilities; these might have ambiguous beginnings and endings, and depending on the specific Indigenous community, multiple intimate relationships might occur simultaneously, stacking vertically depending on the protocol involved.

By contrast, state regulation of marriage tends to focus on binaristic framing, recording the moment of solemnization (or termination) between the participants, whose race and gender under settler hierarchies determine whether a sexual relationship can legitimately exist. This segment of time—from the lawful formation to termination of a marriage—is a zone of exclusive kinship, marking intimate relationships that overlap with it for state regulation and punishment. Thus, settler marriage policy attempts to render kinship into sequential segments of time rather than simultaneous, layered relationships and responsibilities. Furthermore, each criterion of "legitimate" marriage, which has at times involved the citizenships, ages, genders, sexualities, races, and degree-of-relatedness of the participants, proposes a thinning of kinship possibilities along the lines of restrictive binaries.

That the state centers two forms of relatedness—heterosexual monogamous marriage, and the direct biological descent of children from said marriage—is not an accident. It is, in effect, the key process by which state bureaucracy reproduces itself as a kinship system. Political scientist Jacqueline Stevens identifies birthright citizenship and marriage as core processes of state bureaucracy. Under her analysis, states co-opt notions of familial belonging, leading into a national collective. For instance, upon the birth of a child within the state's imposed geographic

boundaries, it issues a birth certificate effectively "creating" a citizen through bureaucratic sleight-of-hand. Yet, the state bureaucracy did not create life here; it would be more accurate to say that it recognizes and registers this life, composing a contract of participation in the settler nation-state.

With regard to marriage, Stevens makes the observation that "the official rules of marriage do not map onto existing practices of intimacy."[64] These "official rules" propose a containment of intimacy within a private/domestic social space and administers benefits and violence along those lines in order to perpetuate the citizenship and property relationships that maintain the existence of the state. Thus, importantly, bureaucratic kinship does not truly replace other modes of kinship but rather asserts itself as the form of kinship that matters when definitions of relationships between humans and humans, humans and states, humans and property, etc., are litigated. When alternate manifestations of kinship rupture in ways the state deems criminal, or as disputes over entities defined as property, the official rules determine which kinship bonds are recognized. These official rules, further, are not static, but respond somewhat flexibly—albeit with considerable inertia—to these ruptures in underlying kinship systems.

In U.S. case law, for instance, bureaucratic kinship has shifted in its definitions and recognitions when the settler state's interests are suited to aligning official kinship with frequently contested ruptures. In his close reading of the 2005 U.S. Supreme Court decision *Lawrence v. Texas*, which overturned the remaining state-level "sodomy" laws, Eng observes how the majority decision turns on a right to privacy, which "speak[s] only to couples in the

[64] Jacqueline Stevens, *Reproducing the State* (Princeton, NJ: Princeton University Press, 1999), 7.

private domain of the monogamous bedroom."[65] In effect, the Supreme Court folds queerness into "a normative discourse of family and family values."[66] The decision uses this partial decriminalization of homosexuality to retrench other core aspects of bureaucratic kinship like private property and individualism. A key insight that this type of analysis offers is that the "official rules" governing marriage and illicit sexuality adapt, generating new categories of recognition as needed to maintain settler state futurity. Thus, from a methodological perspective, tracing when elements of the state's many bureaus, offices, courts, agencies, and so forth offer and restrict recognitions of kinship is essential to understanding and challenging settler state power.

Indigenous kinship practices have been highlighted within Native American studies—and in particular, where that field intersects with gender and sexuality studies—as resistive and transformative modes of being in the world that pre-exist, survive, and surpass settler bureaucratic kinship systems. In his study *When Did Indians Become Straight?* queer studies scholar Mark Rifkin makes the following key observation:

> Indigeneity puts the state in crisis by raising fundamental questions about the legitimacy of its (continued) existence, and to contain the crisis, state institutions and allied nongovernmental discourses, like late-nineteenth-century and early-twentieth-century anthropology, interpellate forms of [I]ndigenous sociality, spatiality, and governance that do not fit within liberal frameworks as *kinship* [emphasis in original], coding them as aberrant or anomalous modes of (failed) domesticity when measured against the natural and self-evident model of nuclear conjugality.[67]

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[65] David L. Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham, NC: Duke University Press, 2010), 42.

[66] Eng, *The Feeling of Kinship*, 42.

[67] Mark Rifkin, *When Did Indians Become Straight?: Kinship, the History of Sexuality, and Native Sovereignty* (New York, NY: Oxford University Press, 2011), 37.

While settler logics of kinship have attempted to map over Indigenous kinship practices, and indeed, those practices have responded in agential ways to bureaucratic kinship, Indigenous kinship systems reveal the thinness of bureaucratic kinship and offer pasts, presents, and futures that de-naturalize and disrupt settler colonial governance.

Responding to the concept of "sovereignty", Leanne Betasamosake Simpson centers an Anishinaabe concept, "Kina Gchi Anishinaabeg-ogamig—the place where we all live and work together" as an organizing principle.[68] This notion of sovereignty reflects a thickness of kinship that "spans back seven generations and that spans forward seven generations," including "animal nations and plant nations, the water, the air, and the soil—meaning the land is part of us and our sovereignty rather than an abstract natural resource for our unlimited use."[69] As a rejection of what I am describing as bureaucratic kinship, Simpson's framing illustrates via contrast how the thinning of kinship under settler colonial governance allows for the translation of kin into property. This process, which might be described as "propertyification," expels all non-humans—and indeed, many humans—from its definition of kin in order to maintain control and exploitation of what has been redefined as property.

Along similar lines, Diné scholar Jennifer Nez Denetdale analyzes how U.S. federal Indian policies "intended to eliminate the Diné as Diné by transforming the Navajo nation into a heterosexual patriarchy, even as the Navajo remain matrilineal and LGBTQ people assert k'é as the foundation by which they belong to their people and the land."[70] For Denetdale, k'é is the

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[68] Leanne Betasamosake Simpson, "The Place Where We All Live and Work Together: A Gendered Analysis of 'Sovereignty,'" in *Native Studies Keywords*, ed. Stephanie Nohelani Teves, Andrea Smith, and Michelle H. Raheja (Tucson, AZ: University of Arizona Press, 2015), 19.

[69] Simpson, "The Place Where We All Live and Work Together, 19.

[70] Jennifer Nez Denetdale, "Return to 'The Uprising at Beautiful Mountain in 1913': Marriage and Sexuality in the Making of the Modern Navajo Nation," in *Critically Sovereign: Indigenous Gender, Sexuality, and Feminist Studies*, ed. Joanne Barker. (Durham, NC: Duke University Press, 2017), 73.

traditional expression of Navajo kinship relations, which faces legal, political, and spiritual pressure from the U.S. settler state as it attempts to transform Diné people "into citizens of both the United States and tribal nations as heteronormative nuclear family units."[71] Thus, understanding settler colonial bureaucracy as itself a kinship system illustrates why marriage, sexuality, citizenship, and property are core sites of epistemic contestation between Native peoples and settler states.

Bureaucratic Kinship in the Office of Indian Affairs

In this section, I curate a cursory selection of documents ranging from 1883 to 1940 that outlines some of the intra-departmental anxieties, plans, and practices as the Office of Indian Affairs expends resources to develop this bureaucratic kinship system. I use this range for a few reasons. First, it spans pre-allotment documents to post-IRA documents. As I will discuss in Part II, allotment drives many of the OIA's policies and practices toward marriage. However, bureaucratic kinship precedes and exceeds any notion of allotment as a distinct "period" that is often imagined to begin in 1887 and end in 1934. Allotment does not fundamentally disrupt federal governance and surveillance over marriage, so much as intensifies and directs it. Further, any official narrative that the IRA "ends" allotment misses the point that allotment and allotment-like policy continues.

At the outset, I will discuss an excerpt from the 1883 Annual Report of the Secretary of the Interior, which describes the agency's interest in using bureaucratic tools in opposition to polygynous plural marriages. My analysis explores how this report engages multiple frames of

[71] Denetdale, "Return to 'The Uprising at Beautiful Mountain in 1913,'" 73.

domesticity and pursues the intensification of bureaucratic kinship even as it criticizes the current implementation of that bureaucracy.

Second, I focus on a departmental memorandum, issued in 1901 and distributed to the individual agents and Superintendents assigned to control and surveil Native peoples within their jurisdiction. I dissect the document itself, revealing how its attempts to regulate Native kinship through bureaucratic management build upon contradictory foundations, gesturing toward settler state futurity that it imagines as both ideal and possible, while at the same time undermining those possibilities through delusion over its own managerial competence. Then, I analyze a contemporaneous response by a locally-situated agent returns to the central office. This response highlights gaps and failures between this top-down management and local conditions, further underscoring how illusory the department's attempts at "rational" management.

I finish this analysis with a discussion of an eerily similar circular issued by John Collier in 1940, which illustrates how this federal bureaucracy has grown larger and more invasive while at the same time failing to address the initial problems it attempted to solve.

1883 Annual Report of the Secretary of the Interior. In the 1883 Annual Report of the Secretary of the Interior, Secretary Henry M. Teller identifies marriage as requiring the "immediate attention of the agents."[72] Even before the Dawes Act came into effect, the department had been engaged in the process of bureaucratically managing the kinship of Native peoples it assumed jurisdiction over. The first concern Teller lists is regarding plural marriages—more specifically, cases where one man has multiple wives. (Polyandry, it seems, goes unremarked or unimagined.) He argues that government-issued rations have made it possible for

[72] Henry M. Teller, Secretary of the Interior, "Extract from the *Annual Report of the Secretary of the Interior*," 1 November 1883, in *Documents of United States Indian Policy,* ed. Francis Paul Prucha, 3rd ed. (Lincoln, NE: University of Nebraska Press, 1975/1990/2000), 159.

Native men to support more wives and further, "the more numerous the family and greater the number of the rations allowed."[73] For Teller, this is a change from a previous condition of impoverishment that did not allow this family structure to exist. Somewhat surprisingly, given his moralistic stance problematizing plural marriage, Teller does not advocate for dissolution of existing plural marriages, instead aiming to prevent future plural marriages "by all possible methods."[74]

The elisions of this report are many but reveal aspects of this agency's ideology, particularly its view of its own influence. He views the absence of the settler state's intervention as a state of impoverishment, rather than recognizing that genocide and land dispossession have precipitated this state of impoverishment; or perhaps that his conception of impoverishment is in the first place tethered to a community's ability to display "wealth" in a way that is legible to Euro-American norms. Beyond this, though, it is noteworthy that he views the intervention of the settler state as positive in an economic sense—the alleviation of poverty via ration distribution—while at the same time expressing doubt in the project, suspecting that the "dependency" created by these rations in some way incentivizes plural marriages, which he signals is self-evidently morally objectionable.

Teller further pontificates on the nature of Native marriages, writing that "The marriage relation, if it may be said to exist at all among the Indians, is exceedingly lax in its character." This view, that Native people essentially *lack* a kinship structure because of its incongruity when

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[73] Henry M. Teller, Secretary of the Interior, "Extract from the *Annual Report of the Secretary of the Interior*," 1 November 1883, in *Documents of United States Indian Policy,* ed. Francis Paul Prucha, 3rd ed. (Lincoln, NE: University of Nebraska Press, 1975/1990/2000), 159.

[74] Henry M. Teller, Secretary of the Interior, "Extract from the *Annual Report of the Secretary of the Interior*," 1 November 1883, in *Documents of United States Indian Policy,* ed. Francis Paul Prucha, 3rd ed. (Lincoln, NE: University of Nebraska Press, 1975/1990/2000), 159.

viewed through a Euro-western lens, offers the perspective that no civilized kinship system can exist without marriage as a core structural tenet. In his view, the Department is not overwriting or replacing kinship systems, but rather encouraging the development of a "civilized" something where he imagines "nothing" to exist. His remedy for the perceived moral/kinship deficit focuses on the state taking an instructive role vis-à-vis Native men, as well as taking punitive measures to coerce the desired behavior. He writes that, "The Indian should also be instructed that he is under obligations to care for and support, not only his wife, but his children, and on his failure, without proper cause, to continue as the head of such family, he ought in some manner to be punished, which should be either by confinement in the guard-house or agency prison, or by a reduction of his rations."[75] Effectively, this uses the bureaucratic violence and carceral power as a method to correct "failed" men who do not perform the head of household role assigned to them under heteropatriarchy.

This virulent discourse engages multiple registers of domesticity, deploying Indian agents—representing the "guardian" state—as instructors of kinship, graded along a rubric of conformity to heteronormative contractual marriage as the basic building block of kinship.

1901 Circular on Marriage. The Department of Interior circular on marriage, issued by Indian Commissioner William A. Jones in 1901, and addressed to the superintendents and Indian agents, distills much of the ideology of bureaucracy as kinship. In this period of intensive allotment and Native land dispossession, marriage is a core site of state surveillance. Commissioner Jones foregrounds allotment as the reason for the circular, writing that it is "imperative that a reliable and permanent record of Indian family relations should be kept at

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[75] Henry M. Teller, Secretary of the Interior, "Extract from the *Annual Report of the Secretary of the Interior*," 1 November 1883, in *Documents of United States Indian Policy,* ed. Francis Paul Prucha, 3rd ed. (Lincoln, NE: University of Nebraska Press, 1975/1990/2000), 159.

every agency, and especially at agencies where the lands of the Indians have been or are soon to be allotted."[76] Following this declaration of purpose, the Department identifies ten specific policies aimed at creating this "reliable and permanent record," finishing with a list of materials that will be distributed to local Indian Agents and Superintendents to facilitate this process.

One of the recurring emphases of this document is the notion of "permanence," which is used multiple times to describe the archive of marriages Jones wants agents to create, but also is referenced with respect to the type of marriage to be recorded. An acceptable type of marriage is to "declar[e] before witnesses their intent to live permanently together as sole husband and sole wife." The focuses on permanence of archive and of marriage itself reveals how the agency constructs visions of settler futurity. It imagines a future of stable heterosexual marriages, a world where it can easily sort Native peoples into "married" and "nonmarried" status and direct the flow of property and citizenship accordingly. Furthermore, it imagines a future where the department's physical presence within Native communities—much like the settler state at large—is permanent. A "permanent register of marriages," does not suggest a future where Indigenous peoples have merged "into" settler populations—a process meant to disappear Native claims to political and territorial sovereignty through assumption of those rights by a settler population. Such a project is incompatible with a bureaucracy that sustains itself through the "management" of Native lands and peoples.

Jones identifies two methods by which a Native person could become legally married. Following a tenet of assimilation policy, which aims to replace government-to-government

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[76] William A. Jones, Commissioner of Indian Affairs, Circular Memorandum Issued to United States Indian Agents and School Superintendents in Charge of Agencies, 5 April 1901, General Records of the Bureau of Indian Affairs, Record Group 75, Klamath, Decimal Subject No. 741 (Seattle, WA: National Archives and Records Administration).

relationships between the U.S. federal government and Native nations, the first method is to "obtain a license … in accordance with the laws of the State or Territory."[77] The jurisdictional creep of state law over Native peoples and lands over time is a notable feature of U.S. settler colonialism as the federal government attempts to extricate itself from treaty obligations and political recognition of Indigenous peoples. This reframing of Native peoples as individual citizens of states as opposed to collective nations in legal relationships with the federal government seeks to minimize Indigenous agency.

Yet, the second method that Jones identifies—that individual agents could issue marriage licenses—undermines that assimilationist aim. As Jones directs in this circular, "United States Indian agents are hereby authorized to issue to Indians licenses to marry."[78] The primary condition that Jones attaches to this newly imagined agency power is that "no Indian shall be permitted to marry a person of any other race except in the manner prescribed by the laws of the State or Territory in which such Indian resides."[79] In effect, the agency is mainly concerned that these agent-issued licenses might run afoul of local anti-miscegenation statutes. Though this gives the settler state flexibility to allow local instantiations of white supremacy to fester, it also instigates conflicts when the state governments, federal government, and people themselves

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[77] William A. Jones, Commissioner of Indian Affairs, Circular Memorandum Issued to United States Indian Agents and School Superintendents in Charge of Agencies, 5 April 1901, General Records of the Bureau of Indian Affairs, Record Group 75, Klamath, Decimal Subject No. 741 (Seattle, WA: National Archives and Records Administration).

[78] William A. Jones, Commissioner of Indian Affairs, Circular Memorandum Issued to United States Indian Agents and School Superintendents in Charge of Agencies, 5 April 1901, General Records of the Bureau of Indian Affairs, Record Group 75, Klamath, Decimal Subject No. 741 (Seattle, WA: National Archives and Records Administration).

[79] William A. Jones, Commissioner of Indian Affairs, Circular Memorandum Issued to United States Indian Agents and School Superintendents in Charge of Agencies, 5 April 1901, General Records of the Bureau of Indian Affairs, Record Group 75, Klamath, Decimal Subject No. 741 (Seattle, WA: National Archives and Records Administration).

perceives the races of individuals attempting to marry differently based on different systems of understanding race, kinship, and identity.

I will cover the quagmire created by these agent-issued licenses later in Part I, but for our purposes here I draw your attention toward the seeming contradiction between assimilation policy agendas. On one hand, the agency would like state laws to apply, effectively ridding themselves of having to fulfill obligations to Indigenous peoples or recognize their collective political rights. Yet, the invention of this secondary track for obtaining marriage licenses does the opposite, placing the federal government in charge of managing these marriage licenses anyway. In effect, what appears at first to be the deferral of responsibility to state and territorial governments proves to be a mis-framing of the outcome. Rather, both state *and* federal regulation of Indigenous peoples increases—a multilayered intensification of bureaucratic kinship that attempts to individualize Native people in the context of these nested legal structures.

The gap between state law and however an individual agent chooses to approximate state law by issuing a marriage license provides an interpretive legal space that empowers these individual agents to use this power to pursue personal and/or ideological agendas, while at the same time fragmenting marriage policy by introducing the possibility of competing archives—state government, local Indian agency, and the federal Office of Indian Affairs—that could have mismatched records.

In addition to the above regulations, Jones also prohibits the issuance of a license "to an Indian who has a wife or a husband living from whom such Indian has not been divorced," a direct attempt to avert plural marriages.[80] Yet, later, Jones instructs agents to record existing

plural marriages: "If an Indian is living as husband with more than one woman the record shall give the name of each and the order of time in which he professes to have married them."[81] It's notable to mention here that the agency imagines plural marriages under polygyny—one man married to multiple women—and does not imagine polyandry, nor any kinship system involving more than two genders. This tracks with the department's interest in reproducing heteropatriarchy, seeing Native men who do not function as a head of household married to exactly one woman as impeding the progress of civilization. This system of recording plural marriages that exist without issuing licenses for "new" plural marriages seems to be an attempt to use a bureaucratic procedure to instigate a one-time shift from recognition to nonrecognition of plural marriages. This imagines that there is some grand leap in legitimacy from a marriage that is recorded into an archive and a licensed marriage that is recorded into that same archive.

The circular engages in a punitive, carceral notion of guardian-wardship, recommending that rations be withheld from Native people who "refuse to obtain proper marriages licenses or to give truthfully the information needed for the proposed records."[82] The deployment of starvation to coerce Native peoples into this surveillance illustrates the material violence of writing Indigenous lands and bodies into the colonial archives of bureaucratic kinship. The abstract ideal of this permanent record, in the agency's view, becomes a tool rationalizing its agents' abuses.

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[80] William A. Jones, Commissioner of Indian Affairs, Circular Memorandum Issued to United States Indian Agents and School Superintendents in Charge of Agencies, 5 April 1901, General Records of the Bureau of Indian Affairs, Record Group 75, Klamath, Decimal Subject No. 741 (Seattle, WA: National Archives and Records Administration).

[81] William A. Jones, Commissioner of Indian Affairs, Circular Memorandum Issued to United States Indian Agents and School Superintendents in Charge of Agencies, 5 April 1901, General Records of the Bureau of Indian Affairs, Record Group 75, Klamath, Decimal Subject No. 741 (Seattle, WA: National Archives and Records Administration).

[82] William A. Jones, Commissioner of Indian Affairs, Circular Memorandum Issued to United States Indian Agents and School Superintendents in Charge of Agencies, 5 April 1901, General Records of the Bureau of Indian Affairs, Record Group 75, Klamath, Decimal Subject No. 741 (Seattle, WA: National Archives and Records Administration).

Along with more instructions detailing what types of information about marrying couples should be included, and who agents should give this information to, the circular concludes by listing the materials—that is, the paper itself—that will be distributed to these agencies with the goal of becoming the permanent archive. These materials include physical books: the "Register of licenses and marriages after June 1, 1901" and the "Register of all families"; as well as blank paper templates for "marriage licenses issued by the agent," "certificates of marriage returnable to agent," "certificates of marriage to be given to persons married," and "certificates of marriage to frame and hang in the home."[83] This last is particularly salient when considering the multiple registers of domesticity under this intimate settler colonialism, inviting Native households to make this bureaucratic kinship prominent.

1901 Superintendent Response to the Circular. Approximately a month and a half after the issuance of this circular, Fort Lapwai Indian Agent Clinton Stranahan sent back a response which foreshadows the quagmire of marriage recognition that the Office of Indian Affairs is in the process of generating. Stranahan argues that creating the "permanent and reliable record" of marriages is prohibitively expensive and labor intensive, noting that "it would take the whole time of one person for a year to make such a record, and the expense would be in the neighborhood of one thousand dollars, and could only then be kept within said amount by using the official interpreter and captain of police at this agency."[84] In other words, generating and maintaining the archive that Commissioner Jones imagines for marriages would require an

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[83] William A. Jones, Commissioner of Indian Affairs, Circular Memorandum Issued to United States Indian Agents and School Superintendents in Charge of Agencies, 5 April 1901, General Records of the Bureau of Indian Affairs, Record Group 75, Klamath, Decimal Subject No. 741, Seattle, WA: National Archives and Records Administration).

[84] Clinton T. Stranahan, U.S. Indian Agent at Fort Lapwai, Correspondence to William A. Jones, Commissioner of Indian Affairs, 31 May 1901, General Records of the Bureau of Indian Affairs, Record Group 75, Fort Lapwai, Decimal Subject No. 743, (Washington, DC: National Archives and Records Administration).

extreme intensification of the agency's bureaucratic presence with respect to person-hours and financial resources.

Stranahan notes that Idaho state law allows for only one type of marriage to be recognized—the license can be issued by a county auditor for a fee—meaning that as a federal agent, he cannot issue the free licenses the circular invents and have those licenses be recognized by the state of Idaho. Stranahan also observes significant inconsistency in how courts recognize marriages, writing that "There are several forms of marriage among these Indians." This is perhaps a recognition that there are plural kinship systems in Native nations and communities, that these kinship systems are expansive in their recognition of relationship types in a way that conflicts with a bureaucratic heteropatriarchal model.

Moving on from this, Stranahan spends some time lamenting the current kinship practices, describing as follows, "Many Indians on this reservation have taken what they call a wife, that is they associate with a woman possibly from one month to five years and may have issue, and upon some provocation or without any in many instances separate and take up with another man or woman as the case may be."[85] The purported alienness of a kinship system in which the intervention of religious or governmental bureaucracy in recording marriages and divorces is, to Stranahan, an obstacle insofar as it makes ensuring the issuance of licenses only to people not currently married impossible. This recognition, however crusted over with white supremacy, that Native kinship structures already exist according to their own internal logic, illustrates how agents attempt to not only create bureaucratic kinship, but that for bureaucratic kinship exist, they see it as important to disrupt what already exists. Stranahan complains that

[85] Clinton T. Stranahan, U.S. Indian Agent at Fort Lapwai, Correspondence to William A. Jones, Commissioner of Indian Affairs, 31 May 1901, General Records of the Bureau of Indian Affairs, Record Group 75, Fort Lapwai, Decimal Subject No. 743, (Washington, DC: National Archives and Records Administration).

Idaho doesn't provide adequate tools to criminalize Native sexuality, noting a lack of adultery legislation, as well as an unwillingness by local district attorneys to enforce "lewd cohabitation" laws because these attorneys "do not feel like putting their respective counties to the expense of prosecuting these lewd cohabitation cases against the Indians." [86]

Throughout this letter, Stranahan blames lack of financial resources for the incomplete implementation of the department's vision for their marriage record. He concludes:

> I will use every effort to carry into full force and effect your circular letter; but I am very much afraid that the order will be feebly executed unless additional assistance is provided at this office. I have but one suggestion to make in connection with this order, and that is that all agents be premitted [*sic*] to withhold rent moneys from allottees until they furnish a satisfactory family record to the agent.[87]

His recommendation follows a similar logic, advocating for the use of financial punishment—more control over Native land, which here has been constructed as rent-producing property—to create the record.

This type of argument—that the agency would accomplish its goals if fully funded—allows its participants to explain the failure of the office to accomplish its agenda by blaming its unfunded mandates rather than by being forced to acknowledge the moral and ideological failures of settler colonial projects of domestic imperialism. Even after explaining in detail the various ways in which the archive would be impossible to create and maintain according to Commissioner Jones's description, Stranahan continues to inhabit a white supremacist fantasy

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[86] Clinton T. Stranahan, U.S. Indian Agent at Fort Lapwai, Correspondence to William A. Jones, Commissioner of Indian Affairs, 31 May 1901, General Records of the Bureau of Indian Affairs, Record Group 75, Fort Lapwai, Decimal Subject No. 743, (Washington, DC: National Archives and Records Administration).

[87] Clinton T. Stranahan, U.S. Indian Agent at Fort Lapwai, Correspondence to William A. Jones, Commissioner of Indian Affairs, 31 May 1901, General Records of the Bureau of Indian Affairs, Record Group 75, Fort Lapwai, Decimal Subject No. 743, (Washington, DC: National Archives and Records Administration).

that more labor, more time, and more money will eventually allow for full managerial control over Indigenous peoples.

1940 Circular on Marriage. Finally, to illustrate what has changed and what hasn't by the time implementation of the Indian Reorganization Act has begun, I examine a circular that Commissioner John Collier issued on February 17, 1940—nearly four decades after Commissioner Jones's circular on marriage.

Collier begins with a statement of purpose that largely echoes Jones's interest in the subject, albeit from the perspective of an agency that has struggled to understand the implementation of its own bureaucracy around property and kinship. He writes, "The work of the Indian Office, particularly that of the Probate Division, is made extremely difficult at times by the lack of adequate records and information with regard to marriage and divorce."[88] This statement acknowledges, implicitly, the failure of the previous circular. Despite all this intensification of state and federal surveillance and influence over Native peoples, the agency has failed to create the "permanent and reliable" record of marriages that Jones called for. Against real world material conditions, byzantine legal abstractions, and the survivance of Native kinship systems, the settler state has not succeeded in its goal of vanishing Native sovereignties over land, kinship, and sexuality. But again, instead of recognizing the moral and ideological contradictions and failures of this settler colonial project, Collier imagines instead that a more perfect archive could eventually fix this foundational issue.

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[88] John Collier, Commissioner of Indian Affairs, Circular Memorandum Issued to All Superintendents and others in Charge of Indian Tribes and Groups, 17 February 1940, General Records of the Bureau of Indian Affairs, Record Group 75, Warm Springs, Decimal Subject No. 741, File No. 92005-40 (Seattle, WA: National Archives and Records Administration).

Despite these echoes, though, the interests and practices of tribes as political and cultural entities are framed as relevant here in a way that the previous circular elided. Collier continues, "Please insist, through every medium at your disposal, that all marriages and divorces, whether consummated in accordance with the State law *or in accordance with tribal custom* [emphasis added], shall be recorded within three months at the office of the jurisdiction."[89] This acknowledgment that Native kinship systems exist simultaneously with bureaucratic kinship in the form of state law, has come about as a result of the OIA's continued reluctant recognition of custom marriages and divorces at the behest of federal and state court rulings, as well as practical necessity because of the continued weight and relevance of Native kinship systems despite assimilation efforts. While unlike Jones, Collier does not describe specific punitive measures to be used against resistant Native peoples, he nonetheless allows conceptual space for such practices in his vague description, "every medium at your disposal."[90]

Collier asks agents to inform the office "whether Indian Custom Marriage and Indian Custom Divorce are recognized as lawful within your jurisdiction, and if so what is deemed to constitute such marriage or divorce."[91] This reveals that there are still, even after all this time, no enumerated federal standards over the custom marriages recognized. Instead, it is left to state and

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[89] John Collier, Commissioner of Indian Affairs, Circular Memorandum Issued to All Superintendents and others in Charge of Indian Tribes and Groups, 17 February 1940, General Records of the Bureau of Indian Affairs, Record Group 75, Warm Springs, Decimal Subject No. 741, File No. 92005-40 (Seattle, WA: National Archives and Records Administration).

[90] John Collier, Commissioner of Indian Affairs, Circular Memorandum Issued to All Superintendents and others in Charge of Indian Tribes and Groups, 17 February 1940, General Records of the Bureau of Indian Affairs, Record Group 75, Warm Springs, Decimal Subject No. 741, File No. 92005-40 (Seattle, WA: National Archives and Records Administration).

[91] John Collier, Commissioner of Indian Affairs, Circular Memorandum Issued to All Superintendents and others in Charge of Indian Tribes and Groups, 17 February 1940, General Records of the Bureau of Indian Affairs, Record Group 75, Warm Springs, Decimal Subject No. 741, File No. 92005-40 (Seattle, WA: National Archives and Records Administration).

tribal law. Even so, Collier's questions betray a continued desire for the calcification of custom marriage policy. He wants a rigid set of rules, frozen in time, that will be practiced the same way in perpetuity. This still doesn't truly recognize the possibility that Native kinship practices grow or change over time, or that multiple different types of marriage could coexist within these kinship systems.

The Indian Reorganization Act has added a new layer of bureaucratic kinship through the organized/unorganized dichotomy. This terminology refers to whether or not a given Native polity voted to adopt the Indian Reorganization Act to create a new version of their tribal government, or if they voted to reject the IRA. A key criticism of this "self-government" policy is that the IRA attempts to mold Native governance into bureaucracies modeled after U.S. governance structures. As Deloria and Lytle remark:

> This drafting [of IRA constitutions] itself was done by the attorneys within the Department of the Interior. A model tribal constitution was drafted to assist tribes, and teams of lawyers were dispatched to reservations to help in this endeavor. Though local tribes were given the opportunity to write their own constitutions, too often the lack of expertise and experience meant that local Indian communities relied heavily on the legal experts from Interior. Is it little wonder that so many of the newly established constitutions had a distinct Anglo-American flavor?[92]

The boiler plating of IRA governments, including policies sunsetting custom marriages meant to be issued by tribal council resolutions, seems to have mapped another layer of bureaucratic kinship onto Native peoples. In effect, this falls within the register of "domestic dependent nations," with this version of federal guardianship resembling an attempt to get Native polities to implement bureaucratic kinship themselves, subject to federal government approval. This is, if anything, an extension of previous ideologies aim to standardize Native kinship practices in

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[92] Vine Deloria, Jr., and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty*, 2nd ed. (Austin, TX: University of Texas Press, 1984/1998), 173.

order to "better" manage land-as-property under a settler colonial regime. Collier's vision of "organized" governments—a cipher here for "civilized" governments—are those in which Native people participate in the bureaucratic definitions of their kinship practices, provided that they choose the definitions most legible to settler heteropatriarchy. They can choose anything—provided that they choose *correctly*. To what extent is devolved self-management using the state's rules still sovereignty? And to what extent do Native nations use these bureaucratic norms and kinship regulations strategically and transformatively?

Conclusion

Throughout this chapter, I have developed the framework of "bureaucratic kinship" as a way of describing the particular settler colonial logic that attempts to paper over Indigenous kinship systems with a standardized set of rules and procedures aimed at enabling social control and settler theft of Indigenous land. In order to arrive at this analysis, I detailed the ways that narratives of domesticity structure settler colonial relations in the U.S., and drew from critical scholarship in legal history, Native and Indigenous studies, and gender studies, as well as the Office of Indian Affairs' archives in developing this idea.

In the next chapter, I'll take a closer look at the day-to-day administration of the Office of Indian Affairs around marriage, highlighting the counterintuitive proliferation of categories of marriage that resulted from the office's attempts to enforce a standard, and Indigenous peoples' participation in and resistance to that process.

CHAPTER 2: THE JURISDICTIONAL CHAOS OF STANDARDIZATION

For the next step in this unpacking of "bureaucratic kinship," the archival sources from the Bureau of Indian Affairs guided my focus to a core contradiction embedded within the settler colonial administration of marriage policy. Consistently throughout the files, federal employees in the Department of the Interior emphasize their desire to standardize marriage. They have taken upon themselves the destructive paternalism that casts Indigenous kinship systems as nonexistent, or perverse, or immoral, but the result of their efforts to standardize is jurisdictional chaos—a proliferation of legal and extra-legal categories of marriage and divorce, ostensibly the conceptual opposite of standardization.

I contend that like the public-private binary, the "standardization" of marriage law is an incongruous fiction, and the proliferation of categories results from the Office of Indian Affairs' attempts to assert undue power and influence over Indigenous peoples and lands, their incompetence in executing on their plans, and most importantly, active Indigenous indifference, resistance, and contestation of the settler state's system of bureaucratic kinship. In the following sections, I detail three areas of concern—Superintendent-issued marriage licenses; Indian custom marriages; and divorce—that illustrate this contestation and the jurisdictional chaos resulting from standardization.

Superintendent Licenses in Limbo

The Department of the Interior's decision to authorize Superintendents to issue marriage licenses had no formal legal basis. Even under the suspect authority of the U.S. government to make such a determination given its political illegitimacy vis-a-vis Native nations, there is no treaty, act of Congress, or Supreme Court decision clarifying that as a power of this executive agency.

Yet, as directed by Department in 1901, Superintendents begin issuing licenses to Native couples that they claimed jurisdiction over. What does this gap between the law as an abstract set of principles and the law as a grounded, situated practice reveal about settler colonial administration? Gaps in enforcement have long been used—and continue be used—to promote facets of white supremacy. This gap, containing the practices of the state without a legal foundation even under its own dubious rules, is the space in which much of the conceptual and material work of the settler state is done. I argue here that these illegal, extra-legal, quasi-legal practices bring an aesthetic of rational authority that converts later into a more "real" authority through practices of bureaucratic record-keeping. Indeed, because these unlawful decisions are layered into the language of executive authority, they project enough of a sense of legality that they ossify over time as the unlawful elements of their origins become obscured under a precedent-based system. By tracing the intra-agency discussions around these Superintendent-issued licenses, we can see how these licenses place Indigenous people and lands into legal limbo that ends up retroactively recognizing unlawful actions taken by the agency and its Superintendents.

First, I will establish that according to the agency's own internal discussions, there is no legal basis for Superintendents to be able to issue marriage licenses. Responding in 1913 to a request from Warm Springs Superintendent Gilbert Hall as to the legitimacy of these licenses, Assistant Commissioner E. B. Meritt writes, "The Office has at times countenanced the issuance of marriage licenses by superintendents, where it meant either that or an unrecorded Indian custom marriage, *but the practice is not founded upon any law* and the Office is endeavoring to get away from it wherever possible. [Emphasis added]"[93]

This summary of the situation reveals a lot. The verb "countenanced" suggests a rather more circumspect, cautious approach toward allowing the issuance of these licenses, especially when contrasted against the direct language within the 1901 circular which directly authorizes the practice. In terms of bureaucratic kinship, it is posed as the preferable alternative to "an unrecorded Indian custom marriage." The notion that Native kinship practices are "unrecorded" is a settler misconception conflating the illegibility of these practices to its bureaucracy with a sense of disorganization. The final line reveals that the Department is haunted by the ramifications of this decision. The current department is trying to distance itself from its own past choices, but the chaos and ambiguity generated by these license follows them.

In a similarly framed response to a request by Superintendent Peter Paquette at the Navajo agency for more copies of the license form, Commissioner Cato Sells writes:

> The use of this form is not based on any law, and was only instituted in the beginning in order to enable Superintendents to keep a record of marriages. Having no lawful authority for its use, it has been determined to discontinue it, and insist on Indians complying with State laws in all respects so far as marriage and divorce are concerned."[94]

The attempt to pass marriage jurisdiction off on states was already not working in 1901—hence the original authorization for Superintendents to issue licenses—and it is still not working here in 1913. But, Commissioner Sells still envisions a future in which it will eventually be the case that Native peoples are having their marriages regulated fully by state governments.

Sells undercuts this vision of the future almost immediately in the final paragraph of his response, where he notes that until "satisfactory legislation" authorizing Superintendents to issue

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[93] Edgar B. Meritt, Assistant Commissioner of Indian Affairs, Correspondence to Gilbert L. Hall, Superintendent of Warm Springs Indian School, 2 January 1914, General Records of the Bureau of Indian Affairs, Record Group 75, Warm Springs, Decimal Subject No. 741, File No. 143023-13 (Washington, DC: National Archives and Records Administration).

[94] Cato Sells, Commissioner of Indian Affairs, Correspondence to Peter Paquette, Superintendent of Navajo School, 25 September 1913, General Records of the Bureau of Indian Affairs, Record Group 75, Navajo, Decimal Subject No. 741, File No. 98213-13 (Washington, DC: National Archives and Records Administration).

licenses is passed, Superintendent Paquette should "prepare marriage licenses on the typewriter in the same form which you have been using." After specifically pointing out that the practice has no "lawful authority," Sells instructs Paquette to *issue them anyway* by simply typing them on a typewriter rather than using the obsolete form. The settler archive here is so hungry to surveil Native kinship that Sells promotes even the flimsiest form of recording as a better option than recognizing and respecting Native autonomy over personhood and relationships.

Legal Ambiguities of Superintendent Licenses. Previously, I mentioned that the issuance of these non-lawful marriage licenses created legal ambiguity that persisted even after the central Office of Indian Affairs attempted to end the practice. These legal ambiguities included: (1) no process for divorce from these licenses; (2) state government refusal to recognize these licenses; and (3) conflation of these licenses with Indian Custom Marriage.

One of the poorly thought out aspects of the department allowing Superintendents to issue marriage licenses is that they did not include a divorce process in this authorization. It is somewhat ironic that, after spending so much time criticizing Indigenous kinship practices as immoral, these practices prove much more flexible and responsive by providing processes by which couples could separate. By contrast, the agency and its Superintendents seem to imagine future marriages as a permanent condition. This is analogous to the narrative of progress toward settler colonial completion and ultimate Native disappearance/absorption that the agency works toward and consistently fails at. It is in effect, unimaginable that once married, a Native couple might separate, much like settler administrators imagined allotment to be a process that would be completed rather than turn into an ongoing policy disaster in the face of Indigenous resistance.

In 1913, a man from Browns Valley, Minnesota writes to the Commissioner of Indian Affairs with a very simple query: "Please inform me of the fellowing [*sic*]: Whether an Indian

Agent have right to divorce Indian marriages, and if so, how long ago was that inforce [*sic*]?"[95] Based on what has already been established above—that there is no lawful authority for the Superintendents to issue licenses for marriage in the first place, the answer should clearly be "no."

Instead, this is what Assistant Commissioner E. B. Meritt says in response:

> The question of marriage and divorce among Indians is in such an unsettled condition that it is inadvisable to answer questions of the foregoing character without full knowledge of the facts in the case in connection with which such answer will be used. If you will submit a complete statement of the case you have in mind, the Office will endeavor to give you a proper answer.[96]

This response is notable on a number of levels. Most prominently, it displays the common evasive strategy that the department uses when receiving queries from people outside the agency bureaucracy to avoid clarifying questions of marriage policy: asking for the specific case information.

On one level, this does have some utility in the sense that, given the fraud around allotment and the manipulations people apply to marriage and divorce policies to try to obtain access to allotment property, the department is ostensibly avoiding stating the rules outright to resist being caught in contradictions. In a broader sense, though, the department is also trying to cover its collective bureaucratic asses by telling members of the public that they were unlawfully issuing licenses. The phrase "an unsettled condition" is also an incredibly passive framing of the issue, as though the agency itself weren't responsible for creating the very decisions it criticizes.

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[95] Isaac Greyearth, Correspondence to Cato Sells, Commissioner of Indian Affairs, 24 November 1913, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 743, File No. 139369-13 (Washington, DC: National Archives and Records Administration).

[96] Edgar B. Meritt, Assistant Commissioner of Indian Affairs, Correspondence to Isaac Greyearth, 2 January 1914, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 743, File No. 139369-13 (Washington, DC: National Archives and Records Administration).

Incidentally, it's easy to imagine what Meritt sees as the solution to this lack of settlement—the continued implementation of assimilation policy and the application of state laws, belying the self-rationalizing practices of the settler colonial administration.

To my second overarching point, these licenses create legal ambiguity when they come into contact with state governments—particularly state courts. Typically, a state issues its own marriage licenses through county offices, certified by an employee or representative of that state. Given this, Superintendents and federal Indian Agents issuing licenses, unless specifically authorized by state law (see more on that later), would be doing so without the knowledge or interest of a state government.

In 1915, Warm Springs Superintendent Gilbert Hall solicits a legal opinion from a U.S. District Attorney in Portland, Oregon regarding the validity of superintendent-issued licenses under state law. The attorney writes, "In recent cases where Indians were tried in our courts upon charges of adultery, the judges have strongly intimated in their instruction to juries that only those marriages among citizen Indians which fonform [*sic*] to the requirements of our state statute will be recognized and binding."[97] He recommends in cases of superintendent-issued licenses that such couples get married to each other again using state licenses.

When Superintendent Hall asks the central office what should be done about the "approximately one hundred" existing superintendent-issued licenses, Assistant Commissioner Meritt responds by arguing that the existing superintendent-issued licenses should still be considered valid, citing Oregon case law supporting the idea that these licenses "might subject

[97] Gilbert L. Hall, Superintendent of Warm Springs Indian Agency, Correspondence to Cato Sells, Commissioner of Indian Affairs, 15 January 1915, General Records of the Bureau of Indian Affairs, Record Group 75, Warm Springs, Decimal Subject No. 741, File No. 7752-15 (Washington, DC: National Archives and Records Administration).

the ministers officiating at the marriage, and perhaps other persons, to a penalty for non-compliance with the law, but that it would not invalidate the marriages."[98] Given this, Meritt doesn't see it as legally necessary for the re-marriages to occur, though he does state that "if the parties are willing, it would be an act of prudence on their part to remarry in accordance with state laws."[99]

This exchange reveals the jurisdictional chaos generated by the Department of the Interior's attempts to usurp authority not vested in them even under the settler state's own rules. The divergent practices of state judges and federal officials means that these marriages sometimes are and sometimes aren't recognized. But there's something deeper happening here as well, at least in my view. Notice how Meritt's citation of Oregon law—the idea that even though the issuance of the license was unlawful, the marriages themselves are still valid—functions to legitimize the institutional validity of the Office of Indian Affairs. In effect, he interprets these unlawful marriage licenses as retroactively legal. The logic that these marriages are recorded on paper and believed to exist in a practical sense overrides the fact that this is, in effect, an abrogation of tribal sovereignty over domestic relations.

It also reveals a steep enforcement gap in the law. Meritt says that those unlawfully officiating marriages might face legal scrutiny. That would appear to open up many members of the Office of Indian Affairs bureaucracy to face accountability for issuing these licenses

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[98] Edgar B. Meritt, Assistant Commissioner of Indian Affairs, Correspondence to Gilbert L. Hall, Superintendent of Warm Springs Indian Agency, 15 February 1915, General Records of the Bureau of Indian Affairs, Record Group 75, Warm Springs, Decimal Subject No. 741, File No. 7752-15 (Washington, DC: National Archives and Records Administration).

[99] Edgar B. Meritt, Assistant Commissioner of Indian Affairs, Correspondence to Gilbert L. Hall, Superintendent of Warm Springs Indian Agency, 15 February 1915, General Records of the Bureau of Indian Affairs, Record Group 75, Warm Springs, Decimal Subject No. 741, File No. 7752-15 (Washington, DC: National Archives and Records Administration).

unlawfully. Yet, as the file reveals, it is Native people in state court under adultery charges who are facing criminalization entangled with the legal ambiguity of their marriages. Effectively, the Office of Indian Affairs has authorized illegal behavior that it later folds into it bureaucratic kinship system and authority, while Native people deal with the consequences wrought by the Office's usurpation of legal authority.

The final point I would like to make on this front, at least with respect to legal ambiguities resulting from these Superintendent-issued licenses, is that they are conflated with Indian custom marriages. The lines between common law marriages, Indian Custom marriages, and superintendent-issued marriage licenses are poorly defined. Some Superintendents use the leeway afforded to them under the OIA to bend these rules to their own interpretation and justify their own practices.

In the same exchange I cited above, one of the concerns that the District Attorney raised around Superintendent-issued licenses was that "the ceremony outlined by this license is never one authorized by the state status, nor is it in any sense a marriage of tribal custom; it seem to be more of a corss [*sic*] between the two and, as such, without authority of law whatsoever."[100] He mentions that custom marriages are sometimes recognized by the courts, and that common law marriages are not recognized at all. In effect, his interpretation of the licenses is that they are a legal fiction somewhere between a custom marriage and a state license that will not be upheld.

But unlike in that example, some superintendents argue that the licenses they issue *are* Indian custom marriages. In 1915, the Law and Order division of the OIA calls the Assistant

[100] Gilbert L. Hall, Superintendent of Warm Springs Indian Agency, Correspondence to Cato Sells, Commissioner of Indian Affairs, 15 January 1915, General Records of the Bureau of Indian Affairs, Record Group 75, Warm Springs, Decimal Subject No. 741, File No. 7752-15 (Washington, DC: National Archives and Records Administration).

Commissioner's attention to a paragraph in the annual report submitted by Pine Ridge superintendent John Brennan. In this report, Brennan notes:

> For years our Indians have been married upon license issued from this office and the ceremony conducted by ministers of the gospel. The Indians realize that any other form of marriage meets with the entire disapproval of this office and any attempt to marry according to the old custom is punished by a term in the guard house. The Indians in general do not recognize an elopement as a marriage and it is the general opinion that such cases should be treated severely. Desertions are not considered as divorces according to Indian custom and before the parties are allowed to remarry they are compelled to show a legal divorce through the State courts.[101]

We can glean a few important points from this. First, the issuance of Superintendent marriage licenses here has continued until at least 1915, in contrast to other examples where the office has worked to end this practice due to it having no legal basis. Next, it reveals the use of the guardhouse as a mechanism for punishment for continuing to express relationships via the "old custom," effectively criminalizing Native kinship practices. Here, he makes a sharp distinction between these custom marriages and the Superintendent licenses, going further to describe the separation of couples as "desertion" rather than "Divorces according to Indian custom" and involves the state courts to further stigmatize and criminalize Native kinship practices.

Assistant Commissioner Meritt—who, as you will have probably noticed by this point, seems to be one of the stickiest spots in this administrative quagmire around marriage policy—writes to Brennan to criticize his issuance of licenses, writing: "There is no authority of law for the issuing of marriage licenses by Superintendents in South Dakota and it is believed that the time has come when this practice, which was originally instituted as the then most practicable

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[101] John R. Brennan, Superintendent of Pine Ridge Indian School, quoted in Correspondence by Edgar B. Meritt, Assistant Commissioner of Indian Affairs, 23 September 1915, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 741, File No. 104177-15 (Washington, DC: National Archives and Records Administration).

means of keeping a record of Indian marriages, should be discontinued."[102] Superintendent Brennan responds in a lengthy, defensive letter where he blames various other factors and complains about his "struggle" to "get the Indians, of a certain class, to marry in a formal manner, by license and ceremony."[103] He then cites South Dakota's recognition of Indian Custom marriages, with the statute stating that "Indians contracting marriage according to the Indian custom, and cohabiting as husband and wife, are lawfully married."[104] His argument here is that "the marriage of the Indians is perfectly legal and the record of marriage is made in this office, where such record is most used and needed."[105] His jurisdictional sleight of hand here involves claiming that his licenses are just a paper record of the Indian Custom marriages recognized under state law. As you may have noticed, this contradicts his earlier report where he makes a sharp distinction between the custom marriages he is criminalizing Native people for and his own licenses. Here, when called out for this practice, he suddenly uses custom marriages as a legal instrument to justify his practice.

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[102] Edgar B. Meritt, Assistant Commissioner of Indian Affairs, Correspondence to John R. Brennan, Superintendent of Pine Ridge Indian School, 23 September 1915, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 741, File No. 104177-15 (Washington, DC: National Archives and Records Administration).

[103] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Edgar B. Meritt, Assistant Commissioner of Indian Affairs, 29 September 1915, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 741, File No. 104177-15 (Washington, DC: National Archives and Records Administration).

[104] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Edgar B. Meritt, Assistant Commissioner of Indian Affairs, 29 September 1915, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 741, File No. 104177-15 (Washington, DC: National Archives and Records Administration).

[105] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Edgar B. Meritt, Assistant Commissioner of Indian Affairs, 29 September 1915, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 741, File No. 104177-15 (Washington, DC: National Archives and Records Administration).

So, how does Assistant Commissioner Meritt—who, as we have previously seen, has stated repeatedly that Superintendents were not lawfully authorized to issue them—respond to this situation? He decides, in effect, that he doesn't want to deal with it, writing that "You may disregard the instructions on the aforesaid subject which are contained in Office letter to you of Sept. 23, 1915. This will leave your present arrangements undisturbed."[106] Rather than pursue the point that superintendents should not be issuing licenses, Meritt does not note any of the contradictions in Brennan's statements and appears to lose interest in the topic.

Just Wait—Congress will Bail us Out Eventually! One theme underlying these files—and others like it—as the OIA scrambles to clean up the mess it created by having superintendents issue licenses, is the proposal of Congressional legislation that will create a foundation for the practice. There are numerous mentions that the Office is lobbying for this legislation, yet, apparently, this legislation was never enacted.

In 1913, Elsie E. Newton, supervisor of the field matrons, sent a letter addressed to the Commissioner of Indian Affairs describing the moral and procedural problems she had observed related to marriage and divorce. Newton proposes Congressional legislation authorizing Superintendents to issue marriage licenses—effectively codifying the process that started under the 1901 departmental regulations without the explicit authorization of Congress. The evidence and arguments Newton compiles to make her case exposes the ideological threads twined together under assimilation; she makes moral judgments against Native peoples on the basis of

[106] Edgar B. Meritt, Assistant Commissioner of Indian Affairs, Correspondence to John R. Brennan, Superintendent of Pine Ridge Indian School, 11 December 1915, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 741, File No. 104177-15 (Washington, DC: National Archives and Records Administration).

sexuality and kinship practices, highlights the intimate colonialism of the field matron program, and reveals how marriage policy is foundational to land dispossession via allotment inheritance.

Newton begins by laying out the central issue from her perspective. Under current policy, "the jurisdiction of the superintendent of a closed reservation is extremely doubtful" on matters of marriage and divorce.[107] By "closed," Newton means reservations that have not yet become subject to allotment, a process which penetrates reservation boundaries by "opening" land deemed as "excess" to further white settlement. However, this distinction between "closed" and "opened" reservations also intersects with questions of jurisdiction and citizenship. Allotment didn't just attempt to phase out trust status by issuing fee patents, it also provided a mechanism by which Native peoples would "progress" from wardship to full citizenship, thus becoming subject to the laws of the state overlapping with their allotment property. In Newton's explanation, then, the "closed" reservation represents continued wardship, where the Office of Indian Affairs had a central role in executing the "guardianship" of the trust relationship. Thus, from her perspective, if the Superintendent is not clearly empowered to manage marriage and divorce on a closed reservation, there is a void of jurisdiction as state authorities don't apply. This represents a "lawless" state, as Native peoples were framed as lacking a great enough degree of civilization—as legible to the settler administration—to determine their own practices around kinship and sexuality.

Newton traces the source of this ambiguity to follow-up orders issued in 1911, where "the Office instructs the agent to require Indians to comply with territorial or state laws in all questions concerning marriage and divorce, but adds that if every effort has been exhausted to

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[107] Elsie E. Newton, Supervisor of Indian Schools, Correspondence to Cato Sells, Commissioner of Indian Affairs, 15 May 1913, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 740, File No. 62431-13 (Washington, DC: National Archives and Records Administration).

require this and they will not marry according to local laws, the superintendent should issue marriage licenses rather than have no record of marriage."[108] Effectively, the OIA stratifies jurisdiction by recommending that superintendents should compel Native peoples to follow state law, but without a clear enforcement mechanism, requiring the continued issuance of marriage licenses as a fallback measure.

She brings up the recognition of Indian custom marriage, which she describes as taking place "When an Indian man and woman live together for any length of time, either with or without a tribal ceremony."[109] The fact that this situation is recognized as a form of marriage by the federal government, along with the fact that the Superintendent can issue licenses, means that "it is extremely doubtful whether without actual compulsion nine-tenths of them would ever go to a county seat for a license," given the travel distance and expense associated with that.[110] Newton suggests that the plural jurisdiction for marriage is effectively stifling progress toward the full implementation of state law. Cementing this point, she includes parenthetically that "This is especially the case where no church has any hold."[111] This highlights the synchronization of assimilation pressure between the OIA acting as guardian, Christian missionaries indoctrinating Native peoples against "uncivilized" practices, and her own positioning as supervisor of field

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[108] Elsie E. Newton, Supervisor of Indian Schools, Correspondence to Cato Sells, Commissioner of Indian Affairs, 15 May 1913, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 740, File No. 62431-13 (Washington, DC: National Archives and Records Administration).

[109] Elsie E. Newton, Supervisor of Indian Schools, Correspondence to Cato Sells, Commissioner of Indian Affairs, 15 May 1913, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 740, File No. 62431-13 (Washington, DC: National Archives and Records Administration).

[110] Elsie E. Newton, Supervisor of Indian Schools, Correspondence to Cato Sells, Commissioner of Indian Affairs, 15 May 1913, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 740, File No. 62431-13 (Washington, DC: National Archives and Records Administration).

[111] Elsie E. Newton, Supervisor of Indian Schools, Correspondence to Cato Sells, Commissioner of Indian Affairs, 15 May 1913, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 740, File No. 62431-13 (Washington, DC: National Archives and Records Administration).

matrons. The fact that both the government, by creating ambiguous jurisdiction, and churches, by failing to assert moral jurisdiction, are in effect derelict in their duties and stymying progress toward settler futurity.

After further exchange between Newton and Assistant Commissioner Meritt, the file ends with Meritt's note that he "expect[s] that a bill embracing the subject will be introduced in the present Congress."[112] Meritt is not the only OIA official making such claims. In a 1913 letter, Commissioner Cato Sells responds to a query from Superintendent Peter Paquette, saying that "The Office appreciates the difficulty which Superintendents will experience in complying with the law in this matter, and is taking steps to procure legislation which will enable to Superintendents to deal with these matters in a manner which will be more satisfactory."[113] Yet, this legislation never comes to fruition. Despite multiple attempts to have the bill introduced, it does not ultimately become law.

Superintendents as State Officials. In a previous example, I discussed a case (Oregon) where the state courts were deemed hostile to recognizing marriage licenses issued by superintendents. However, this was not uniformly the case. In Arizona, superintendents coordinated with state legislators to have a law passed authorizing Superintendents to issue marriage licenses as though they were agents of the state government, rather than federal government. A notable feature of this legislative push is that a parallel effort to repeal Arizona's miscegenation statute banning intermarriage between "Whites" and "Indians" failed, revealing

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[112] Edgar B. Meritt, Assistant Commissioner of Indian Affairs, Correspondence to Elsie E. Newton, Supervisor of Indian Schools, 30 January 1914, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 740, File No. 62431-13 (Washington, DC: National Archives and Records Administration).

[113] Cato Sells, Commissioner of Indian Affairs, Correspondence to Peter Paquette, Superintendent of Navajo School, 25 September 1913, General Records of the Bureau of Indian Affairs, Record Group 75, Navajo, Decimal Subject No. 741, File No. 98213-13 (Washington, DC: National Archives and Records Administration).

the local confluence of white supremacist interest in regulating marriage through bureaucratic kinship.

San Xavier superintendent Henry McQuigg writes to the central office, enclosing a copy of the proposed bill which would "authorize Superintendents to issue marriage licenses and perform the ceremony in this State, upon its passage."[114] The vast majority of his letter, however, concerns a different matter. He describes the current miscegenation statute, which "prevents Indians intermarrying into the Caucasian Race, but does not prohibit Indians, Chinese, and Negroes miscegenating."[115] He blames the existence of this law on settler responses to Native violence, writing "It is truly a legacy left from the Pioneer days when the Apaches made so many marauding trips among the settlers."[116] McQuigg concludes that he "do[es] not think the laws should prevent such intermarrying when the parties concerned wish to do so, especially as the Indian and white races mix so readily." This notion reveals his interest in intermarriage that follows the lines of hyperdescent blood quantum. Unlike hypodescent blood quantum, under which intermarriage between white and (typically) Black people is viewed as a "pollution" of whiteness, under hyperdescent, intermarriage between white and Native people is seen as a mechanism to disappear Indigeneity through "absorption" into white populations, thereby

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[114] Henry J. McQuigg, Superintendent of San Xavier Agency, Correspondence to Cato Sells, Commissioner of Indian Affairs, 8 February 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 742, File No. 17617-15 (Washington, DC: National Archives and Records Administration).

[115] Henry J. McQuigg, Superintendent of San Xavier Agency, Correspondence to Cato Sells, Commissioner of Indian Affairs, 8 February 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 742, File No. 17617-15 (Washington, DC: National Archives and Records Administration).

[116] Henry J. McQuigg, Superintendent of San Xavier Agency, Correspondence to Cato Sells, Commissioner of Indian Affairs, 8 February 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 742, File No. 17617-15 (Washington, DC: National Archives and Records Administration).

eliminating competing land and sovereignty claims and imbuing that white population with the ability to claim an "inheritance" of that Indigeneity. McQuigg's indignant opposition to the miscegenation statute can be read as an attempt to align state law with the federal interest in white supremacy. Though he frames his opposition in terms of progress, what underlies his argument is the sense that the state's prohibition of marriage between Native and white people pursues a less relevant white supremacist tactic (hypodescent) and should instead use the version tailored to a Native-white racial dyad (hyperdescent). This is especially clear given the other races that he names as being allowed to "miscegenate."

In response to this letter, Assistant Commissioner Meritt is enthusiastic for the legislation authorizing Superintendents to issue licenses. However, he discourages Superintendent McQuigg from pursuing the repeal of the miscegenation statute, writing that "you are advised that the Office believes that it should not interfere in this matter."[117] Even so, Meritt notes that "the practice of intermarriage between Indians and Whites is carried on in many other States and, so far as the Office knows, it has not resulted to the detriment of society."[118]

The Arizona legislation authorizing Superintendents to issue licenses ultimately does pass, while the repeal of the miscegenation repeal does not. McQuigg is disappointed, writing that "there appears to be a great deal of prejudice in this State against the Indians by some of the

[117] Edgar B. Meritt, Assistant Commissioner of Indian Affairs, Correspondence to Henry J. McQuigg, Superintendent of San Xavier Agency, 9 March 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 742, File No. 17617-15 (Washington, DC: National Archives and Records Administration).

[118] Edgar B. Meritt, Assistant Commissioner of Indian Affairs, Correspondence to Henry J. McQuigg, Superintendent of San Xavier Agency, 9 March 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 742, File No. 17617-15 (Washington, DC: National Archives and Records Administration).

older settlers."[119] In this case, local white supremacist anxiety over intermarriage (hypodescent) overrides the federal interest in using intermarriage as a tool toward land theft (hyperdescent).

What does this tell us? In a bizarre reversal of federalism, the state government empowers federal officials to act as state officials in the interests of embedding Native people into its bureaucratic kinship system. However, the state and federal governments still create friction between their policy agendas in the case of the miscegenation statute. In effect, the Superintendents can issue marriage licenses but would not be able to if a Native person is marrying a white person in the state. Meritt's reticence toward repealing the miscegenation ban belies the jurisdictional quagmire at issue: marriage is typically devolved to states, but the federal government claims jurisdiction over Native peoples through its colonial domesticity. He pursues only the change in legislation that empowers his own agency.

"Indian Custom Marriage": (Mis)recognitions and Politics of Disposability

Unlike the Superintendent-issued marriage licenses, which the Department of the Interior fabricated into existence in 1901, the legal category of "Indian custom marriage" has a considerably murkier emergence into the settler bureaucratic kinship networks manipulated by the Department. Indian custom marriage starts not as the creation of a new type of marriage license, but instead as the attempt to *recognize* the domestic power of Native nations to set marriage policy.

The interconnections between marriage, property, and privacy under settler colonialism lead to reciprocal recognition between jurisdictions so as not to "disturb" marriages that direct

[119] Henry J. McQuigg, Superintendent of San Xavier Agency, Correspondence to Cato Sells, Commissioner of Indian Affairs, 27 March 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 742, File No. 17617-15 (Washington, DC: National Archives and Records Administration).

the flow of private property (particularly land) along white supremacist and patriarchal lines. For instance, under the full faith and credit clause of the U.S. Constitution, individual states should generally recognize the "public Acts, Records, and judicial Proceedings of every other State."[120] This would include recognitions of marriages recorded within those states. Because, as I have previously discussed, Native polities have been assigned the jumbled status of "domestic dependent nations," at times viewed more similarly to foreign nations and at times viewed more similarly to states by the federal government, federal courts look to relationships to states and other nations for guidance as to what recognition of marriage law in Native nations might look like. Thus, in general, due to the ideology bundled around marriage and property under the conditions of settler colonialism, U.S. federal courts would be inclined to rule in favor of recognition of marriage in Native nations and other recognized Indigenous polities.

Before we proceed into a discussion of recognition specific to Indian custom marriages though, it is important to set the fraught context for settler colonial recognition of Native nations in general. Far from the kind of reciprocal mutual recognition imagined between states under the full faith and credit clause, settler recognitions of Native polities are often incomplete, withheld, and otherwise deployed to serve a white supremacist agenda of Indigenous genocide and land dispossessions.

Glen Coulthard's analysis in *Red Skin, White Masks* is illuminating here. Coulthard argues that, "instead of ushering in an era of peaceful coexistence grounded on the ideal of *reciprocity* or *mutual* recognition, the politics of recognition in its contemporary liberal form promises to reproduce the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples' demands for recognition have historically sought to transcend. [Emphasis in

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[120] United States Constitution, Article IV, Section 1.

original]."[121] Under the conditions of settler colonialism—indeed perhaps definitional to settler colonialism—the settler state offers contingent forms of recognition that appear to be reciprocal, but in fact structure inequalities into these nation-to-nation relationships.

Under settler colonial (mis)recognitions, the settler state awards itself the jurisdiction of interpretation, operating under the guardian-wardship register of domesticity. There is a clear jurisdictional skewing embedded in language like "domestic dependent nations." The repositioning of Native nations as domestic to and dependent upon the U.S. federal government shifts the field of recognition from a more level, international perspective, to a tilted field where the "guardian" state sets the terms. This also serves to deprioritize recognition *between* Native polities, by imagining the settler state at the administrative center with the power to set the relationship with individual nations.

If true reciprocity requires mutual recognition of protocol, the standardization of recognition (categories like: "federally recognized tribe") renders this recognition interchangeable, and ultimately disposable. Native polities are expected to conform to these standards of legibility to receive the settler state's stamp of approval, and the material benefits and restrictions attached to that. One result of this is, for example, the creation of reservations where nations are forcibly combined into confederations under a single tribal government. Another example is the non-ratification of treaties between California Indian nations and the U.S. The geopolitical framing of Native polities as "within" the arbitrary boundaries of U.S. states drawn around them create similar standards of recognition that lack the specificity of reciprocity necessary for them to be truly reciprocal and even-handed. The politics of

[121] Glen S. Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, MN: University of Minnesota Press, 2014), 3.

misrecognition are politics of disposability—recognition is proffered in contingency, often itself as a mechanism to create further dispossession of Native lands, kinships, and bodies.

In the case of "Indian custom marriages" as a legal category, then, it is productive to think in terms of the *mis*recognitions that are structured into settler state relationships to Native polities. The poisoned reciprocity involved with "Indian custom marriages," renders it a category that the settler state creates even as it tries to end the kinship practices it intends to enclose within that category. The Office of Indian Affairs, as well as federal and state courts, use the recognition of these custom marriages and divorces as a mechanism to manage the creation and transference of Native lands as property. This practice of bureaucratic kinship, while mimicking the aesthetic of mutual reciprocity, instead practices the politics of disposability by which Native peoples, individually and collectively, face systemic inequality and injustice through the misrecognitions of Indian custom marriages.

Common Law: An Uncertain Analogy. In practice, you might reasonably wonder, what does settler state recognition of "Indian custom marriage" look like? Based on the OIA correspondence files, it is a question that the bureaucracy itself doesn't seem to have a coherent or consistent answer to. However, a key pattern within this confusion involved executive, judicial, and legislative assumptions that Indian custom marriages are the same as common law marriages. That is, while true reciprocal recognition would require the settler government to learn and respect each individual nation or community's kinship protocols, they instead flatten those distinctions as much as possible in order to expedite the processes of Native land dispossession.

In response to a query about the general status of Native marriage policy under federal law, Assistant Commissioner E. B. Meritt drafts a response that makes this comparison clear. He writes:

> While there are records and information to show that, at least among some of the tribes, marriage was entered into, sometimes, at least, with ceremony and feasting, the present marriage by "Indian custom" is, to a large extent, practically the same as marriage by common law among white people; and "Indian custom divorce" is, practically, a voluntary separation of the parties without any formal ceremony or judicial decision.[122]

This shows the general state of recognition for custom marriages, synthesizing in particular the federal court opinions around the topic. The cohabitation of a man and a woman is recognized as a marriage, and their separation is recognized as a divorce whether or not there is the paperwork to show it.

In a surprising turn, the Law and Order Department of the OIA requests that Meritt redact several sections of his explanation, including the quote above, in a handwritten note that reads, "Too much is said herein. I suggest that you advise L & O [Law & Order] in all such letters as this correspondent submit, be transferred to Probate Dir [director] which handles all such matters. It will promote uniformity to do so. [Underline in original]."[123] In the final version of the letter that Meritt sends, he merely states that the OIA sometimes recognizes custom marriages and divorces without describing what they look like in practice.

The conflation of custom marriages with common law marriages animates the OIA's misrecognition of custom marriages. At times, the department holds that coupling and separation

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[122] Edgar B. Meritt, Assistant Commissioner of Indian Affairs, Unsent Draft Correspondence to Fred S. Hall, Associate Director of the Charity Organization Department of the Russell Sage Foundation, September 1923, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 471, File No. 71983-23 (Washington, DC: National Archives and Records Administration).

[123] Internal Office of Indian Affairs note to Edgar B. Meritt, Assistant Commissioner of Indian Affairs, September 1923, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 471, File No. 71983-23 (Washington, DC: National Archives and Records Administration).

similar to common law marriages are valid, while other times, local agents will attempt to draw a distinction between custom marriages and common law marriages as a tool to coerce assimilation to settler bureaucratic kinship. As we will see in the next file, definitions of custom marriage that use the constructed categories imposed by the settler state for reference create flexible tools for local agents to use to forward agendas of Christianization and assimilation to settler patriarchy.

"By What Law or Authority?": Custom in Conflict. Much like how Native polities face recognition under the conditions of hostile settler states using that recognition as a mechanism for enacting violence and dispossession, Native nations facing the OIA encounter a bureaucracy intent on destroying Native kinship practices even when it (inconsistently) recognizes them. Within the OIA files, Superintendents, Indian Agents, and Christian religious authorities installed in Native communities express open disgust and hostility toward Native kinship practices surrounding marriage. Community kinship laws and protocols are viewed as morally objectionable along various lines.

In a lengthy letter to Umatilla Superintendent E. L. Swartzlander, a missionary named J. M. Cornelison, situated at the Tutuilla Presbyterian Church, criticizes the Department of the Interior on moral grounds for its decisions recognizing Indian Custom Marriage. His letter synthesizes many of the moral arguments made against Native kinship practices, which often connect with property and other white supremacist motives.

One line of criticism deployed against recognition of Native kinship protocols is that they are "uncivilized," and specifically, mislabeled as "paganism" and therefore inimical to Christianity. Cornelison specifically invokes a collusion of Christian-State power in Europe as an analogy for the situation on the Umatilla reservation, writing:

> Without question our own forebears rebelled when their "tribal" marriage customs were broken up in ages past in the Teutonic forests of what is now Germany. But some time in the past they were made to quit this loose way of living together in the marriage relations in the face of a law. And now and then some fellow rebels and runs afoul the and pays the penalty. When will this benevolent Government ever tell the Indians that they must quit too?[124]

Cornelison's invocation of state power deployed in Europe against "pagan" practices positions Native cultural and kinship practices as outside the category of civilization entirely. He recommends the further mobilization of state power against these practices, requiring the destruction of Indigenous cultural protocols as a prerequisite for civilization.

Another key argument Cornelison makes is that recognition of custom marriages includes recognition of polygamous marriages, which are immoral in his view. He cites a local case that shows "that neither the state nor Federal court can or will prosecute these many polygamous cases among the Indians."[125] He argues that "this state of affairs is going to render largely null and void much of the splendid effort that the Government is putting forth to educate and domesticate these fine boys and girls."[126] The word "domesticate" looms large here, along with the argument that in effect, the federal government is undercutting its own assimilationist agenda by continuing to recognize custom marriages. However, as we will see later with allotmentality,

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[124] James M. Cornelison, Presbyterian Missionary, Correspondence to Edward L. Swartzlander, Superintendent of Umatilla Indian School, 1 January 1918, General Records of the Bureau of Indian Affairs, Record Group 75, Umatilla, Decimal Subject No. 740, File No. 2701-18 (Washington, DC: National Archives and Records Administration).

[125] James M. Cornelison, Presbyterian Missionary, Correspondence to Edward L. Swartzlander, Superintendent of Umatilla Indian School, 1 January 1918, General Records of the Bureau of Indian Affairs, Record Group 75, Umatilla, Decimal Subject No. 740, File No. 2701-18 (Washington, DC: National Archives and Records Administration).

[126] James M. Cornelison, Presbyterian Missionary, Correspondence to Edward L. Swartzlander, Superintendent of Umatilla Indian School, 1 January 1918, General Records of the Bureau of Indian Affairs, Record Group 75, Umatilla, Decimal Subject No. 740, File No. 2701-18 (Washington, DC: National Archives and Records Administration).

the drive to control property in this bureaucratic kinship system supersedes the "moral" requirements of assimilation.

Cornelison continues sending similar correspondence to Superintendent Swartzlander, urging the OIA to take action to intervene against custom marriage on the Umatilla reservation. Swartzlander brings these concerns to Commissioner Cato Sells, explaining that "I believe fully in the sanctity of the marriage relations, both among whites, Indians, and all other races, but your Office can readily see the difficulties I have in compelling Indians of this reservation, owing to their peculiar status, to be legally married."[127] He describes the jurisdictional inconsistencies matching patterns in many other files across different Indian agencies during this same time period, as I have already discussed extensively in this chapter.

Swartzlander works in concert with the Presbyterian missionaries in attempts to undermine custom marriages and divorces. In 1923, this prompts members of the Umatilla confederated tribes to organize a delegation and hire an attorney named J. W. Brooks to demand intervention by the OIA's D.C. office against Swartzlander. Brooks sends a telegram as follows:

> DELEGATION UMATILLA RESERVATION CLAIM MARRIAGE INDIAN CUSTOM NOT RECOGNIZE INDIAN FORCED MARRY OR IMPRISON ORDERED ATTEND ONE OF TWO CHURCHES WANT TO KNOW BY WHAT LAW OR AUTHORITY [*sic* throughout, telegram formatting].[128]

After receiving this telegram, Assistant Commissioner Meritt writes to Swartzlander requesting more information about this issue, activating the internal power structure of the OIA

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[127] Edward L. Swartzlander, Superintendent of Umatilla Indian School, Correspondence to Cato Sells, Commissioner of Indian Affairs, 12 February 1918, General Records of the Bureau of Indian Affairs, Record Group 75, Umatilla, Decimal Subject No. 740, File No. 2701-18 (Washington, DC: National Archives and Records Administration).

[128] J. W. Brooks, Attorney, Telegram to Office of Indian Affairs, 16 March 1923, General Records of the Bureau of Indian Affairs, Record Group 75, Umatilla, Decimal Subject No. 741, File No. 33229-16 (Washington, DC: National Archives and Records Administration).

bureaucracy. Swartzlander describes his view of the situation, which is that, "We have on the Umatilla reservation several Indian couples who are living together as husband and wife alleging they were married by Indian custom. In fact so far as I can learn there was no ceremony of any kind either Indian custom or legal marriage in connection with their living together."[129] He further adds, "I have not at any time issued any instructions to any Indians here directing them to attend any church and of course have no intention of issuing any such instructions."[130]

Yet, as the actions of the Umatilla delegation reveal, Swartzlander's perspective is misleading. He claims that no custom marriages have taken place, yet if it is up to Native polities themselves to determine what custom marriages look like, he has no grounds to make such an evaluation. This feeds back to the concept of misrecognition. In effect, only marriages legible to Swartzlander as such—due to their Christian/state status—would be considered valid. While he claims this does not require attendance of any church, the delegation's response reveals the understanding that Swartzlander's puritanical definitions of marriage are inextricable from Christianization, the presence of missionaries on the reservation, and the state-church collusion endemic to assimilation policy.

Further, the Umatilla delegation's strategy attacks Swartzlander's actions where they are weakest: having clear authorization under Congress. In effect, the delegation uses the settler state's own rules against it by revealing that Indian agents lack the authority to define and prohibit custom marriages. This questioning of the settler state authority reveals the truth that its

[129] Edward L. Swartzlander, Superintendent of Umatilla Indian School, Correspondence to Edgar B. Meritt, Assistant Commissioner of Indian Affairs, 19 March 1923, General Records of the Bureau of Indian Affairs, Record Group 75, Umatilla, Decimal Subject No. 741, File No. 33229-16 (Washington, DC: National Archives and Records Administration).

[130] Edward L. Swartzlander, Superintendent of Umatilla Indian School, Correspondence to Edgar B. Meritt, Assistant Commissioner of Indian Affairs, 19 March 1923, General Records of the Bureau of Indian Affairs, Record Group 75, Umatilla, Decimal Subject No. 741, File No. 33229-16 (Washington, DC: National Archives and Records Administration).

interference into Native kinship systems is not valid even under the rules that the settler state claims that it follows. By continuing to practice their own modes of kinship and sexuality in the face of the settler state's coercive measures, this delegation displays resistance against the state's authority while using the language of settler law as a tool against it.

The "Reorganization" of Custom Marriages. As with other forms of marriage, the "new" era of John Collier's administration and the associated "self-governance" phase of settler colonial policy does not mark a departure from previous misrecognitions of custom marriages and divorces, but instead extends this ambivalent relationship between state, federal, and tribal authorities.

In 1935, the Secretary of the Interior approves new "Law and Order Regulations" governing the OIA's attitudes toward Indian Custom Marriages. Mirroring the shift toward the "self-governance" model promoted by the IRA, these regulations recognize elements of tribal sovereignty over marriage and divorce while simultaneously continuing the OIA's push toward further bureaucratic management of Native kinship. The section on custom marriages and divorces reads as follows:

> The Tribal Council shall have authority to determine whether Indian Custom Marriage and Indian Custom Divorce for members of the tribe shall be recognized in the future as lawful marriage and divorce upon the reservation, and if it shall be so recognized, to determine what shall constitute such marriage and divorce and whether action by the Court of Indian Offenses shall be required. When so determined in writing, one copy shall be filed with the Court of Indian Offenses, one copy with the Superintendent in charge of the reservation, and one copy with the Commissioner of Indian Affairs. Thereafter, Indians who desire to become married or divorced by the custom of the tribe shall conform to the custom of the tribe as determined. Indians who assume or claim a divorce by Indian custom shall not be entitled to remarry until they have complied with the determined custom of their tribe nor until they have recorded such divorce at the agency office.
>
> Pending any determination by the Tribal Council on these matters, the validity of Indian custom marriage and divorce shall continue to be recognized as heretofore.[131]

After its struggles to define jurisdiction over marriage and divorce, and fully normalize settler models of licensed civil marriage that orient kinship around white supremacist and patriarchal modes of citizenship and property, these new regulations attempt to get tribal governments to put bureaucratic kinship into practice ostensibly toward their own interests, but continuing settler surveillance as oversight.

The final paragraph of these regulations reveals that the situation for Native peoples under the department's current policy allows significant flexibility, as the Solicitor of the Interior ruled broadly that custom marriages and divorces would be (mis)recognized along the lines of common law marriages in most cases. However, these new regulations request that tribal governments define marriage and divorce, send records of those definitions to the OIA, and then end recognition where kinship doesn't match the definitions provided. Essentially, the department's new policies move toward further incorporation of Native polities into bureaucratic kinship, by pushing toward new rules that would allow for "clearer" definitions of marriage and divorce that would ultimately streamline executive and judicial interference into Native land-as-property.

As is frequently the case under bureaucratic kinship, this is not a simplification of marriage policy under settler jurisdiction. This effectively creates two tiers of Indian custom marriages: custom marriages where a tribal government has not set a definition, and custom marriages where a tribal government has set a definition. Within the latter set, each tribal government might set a distinct definition, meaning that the total number of types of marriages under the federal-tribal-state matrix of bureaucratic kinship has once again increased.

[131] United States Department of the Interior, Departmental Law and Order Regulations, Chapter 3, Section 2, "Tribal custom Marriage and Divorce," Approved 27 November, 1935.

To emphasize the point that this new attempt at clarity does not resolve jurisdiction issues but instead echoes the previous OIA efforts to resolve Native kinship into something legible to the settler state, Wallace A. Murray, a member of the Rosebud tribal council writes to John Collier with a fresh set of concerns that the probate department struggles to respond to. Murray asks for clarifications as to the department's definitions of Indian custom marriage and divorce, following up with the following observations about the jurisdictional chaos regarding the overlapping definitions of marriage:

> You realize that the present general mix up of our marriages and divorce in this reservation is caused from financial inability of individuals concerned to secure proper divorces according to state laws and also the inability of the Indian Police Judge to properly dissolve marriages because of the conflicting circumstances and lack of proper authority. In view of that fact, and if we should decide in favor of the State laws, can the new Judge to be appointed be authorized to determine or dissolve marriages? If not, who can? You further realize that if this authority cannot be granted or regulated by our new court system, the present deplorable conditions will continue to exist?[132]

Murray's observations point to many of the flaws underlying the bureaucratic kinship system developed by the interfaces between federal agencies and state courts. He cites the financial burden of divorce proceedings as a key factor in the continuation of custom divorces which don't require hiring a lawyer (an artifice of the settler legal system). Further, the lack of clear authority in the court system undermines these attempts to set consistent rules.

Murray's next observation directly involves the interface between allotment policy and marriage laws via probate. He asks, "If we should abide by the state laws covering marriages and divorce, what would be the substance, difference, and changes in determinations of inheritance, estates and heirs from the present status?"[133] Because the recognition of custom marriages and

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[132] Wallace A. Murray, Rosebud Sioux Council Member, Correspondence to John Collier, Commissioner of Indian Affairs, 18 March 1936, General Records of the Bureau of Indian Affairs, Record Group 75, Rosebud, Decimal Subject No. 741, File No. 16209-36 (Washington, DC: National Archives and Records Administration).

divorces—as well as superintendent licenses and state licenses—has been attached to land-as-property under the patriarchal lines imposed via settler colonialism, any changes in policy interpretation within the OIA can have a significant impact on the outcomes of probate property transfers. Notable about Murray's concerns is the way in which he, as a member of the Rosebud Council, has adapted bureaucratic tools and language to address the ongoing problems generated by the OIA's uneven policy. He couches questions here in a way that should be legible to the settler government to address, yet, the remainder of the file shows that the OIA is unable to come up with adequate responses to these concerns.

This file includes various drafts of responses written by members of the OIA. First, Arthur Melzner in the probate division of the OIA takes a stab at defining custom marriages and divorces. He writes:

> Indian custom marriage and divorce are difficult of definition. In many cases the marriage is analogous to the common law marriage. There is some slight variation in different Tribes. Indian custom divorce consists, generally of a separation by either party with intent to make such separation permanent. The foregoing are broad statements, and the facts and customs of the respective Tribes always enter into the final determination.[134]

This response illustrates the various layers of (mis)recognition fueling the department's attitude toward custom marriages. He begins with the common law analogy, pays some heed to tribal specificity, but also assumes that any variation in Native kinship systems will be "slight". Bear in mind that Murray's initial request is for a definition as to how the department will interpret custom marriages and divorces for his tribe. Melzner's response is that it varies from tribe to

[133] Wallace A. Murray, Rosebud Sioux Council Member, Correspondence to John Collier, Commissioner of Indian Affairs, 18 March 1936, General Records of the Bureau of Indian Affairs, Record Group 75, Rosebud, Decimal Subject No. 741, File No. 16209-36 (Washington, DC: National Archives and Records Administration).

[134] Arthur B. Melzner, Chief of Probate Division at Indian Affairs, Unsent Draft Correspondence to Wallace A. Murray, Rosebud Sioux Council Member, 26 March 1936, General Records of the Bureau of Indian Affairs, Record Group 75, Rosebud, Decimal Subject No. 741, File No. 16209-36 (Washington, DC: National Archives and Records Administration).

tribe, and essentially puts the onus on the Rosebud Council to set that definition. Yet, the council itself can't control the ways that the department will use its assumed interpreted authority in a case-by-case basis.

In another section of Melzner's draft memo, he responds to Murray's questions about heirship by writing the following:

> If we should apply the state laws covering marriage and divorce, the entire scheme of the determination of heirs would be upset. Without recognition of Indian custom marriage and divorce, and these applied, at times, differently to individual cases, the problem of illegitimacy would become overwhelming and 'bigamy' would become ridiculously prevalent. Such changes must result from education and gradual change. Some Reservations have made forward steps along this line, but it is not nearly so general as might be desired.[135]

As a reminder, this is a memo from 1936, multiple *decades* after these questions about the interface between state laws, custom marriages, and allotment inheritance became apparent. Even at this point, state law is seen as inadequate, while recognition of custom marriages is framed in a negative light by generating "illegitimacy" and "bigamy," categories that have been constructed by the settler state and are only given relevance by the patriarchal model of citizenship and property that attempts to accumulate property within a given family by defining it under the repressive policy pair of restrictive definitions of illicit sexuality and licensed marriages. Melzner falls back on the trope that more "education"—read: "civilization"—is required, a trope that has long been discredited by the history up until that point yet still animates the futurist projections of settler agents.

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[135] Arthur B. Melzner, Chief of Probate Division at Indian Affairs, Unsent Draft Correspondence to Wallace A. Murray, Rosebud Sioux Council Member, 26 March 1936, General Records of the Bureau of Indian Affairs, Record Group 75, Rosebud, Decimal Subject No. 741, File No. 16209-36 (Washington, DC: National Archives and Records Administration).

Attached to Melzner's draft is a response from another member of the department, telling him "to put the attached party [Murray] to rest" by simply forwarding the 1930 Solicitor's opinion on the recognition of custom marriages and divorces instead of directly answering the questions posed.[136] Melzner takes this recommendation and does so, sending Murray a copy of this decision. Through the unsent drafts, we can see that the probate division itself struggles to answer the questions Murray posed, but instead of taking accountability for this lack of clarity, the department just falls back on the Solicitor's opinion. The probate division has taken up the authority to determine the outcomes of heirship cases, yet does not know internally how it will interpret custom marriages.

As these files indicate, the "new" direction in policy under the Indian Reorganization Act and the direction of John Collier's version of the department echoes the previous policy confusion and instability. Far from representing a repudiation of allotment and assimilation policies, at least in terms of the connections between marriage, divorce, and property, the injustice structured into the department's ambiguous authority instead extends these patriarchal and white supremacist modes of governance.

The constructed category of "Indian custom marriage" is one of the most ill-defined in these files, as it occupies the uncanny valley between settler recognition of Native sovereignty and the settler state's unwillingness to recognize kinship concepts that do not conform to its baseline ideologies of property, white supremacy, and patriarchy. On one hand, the recognition of Indian custom marriages as a domestic power inherent to Native nations shows that pre-existing and continuing forms of Native kinship exist alongside (and resist) expansions of settler

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[136] Internal Office of Indian Affairs Note to Arthur B. Melzner, Chief of Probate Division at Indian Affairs, 5 June 1936, General Records of the Bureau of Indian Affairs, Record Group 75, Rosebud, Decimal Subject No. 741, File No. 16209-36 (Washington, DC: National Archives and Records Administration).

jurisprudence. Yet, this recognition becomes another tool by which agents of the settler state intensify bureaucratic kinship, modifying and conditioning this recognition in attempts to ensnare Native peoples deeper into settler futurities, normalizing settler relationships to property.

Divorce in Disarray

While the majority of this chapter focuses on jurisdiction over marriage, and the ways that settler bureaucracies intensify surveillance and control over Native lands and kinship to further settler colonial aims of white supremacy and land theft, it is important to look at a closely related concept: divorce. As divorce, like marriage itself, is understood as a "domestic" power under settler federalism, jurisdiction over divorce for Native peoples during this period became another source of ambiguity and injustice. In the case of marriage, the involvement of state governments typically concerned the issuance and recognition of marriage licenses, divorce is primarily the arena of state courts. Under settler policy, significant asymmetry exists between marriage and divorce, where divorce is made to be significantly more difficult and surveillance-intensive.

In this section, I take a look at two case files, from South Dakota and North Dakota, respectively, that showcase both friction and collusion between state and federal interests as they attempt to redefine Native kinship in terms of divorce policy. In both cases, settler missionaries are key instigators of legal action, due to a mix of moral opposition to divorce itself and to the continued existence of Native cultural sovereignty. Allotment looms large in these files, as various aspect of allotment policy shape the definitions of citizenship and property that the OIA and state courts manipulate to continue enfolding Native kinship into hostile settler institutions.

Settler States: The Real "Divorce Evil". In South Dakota, the efforts by allotment policy to direct land-as-property to flow through legally recognized marriages and divorces instigates a

situation where South Dakota's divorce courts become rife with fraud as men married to Native women attempt to get no-contest divorces in order to gain control over allotment property and the attached money accounts.

This situation is brought to the OIA's attention originating as an internal communication within the Bureau of Catholic Indian Missions. A missionary at Pine Ridge named Henry Westropp sends a plea for help to fight the "divorce evil" on the reservation to the director of the national organization, William H. Ketcham, who then forwards this letter to the Assistant Commissioner of Indian Affairs F. H. Abbott. Assistant Commission Abbott then contacts the Superintendents of Pine Ridge and Rosebud for more information. Westropp describes the "divorce evil" as follows:

> Marriage is threatening to become a mere farce in many cases. If an Indian is tired of his wife, he has only to go to Hot Springs or some other place and apply for a divorce. As for the woman, she is called upon to appear in court, which as a rule she cannot do. So the case is decided against her. The man pays his $25 or 50 and goes and marries another woman; and there seems to be nobody to defend the rights of the injured party. … This divorce fever is getting contagious, so that also some of our Catholics are affected are affected [*sic*] by it. [underlines in original][137]

In this passage, Westropp is able to successfully diagnose that there is a problematic situation—as I will discuss more in detail in a moment—but because of his framing of divorce as itself evil, as well as his assumption of entitlement to a position of authority over Native peoples' sexuality, fundamentally misunderstands the problem. He describes the concept of divorce as a contagion, a disease being spread from Native men to "our Catholics." Furthermore, as I have previously argued, one of the stated goals of OIA policy was to get Native people to follow state laws

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[137] Henry I. Westropp, Jesuit Missionary, Correspondence to William A. Ketcham, Director of the Bureau of Catholic Indian Missions, 16 October 1909, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

regarding marriage and divorce. In effect, the problem has been created because Native men are following OIA guidelines and going to state courts to get divorces. Westropp is ultimately going to the administration of Indian Affairs to get them to "solve" a problem that the OIA has itself instigated.

Westropp, assured that he knows what's best in this situation, generously offers the following recommendations:

> To remedy this evil we need stricter marriage laws. 1. The parties, that intend to marry ought not to be allowed to live together, until they are really married. 2. They ought to be obliged to marry in the reservation. 3. Outside lawyers and judges ought to have no power to procure a divorce for them. 4. Difficulties among married people ought to be settled by the Agent or by some other competent persons. The Indian judges make sometimes a mess of it. 5. Desertion ought to be severely punished. 6. If one manages to get a divorce, he ought not to be allowed to take another woman at least for a year.[138]

Point by point, these recommendations reveal a fundamental misunderstanding of the situation. For the first recommendation, Westropp's insistence that people live apart until they are "really married" reveals his belief that only paper/licensed marriages count, which abridges Native sovereignty over matters of kinship. On the second point, marriage "in the reservation" has proven to be jurisdictionally chaotic up to this point, with superintendent-issued marriage licenses being dubious, state law not applying, and Westropp explicitly rejects Indian custom marriages later in his letter. His fourth recommendation calls for an intensification of settler state interference within Native communities, casting doubt over the validity of Indian judges and expressing a whitewashed notion of "competence." Euro-American agents in these files typically misunderstand separation as "desertion," and the notion that a man is "taking" a woman assumes

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[138] Henry I. Westropp, Jesuit Missionary, Correspondence to William A. Ketcham, Director of the Bureau of Catholic Indian Missions, 16 October 1909, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

a patriarchal frame of kinship and sexuality. While it may seem a questionable use of one's time to debunk a missionary's legal recommendations from 1909, I do think it's worth revealing the ways in which settler colonial assumptions of white supremacy and the layered frames of domesticity result in the continuation and intensification of settler surveillance, interference, and violence within Native communities.

As part of the investigation into the "divorce evil," the Pine Ridge Superintendent John R. Brennan sends correspondence over the last two years (1908-1909) that he has had with a South Dakota Judge named Levi McGee, where he highlights the issue of no-contest divorces taking place within his jurisdiction.

In the first set of correspondence from 1908, Brennan brings attention to the impact of a divorce decree upon a woman enrolled on the Pine Ridge reservation. Brennan writes, "The decree gives all the property owned by the family to the divorced husband; that is, all he had not squandered in the divorce proceedings; also, the custody and possession of all the children; setting the mother afoot, depriving her of her home, her children; and her support."[139] The woman affected by this judgment was not aware it was taking place "until after the divorce was granted and had received no notice of the suit either by mail or otherwise."[140] Brennan describes the process of gaming the state courts as follows, writing:

> Since these Indians have learned that they can secure divorces in outside courts, many of the men for some trifling cause or other get a notion into their heads that they want to get rid of their wives. They go outside of the Reservation, consult some attorney, usually lie

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[139] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Levi McGee, Judge of the 7th Circuit District of South Dakota, 26 August 1908, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

[140] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Levi McGee, Judge of the 7th Circuit District of South Dakota, 26 August 1908, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

> about the case, secure his services and starts proceedings. Notice is sent to the wife through the mail and the chances are ten to one that she does not receive the notice until it is too late to make answer. Even if the wife receives a notive [*sic*] through the mail that her husband has sued for a divorce, more than likely she would not know what it meant and would pay no attention to it until it was too late. If she did realize what was going to happen, the probabilities are she would be without means to appear in Court or to procure the services of counsel to properly defend her. In one of these cases brought to my notice, it developed that the husband sold his wife's team and wagon, the only property they owned, and gave the proceeds to an attorney to secure a divorce for him, and he got his divorce.[141]

The pattern that Brennan describes is reminiscent of the various ways that settler governments disenfranchise Native people by providing inadequate (or no) "consultation" or "notice" as to actions taking place internally within settler bureaucracy that will materially impact their lives. Even in the case where notification does arrive in time, settler courts and agency are already skewed to disempower Native peoples due to white supremacy as well as patriarchal rules that specifically disenfranchise Native women. The fact that, in the example described, the husband was able to sell property owned by the couple without her knowledge or consent is a direct result of reframing men as property owners and wives as under the authority of husbands.

While Brennan is able to describe a problem happening under settler colonial rule, after multiple Native women complain to him of the situations they are facing, he fails to recommend a viable solution. His recommendations are:

> When an Indian starts divorce proceedings against his wife I believe it would be advisable for the Court to require the Attorneys for the plaintiff to serve notice on the defendant through the Agent. The Agent could then see that defendant received the notice within a reasonable time, and I believe where the wife is unable to appear and defend her Character [*sic*] because of lack of a conveyance to take her to Hot Springs, Rapid City, or to Custer, or of money to pay her fare on the railroad, the plaintiff should be required to

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[141] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Levi McGee, Judge of the 7th Circuit District of South Dakota, 26 August 1908, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

> advance money for her expenses and the Agent should be asked to make an investigation of the case for the proper information of the Court.[142]

These solutions are inadequate because they do not address the ways in which the OIA has created these problems. As part of allotment and assimilation policies, the OIA has coerced Native peoples to follow state law regarding marriage and divorce, while binding land-as-property to marital status as part of bureaucratic kinship. In many respects, settler colonial bureaucracy is doing what it is designed to do: disempower Native women by assuming undue authority over their land and lives. The fact that greater participation in settler bureaucracy results in routine disenfranchisement is not a "bug" in the system, it is the result of a system functioning with white supremacy and patriarchal property-kinship laws as its code.

In his response, Judge Levi McGee promises to follow these recommendations, writing:

> In the hereafter I think I will require them to serve the summons on the agent as well as the defendant. It will probably put some more work on you to look into the matters, but there surely ought to be some one [*sic*] to protect the innocent. In this connection I want to add, that any one of these cases that have been procured through fraud, if it is shown to be the decree will be promptly set aside. Where the wife has no money to defend; provisions will be made requiring the husband to pay all expenses of case in making her defense, or drop the case.[143]

McGee does not take responsibility for the fraud within the court and his role in granting these divorces in a way that disenfranchises Native women, but instead makes vague promises to do better.

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[142] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Levi McGee, Judge of the 7th Circuit District of South Dakota, 26 August 1908, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

[143] Levi McGee, Judge of the 7th Circuit District of South Dakota, Correspondence to John R. Brennan, Superintendent of Pine Ridge Indian School, 28 August 1908, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

However, this type of fraud continues largely unabated. Writing back a year later, Brennan attaches a letter from a Native woman who complained to him about a divorce ruling taking place without her knowledge or consent, citing it as one of many similar letters. Brennan writes, "The Indian Woman of this reservation seem to be getting decidedly the worst of it in the South Dakota devorce [*sic*] mill."[144] He asks the judge to take action to resolve the fact that she did not have enough information to be present at the hearing.

McGee opens his response disclaiming any responsibility or knowledge of the situation, saying that "I have tried to follow the suggestion made by you of having all summons served upon you as well as the defendant, and I think all have been since then."[145] The recommendation that summons for state court hearings be served to defendants and the Indian Agent or Superintendent of their reservation has a somewhat ambiguous effect. On one hand, this is further intrusion into Native peoples' lives, surveilling Native people for the purposes of augmenting the settler colonial legal system at the expense of Native autonomy. On the other hand, the fact that Native people are not being told when state courts are enacting judgments against them without their knowledge is itself a form of settler violence, as the material conditions of Native women are harmed via these no-contest divorces.

McGee does not see this is a systemic issue inherent to unilaterally assuming state authority over Native peoples, though. He instead blames individuals within the system, writing,

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[144] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Levi McGee, Judge of the 7th Circuit District of South Dakota, 30 June 1909, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

[145] Levi McGee, Judge of the 7th Circuit District of South Dakota, Correspondence to John R. Brennan, Superintendent of Pine Ridge Indian School, 1 July 1909, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

"The plain truth is unscrupulous lawyers take these cases and often fix up the records, in such manner as to make it comply with the law, and where there is default, or no appearance made by the defendant, it is a short matter, and only one side is heard. It makes it almost impossible to refuse the divorce where such a case is made out."[146] While it may be the case that lawyers are gaming the system in order to get money from men for an easy divorce settlement, the system itself, which tethers property to marital status and assumes that distant state courts have authority of Native peoples' lives, is itself the underlying problem. Because allotment and assimilation policies have transferred land from kin to property, and individualized ownership with a view toward fee-simple title, the OIA has encouraged situations like this to take place. This isn't just a systemic failure—it's a system doing what it is designed to do, to undermine Native kinship networks and disempower Native women in particular. This problem would not exist if not for allotment and for the federal government's actions to coerce Native peoples to follow state law under penalty and criminalization if they continue following their own protocols.

After bringing this chain of correspondence to the attention of Assistant Commissioner Valentine as a response to his query, Brennan claims that Westropp's claims are "in a measure true but everything possible under the state laws and regulations of the Department is being done to reduce said evils to a minimum."[147] He cites his correspondence with McGee as evidence of what he was able to set up within the system with no new legislation. Brennan writes, "Under the

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[146] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Robert G. Valentine, Commissioner of Indian Affairs, 5 January 1910, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

[147] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Robert G. Valentine, Commissioner of Indian Affairs, 5 January 1910, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

law the state courts have jurisdiction in all civil cases, affecting Indians whether Government wards or not. When an Indian makes up his mind that he wants a divorce, there is no way that I know of to prevent him from employing a lawyer and bringing an action."[148] There's a steep irony here in that, in following the spirit of what the OIA claims it wants—for Native people to follow state laws regarding marriage and divorce, something it has encouraged Indian Agents to pursue with coercion, incarceration, and other punitive tactics—that when these laws are actually followed, the result is still undesirable in their eyes. The OIA has imagined state law as ordered, just, and rational, when state law is in fact disordered, unjust, and rampant with fraud.

Brennan does praise McGee, noting that "I am pleased to say that because of the cooperation of Judge McGee for past two years, very few of the divorces applied for by the Pine Ridge Indians have been granted. I believe not more than two in the past year, rather a small per cent for 7000 people."[149] Yet, is this really desirable? By intensifying his authority as Superintendent and colluding with judge McGee to attain greater surveillance, the result is that Brennan has almost completely suppressed divorce itself.

He concludes this section of his letter by commenting on Westropp's recommended changes to marriage policy, writing that "This would help some but as the present State laws governing marriage seem to be satisfactory to the citizens of the state, it would be a difficult matter to have our law makers change the marriage or divorce laws to fit marriages and divorces

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[148] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Robert G. Valentine, Commissioner of Indian Affairs, 5 January 1910, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

[149] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Robert G. Valentine, Commissioner of Indian Affairs, 5 January 1910, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

among Government wards."[150] In other words, state law is (ostensibly) more responsive to the desires of citizens within that state, and doesn't take the needs or desires of Native communities into consideration whatsoever. Brennan notes that he is already using his authority as Superintendent to punish Native people for transgressing his notions of acceptable kinship and sexuality, writing:

> Parties who intend to marry are not allowed to live together until they are really married if we know it and just as soon as our attention is called to a case of this sort, the parties are brought to the office, a license is made out and at the risk of having to defend a case in the state court for coercion or illegal imprisonment, they are compelled to marry or go to jail and remain there until they agree to the marriage ceremony."[151]

In effect, Native people on Pine Ridge face two true "divorce evils"—on one hand, a fraudulent state court that systemically disenfranchises Native women and uses bureaucratic kinship to sever them from land and autonomy while white lawyers collect payment, and on the other hand, an authoritarian Superintendent using the power of his office to incarcerate and punish Native peoples for pursuing their own modes of kinship and sexuality.

Indian Divorces and other "Emergencies". The second case study I will present on the bureaucratic kinship of divorce focuses on an incident in North Dakota. This set of correspondence focuses on attempts to extend the jurisdiction of the state courts over Native peoples enclosed within the borders of the state who are not yet U.S. citizens. These

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[150] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Robert G. Valentine, Commissioner of Indian Affairs, 5 January 1910, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

[151] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Robert G. Valentine, Commissioner of Indian Affairs, 5 January 1910, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

communications show the active roles of settler missionaries, federal, and state actors as they attempt to bring divorce under the further control and surveillance of settler institutions.

Aaron McGaffey Beede, an Episcopal missionary in North Dakota, starts this correspondence with the OIA by asking if the office would object to the state courts extending jurisdiction over divorce. His purpose in doing so stems from his observation that the granting of a divorce by an Indian Agent is "a method which is too easy in obtaining a divorce" and that "a regular Court gives more dignity to such a preceeding [*sic*] at any rate."[152] While he states that he is opposed to divorce, he nonetheless advocates for the state court to take jurisdiction because "Some divorce cases among Indians now with land in severalty are unavoidable."[153] In effect, Beede combines a moral argument with distaste for divorce being too easy with a property-forward argument focused on the outcomes of land allotments. For Beede, the assumption of bureaucratic kinship of the state of North Dakota could infuse divorce with a legalistic process capable of managing Indigenous lands as property.

In response to this query, Assistant Commissioner Meritt notes that despite the Office's continued attempts to get states to apply jurisdiction over marriage and divorce, "In a few instances state courts have declined to exercise this juridcation [*sic*] and the Office has been accordingly embarrassed in carrying out its purpose."[154] Meritt's recommendation is that the

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[152] Aaron McGaffey Beede, Episcopal Missionary, Correspondence to Edgar B. Meritt, Assistant Commissioner of Indian Affairs, 12 October 1914, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 743, File No. 11131-14 (Washington, DC: National Archives and Records Administration).

[153] Aaron McGaffey Beede, Episcopal Missionary, Correspondence to Edgar B. Meritt, Assistant Commissioner of Indian Affairs, 12 October 1914, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 743, File No. 11131-14 (Washington, DC: National Archives and Records Administration).

[154] Edgar B. Meritt, Assistant Commissioner of Indian Affairs, Correspondence to Aaron McGaffey Beede, Episcopal Missionary, 24 October 1914, General Records of the Bureau of Indian Affairs, Record Group 75, General

North Dakota judges should serve notices of divorce proceedings simultaneously to the defendants and their corresponding Superintendent as a mechanism for abating fraud. The OIA is far less interested in the moral implications of the state's divorce process, instead focusing on the financial and legal aspects of directing the flow allotment property along non-fraudulent lines. It is important to observe here, of course, that the imposition of the allotment-property framework over Native lands cannot be made fraud-free as it itself generates the conditions making "fraud" possible.

Beede follows Meritt's recommendations, lobbying the North Dakota legislature to introduce a bill that would "requir[e] the state court to consider Indian divorce cases, and requir[e] the notice to be served on an Agent or Sup't as well as on the respondents."[155] In response, Indian Commissioner Sells thanks Beede for his "efforts to place the marital relations of Indians upon a sounder basis," a tacit admission that the existing legal landscape on marriage and divorce has been a consistent source of jurisdictional disorder and mismanagement.[156]

As a result of Beede's lobbying effort, North Dakota Legislator Wiley introduces House Bill 327 modifying the state's divorce laws as follows:

> A divorce must not be granted unless the plaintiff has in good faith been a resident of the state for twelve months next preceding the commencement of the action and is a citizen of the United States or has declared his intention to become such, or is an Indian. Provided, however, that where the defendant is an Indian a copy of the summons and

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Service, Decimal Subject No. 743, File No. 11131-14 (Washington, DC: National Archives and Records Administration).

[155] Aaron McGaffey Beede, Episcopal Missionary, Correspondence to Edgar B. Meritt, Assistant Commissioner of Indian Affairs, 27 January 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 743, File No. 11131-14 (Washington, DC: National Archives and Records Administration).

[156] Cato Sells, Commissioner of Indian Affairs, Correspondence to Aaron McGaffey Beede, Episcopal Missionary, 9 February 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 743, File No. 11131-14 (Washington, DC: National Archives and Records Administration).

> complaint in such divorce action shall be served upon the superintendent of the reservation on which the defendant resides in like manner as upon the defendant.[157]

This is a clear expansion of North Dakota's assumed authority over Native peoples. The involvement of the reservation superintendent under state law mirrors the notion of "wardship," infantilizing Native people by notifying Superintendents as "guardians" in the divorce process. The incorporation of federal officials into state policy is an effort to reinforce the network of settler surveillance and control over Native kinship, and by extension, land-as-property, by working to align state and federal efforts to do so.

Also notable in the bill is section three, an "emergency" clause that states, "Whereas an emergency exists in that there is no definite provision of law permitting an Indian who has not become a citizen of the United States to procure a divorce, therefore this Act shall take effect and be in force from and after its passage and approval."[158] The emergency provision is tacked on as a legal tool to allow the legislation to take effect immediately upon signature by the governor. However, it is noteworthy to see this language of crisis deployed; the bill author views unclear jurisdiction over Native divorces as an "emergency" worthy of immediate action. Yet the lack of "definite provision of law" is better understand as a norm in settler colonial policy toward land theft via bureaucratic kinship, rather than an exceptional situation. The assumption of control

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[157] Legislative Assembly of the State of North Dakota, "For an Act to Amend and Re-enact Section 4398 of the Compiled Laws of North Dakota for the year 1913, the same being Section 4067 of the Revised Codes of 1905, Relating to the Dissolution of Marriage," H. B. 327, Section 4398, Document Used as Paper for Correspondence within File, 16 February 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 743, File No. 11131-14 (Washington, DC: National Archives and Records Administration).

[158] Legislative Assembly of the State of North Dakota, "For an Act to Amend and Re-enact Section 4398 of the Compiled Laws of North Dakota for the year 1913, the same being Section 4067 of the Revised Codes of 1905, Relating to the Dissolution of Marriage," H. B. 327, Section 3, Document Used as Paper for Correspondence within File, 16 February 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 743, File No. 11131-14 (Washington, DC: National Archives and Records Administration).

over Native kinship, while simultaneously creating a jurisdictional quagmire requiring further intervention by settler institutions, is a key source of structural violence in the U.S. settler state.

Anticipating the passage of this bill, a North Dakota state attorney named Edward S. Johnson notes that the primary reason that state courts in North Dakota have had jurisdictional issues is the delay in citizenship status built into allotment legislation. He writes, "The trouble in the past has been that our statute covering divorces, required the plaintiff in the action to be a citizen of the United States and under the act under which these Indians were allotted they would not become citizens until a fee patent had been issued to them."[159] This is an example of how while allotment policy ostensibly intended to "simplify" the relationship between Native peoples by transforming their legal status from collective nations to individual citizens, the implementation of allotment resulted instead in the intensification of legal ambiguities. In this case, the OIA's intention that Native peoples follow state laws regarding divorce as part of this attempt to disappear Native nations into the state and county levels of settler governance is at odds with the legislation's delay in citizenship on the basis of white supremacist notions of "competence." This action in North Dakota represents the state-by-state, piecemeal legislation that attempt to patch the myriad inconsistencies and incoherence that bureaucratic kinship under settler colonialism generates in its attempts to circumvent the sovereignty of Native polities.

In his letter, Johnson asks Assistant Commissioner Meritt whether the OIA will "co-operat[e] with the state court in enforcing a judgement for alimony."[160] This raises a key issue

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[159] Edward S. Johnson, State's Attorney for Sioux County, North Dakota, Correspondence to Edgar B. Meritt, Assistant Commissioner of Indian Affairs, 16 February 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 743, File No. 11131-14 (Washington, DC: National Archives and Records Administration).

[160] Edward S. Johnson, State's Attorney for Sioux County, North Dakota, Correspondence to Edgar B. Meritt, Assistant Commissioner of Indian Affairs, 16 February 1915, General Records of the Bureau of Indian

where, once again, U.S. federalism creates ambiguous jurisdiction as it relates to the implementation of settler colonial models of divorce as applied to Native peoples. Namely, can a state court direct the flow of money and property held in federal trust status as part of a divorce judgment? Since the OIA claims control over the administration of Indian Individual Money accounts, alimony payments would require OIA approval to draw from those accounts. This is an example of how, by redefining Native lands as income-generating property, then paternalistically assuming control over the management of said income, the federal government has invented a problem that did not exist until it intervened to enact land theft via allotment. It also represents a thickening of bureaucratic kinship where decisions about Native lands, marriages, and divorces play out as conversations between various settler courts and agencies according to arcane rules that the various actors involve do not consistently apply.

Responding to Johnson's question, Meritt offers the following commitment in terms of OIA cooperation with North Dakota's courts:

> Superintendents would be instructed to inform the Court immediately upon the receipt of a copy of the summons and complaint, as provided for in the bill, if any fraud were found to exist. It is with this object in view that the Office already has an understanding with some of the Judges whereby the Superintendent under whose jurisdiction the defendant lives shall be notified before a divorce action is heard."[161]

As in the South Dakota example, here we see collusion between state courts and the OIA's localized superintendents in the surveillance and punishment of Native peoples if their divorces under state law are later deemed "fraudulent."

Affairs, Record Group 75, General Service, Decimal Subject No. 743, File No. 11131-14 (Washington, DC: National Archives and Records Administration).

[161] Edgar B. Meritt, Assistant Commissioner of Indian Affairs, Correspondence to Edward S. Johnson, State's Attorney for Sioux County, North Dakota, 26 February 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 743, File No. 11131-14 (Washington, DC: National Archives and Records Administration).

The North Dakota "Indian Divorce Bill" passes and is signed into law by the governor. However, Beede writes that there was one point of contention in the passage of the bill—concerns over "allowing state liability regarding Indians."[162] North Dakota lawmakers were evidently concerned with the possibility that, if Native peoples enclosed within their borders become state citizens, the state takes responsibility over various forms of jurisdiction and providing services which it must pay for. This is an example of how state and federal interests regarding Native peoples diverges—in this case, the local flavor of white supremacy takes the form of fear over further integration of Native peoples within the state's political economy, which is one of the main goals of assimilation policy.

Upon receipt of notification that the bill has taken effect, Meritt uses this as an opportunity to further abrogate Native sovereignty over kinship. He writes to all Superintendents in the state of North Dakota to tell them, "Since the Indians now have adequate means in the State Courts for procuring such dissolutions of their marriage contracts as the facts may justify, you are requested to use special effort to see that divorce by Indian custom is henceforth altogether abandoned."[163]

That this file ends with reinforced attempts to punish Native peoples for refusing settler definitions of kinship is an important reminder of the genocidal intentions of the settler institutions involved. This confusion and wrangling over questions of divorce jurisdiction circle

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[162] Aaron McGaffey Beede, Episcopal Missionary, Correspondence to Edgar B. Meritt, Assistant Commissioner of Indian Affairs, 4 March 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 743, File No. 11131-14 (Washington, DC: National Archives and Records Administration).

[163] Edgar B. Meritt, Assistant Commissioner of Indian Affairs, Correspondence to E. W. Jermark, Superintendent of Fort Berthold School, Copied to Superintendents at Standing Rock, Fort Totten, and Turtle Mountain, 7 May 1915, General Records of the Bureau of Indian Affairs, Record Group 75, General Service, Decimal Subject No. 743, File No. 11131-14 (Washington, DC: National Archives and Records Administration).

back to efforts to overwrite Native protocols and ways of being with bureaucratic kinship, using the powers of settler jurisdiction to disrupt Native cultural and political sovereignty to abet ongoing land theft.

Taken together, these two case files illustrate how settler actors representing federal, state, and religious authorities offer a conflicting stew of moralistic and property-forward interests that result in the intensification of bureaucratic kinship and extend white supremacist aims of land theft and disruption of Native kinship sovereignty. The authors of these files make the central assumption that Native sovereignty and cultural practices are an obstacle to be eliminated and managed by a growing settler legal apparatus. Moral opposition to divorce converges with moral opposition to Native peoples themselves to create a locus of settler surveillance around the separation of Native couples.

Allotment and assimilation policies generate opportunities for further fraud, which then becomes the basis of further settler intervention into the lives of Native peoples. The tethering of land-as-property to the outcomes of divorce proceedings in state courts combine with the patriarchal framing of property ownership and citizenship under U.S. settler colonialism to particularly disenfranchise Native women. This examination of the OIA's actions on divorce policy illustrates how settler jurisdiction, while chaotic and disorderly, nonetheless pushes forward white supremacist and patriarchal interests as the quagmire of bureaucratic kinship grows.

Conclusion

Throughout this chapter, we've seen how the Office of Indian Affairs' attempts to standardize marriage resulted instead in jurisdictional chaos, and a proliferation of categories of marriage and divorce. These categories included: superintendent-issued marriage licenses, which

were deemed unlawful yet issued regardless, and whose legal ambiguity illustrates the vacuousness of the settler state's bureaucratic kinship; Indian custom marriages, an attempt to create a standardized recognition of Native nations' sovereign power to set their own kinship rules which misses the point entirely by mis-recognizing Indigenous kinship systems as common law marriages; and divorce, whose murky methods and legality focused the interests of state and federal officials on controlling Indigenous sexuality as well as manufacturing ways to redefine and control land.

PART I: CONCLUSION

I told you this wouldn't be an easy journey. And, though this particular chapter is coming to a close, our journey continues. Throughout this chapter, I have introduced the theoretical frames of narratives of domesticity and bureaucratic kinship, illustrating the ways that the Office of Indian Affairs attempts to accomplish its white supremacist and patriarchal agenda of settler colonialism. I've taken you through the legal fictions of superintendent-issued marriage licenses, the (mis)recognitions of Indian custom marriages and divorces, and showed the settler state's discord and disarray over its delusional fantasies of futurity free of accountability to Native peoples.

Revisiting Solicitor Finney's opinion, new lines stand out to me now that didn't before. For example, he writes, "The policy of the Government is to recognize Indian custom marriage and divorce because experience, has demonstrated there is no escape from such a course."[164] Clearly, the files upon files showing the failure of the Office of Indian Affairs' attempts to avoid recognizing the continued political and cultural distinctiveness of Native peoples illustrate this "experience." But the phrase "no escape" has an ironic weight to it. The "escape" the settler state seeks is to no longer have to face accountability, to no longer have to address Native peoples or repatriate stolen land; to have no remaining barriers to its claims to sovereignty.

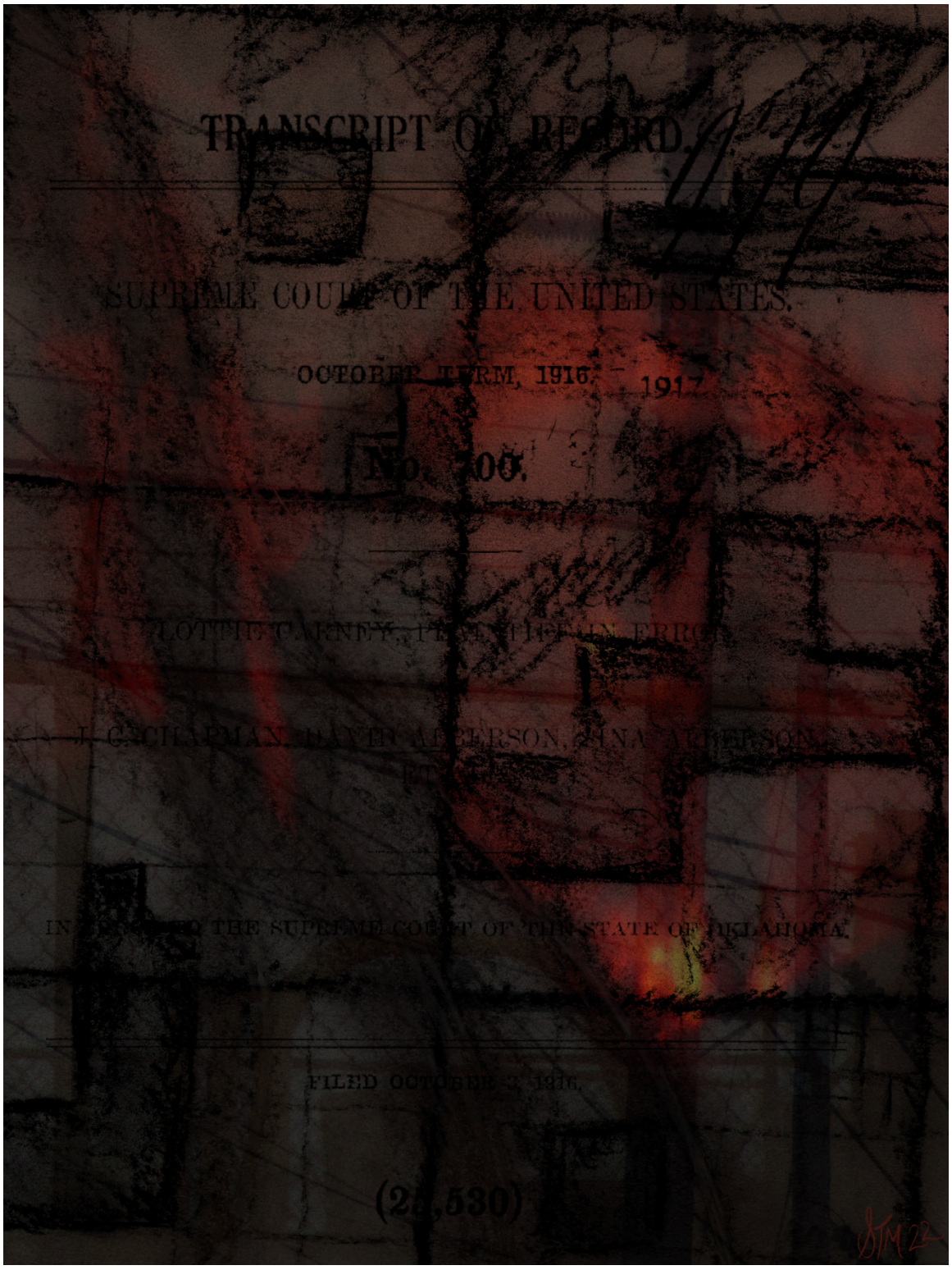
Yet, it is the settler state's incoherent, inconsistent, and unethical legal regime that it is trapped within. It has created the conditions from which it wants to "escape." In its efforts to sink

[164] Edward C. Finney, Solicitor of the Department of the Interior, Decision Reported to Ray L. Wilbur, Secretary of the Interior, 12 April 1930, General Records of the Bureau of Indian Affairs, Record Group 75, Klamath, Decimal Subject No. 743, File No. 55112-32 (Seattle, WA: National Archives and Records Administration).

Native peoples into its legal quagmire on marriage and divorce, it has sunk itself in the process. At every step, when the settler state presumes to introduce "order" or "rationality" via its assumption of authority, it only amplifies its unevenness, its chaos, and its structural injustices.

So, where do we go from here? There are certainly many directions we could go next. However, something has loomed large in this chapter that I feel hasn't been fully addressed: allotment. While I have obviously referenced allotment, I feel that I have not yet done enough to demonstrate how allotment is the pretext for so much of the settler state's angst regarding marriage and divorce policies. Allotment is such a crucial underlying motivation not only in these files, but in the development and intensification of the Office of Indian Affairs bureaucracy itself. Why else would there be an entire "Probate Division" within it? As I will demonstrate next, "allotmentality" is the linchpin hinging marriage to land under settler colonial policy.

PART II: ALLOTMENTALITY



ARTIST STATEMENT

"Allotmentality," June 2022. The purported geometric perfection of a charcoal rendered allotment plat is betrayed, its wavering lines set askew, creating visual imbalance. The charcoal rendering sits atop a sinister collage of photographed imagery from beneath the veil of smoke and ash that descended over Davis, California during the August and September 2020 wildfires. The title page of the U.S. Supreme Court decision Carney v. Chapman intersects power lines and barbed wire. The false geometry of allotmentality entangles the futures it produces.

PART II: INTRODUCTION

In Part II, "Allotmentality," we are going to build on the ideas and analysis from Part I with a shift in focus. I think of allotmentality as another tool looking at the same types of questions that "bureaucratic kinship" does. Many of the themes from the previous chapters carry over here. The primary goal of the term "allotmentality," when considering the context of settler colonial and Indigenous marriage laws, is to re-center land in the conversation. A central question for Part II is, how can the development, application, and interpretation of marriage laws—especially in the ambiguous cases created by systems of bureaucratic kinship—be used as a tool for land dispossession? I build this term off of "allotment" because this set of policies—aiming for the privatization of land, the incorporation and assimilation of Indigenous peoples, and the genocidal overwriting of Indigenous peoples' traditions, languages, and identities—is central to U.S. settler colonialism.

Part II is divided into two chapters. First, in Chapter 3, "Toward a Theory of Allotmentality," I describe the term "allotmentality," building from existing scholarship in Native American and Indigenous studies. This chapter makes a case for what this term really means and why I think it is a useful tool for analyzing the production and maintenance of categories of marriage law in relation to land. In this chapter, I do an overview of various legislation in federal Indian law that illustrates key features of allotmentality.

After this, in Chapter 4, "Breaking the Fourth Wall of Settler Colonialism: Allotmentality and Resistance in *Carney v. Chapman*," I proceed to do a close reading of the *Carney v. Chapman* court case, concerning land rights to a Chickasaw allotment. As I argue, this case's precedent has been somewhat mischaracterized in the existing literature, and I find the case revealing in terms of how it illustrates bureaucratic kinship, sexual surveillance, and

allotmentality. Along the way, I developed reading practices for this type of source—a courtroom transcript—that I found helpful in working my way toward better understanding the case. This case study is in some ways the core of this entire project, as it brings together a lot of the central ideas I had and shaped my thinking considerably. Even though this case is rarely cited or discussed—as far as I have found—I hope you will find it as illuminating as I have in finding ways to describe and argue against the settler colonial logics at play.

With that, let's get started.

CHAPTER 3: TOWARD A THEORY OF ALLOTMENTALITY

In order to get a better sense of what "allotmentality" is, a natural starting point is to consider the intent, application, and results of the 1887 General Allotment Act (also known as the Dawes Severalty Act, or the Dawes Act). The passage and implementation of this legislation is considered to be pivotal in Indigenous land dispossession under U.S. settler colonialism. As Jean Dennison describes, "The federal policy of allotment officially began in 1887 with the Dawes General Allotment Act, which called for the widespread surveying of native tribal lands. Once the surveys were completed, these lands were parceled out, usually in 160-acre tracts, to individual Indians."[165] This is the core mechanism of allotment—a redefinition and redistribution of reservation lands as individualized parcels. It's worth noting here that, without overly re-summarizing the history of federal Indian policy, reservations and their federal trust status already represent significant acts of colonial violence and Indigenous dispossession.[166]

However, the definitional changes allotment imposes onto reservation lands rendered these lands permeable, in a jurisdictional sense, to further settler invasion and theft. The General Allotment Act aimed to change the terms of federal trust land from being held in trust at a tribal government level to an individual (or nuclear family) level. In addition to the shifting terms of trust status, the architects of the legislation attempted to create an expiration date for trust status altogether. Analyzing this component of the legislation, Katherine Ellinghaus observes, "Allotted

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[165] Jean Dennison, *Colonial Entanglement: Constituting a Twenty-First-Century Osage Nation* (Chapel Hill, NC: University of North Carolina Press, 2012), 22.

[166] For a detailed analysis of varied interpretations of the "trust doctrine," see David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman, OK: University of Oklahoma Press, 2001). Wilkins and Lomawaima criticize a view of the trust doctrine that characterizes the federal government as having essentially no restraints in its authority to manage Native nations, 69. For a discussion of how the federal government's management of the trust doctrine paved the way for exploitative mining on reservations, see Traci Brynne Voyles, *Wastelanding: Legacies of Uranium Mining in Navajo Country* (Minneapolis, MN: University of Minnesota Press, 2015), 77.

land was normally held in trust by the government for a period of twenty-five years in a paternalistic effort to ensure that allottees learned to be self-sufficient farmers before they acquired power to sell, lease, or mortgage their lands."[167] Upon expiration of the twenty-five-year period, the General Allotment Act intended for trust status to transition to fee-simple status. This status not only allowed the land to be sold to non-Natives, but importantly, it also meant that state jurisdiction would apply. This included state property taxes, expenses that might create an immediate financial impetus for allottees to sell their lands, thus further accelerating the transfer of legal title of Indigenous lands to settlers.

Alongside this scheme to vanish Indigenous governance, kinship, and land relations into undifferentiated U.S. citizenship, unallotted lands were deemed "surplus" and were sold to white land prospectors. Thus, reservations that before allotment had a uniform jurisdiction under federal trust status underwent a process that is often described as "checkerboarding." Detailing this phenomenon on Anishinaabe lands, Stephanie Fitzgerald writes, "Trust land lies next to land in fee-simple title; Indian neighbors reside next to non-Indian neighbors; jurisdiction changes from one side of the street to the other. Former Anishinaabe fishing camps, which in turn became part of Native allotments along lakeshores, are now tourist lodges for city fishermen."[168] Fitzgerald's description lends a sense of just how jarring and unnatural the changes in land title instigated by allotment really are; a reimagining of synthetic borders that become more real as they are enforced and policed by settler institutions. This is what I mean when I say that the General Allotment Act renders tribal jurisdiction permeable—by rewriting the terms of land and

[167] Katherine Ellinghaus, "'A Little Home for Myself and Child': The Women of the Quapaw Agency and the Policy of Competency," *Pacific Historical Review* 84, no. 3 (2015): 307-308.

[168] Stephanie J. Fitzgerald, *Native Women and Land: Narratives of Dispossession and Resurgence* (Albuquerque, NM: University of New Mexico Press, 2015), 47.

law, the federal government overwrites Indigenous land with a mix of state, federal, trust, and privately-owned property. It is both conceptual and material.

As a brief description of what the General Allotment Act does, my summary above hopefully gives a sense of how legal notions of land title shifted as a result of the legislation. But it does not really capture the deeper processes of allotment, which does not solely rewrite land title. The assimilative aims of the legislation represent a holistic attack on Indigenous peoples' ways of understanding themselves, knowing, and being.[169] Bundled with these changes in land title are the constitutive logics of land as property, white supremacist notions of racialized citizenship, heteropatriarchy, and its associated taxonomies of gender and sexuality. This is not just allotment, it is *allotmentality*—the cluster of ideologies developed through the process of settler state power focusing itself on the dual tasks of Indigenous land dispossession and self-rationalization.

From Governmentality to Allotmentality

I offer "allotmentality" as a lens to analyze settler colonial relations, building upon a genealogy of Native and Indigenous studies scholarship applying Michel Foucault's notion of "governmentality." NAIS extends analysis of governmentality by centering Indigenous peoples' navigations of past and ongoing settler colonialism in discussions relating to state power, especially around citizenship and property. I find this definition of "governmentality" to be the most relevant starting point for engaging with the term. As Foucault explains, governmentality is:

[169] For an example of an anthology taking a more holistic view of allotment, see Daniel Heath Justice and Jean M. O'Brien, eds., *Allotment Stories: Indigenous Land Relations Under Settler Siege* (Minneapolis, MN: University of Minnesota Press, 2021). In the introduction, editors Justice and O'Brien write, "Fracturing land, families, cultures, and more, these settler colonial projects have aimed to sever the deep reciprocity of people with place, defined through their relationality with plants and animals, the animate and inanimate world," xvii.

> The ensemble formed by the institutions, procedures, analysis and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security."[170]

Foucault is looking at "the state" less as a singular coherent entity, and more as a network of relationships, between people, between institutions, and in particular, as a set of processes or practices. When I read "governmentality," I'm thinking of not just bureaucracies as networks of positions that people have been hired into for a given task, but also as a method of organizing and approaching the world; a way of thinking. This worldview centers the collection and maintenance of data; the creation of abstractions, people into populations and land into property. Populations and property become interchangeable and manageable.

With that sense of governmentality in mind, it is perhaps not surprising that Native and Indigenous studies, with its attendant critiques of settler colonialism and centering of Indigenous perspectives have found utility in this term.[171] One area that the field has focused on is thinking about settler colonial aims to expand jurisdiction and eliminate "difference"—that is, in a sense, to create an expanding political monoculture. For instance, Scott Morgensen notes, "Western law attains universality by containing and eliminating differences in the functional extension of settler colonialism as liberal governmentality."[172] The extension of settler state ways of knowing

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[170] Michel Foucault, "Governmentality," in *The Foucault Effect: Studies in Governmentality*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago, IL: University of Chicago Press, 1991), 102.

[171] See, in the following analysis, Scott Lauria Morgensen, "The Biopolitics of Settler Colonialism: Right Here, Right Now," *Settler Colonial Studies* 1, no. 1 (2011); Mishuana R. Goeman, "Disrupting a Settler-Colonial Grammar of Place: The Visual Memoir of Hulleah Tsinhnahjinnie," in *Theorizing Native Studies*, ed. Audra Simpson and Andrea Smith (Durham, NC: Duke University Press, 2014); and Lanny Thompson, "Governmentality and Cartographies of Colonial Spaces: The 'Progressive Military Map of Porto Rico,' 1908-1914," in *Formations of United States Colonialism*, ed. Alyosha Goldstein (Durham, NC: Duke University Press, 2014); and Thomas Biolsi, *Power and Progress on the Prairie: Governing People on Rosebud Reservation* (Minneapolis, MN: University of Minnesota Press, 2018).

[172] Scott Lauria Morgensen, "The Biopolitics of Settler Colonialism: Right Here, Right Now," *Settler Colonial Studies* 1, no. 1 (2011): 68.

and thinking about the world uses logics of property, "rationality," and taxonomies of race and gender in order to universalize and standardize the scope of the law. In a more specific example, Mishuana Goeman applies the term to federal recognition of Native nations:

> The criteria for federal recognition includes aspects of time and space and particularly focus on key words such as *continuous, historical, distinct,* and *established,* which reoccur over and over in the legal document outlining federal guidelines. It is important to make clear the connection between place and settler logics of governmentality. … The classification of 'Indian' has everything to do with the spatial occupation of land and bodies.[173]

Goeman's emphasis on those four terms—*continuous*, *historical*, *distinct*, and *established*—illustrate a settler governmentality that is focused on limiting the scope of Indigenous peoples' recognizability to fit within the spatial and temporal logics that form the basis of settler state power.

Another scholar, sociologist Lanny Thompson, finds the term "governmentality" useful in the way that it reveals an expanding "notion of the state beyond the narrow confines of the national bureaucratic apparatus to include complex and transnational processes that articulate both nation and colonial state formations, national and colonial elites, and a myriad of empire builders, both public and private, that circulated widely among empires and their colonies."[174] This way of thinking about settler colonial formation de-centers "the settler state" as a monolith and implicates a wider range of entities beyond official government representatives in the production and maintenance of the conditions of ongoing Indigenous dispossession.

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[173] Mishuana R. Goeman, "Disrupting a Settler-Colonial Grammar of Place: The Visual Memoir of Hulleah Tsinhnahjinnie," in *Theorizing Native Studies*, ed. Audra Simpson and Andrea Smith (Durham, NC: Duke University Press, 2014), 236.

[174] Lanny Thompson, "Governmentality and Cartographies of Colonial Spaces: The 'Progressive Military Map of Porto Rico,' 1908-1914," in *Formations of United States Colonialism*, ed. Alyosha Goldstein (Durham, NC: Duke University Press, 2014), 292-293.

Providing another useful perspective on governmentality, Thomas Biolsi observes, "Getting Indians to willingly accept 'industry' and 'thrift' would have more in common with what we call 'consciousness raising,' 'enlightenment,' or simply 'teaching' than with discipline or control, and the teacher-student game—as paternalistic as it obviously can be—is a critical form of governmentality."[175] The paternalism itself—the settler state and its agents as "instructors" (or in the rather grotesque parlance of federal Indian policy, "superintendents,")—is not only a justification for settler colonialism but a key constituent of its power. It's an attempt to incentivize settlers and Indigenous peoples alike to behave in ways that reproduce these logics of property, white supremacy, and heteropatriarchy until they feel natural, becoming the default way to view the world.

So, why shift from "governmentality" to "allotmentality"? It's a small adjustment, I suppose, but what I find compelling about this way of considering the situation is that it places land back at the center of our analysis of settler state power. And further, the mentality and practices of allotting land implicates the logics that feed into such dispossession, redistribution, and redefinition. When I ask a question like, "What is the allotmentality of federal court decisions interpreting marriage policy?" what I'm really getting at is how this nexus of institution (courts), policy (civil contractual marriage), and people (Indigenous peoples surviving and resisting settler colonialism) coalesces to extend the arch-goal of allotment—the transformation of Indigenous lands into settler property.

The Allotmentality of Land Relations

[175] Thomas Biolsi, *Power and Progress on the Prairie: Governing People on Rosebud Reservation* (Minneapolis, MN: University of Minnesota Press, 2018), 45.

Looking a bit deeper into the logics of allotmentality, one core component to understand is how it imposes, and then normalizes, settler colonial ownership of land, by the settler state government itself and private or corporate entities. In *The White Possessive*, Aileen Moreton-Robinson describes how repetitive insistence of settler ownership of land becomes normative over time:

> The state's assertion that it owns the land becomes part of normative behavior, rules of interaction, and social engagement embodied by its citizens. It is most acutely manifested in the form of the state and the judiciary. Thus, possession and virtue form part of the ontological structure of patriarchal white sovereignty that is reinforced by its socio-discursive functioning within society enabled by the body of the state.[176]

It's as though this lie, through insistent administrative force and sheer repetition, gradually gains status as the natural state of things, becoming more difficult to question as it becomes the backdrop for the everyday practice of law.

Extending this analysis, Brenna Bhandar describes the co-constitutive elements of property and race as "racial regimes of ownership."[177] In her analysis:

> Being an owner and having the capacity to appropriate have long been considered prerequisites for attaining the status of the proper subject of modern law, a fully individuated citizen-subject. In the colonies specifically, one had to be in possession of certain properties or traits, determined by racial identity and gender, to own property. In this way, property ownership can also be understood as complicit in fabricating racial difference and gender identities.[178]

What Bhandar articulates here is how the practices of owning property, simultaneously developed alongside white supremacist ideas about who has the capacity to do so, create a model for the type of citizen in the type of state whose relationships to land are normalized. In this way,

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[176] Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis, MN: University of Minnesota Press, 2015), 178.

[177] Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham, NC: Duke University Press, 2018), 2.

[178] Bhandar, *Colonial Lives of Property*, 5.

allotmentality develops as a way of understanding relationships to land that run counter to Indigenous kinships on and with land, which are cast as "nonmodern" or "backward."

A central concept to consider here is conflicting valuations of land. Focusing specifically on federal government agency decisions to approve, sell, or cancel allotments, Beth Rose Middleton Manning draws attention to schemes of valuation, writing, "For the agency and buyers competing for allotments, as well as the allottees endeavoring to glean some benefit from these parcels, the valuation of land was linked to its accessibility—that is, both its location (its proximity to processers and markets) and the means of managers to extract its value."[179] Middleton Manning describes how settler colonial valuation of land varied across time not only according to market logics (of, say, timber prices), but how that valuation systemically depended upon the race and identity of the people involved. As she explains, "When lands were surveyed, if they were found more valuable for timber or water resources, they risked cancellation. However, when appraised for sale, their value was often understated in order to facilitate transfer to non-Indian companies and individuals."[180] This implicates Bhandar's idea of "racial regimes of ownership," as we see the bureaucratic logic of overvaluation to cancel allotments held in trust for Indigenous allottees renders the land more permeable to settler extractions, and the undervaluation to sell allotments accomplishes the same ends. That administrative valuation gap exemplifies allotmentality; the notion that settler state agencies are empowered to interpret ostensibly rational market trends for Indigenous peoples' own good. It serves both as the *means* and the *justification* for dispossession.

[179] Beth Rose Middleton Manning, *Upstream: Trust Lands and Power on the Feather River* (Tucson, AZ: University of Arizona Press, 2018), 112.

[180] Middleton Manning, *Upstream*, 98.

This analysis is important as well for how it implicates tools of settler colonial land surveillance—cartography, mapping, surveys—as schemes for reshaping the meaning of land. Describing the role of cartography in settler colonialism, Lanny Thompson writes,

> Cartography demarcates and defines territories and their administrative units; it delineates populations and describes their distribution in space; it provides inventories of demographic, economic, and natural resources. Maps also provide the basic grid for other techniques of knowledge production such as the national census and industrial surveys. In addition to the demarcation of national territories, cartography has been central in the division of the globe into colonies and the establishment of imperial control.[181]

It's abundantly clear that land surveillance is a key process of settler colonial invasion. But specifically, this type of mapping encodes ideas about how land should be valued and abstracted, with a view toward property ownership and resource extraction. Further detailing this phenomenon, Thomas Biolsi remarks:

> The new space of the grid was "abstract, homogenous, and universal," and provided a practical, measurable, linear, simplifying overlay for the commodification of land and the geographic extension of private property and capitalism into newly cleansed "virgin" territories. It also enabled the penetration of the state's capacity for surveillance and regulation of land titling, assessment and taxation, and other state projects.[182]

So it is not just the maps themselves, but the ways of thinking about land and clustered institutions and ideologies—the allotmentality—that translates land into settler property.

This is part of what Mishuana Goeman describes as a "settler-colonial grammar of place," a spatialization built upon "repetitive practices of everyday life that give settler place meaning and structure. Yet space is fluid, and it is only in the constant retelling and reformulating of colonial narratives that space becomes place as it is given structure and meaning."[183] This notion of repetition, essentially a saturation of settler narratives over time,

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[181] Thompson, "Governmentality and Cartographies of Colonial Spaces," 295.

[182] Biolsi, *Power and Progress on the Prairie,* 11.

[183] Goeman, "Disrupting a Settler-Colonial Grammar of Place," 236-237.

signals back to my earlier discussion of Moreton-Robinson's description of settler possession. Allotmentality, and indeed, allotment itself, is not descriptive of a moment, but rather ongoing, repetitive practices. These are practices that maintain the state of Indigenous dispossession.

Hopefully, at this point, it is clear that the imposition and maintenance of settler colonial relations to land is a fundamental process of allotment. These processes are complicated, they're entangled, and settler institutions have put in a lot of sociopolitical work to occlude them—but at some point, doesn't it feel like trying to name some indescribable leviathan, as though by finding the exact words of some incantation, it might finally be revealed, understood, and ended? It's here where I want to shift the frame a bit. Just a little nudge, to show another important angle on allotmentality.

While damaging, allotmentality is not all-powerful, nor is it ever able to actually accomplish the future it imagines. Alongside these technical descriptions of what settler colonialism is and does, it's important to emphasize the resilience of Indigenous land narratives and futurities. Stephanie Fitzgerald observes, "There is a trajectory, then, of land narratives that are continuously created and re-created, from creation stories to contemporary literature. Taken together, they map out the continuance of Native peoples and nations in the face of continuing land loss and dispossession."[184] Despite the replicative power of settler colonial methods of bureaucratizing and deadening land, this monocultural narrative is unable to crowd out Indigenous narrations, that in Fitzgerald's description, create and re-create land as Indigenous relations.

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[184] Fitzgerald, *Native Women and Land*, 16.

Describing responses to attempts to allot Nez Perce lands, Nicole Tonkovich writes, "Those who administered the policy followed an abstract theoretical plan. They quickly found themselves to be in active negotiation with Nez Perces, whose interventions forced them to modify their plans and the policy itself in ways that would recognize specific details of Nez Perce history, territory, and culture."[185] Settler abstractions about land collide with Indigenous realities about land; the abstraction essentially fails, because land and its attendant narratives and kinships cannot truly be condensed into interchangeable imagined units the way that allotmentality intends.

But these important observations about how Indigenous land narratives can limit and supersede allotmentality can be read alongside another way of considering the situation. Mark Rifkin describes the process of allotment, writing, "Rather than simply negating existing native kinship networks, political structures, and forms of land tenure, allotment reorders the field of possibility for the articulation and experience of native sociality, giving rise to new modes of representation and association that in various ways follow, mediate, and oppose the terms of the law."[186] In this formulation, even though the abstract "ideal" of allotmentality is not reached, its power lies in its ability to alter the possibilities for the future. In a similar vein, Bhandar writes, "Countermovements of representation and use of First Nations land exist (as they always have) in relation to and tension with a spatial order of property law that remains fundamentally bound and shaped by capitalist, liberal, and/or neoliberal political-economic structures."[187] I find myself

[185] Nicole Tonkovich, *The Allotment Plot: Alice C. Fletcher, E. Jane Gay, and Nez Perce Survivance* (Lincoln, NE: University of Nebraska Press, 2012), 6.

[186] Mark Rifkin, *When Did Indians Become Straight?: Kinship, the History of Sexuality, and Native Sovereignty* (New York, NY: Oxford University Press, 2011), 182.

[187] Bhandar, *Colonial Lives of Property*, 184.

wondering here how to make sense of this. Do settler logics "fundamentally bind" space? Don't Indigenous contestations of allotmentality prove that it's not truly bound? I leave that as one of the tensions that may not be resolvable—the tension between the ongoing political potency of allotmentality as settler notions of land continue in their dire enforcement, and the idea that Indigenous peoples' presence and futurities prove allotmentality's vulnerability and impermanence.

The Allotmentality of Marriage and Sexual Surveillance

Key to the process of dividing collectively held land is the redefinition of terms of kinship used to redistribute land, the terms of which extend settler notions of family, marriage, and heteropatriarchy into the management of land as property. Describing the General Allotment Act in terms of its differential gendered effects, Cathleen Cahill describes how allotment specifically disenfranchised married Native women, noting that:

> Each "head of a family" received a quarter of a section, or 160 acres, the same amount white settlers could claim under the Homestead Act. Single men and women over the age of eighteen received one-eighth of a section, or eighty acres, as did each orphan under eighteen years of age. … Married women received no land; it was assumed that a married woman would share in her husband's property and that he would provide for her.[188]

In reconfiguring relationships to land under allotmentality, settlers brought legal mechanics to bear that assumed a patriarchal notion of property and citizenship—the idea that property flowed specifically through married men, thereby disenfranchising women. Cahill further describes how the inheritance laws of the state—in the sense of a state government like Kansas—would apply on allotment lands, as opposed to federal or tribal laws.[189] Thus, heteropatriarchy as a key force

[188] Cathleen D. Cahill, *Federal Fathers and Mothers: A Social History of the United States Indian Service, 1869-1933* (Chapel Hill, NC: University of North Carolina Press, 2011), 41.

[189] Cahill, *Federal Fathers and Mothers,* 41.

of allotmentality enters at two major points within the General Allotment Act—the initial shattering of collectively held land title into portions according to a settler taxonomy of gender and kinship relations, but then again in probate cases, precipitating intergenerational transfer along the lines of state law embedded with the same gender-property matrix of legal marriage.

Allotment is not then a singular moment of transition between kinship systems, but rather, allotmentality requires the ongoing maintenance of settler bureaucratic kinship through surveillance of Indigenous peoples' sexuality and the associated coercive measures to focus the power of the settler state violence onto Indigenous bodies, traditions, and lands. Describing this aspect of allotment, Rose Stremlau writes:

> Allotment's proponents wanted to dismantle tribal land bases by dismembering extended American Indian families, and altering gender roles and sexual mores were central components in the process. Assimilationists documented and filed, chastised and criminalized, passed regulations and heard cases about Indian sexuality with astonishing vigor. The investigative component of agents' work illuminates an intent to regulate the sexuality of allottees to facilitate the management of their property.[190]

The obsessive compilation of information about Indigenous families and sexual relationships by, for example, the Dawes Commission, along with the associated carceral logics of illicit sexuality, is a process that is key in constituting allotmentality. That is to say, allotment and its configurations of settler state, corporate, and institutional power is not just about land—though land is still central, of course—but about asserting heteropatriarchy as a norm for person-to-person relations on that land to maintain its status as property.

An important intervention Stremlau makes, especially discussing the ideological connections between allotment and Jim Crow laws in the South, is the way that the racialized regulation of sexuality is central to both. She notes:

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[190] Rose Stremlau, "Allotment, Jim Crow, and the State: Reconceptualizing the Privatization of Land, the Segregation of Bodies, and the Politicization of Sexuality in the Native South," *Native South* 10, no. 1 (2017): 61.

> The mere fact of their [Native southerners'] existence threatened the purity of the white race, not to mention the stability of a nation-state rooted in whiteness. Government officials thus recorded their interpretations of Native peoples' bodies, behavior, and cultures, including sexuality, which created a façade obscuring normalcy and inventing categories of deviance.[191]

Under this at least facially contradictory logic, settler hunger for Indigenous lands under allotmentality requires the imposition of settler modes of kinship, but white supremacist anxiety about racial mixture casts interracial relationships as "deviant."

This is why it is so important to look at marriage law not just at the moment of issuing a license—where white supremacist confabulations about deviant sexuality might result in condemnation and criminalization of interracial relationships—but also at points of divorce and probate where marriage recognition or non-recognition can be applied by courts or federal agents to cleave land rights from Indigenous peoples. In this sense, I'd argue that, similarly to my above discussion of Beth Rose Middleton Manning's analysis regarding how the over or undervaluation according to whatever settler state or corporate interest was served resulted in the issuance or cancelation of allotment patents, a marriage license's recognition or non-recognition follows a similar trajectory of situational settler valuation.

Illustrating the connections between allotment and marriage under what I describe as allotmentality, Antonina Vaznelis characterizes Indian probate cases involving allotment as a "jurisdictional maze."[192] Detailing the possibility that a single probate might require the intervention of tribal, state, *and* federal courts under the settler colonial legal system, Vaznelis writes:

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[191] Stremlau, "Allotment, Jim Crow, and the State," 64.

[192] Antonina Vaznelis, "Probating Indian Estates: Conqueror's Court Versus Decedent Intent" *American Indian Law Review* 10, no. 2 (1982): 308.

> Today [at time of Vaznelis's writing, "today" is 1982] when an Indian decedent owns personal and/or real property, located both on and off the reservation, it is possible for three separate forums to claim probate jurisdiction. The administrative law judge exercises exclusive jurisdiction over all property held in trust by the United States. The state asserts jurisdiction over all real property located off the reservation. State courts have also asserted at least concurrent jurisdiction over personal property located off the reservation or on a reservation other than the one of which decedent was a member. The tribal court may claim jurisdiction over all nontrust property, real and personal, owned by members within the reservation. ….. Thus, one estate may be affected by a hodgepodge of federal, state, and tribal court procedures and laws.[193]

Though Vaznelis published this guide for attorneys working with tribal members on probate cases in 1982, outdating some of the specifics that have been superseded by future legislation, her work is noteworthy in the way that it lays out the inter-sovereign conflicts around Indigenous peoples' land that is perhaps a fundamental characteristic of allotmentality. Because tribal, state, and federal courts may all weigh in on the validity of the same marriages in their determinations of property transfer, there is a lot of jurisdictional leeway for settler actors to tip the scales of interpretation of a marriage license on a case-by-case basis to further Indigenous land dispossession.

Describing this phenomenon in a 1991 law review article, S. Gail Gunning observes that "The strands of tribal, state, federal, and concurrent jurisdiction interlace with ownership of restricted and unrestricted land, and again with tribal membership, status, testacy, and intestacy. Through it all run the variegated ribbons of ever-changing policy."[194] This stratification of jurisdiction has become a central feature of allotmentality.

It's worth pointing out here that this legal complexity is an artificial and arbitrary imposition—Indigenous peoples could much more be easily left to make their own decisions

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[193] Vaznelis, "Probating Indian Estates," 299.

[194] S. Gail Gunning, "Indian Probate: Can an Adopted Indian Child Receive Trust Property as an 'Heir of the Body' Under an Indian Will?" *American Indian Law Review* 16, no. 2 (1991): 559.

about their land without reference to overlapping settler courts and agencies. But, this complexity itself serves a key function in land dispossession. Settler governance generates these arcane disputes about technical details related to marriage recognition, which then settler colonial agents swoop in to adjudicate as "competent" jurisdictions. By pulling together threads of precedent from this tangled mess in a given court case, judges have significant leeway to determination the recognition or nonrecognition of a marriage license to benefit whatever side their biases might lead them to think is the "commonsense" resolution. And if Indigenous peoples want to appeal these decisions, more years of expensive litigation await, further entwining the fate of the land in settler governance.

Under allotmentality, Indigenous marriages, kinship, and sexuality are framed as tenuous, fragile, or even criminal as needed to pursue a program of land divestment. Contemplating this legal ambiguity at the end of her article, Gunning writes:

> The inconsistencies in Indian probate constrict the process. The inconsistencies further raise the question of whether Indian probate may be a dispensation of injustice. Why should a person write a 'will' and yet find its terms subject to disapproval by those who are unfamiliar with the testator, his ways, and the objects of his bounty? Why should a tribe, which takes responsibility for Indian land during a tribe member's life, see that jurisdiction dissolve with the sale of the land or with the tribe member's demise? Why should the Indian landowner, whether an individual or a tribe, be 'protected' out of the full rights accorded other citizens of the United States? Why should the original inhabitants and lovers of the land be forced to participate in the determination of its future 'ownership' and yet be limited in doing so?[195]

As this series of incisive questions illustrates, the complexity of allotment probates is an unnecessary imposition, and the inconsistencies are really just vehicles for settler colonial claims to Indigenous lands to persist. It's akin to a sieve, where Indigenous land only has to pass through one of many possible gaps left by settler jurisprudence to be have Indigenous title

[195] Gunning, "Indian Probate," 572.

severed, while the defenders of that land must work simultaneously to plug every leak and dismantle the sieve itself.

A Legislative Genealogy of Allotmentality

Now that we've taken a closer look at some of the constitutive logics of allotmentality, I think it is worth shifting our attention beyond the General Allotment Act to the longer trajectory of allotment-adjacent legislation. Passage of the General Allotment Act is timestamped as a critical "moment" of federal Indian policy that has received a huge amount of critical attention—frankly, as a result of how categorically destructive it has been in terms of the scope of alienation and dispossession of Indigenous homelands. However, temporally affixing allotment to 1887 misses the fact that the process of updating, amending, repealing, and adding to previous legislation is perhaps even more essential to the everyday churn of settler colonial governance. That is to say, viewing the allotment process as constantly negotiated, a seething web of rules under constant adjustment and interpretation, is critical to understanding the effects of both Indigenous resistances to allotment and the maintenance of settler colonial land relations.

Describing federal Indian law from a wide view, David Wilkins and K. Tsianina Lomawaima write:

> Inconstancy, indeterminacy, and variability characterize the uneven ground of federal Indian policy. The course of Indian policy has not proceeded along some smooth racetrack, but has pitched and bumped over the rutted tracks that the conflicting interests of tribes, states, federal agencies, railroads, energy and industrial barons, homesteaders, tourists, and casual visitors have carved across Indian Country. Of course, there is another meaning of "uneven ground" that also applies. Relations of power among native and non-native groups have shifted over time as well, favoring one, then another[196].

[196] David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman, OK: University of Oklahoma Press, 2001), 6-7.

For Wilkins and Lomawaima, the "uneven ground" metaphor for federal-tribal-state inter-sovereign relations performs a double representation of the constantly shifting rules and the power imbalances that result. Drawing attention to the "inconstancy, indeterminacy, and variability" itself as a logic and mechanism of dispossession is essential.

Following a similar thread, Jean Dennison applies her own lens to describing this aspect of settler colonialism for Osage people. She observes:

> the term "contradiction" itself does not quite do justice to the way in which various forces are entwined with Osage life. Such complexity can be seen not only across Indian Country but throughout the world and must be understood as a fundamental part of how power dynamics function in reality. I utilize the term "entanglement" to highlight these moments of complexity and follow how they serve to at times bolster and at other times hinder national capacities.[197]

Dennison's "entanglement" framework highlights the ways that engagement with this regime of law—even to resist, contradict, and manipulate it from Indigenous standpoints—cannot be posed in a simple, binaristic way considering the interlocking or, well, *entangled* interests and ideologies involved.

Taking these ideas together, both the idea that settler colonial law operates on and as uneven ground, and that Indigenous polities become entangled in these power relations, I think it is worth giving specific attention to allotmentality as amending, updating, and even repealing legislation. My goal in this section is not to provide an exhaustive account of every piece of legislation even tangentially connected to allotment; I'm sure you can understand that composing or poring over a thousand-page grimoire of property law wouldn't be the best use of either of our time and energy. Rather, what I hope you will get out of this is the experience of a brief, curated

[197] Dennison, *Colonial Entanglement,* 7.

tour through the legislative history, attentive to the logics of allotmentality as they cohere around different questions and contexts.

1893-1908, Dawes Commission. A first critical amendment to allotment to consider is the establishment of the Dawes Commission in 1893. Originally exempted from the General Allotment Act, the Five Southeastern Tribes in Indian Territory came under threat of allotment. As Katherine Ellinghaus describes, "settler pressure to open up even more Indian Territory lands prompted the government to create the Dawes Commission and charge it with the task of convincing the Five Tribes to submit to the allotment process."[198] (24). This notion of consent, however, proved illusory, as Congress later passed the 1898 Curtis Act imposing allotment on these nations.[199]

The Dawes Commission had, at its core, the goal of surveilling Indian Territory, recording a census of tribal members, and forcibly rewriting the legal definitions of property in order to pursue land dispossession and the dismantling of tribal sovereignty. In her account of Chickasaw responses to the Dawes Commission, Wendy St. Jean writes,

> The commission's mission was to divide the Five Tribes' lands into plots that were to be divided among tribal members. As part of this process, the commission either accepted or rejected applicants for tribal membership based on its requirements, which differed from the Five Tribes' rules. For example, the Chickasaw legislature had ruled that "a white man who secured citizenship through marriage with an Indian would lose such citizenship if the Indian died and the white citizen later married a white person." The commission, however, refused to accept this rule, holding that it was contrary to treaty stipulations which held that all citizens should have equal rights.[200]

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[198] Katherine Ellinghaus, *Blood Will Tell: Native Americans and Assimilation Policy* (Lincoln, NE: University of Nebraska Press, 2017), 24.

[199] Ellinghaus, *Blood Will Tell*, 25.

[200] Wendy St. Jean, *Remaining Chickasaw in Indian Territory, 1830s-1907* (Tuscaloosa, AL: University of Alabama Press, 2011), 87.

St. Jean is particularly attentive in her analysis to way that the production of the Dawes rolls skewed as much allotment land into white hands as possible. As she notes, Chickasaw marriage and citizenship laws, which had been carefully written to balance the influence of intermarried white members, were effectively ignored. We can see here that the Dawes Commission suddenly becomes very interested in upholding treaty clauses when it would allow for greater white access to Chickasaw lands. This selective and malicious enforcement of the law is where allotmentality lurks—the fact that the commission has assumed interpretative authority over treaty rights against the intent and goals of the Chickasaw Nation is illustrative of how enforcement gaps can be deployed for the purposes of land dispossession.

In response, the Chickasaw Nation changed its own marriage laws, attempting to constrain this newly empowered vehicle for land theft via marriage. The Nation "raised the marriage licenses fee to exorbitant rates. In 1898 the Chickasaw Council demanded $600 for a marriage license. The next year the legislature raised the fee to $1,000, with the additional stringent requirement of ten witnesses to the good moral character of the applicant."[201] The escalation of fees toward absurd extremes was meant to stem the flood of fraudulent and predatory marriages aimed at transferring land title to invading settlers. This also illustrates the power inherent in reconfiguring rules and regulations as part of a strategy of resistance to allotment, even as the shifting legal conditions are central to allotmentality.

The commission itself engaged in a high degree of invasive surveillances of Indigenous peoples' lands and sexuality, using interviews to record and develop data in order to manifest this new regime of property tenure. Describing this interview process in detail, Rose Stremlau writes:

[201] St. Jean, *Remaining Chickasaw*, 88.

> Emboldened by legal and economic justifications for intrusiveness, commissioners ran roughshod over Native peoples' expectation that government would respect the privacy of individuals regarding sexual matters. During their enrollment interviews, Native people answered questions about their personal lives rather than their property claims. Commissioners asked when and how couples were married and whether those individuals had been married previously.[202]

Even on the "small" scale of personal interviews, the commissioners collected information, often inconsistently and inaccurately, in a way that would create data to undermine future claims to allotments. Allotmentality is not just in the design of rules, but in their execution and in the ambiguity that supposedly precise legislation on the topic of Indigenous land title inevitably generates upon contact with material conditions and in the face of Indigenous ways of knowing and understanding land relations.

At the conclusion of the Dawes Commission's work, Congress attempted to modify the rules once again to further the cause of dispossession, as Ellinghaus notes, "In 1908 Congress closed the rolls of the Five Tribes … Closing the rolls also instantly deprived the next generation of Five Tribes Indians from citizenship in the Five Tribes. … Whether this was the result of a notion that allotment had done the job of assimilation in only one generation, or simply an administrative washing or hands, is not clear."[203] Under allotmentality, settler legislation often attempts to set an endpoint for Indigenous land claims—this is core to settler colonial governance as it attempts to close out Indigeneity in order to justify permanent settler occupation. It's important to observe that these attempts at closure are never truly successful, because Indigenous peoples cannot be disappeared by legal sleight-of-hand, yet these artificial deadlines are later used to cast doubt upon future Indigenous claims.

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[202] Stremlau, "Allotment, Jim Crow, and the State," 62.

[203] Ellinghaus, *Blood Will Tell*, 42,

1906, Burke Act. Another key piece of legislation embodying allotmentality is the Burke Act, which created a legal mechanism for the Department of the Interior to determine the "competence" of allottees to hold title to land. As Cathleen Cahill observes:

> the secretary [of the Interior] could either extend the trust period or end it early at his discretion. As it was practiced, such decisions were often based on the racial identity of the allottee, and officials determined Native people of mixed heritage to be "competent" more often than those who were "full-blooded." The provisions of the Burke Act would thus simultaneously reduce the number of Indian wards for whom the government was responsible and extend the length of wardship for others, therefore prolonging the need for the Indian Office.[204]

Cahill's description of competence makes clear how white supremacist ideas about civilization were enfolded into these decisions determining the legal status of the land, and furthermore that it had the dual effect of ending the legal differentiation of many allottees while expanding the duration of the OIA bureaucracy. It might seem counter-intuitive, but both of these logics—the alienation of Indigenous peoples from their land, and the increased surveillance and maintenance of trust lands to allow for resource extraction both follow a logic of allotmentality.

In her analysis of competency decisions, Katherine Ellinghaus observes both that "competency" designations were sites of dispossession as well as sites of Indigenous women's tactical navigations of byzantine settler jurisprudence. She writes:

> The process of declaring an Indian competent, therefore, was one complicated by many biological, cultural, and financial factors. These included the following: individual government officials' opinions about what qualities indicated competency and acculturation, how these opinions were affected by gender and racial background, whether the land in question was valuable and therefore more likely to be the target of predatory white people, and pressure from the white population to declare more Indians competent so as to open up lands for sale, lease, or mortgage.[205]

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[204] Cahill, *Federal Fathers and Mothers,* 228-229.

[205] Ellinghaus, "'A Little Home for Myself and Child,'" 313.

Ellinghaus goes on to describe the ways in which some Indigenous women strategically framed themselves in ways that were favorable to either gain or avoid being declared "competent" depending on their interests in the situation.[206] This notion of "competence" is a legal mechanism crafted under allotmentality—it provides the Department of the Interior the means by which they could use whatever patriarchal and white supremacist logic best suited settler aims on a case-by-case basis. I feel that despite Ellinghaus's valuable contribution in highlighting cases where Indigenous women successfully navigated these rules, it's still important to center the role of "competence" as a tool that nevertheless primarily aided in the processes of dispossession.While more certainly could be said—and has been—about the role of "competence," I hope it is evident that this amendment to the allotment process allows for further intervention by settler state bureaucracy around Indigenous lands, proliferating more policies that the state then interprets to further obscure Indigenous land narratives within this regulatory miasma.

1906, Alaska Allotment Act. The week after Congress passed the Burke Act, it began authorizing the issuance of allotments "of nonmineral land in the district of Alaska to any Indian or Eskimo [*sic*] of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. While, as I will discuss later, allotments in Alaska have occurred alongside the transformative 1971 Alaska Native Claims Settlement Act, I wanted to point out the presence of this legislation in the midst of an intensive focus on allotment.

A few key logics of allotmentality stand out to me here. The insistence upon "nonmineral land" illustrates settler mentality around resource extraction; a desire to move Indigenous

[206] Ellinghaus, "'A Little Home for Myself and Child,'" 330.

peoples off of land valued for the purpose of mining, before that land is even incorporated as a territory, let alone as a U.S. state. There's also the extension of the notion of a "head of household," perpetuating the imposition of heteropatriarchal nuclear family as a technology of land dispossession. And, most ominously, the declaration that Alaska Native peoples would have this land "in perpetuity" "until otherwise provided by Congress." Curiously enough, "perpetuity" apparently does not have the same definition within the halls of Congress as it does beyond them. And that is perhaps the most honest aspect of this legislation: the nod to future repeals, amendments, and adjustments to meet the evolving demands of allotmentality.

In a detailed study of trust lands in Alaska, Kyle Scherer describes the complicated contestation of the trust status of Alaska Native lands by the Department of Interior as the Alaska Allotment Act interacted with ANCSA.[207] For one such parcel, a cannery in Angoon, two Tlingit families contested the status of this land being held in trust by the federal government for the federally recognized Angoon Community Association, using a claim filed in 1909 under the Alaska Allotment Act.[208] The status of these allotment claims were canceled and reinstated several times in the ensuing decades, with Solicitors in the Department of the Interior seemingly unable to determine how to interpret the paperwork, some of which could not even be located within federal archives by the officials researching the case.[209] Scherer remarks that the history of parcels like this "reflects the frenetic nature of federal Indian policy in Alaska."[210]

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[207] Kyle E. Scherer, "Alaska's Tribal Trust Lands: A Forgotten History," *Alaska Law Review* 38, no. 1 (2021): 37-64.

[208] Scherer, "Alaska's Tribal Trust Lands," 56.

[209] Scherer, "Alaska's Tribal Trust Lands," 59.

[210] Scherer, "Alaska's Tribal Trust Lands," 62.

Recently, in 2019, the Department of the Interior began implementing a program issuing new land allotments to Alaska Native Vietnam war veterans.[211] It is clear that allotment is continuing to add another layer of administrative complexity to Alaska Native land, perhaps providing opportunities for Alaska Native peoples to shape their relationships to these lands, but also implicating the intensive allotmentality of bureaucratic administration in the process.

1906, Act of June 21. This further legislation, which apparently no representative or senator bothered to have named after themselves, passed the month after the Burke Act and Alaska Allotment Act. The Act of June 21 made an important intervention by extending the twenty-five-year expiration date for trust patents indefinitely.[212] This legislation continues the ambiguities of allotment, by simultaneously repealing a previous rule and extending the scope of that same rule. The point of the twenty-five-year expiration period was to create an endpoint for Indian land to be held in trust, reverting it to fee-simple property afterwards that was then interchangeable as undifferentiated private property.

In that light, the indefinite extension of trust status is an acknowledgment of Indigenous resistance against having the legal status of land set to expire. However, as Kristin Ruppel notes, "the trusteeship of the United States over Indian land allotments quickly became a permanent feature of the federal-Indian relationship, writing nineteenth-century notions of inherent racial 'difference' into the structures and superstructure of federal Indian law."[213] The June 1906 amendments to allotment legislation, by extending trust status indefinitely, aim for another

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[211] Joaqlin Estus, "Interior Opens Allotments for Alaska Native Vietnam Vets," Indian Country Today, April 26, 2022, https://indiancountrytoday.com/news/interior-opens-allotments-for-alaska-native-vietnam-vets.

[212] Kristin T. Ruppel, *Unearthing Indian Land: Living with the Legacies of Allotment* (Tucson, AZ: University of Arizona Press, 2008), 29.

[213] Ruppel, *Unearthing Indian Land*, 5.

branch of settler futurity by raising the prospect of perpetual intervention by the Department of the Interior into Indigenous peoples' decisions about land. While trust status has its benefits in terms of continued recognition and the preemption of state laws, the downside is continued federal mismanagement and paternalistic insistence upon what form of social and economic relations might occur with said land.[214] Even more significantly, despite the white supremacist and heteropatriarchal logics encoded into trust status, the fact remains that for many allottees and their descendants, allotment lands are storied sites of survival. Writing for the introduction to their anthology *Allotment Stories: Indigenous Land Relations Under Settler Siege*, Daniel Heath Justice and Jean M. O'Brien remark, "It is vital to remember that, for all that Indigenous communities have struggled to adapt to ever-mutating colonial pressures to surrender collective commitments and relations to land and multispecies kin, they have consistently done so, and often in surprising and unexpected ways."[215] Despite the ideological and material dispossessions under allotmentality, Indigenous peoples continue to relate to land in ways antithetical to settler desire. Paper, after all, is still just paper.

In terms of allotmentality, then, legislation like this shows that even admissions to the inefficacy of a previous rule (in this case, the twenty-five-year expiration period) is easily paired with a new attempt at further surveillance and intervention, shifting the goalposts to ensure that settler colonial governance will continue in an adjusted format. These attempts can be

[214] For instance, David E. Wilkins and K. Tsianina Lomawaima, in their extensive discussion of the various interpretations of the federal trust status, detail the trust doctrine from conflicting federal perspectives (that argue on one hand that there are essentially no limits on federal power over Native nations, and on the other that there is an enforceable legal obligation for the U.S. to use its power to actually benefit Indigenous interests), but also, importantly, intervene by describing Cherokee Nation perspectives on the trust doctrine to make a point about how the trust doctrine requires Native nations' own interpretations to be centered, *Uneven Ground,* 80.

[215] Daniel Heath Justice and Jean M. O'Brien, eds., *Allotment Stories: Indigenous Land Relations Under Settler Siege* (Minneapolis, MN: University of Minnesota Press, 2021), xxvi.

productively read as evidence of Indigenous peoples' successes in maintaining land relations that exceed and defy settler colonial futurity, and creating new ways of subverting settler authority. Though dispossession continues, the constant revision of rules and procedures reveals that Indigenous peoples' creative applications and refusals of these terms frustrate attempts to place an endpoint on Indigenous political and bodily autonomy.

1934, Indian Reorganization Act. The Indian Reorganization Act (IRA), one of the most widely discussed individual pieces of legislation in federal Indian law, is often periodized as the "end" of the allotment period. This mischaracterization of the legislation is undoubtedly the result of the legislation's claim "That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian."[216] This can be read as a repudiation of allotment policy, at the very least that no further allotments shall be issued. But, as many writers in Native and Indigenous Studies have observed, the IRA does not functionally "end" allotment in any meaningful sense, and instead extends the logics of allotment.

This is well put by Stephanie Fitzgerald in her discussion of Louise Erdrich's works in what Fitzgerald terms a "postallotment" reservation. As Fitzgerald explains, "By using the term 'postallotment,' I mean to show that the dispossession and alienation of Native land resulting from allotment in severalty are part of an ongoing process, one that did not abruptly come to an end in 1934 with the passage of the Indian Reorganization Act. Rather, it reaches both backward and forward through time, up to the present day."[217] The complex web of bureaucracy and regulations around allotment lands represent ongoing dispossession, so Fitzgerald's emphasis on

[216] *Indian Reorganization Act of 1934*, Public Law 73-383, *U.S. Statutes at Large* 48 (1934), 984.

[217] Fitzgerald, *Native Women and Land*, 47.

characterizing reservation lands as "postallotment" suggests that allotment is a significant enough settler colonial intervention into Indigenous land tenure as to mark the condition that still has yet to be healed from, regardless of what the printed text of the IRA states.

If we ask ourselves what the "allotmentality" of the legislation that claims to end allotment is, we might start to see how allotmentality survives in ostensibly "non-allotment" legislation. Describing the effects of the IRA, Kristin Ruppel suggests that "the IRA formally put an end to allotment but failed to contend with the dynamics of fractionated ownership that post-allotment inheritance provisions had generated. Consequently, those lands remaining in the federal trust have required increasingly intensive 'management' by agency officials."[218] Despite the fact that the IRA signaled a return to a period of increased recognition of tribal governments, the terms of that recognition still rest on federal mismanagement of trust lands, only now via an even more expansive and surveillant bureaucracy.

Mark Rifkin finds this discrepancy between increased recognition of tribes on the governmental scale and the continuation of the individualistic logic of allotments as "not simply an inconsistency but instead itself is generative, purposively regulating the kinds of native 'self'-hood that will be seen as viable by the U.S. government."[219] The promulgation of the "self-government" ideology of the IRA attempts to create an analogy between tribal governments and subdivisions of the settler state by emphasizing the adoption of tribal constitutions resembling the format of the U.S. Constitution. And further, by including Native citizens who still possess

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[218] Ruppel, *Unearthing Indian Land*, 31.

[219] Rifkin, *When Did Indians Become Straight?*, 183.

individualized allotments within tribal jurisdiction, this form of recognition models allotmental land relations while still retained federal intervention and management of those lands.

Taking another approach in describing the effects of the IRA, Thomas Biolsi writes:

> It halted the process of assimilating reservation lands into the homogenizing, national grid of state and local government and guaranteed a continuing, direct relationship between the tribe and the federal government, rather than aiming at an eventual off-loading of responsibility for Indians to state and local government, as had been the stated goal in the regime of sod-busting liberalism.[220]

What can we make of this form of recognition as an aspect of allotmentality? In order to continue settler colonial governance, this recognition is both an acknowledgment of the failures of allotment to "disappear" Indigenous nations into undifferentiated individual U.S. citizenship, and an incorporation of that recognition as part of a strategy to continue federal surveillance of Indigenous lands and bodies to maintain dispossession.

1971, Alaska Native Claims Settlement Act. The 1971 Alaska Native Claims Settlement Act (ANCSA) marked an attempt by the U.S. government to depart from the nation-to-nation model of relations and the associated legal regime around trust status. Instead of recognizing Alaska Native peoples as nations or tribes on a large scale—whether or not either of these frameworks would even be an appropriate way of conceptualizing Alaska Native sovereignties—the Act generated a new system of corporate governance, recognizing thirteen regional for-profit Alaska Native corporations and "approximately 250 corporations representing specific village sites throughout Alaska."[221] This legislation purports to sidestep the problem of

[220] Biolsi, *Power and Progress on the Prairie,* 115-116.

[221] Thomas Michael Swensen, "Of Subjection and Sovereignty: Alaska Native Corporations and Tribal Governments in the Twenty-First Century," *Wicazo Sa Review* 30, no. 1 (2015): 104.

federal trust status by instead transferring land in fee-simple status to Alaska Native corporations.[222]

Yet, as should become abundantly clear shortly, ANCSA is once again an extension of, rather than a departure from, allotmentality. As Eve Tuck has noted, the underlying logics of ANCSA represent what she terms "several forms of ideological invasion on Alaska Native life and land"[223] The ideological underpinnings of ANCSA continue both the assimilationist mindset of U.S. settler colonialism and the attempted transformation of land into extractable, interchangeable property. By reframing Alaska Native relations to land as a corporate-private-property relationship, ANCSA emphasizes Alaska as a site for development and resource extraction. At the same time, though, ANCSA also illustrates Alaska Native negotiations and creative resistance in shaping this legislation to "sustain Alaska Native life" and "protect[] land and people."[224] Describing a dilemma of development, Thomas Swensen writes, "Native corporations retain massive landholdings that sit untaxed unless developed in some manner. Even if they allow the lands to stay undeveloped, the Native corporations maintain and manage them at a cost."[225] Refusing to develop land under extractive terms is not a cost neutral decision, but choosing to develop incurs not only the environmental and financial risks of any such project, but initiates taxation. One way or another, settler sovereigns generate wealth off of Alaska Native lands under the dilemmas invoked by the corporate structure of ANCSA.

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[222] Roy M. Huhndorf and Shari M. Huhndorf, "Alaska Native Politics since the Alaska Native claims Settlement Act," *South Atlantic Quarterly* 110, no. 2 (2011): 386.

[223] Eve Tuck, "ANCSA as X-Mark: Surface and Subsurface Claims of the Alaska Native Claims Settlement Act," in *Transforming the University: Alaska Native Studies in the 21st Century*, ed. Beth Ginondidoy Leonard et al. (Anchorage, AK: University of Alaska, Anchorage, 2014), 249.

[224] Tuck, "ANCSA as X-Mark," 242.

[225] Swensen, "Of Subjection and Sovereignty," 109.

Seeing another parallel between ANCSA and the General Allotment Act, Roy and Shari Huhndorf note:

> The assimilationist objectives of ANCSA are clear in an original provision that, after a period of twenty years, Natives could sell their stock, thus rendering corporations and their land vulnerable to takeover by non-Natives. (The parallels to the General Allotment Act, the 1887 assimilationist legislation that divided collectively held Indian reservations into private property, are striking.)[226] 391-392

By setting an end-date by birth year for Alaska Native enrollment in corporations, as well as this twenty-year expiration period akin to the end of federal trust status, ANCSA's settler architects envisioned a future in which Alaska Native peoples are legally permeable, subject to vanishment by a parallel process that imagined the elimination of American Indian land claims.

The construction of a time horizon without Indigenous futurities is a key piece of what allotmentality attempts—just as Indigenous land becomes interchangeable parcels of property, so too do Indigenous peoples become interchangeable citizens of the settler state under this imagining. Eve Tuck makes just this case, observing that "in this context, the settler nation-state attempts to remake the Indigenous collective into bits of seizable capital (shares). It also attempts to replace Indigeneity with incorporation that can then be disincorporated or taken over."[227] In Tuck's analysis, the remaking of Indigenous peoples and land into, as she puts it, "seizable capital," illustrates the neoliberal logic of settler colonialism that is constitutive of ANCSA.

Thomas Swensen, discussing the interlinked—though distinct—tribal and corporate structures recognized by the U.S. in Alaska, describes this process as "empropertiment," noting:

> Whereas the federation emerged out of community activism, corporate and tribal structures flourished through federal law and thereby bound Alaska Natives to the limitations and scenarios these forms imposed on their community. Both arrangements echoed the allotment systems the U.S. Government previously implemented on American

[226] Huhndorf and Huhndor, "Alaska Native Politics," 391-392.

[227] Tuck, "ANCSA as X-Mark," 248.

> Indians in the contiguous part of the nation. Through the individual allotments on reservations, federal policy makers attempted to fracture extended familiar and kinship-based living arrangements of American Indians with a process of empropertiment.[228]

These attempts to fracture kinship systems and fundamentally reorient Indigenous peoples' ways of relating to Indigenous lands and each other—what I have previously described as "bureaucratic kinship"—illustrates that allotmentality extends far beyond legislation that names itself as such.

As we have seen with the General Allotment Act, ANCSA too has been subject to numerous amendments and adjustments, largely as the result of focused and effective Alaska Native activism to counter the insidious effects of the legislation. Thomas Swensen describes the effect of the 1988 amendments to ANCSA, in response to criticisms of the "afterborn" disenfranchisement, which "allowed corporations to distribute shares to 35,000 as 'New Natives.'"[229] This another example of settler attempts to set an endpoint for Indigenous recognition that ends up being revised, but in such a way that the revisions do not discontinue settler colonial relations.

In another key revision of Alaska Native recognition in 1993, the Department of the Interior recognized "all Alaska Native villages as sovereign tribal governments, entitling them to rights as tribal governments under the Indian Reorganization Act of 1934 and to the Bureau of Indian Affairs' services for tribes in 1994."[230] This further grew an overlapping structure of regional corporations, village corporations, and the recognition of sovereign tribal governments. Detailing this overlap, Swensen writes:

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[228] Swensen, "Of Subjection and Sovereignty," 102-103.

[229] Swensen, "Of Subjection and Sovereignty," 105.

[230] Swensen, "Of Subjection and Sovereignty," 107.

> The potential for conflict was an embedded aspect of these subjection technologies—to have the leaderships vie for power against each other, rather than organize collectively against state infringements. This is not to imply that either the Native corporations or the Native tribe were constructions that completed represented Alaska Natives as a whole. Corporations were founded as quasi-sovereign and formed to manage tracts of land and monies after the settlement. Tribal governments formed after federal law recognized inherent Native sovereignty and self-governance.[231]

As with allotment, the generation of complex and contradictory bureaucracy around Alaska Native peoples, lands, and bodies entangles Alaska Native sovereignties within settler colonial land relations. The convoluted structure of ANCSA and its amendments, like other areas of federal Indian law, is still nonetheless the result of ongoing negotiation and contestation by Alaska Native peoples advocating tactically for their rights against settler occupation.

Despite her trenchant criticisms of ANCSA, Eve Tuck reminds the reader that the law itself is the result of negotiations where "Alaska Native leaders and Elders acted on behalf of Indigenous futurity,"[232] and further, "If we consider ANCSA as an x-mark, then the literality of ANCSA is settler coercion, but the decision to sign, to petition, to negotiate—*that* is Indigenous."[233] Even though ANCSA attempted to foreclose Alaska Native claims—to literally "settle" them—Tuck's analysis is an important reminder that ANCSA, and indeed, settler governance at large, is only for now. That does not obviate the need to contest them in strident terms that assert Indigenous narratives and ways of knowing and being on Indigenous lands, if anything, it shows that these assertions have already and will continue to reshape the terms of settler colonial governance.

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[231] Swensen, "Of Subjection and Sovereignty," 113.

[232] Tuck, "ANCSA as X-Mark," 241.

[233] Tuck, "ANCSA as X-Mark," 267. For the origin of the term "X-Mark" as Eve Tuck applies it, see Scott Richard Lyons, *X-Marks: Native Signatures of Assent* (Minneapolis, MN: University of Minnesota Press, 2010).

1983, Indian Land Consolidation Act. Though the problems of heirship fractionation related to allotments were well known to the federal government for decades, it was not until the 1980s that Congress made a serious attempt to address them. Detailing this gap in administrative action, Kristin Ruppel comments, "Landowner advocates interpret the seventy-year delay between problem recognition and proposed solution as a chronic case of federal penny-pinching."[234] The "unfunded mandate" in federal Indian law could be seen as another aspect of allotmentality. The federal government usurps title to the lands that it is holding in trust, but then chronically mismanages them.[235] Based on the artificial complexity and ambiguity of settler governance, it is doubtful that a fully funded program of land management would be effective either, but it does provide an excuse for the executive branch to blame its incompetence on the legislative branch.

Regardless, Douglas Nash and Cecilia Burke describe the effects of the Indian Land Consolidation Act of 1983, writing,

> The Act authorized Indian tribes to adopt land consolidation plans, subject to secretarial approval, under which they could consolidate land holdings by purchase, sale, or exchange. It also authorized tribes to adopt probate codes, again subject to secretarial approval, which would be applied by the Office of Hearings and Appeals in the probate interests in trust lands. The most radical provision called for the escheat to tribes of interests in trust allotments that represented less than 2 percent of the whole parcel, testate or intestate, which had earned less than one hundred dollars in the year prior to probate.[236]

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[234] Ruppel, *Unearthing Indian Land*, 48.

[235] Most infamously, after decades of litigation spearheaded by Blackfoot Tribe Treasurer Elouise Cobell in 1996, the federal government approved a settlement worth $3.4 billion in *Cobell v. Salazar* for its decades of BIA mismanagement of funds, Rebekah Martin, "Defending the Cobell Buy-Back Program," *American Indian Law Review* 41, no. 1 (2016): 104.

[236] Douglas R. Nash and Cecelia E. Burke, "The Changing Landscape of Indian Estate Planning and Probate: The American Indian Probate Reform Act (AIPRA)," *Seattle Journal for Social Justice* 5, no. 1 (2006): 129-130.

After close to one hundred years of applying settler colonial inheritance logics under state law to allotments, resulting in the disastrous fractionation of land title among heirs, this act recognizes tribal governments' sovereign power to set their own probate codes.

Once again, settler complexification of the process, alongside Indigenous adaptation and resistance within the same, resulted in considerable amendments to the legislation. Just four years later, litigation against the ILCA culminated in the 1987 U.S. Supreme Court decision *Hodel v. Irving*.[237] In this case, enrolled citizens of the Oglala Lakota Nation whose fractional shares in individual allotments would've retroceded to the tribal government as a result of the escheat clause sued the Secretary of the Interior.[238] The Court overturns that provision on the grounds that it violates the Fifth Amendment. Whether or not this provision of the ILCA would've been useful as a tool to combat fractionation is a murky question to me. I tend to think not. My main observation here is the way this litigation reveals how the ILCA's escheat clause it pits the interests of individual enrolled citizens and allottees against their tribal governments.

In 2000, another round of amendments to the legislation, as Nash and Burke describe, "made major revisions to the Indian Land Consolidation Act, but it was so complex that the Department of the Interior ultimately conceded that the law was too complicated to administer."[239] This claim—the claim that the federal government could not implement its own policies due to overcomplicating things—felt so absurd that, while I didn't doubt the accuracy of Nash and Burke's analysis, I needed to see it for myself. Nash and Burke are citing a statement

[237] *Hodel v. Irving*, 481 U.S. 704 (1987).

[238] If I understand it correctly, "escheat" is a term in property law that means essentially reversion of title to the state (or in this case, tribal governments) as a result of a lack of heirs. In this case, there were heirs, but the ILCA functioned by setting a minimum value of a fractionated heirship below which it no longer really counts.

[239] Nash and Burke, "The Changing Landscape," 131.

by Ross O. Swimmer, who at the time served in the Department of the Interior as a Special Trustee for American Indians, submitted to the House of Representatives Committee of Resources as they continued further amending the ILCA. I'm going to gloss right over the surreally Orwellian moniker "Special Trustee for American Indians," to focus instead on this section of the statement that I find particularly revealing:

> The 2000 amendments have begun enhancing opportunities for economic development by providing for negotiated agreement, standardizing, and in some cases relaxing the owner consent requirements. This has streamlined the leasing process for land owners to enter into business and mineral leases. While many of the land related provisions have proven to be successful, many other provisions, especially the probate provision, have proven to be complicated and difficult to implement.[240]

The fact that the Department of the Interior was able to easily implement the aspects of legislation meant to increase mineral extraction on Indigenous lands, while the aspects meant to address fractionation and redress Indigenous dispossession created by settler bureaucracy illustrates once more the allotmentality of the Department of the Interior and its policies. That the Department is structured in such a way to fast-track extraction while delaying justice is indicative of the whole scheme of settler governance, isn't it? Going back to earlier discussions, we saw cases where "competence" was used to both eject Indigenous peoples from trust status, while maintaining other instances of trust status in perpetuity, rationalizing ongoing federal surveillance and management. These amendments follow a parallel logic, simultaneously guaranteeing increased corporate access to Indigenous lands while obscuring Indigenous land title under another layer of rules that not even the "best and brightest" in settler bureaucratic phantasmagoria could pretend to understand.

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[240] Ross O. Swimmer, Special Trustee for American Indians, U.S. Department of the Interior, statement to U.S. House of Representatives, Committee on Resources, Legislative Hearing on S. 1721, *A Bill to Amend the Indian Land Consolidation Act to Improve Provisions Relating to Probate of Trust and Restricted Land*, 108th Congress, June 23, 2004.

Further amending the ILCA is the 2004 American Indian Probate Reform Act (AIPRA). Ruppel describes its stated purpose as "to reduce fractionation by creating a uniform federal probate code for owners of trust properties (land or money in Individual Indian Money accounts), especially those who pass away without writing a will."[241] But, as she indicates, "Indian landowners and tribal leaders argue that the law that is emerging out of the AIPRA reflects Interior's agenda to reduce its own costs and liability more so than to live up to its fiduciary responsibilities as trustee."[242] The result is once again legislation that betrays the injustice-generative logics of allotmentality: the creation of new layers of bureaucratic complexity obscuring Indigenous rights and access to land in the name of efficiency and cost-cutting.

Describing the cumulative effects of this legislation layering state, tribal, and federal probate codes, Suzianne Painter-Thorne, in her 2020 law review article offering a practical analysis of the status of Indian probate, writes, "tribal members are subject to at least three separate jurisdictional probate codes: (1) the federal American Indian Probate Reform Act that determines the allocation of the deceased's real property held in trust; (2) their tribe's probate code; and (3) a state probate code for any property located outside the reservation such as bank accounts."[243] Painter-Thorne highlights the distinctive way that tribes that do not recognize same-sex marriages—more discussion on that in Part 3—creates a situation where probate for a surviving same-sex spouse would proceed differently under tribal probate codes compared to the

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[241] Ruppel, *Unearthing Indian Land*, 62.

[242] Ruppel, *Unearthing Indian Land*, 62.

[243] Suzianne Painter-Thorne, "Fraying the Knot: Marital Property, Probate, and Practical Problems with Tribal Marriage Bans," *Brooklyn Law Review* 85, no. 2 (2020): 473.

state/federal codes that are (as of 2015) required to recognize same-sex marriages. The palimpsest of regulations creates scenarios where dispossession can flourish.

Concluding their analysis of the AIPRA, Nash and Burke rather ominously write:

> The evolution of AIPRA will continue. There may well be a need for further amendments to AIPRA, both technical and substantive. Likewise, there may be a need for amendments to the regulations after they become final. The need for changes will be identified as part of the learning process as AIPRA and other regulations are used and applied and, potentially, from litigation that challenges the validity of provision of AIPRA, the implementing regulations, or their interpretation.[244] 167-168

The authors are undoubtedly correct in their assertions that the terms of settler colonial governance will continue to shift, and I would argue, placing further burden on Indigenous polities, their citizens, and their legal representatives to spend unfathomable amounts of time and energy learning the esoteric details whose "simplifications" lead only to further disconnection from the material realities of the land. Allotmentality will continue until morale improves.

Conclusion

This accounting of allotmentality within federal legislation on Indigenous lands may be exhausting, but unfortunately, it is not exhaustive. What I hope to get across by laying out this particular legislative trajectory is that allotment is not merely a day in 1887; it is an ongoing process of devastating, artificial complexity that has deeply weighed in Indigenous land relations. Despite this, allotmentality is a failure in the sense that it has not successfully imagined Indigenous peoples, nations, and traditions out of existence, were such an absurd idea even possible.

But allotmentality as a bundle of processes and ideologies set upon the maintenance of Indigenous land dispossession is ever-shifting. It responds to activism and is in a constant

[244] Nash and Burke, "The Changing Landscape," 167-168.

process of negotiation and amendment to account for its own incompetence and mismanagement in the face of material realities. It is both powerful and permeable, another contradiction that, though it signals the continuance of injustice, demonstrates even more clearly that Indigenous activism around land, around sovereignty, around rights, can and does modify the terms of settler colonial governance. And if it can be modified, who's to say it can't be dismantled?

CHAPTER 4: BREAKING THE FOURTH WALL OF SETTLER COLONIALISM: ALLOTMENTALITY AND RESISTANCE IN *CARNEY V. CHAPMAN*

The 1930 Solicitor's Opinion on recognizing the validity of Indian custom marriages and divorces cites many different cases in the course of its analysis. From reading through it, these snippets of precedential court holdings hint at stories obscured. After all, when reduced to their legal impact as abstract law, settler courts need not look deeper into the ways that the court system has dispossessed or impeded Native rights—nor at the ways that Native people at times creatively and tactically navigate settler law searching for whatever small pockets of justice can be found there.

While it would perhaps take several lifetimes to explore the history behind all these citations, let's start with just one of them. Finney's analysis of this U.S. Supreme Court ruling is as follows:

> The case of Carney v. Chapman (247 U.S. 102), involved an ordinance of the Chickasaw Indian Tribe concerning solemnization of marriages by a judge or ordained preacher of the gospel. In considering the effect of that tribal act and the validity of marriage according to tribal custom, the court in affirming the decision below said: "There was evidence also that it was customary to disregard solemnization before a judge or preacher. It would be going somewhat far to construe the Chickasaw statute as purporting to invalidate marriages not so solemnized."[245]

On its surface, what can we learn about the case from this description? Chickasaw sovereignty is at the heart of this case, clearly, as Chickasaw statute is cited and interpreted by the U.S. Supreme Court. We can see from this description that the ruling rejects an interpretation of Chickasaw statute that would invalidate custom marriages. In general, recognition of Indian

[245] Edward C. Finney, Solicitor of the Department of the Interior, Decision Reported to Ray L. Wilbur, Secretary of the Interior, 12 April 1930, General Records of the Bureau of Indian Affairs, Record Group 75, Klamath, Decimal Subject No. 743, File No. 55112-32 (Seattle, WA: National Archives and Records Administration).

custom marriages and divorces appears to be positive, since it is an aspect of the recognition of Native polities' domestic sovereign powers. Yet, as previously discussed, bureaucratic kinship implicates this recognition in settler land theft via policies like allotment. The fact that the U.S. Supreme Court feels empowered to interpret Chickasaw nation legislation, at a time when the settler state at large was going to significant lengths to disappear the Chickasaw nation, naturally arises as a point of critique.

It could be easy to stop there, write something about the pattern this case fits in terms of the settler state's presumption and interest in directing the flow of land and power to itself, and move on. Instead, let's take a closer look.

The case *Carney v. Chapman* draws its name from two of the parties—Lottie Carney and John C. Chapman. At issue in this case, broadly speaking, is that a Chickasaw Nation allottee named John Alberson, after his allotment passed into fee-simple title, died without a living spouse or child. The case is therefore about which litigant—John C. Chapman, a prominent (non-Chickasaw) businessman and realtor; Lottie Carney, John Alberson's aunt; or David, Sina, and Salina Alberson, allotted as his siblings—held legitimate title to the properties at stake. This case originated in Pontotoc County court in Oklahoma (1912), and then was appealed first to the Oklahoma Supreme Court (1916), and then the U.S. Supreme Court (1918).[246]

The premise of this case alone reeks of allotmentality, bureaucratic kinship, and settler surveillance of Native lands and bodies. Simply put, why does the U.S. Supreme Court feel entitled to weigh in on the inheritors of a single Chickasaw person's land? That the land has been

[246] J.C. Chapman v. David Alberson, Sina Alberson, and Salina Alberson, Minors, and Their Guardians, Willie Monroe and Tom Jones, and Tom Pendleton and Lottie Carney, Defendants, in the District Court of Pontotoc County, OK (1912); Carney v. Chapman et al., 60 Okla. 49, (Okla. S. Ct., 1916); Carney v. Chapman et al., 247 US 102 (1918).

defined as fee-simple allotment property, that he died without having surviving relations rendered valuable under cisheteropatriarchy, and that the case was brought by a powerful local businessman whose legal strategy caused this land ultimately to pass out of Chickasaw hands, is a small yet powerful example of how settler courts enable land theft by defining abstract rules that it only situationally upholds.

In the first section of this chapter, I will discuss my reading methods, making a case for why lower court transcripts beyond the final Supreme Court opinion are important sources to consider, and explaining my approach in applying strategies NAIS writers have developed in engaging with sources compromised by settler archiving. Additionally, I take a brief look at the way that this case has been cited in (primarily) law review articles.

After that, I will discuss the case background in more detail, before proceeding chronologically through the lower court trial. This includes an examination of the leases produced as evidence, jury selection, and witness testimony brought by the three main parties to this case. I conclude this section by looking at the contested jury instructions and verdict.

Next, I will look at the decision rendered by the Oklahoma Supreme Court, with a particular emphasis on the inconsistencies and botched legal representation at issue.

Finally, I will go through the briefs submitted by the appealing parties to the U.S. Supreme Court, finishing with an analysis of the decision with all this context established.

I hope to show through this analysis that this case, though rarely accessed as precedent in later rulings, nonetheless has been misrepresented for what it does. Allotmentality frames this case, white supremacy and heteropatriarchy infuses it, and the decision rendered here is far murkier than the Court or Finney would like to consider.

Toward the Fourth Wall: NAIS on Trials

In her novel *Miko Kings*, LeAnne Howe (Choctaw) introduces the reader to the character of Lena Coulter, a journalist who has returned to her grandmother's allotment in Ada, Oklahoma, upon inheriting the property.[247] After finding a mailbag full of documents in one of the walls, Lena is visited by the spirit of Ezol Day, a Choctaw ancestor, time traveler, and theorist who was alive during the onslaught of Oklahoma statehood, the Dawes Commission, and allotment.[248]

I first encountered this novel in an undergrad Native literature course taught by Carter Meland, who writes of teaching the book, "LeAnne Howe's notion of tribalography is a valuable tool in realizing the decolonizing potential within our students."[249] Not only do I agree with this sentiment, but when I began teaching courses in Native American literature myself, this was one of my go-to texts. On some level, this novel has always challenged me and resonated with me.

As I read the transcript and record of the case *Carney v. Chapman*, which originated as a legal proceeding in county court in Ada, a single two-word phrase from the novel would pop up, unbidden: "Documents lie."[250] This became central to my reading practice in ways that I'll illustrate in a moment. But first, some context.

The phrase originates from one of the initial conversations between Ezol and Lena. This particular exchange highlights how Lena has internalized allotmentality when it comes to narrating land, space, and historical truth:

> "I've been thinking," [Ezol] says, "this must have been Uncle Henri and Cousin Cora's house. They lived in a house just like this one on West Ninth Street."

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[247] LeAnne Howe, *Miko Kings: An Indian Baseball Story* (San Francisco, CA: Aunt Lute, 2007).

[248] Howe, *Miko Kings*, 14.

[249] Carter Meland, "Talking Tribalography: LeAnne Howe Models Emerging Worldliness in 'The Story of America' and *Miko Kings*," *Studies in American Indian Literatures* 26, no. 2 (2014): 26.

[250] Howe, *Miko Kings*, 28.

> "No," I answer. "The land belonged to MourningTree Bolin, my grandmother, and she built the house. This was her allotment, I have the papers to prove it. They're in the safety deposit box in my bank."
>
> Ezol smoothes the hem of her dress. "Documents lie," she says casually.[251]

Lena, here at the start of her journey toward Choctaw tribalography as a method, immediately rises to discredit Ezol's narrative where it conflicts with the colonized archival norms that Lena assumes.[252] The story that follows shows Ezol's narrative to be true, and understanding why requires Lena to unthink colonized ideologies on what constitutes "truth." Not only are these paper documents wrong about the specific allotment in the novel, but in a larger sense, colonial archives are systematically and intentionally wrong about Native lands.

The phrase "Documents lie" is so self-evident as to seem absurdly simplistic. And yet, this belies its devastating depth. It takes Lena the entire novel to really understand, and as a reader, I find that I must constantly remind myself in order to avoid passively accepting the misframing and misinformation in colonial archives. "Documents lie" is not so much a thing that you learn as a reading practice that you must insist upon, repeatedly, with the full knowledge that even that is not really enough. It's as though through these two words, LeAnne Howe—channeled through Ezol—irrevocably unravels the colonizing field of history, forever after requiring something more substantive than "a printed document said this, therefore it probably happened" as its guiding principle. And she does so *casually*.

I wanted to start with a discussion of reading practices precisely because critical reading determines to what extent something useful can be said about documents as contingent and

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[251] Howe, *Miko Kings*, 28.

[252] For her original essay on tribalography, see: LeAnne Howe, "Tribalography: The Power of Native Stories," *Journal of Dramatic Theory and Criticism* 14, no. 1 (Fall 1999): 117-124. Updated in LeAnne Howe, *Choctalking on Other Realities* (San Francisco, CA: Aunt Lute, 2013). See also: *Studies in American Indian Literatures* 26, no. 2, Special Issue: Tribalography (Summer 2014).

misleading as a court case under settler law. If documents lie, then the next step is to ask yourself, what is this document lying about and why? What are its methods of lying, so that I can better notice it happening?

This reading practice is informed by a few other ideas about reading settler/hegemonic archives, which I'll briefly discuss. Craig Womack's (Muskogee Creek) method, "suspicioning," is applicable here, though I'd note that the original context is addressing the perceived ambiguities of Joy Harjo's poetry.[253] On suspicioning, Womack writes, "I would like to consider how suspicioning functions as an action, full of desire for a concrete resolution, a certainty it never achieves, an absence of closure that intensifies a hunger of verities. One suspicions when tackling subjects one feels unsure of, but risks a statement anyway."[254] This is incisive as an approach to poetry, but it also has high applicability to law. Because settler law gains much of its power by cloaking itself in aesthetics of rationality and objectivity, suspicioning it is almost essential to learn anything useful from it.

Another related reading practice—perhaps better understood as a listening practice—is Jodi Byrd's concept of "cacophonies." She writes:

> I read moments of cacophony in political, literary, and cultural productions. Identifying the competing interpretations of geographical spatialities and historicities that inform racial and decolonial identities depends upon an act of interpretation that decenters the vertical interactions of colonizer and colonized and recenters the horizontal struggles among peoples with competing claims to historical oppressions.[255]

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[253] Craig Womack, "Suspicioning: Imagining a Debate between Those Who Get Confused, and Those Who Don't, When They Read Critical Responses to the Poems of Joy Harjo, or What's an Old-Timey Gay Boy Like Me to Do?" *GLQ: A Journal of Lesbian and Gay Studies* 16, no. 1-2 (2010): 133-155.

[254] Womack, "Suspicioning," 133.

[255] Jodi A. Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis, MN: University of Minnesota Press, 2011), xxxiv.

I interpret the practice of listening for cacophonies as a call for attention to the inconsistencies, gaps, and contradictions in settler narratives. To extend Byrd's sonic imagery a bit, we must hear settler narratives not like a coherent symphony conducted to perfection, but instead as a jangling discord of wrong notes. Re-tuning our ears to these cacophonies guides us toward hearing what the blaring brass section of U.S. imperialism has failed to fully obscure in its haste to reach its harmonic resolution.

So we have documents that lie, a critical mode of suspicioning, and an orientation toward hearing the cacophonies. What did these practices make visible and audible to me in this court case? First, they helped think of the trial itself as a performance—on multiple levels. The appellants, plaintiff, defendants, lawyers, and witnesses, are in some sense performing for the judge and jury. These are hardly neutral observers. The powerful audience for a trial in settler court in 1912 is, essentially, white supremacist patriarchal hegemony. Later on, legal opinions like the Supreme Court ruling are performing for a settler audience, assuring the observer that precedents have been followed, that there is rationality, order, and consistency in what is unfolding via abstract technical analysis. As Walter Echo-Hawk writes, "Because society has built numerous safeguards into the American legal system, we fully expect judges to be impartial decision makers, free from bias and prejudice, and able to apply the law and decide cases in keeping with basic considerations of truth and justice," but despite this, "the courts sometimes produce what can only be described as manifestly unjust results."[256] If we view these safeguards as performative, how does that reshape our reading practices?

What stood out to me the most in the trial, often, were moments that Native (mostly Chickasaw) witnesses took the stand but transgressed the "rules" of the trial, breaking out of the

[256] Walter R. Echo-Hawk, *In the Courts of the Conqueror*, 32.

Q and A format or describing events in ways that disrupted the performances of the lawyers attempting to script the case. In effect, Native witnesses in this trial were breaking the fourth wall of settler colonialism. The "fourth wall" is a metaphor describing—initially at least—the relationship between a performance (such as a play) with the audience. The fourth wall is the invisible separation between the audience and performers; inside the four walls, the play's narrative unfolds according to the logic of its fictional rules, characters, and world. Breaking the fourth wall, then, occurs when performers say or do something that suddenly reminds the audience that they are not seeing objective/true events but instead, a performance. If a trial about allotment is a performance, then the fictional "rules" are the assumptions that the settler state should exist, that its jurisdiction is legitimate, and that Native lands should be redistributed as property under white supremacist and cisheteropatriarchal lines. Native testimonies break the fourth wall of settler colonialism by revealing the artifices, the cacophonies, and thus calling upon the audience to continue suspicioning the narratives unfolding before us.

Despite the fact that the documents in these archives lie, these critical reading practices can offer at least a window—if skewed, if contingent—into the ideological machinery of settler colonialism. In her article reviewing U.S. court cases involving Native women, Bethany Berger notes:

> These sources, though limited, are rich. Through the cases the courts, albeit often through a lens of bigotry and prejudice, present histories of women whose stories are rarely told, who often could not write, and who may not have spoken English. … But the cases are, of course, more than just stories. From each understanding of history the judge provides, comes a shaping of history. By articulating assumptions and rules regarding the relationships of Indian women to their partners and children, the judges transform those relationships.[257]

[257] Bethany Ruth Berger, "After Pocahontas: Indian Women and the Law, 1830 to 1934" *American Indian Law Review* 21, no. 1 (1997): 5.

Historian Jacki Thompson Rand (Choctaw) cites Berger and echoes her sentiment on the value of these types of sources. Yet, her discussion of these research methods come with important warnings as well. She observes:

> Every precaution should be taken when working with such materials, particularly in the twentieth century, to avoid causing harm to persons living and deceased who might be named in the materials. While such documents are public and accessible to researchers, one cannot be too diligent in considering the potential impact of using trial transcripts on a tribal community. … Competence, understanding of American Indian history, sage guidance from an experienced researcher, and scrupulous self-awareness are critical.[258]

Reading the transcripts for *Carney v. Chapman* reveals the extent to which this advice applies. In addition to myriad names of people involved with the case—as allottees, witnesses, attorneys, and so forth—the content of the case itself traffics in virulent misogyny and white supremacy.

This case record is publicly accessible, which as Rand indicates, does not mean that it is an inherently acceptable choice to write about it. The settler state's surveillance into the lands, sexuality, and kinship of Indigenous peoples is violence, and the record of such being publicly available is a continuation of that violence. I'll tell you right now that the content of the case traffics in virulent misogyny and white supremacy. Even though this trial and its subsequent appeals took place over a hundred years ago, the words still hold a stomach churning power. It's important to acknowledge this, but perhaps even more important to not transform it into a re-traumatizing spectacle.

So why write about *Carney v. Chapman*? Why draw attention to it at all? In their article "Decolonization is not a metaphor," Eve Tuck and K. Wayne Yang discuss six tropes as settler

[258] Jacki Thompson Rand, "Status, Sustainability, and American Indian Women in the Twentieth Century," in *Sources and Methods in Indigenous Studies*, ed. Chris Andersen and Jean M. O'Brien (New York, NY: Routledge, 2017), 175.

"moves to innocence," including the trope of "At risk-ing / Asterisking Indigenous peoples."[259] In order to avoid decontextualizing Tuck and Yang's criticism, it's important to mention here that their primary discussion of this trope centers on the "ways in which Indigenous peoples are counted, codified, represented, and included/disincluded by educational researchers and other social science researchers." Their particular focus is how this trope is deployed in settler data sets to obscure and marginalize Indigenous peoples—rendering them asterisks/afterthoughts—rather than centering Indigenous land dispossession under ongoing settler colonialism as a distinctive, core factor that must be redressed.

When I read their description that "In U.S. educational research in particular, Indigenous peoples are included only as asterisks, as footnotes into dominant paradigms of educational inequality in the U.S.," I am drawn to think of how the trope of asterisking—or, as I use it here, footnoting—has a parallel practice in legal research.[260] To be clear, there is nothing inherently wrong with footnoting—after all, every article can't be about everything.[261] Where problems arise, in my view, is in situations where footnoting is the primary—or only—engagement with a case. If a U.S. Supreme Court case involving Indigenous issues has not been properly contextualized, or had its particular history and relationships to Indigenous land dispossessions situated, but has nevertheless been footnoted, this is an activation of the trope that Tuck and Yang describe.

After reading the full transcripts and records available for *Carney v. Chapman*, detailing the—admittedly flawed—settler archive around the case beyond the terse final opinion issued by

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[259] Eve Tuck and K. Wayne Yang, "Decolonization is Not a Metaphor" *Decolonization: Indigeneity, Education & Society* 1, no. 1 (2012): 3-4.

[260] Tuck and Yang, "Decolonization is Not a Metaphor," 22.

[261] I, too, use footnotes.

the U.S. Supreme Court, I looked to see where and how this case had been discussed in legal research articles. What I found is that with one notable except—as I will discuss—references to this case exist almost exclusively as footnotes to descriptions that cast the case in an unduly favorable—or at the very least, misleading light.

As an example of what I mean, consider this discussion from a 1994 law review article by John Arai Mitchell. Mitchell writes, "The Supreme Court has also manifested its respect for the tribal interest in being ruled by tribal tradition and local law."[262] This leads to a footnote where Mitchell references *Carney v. Chapman*, describing the ruling as "holding a customary tribal marriage legally valid."[263] This analysis, brushing at the edge of the case, gives the impression that *Carney v. Chapman* is an example of the Supreme Court's "respect" for Native traditions and law. Yet, as I will discuss further, the settler judiciary's application of recognition here is accompanied by the overriding of a law passed by the Chickasaw Nation—that is, its interpretation "validating" Chickasaw tradition simultaneously invalidates policies passed by the sovereign Chickasaw nation government.

Though I criticize this footnote for not properly contextualizing the case, it is at least more specific than many others. In most cases that I found, *Carney v. Chapman* is cited more generically as an example of the Supreme Court recognizing the validity of inherent tribal sovereignty via customs.[264] And yes, there is a certain irony that I am footnoting my criticisms of

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[262] John Arai Mitchell, "A World Without Tribes?: Tribal Rights of Self-Government and the Enforcement of State Court Orders in Indian Country," *The University of Chicago Law Review* 61, no. 2 (1994): 728.

[263] Mitchell, "A World Without Tribes?", 728 f.n. 125.

[264] See: James W. Zion, "Harmony Among the People: Torts and Indian Courts," *Montana Law Review* 45, no. 2 (1984): 274 f.n. 43; Sharon O'Brien, "Cultural Rights in the United States: A Conflict of Values," *Law and Inequality: A Journal of Theory and Practice* 5, no. 2 (July 1987): 297 f.n. 161; Walter R. Echo-Hawk, "Tribal Efforts to Protect Against Mistreatment of Indian Dead: The Quest for Equal Protection of the Laws," *NARF Legal Review* 14, no. 1 (1988): 5 f.n. 7; Richard Maltby, "The Indian Child Welfare Act of 1978 and the Missed Opportunity to Apply the Act in Guardianships," *Saint Louis University Law Journal* 46, no. 1 (2002): 219 f.n. 38;

these footnotes—many of these articles address topics that are important in their own right and constitute important legal research that *Carney v. Chapman* is very marginal to. My point here is not that footnotes are bad, but instead that collectively, these tangential references give an impression of the case's history that misses the more pernicious aspects that become evident upon closer reading.

A rare situation where *Carney v. Chapman* ascends from footnote to text occurs in Antoinette Sedillo Lopez's law review article exploring Navajo nation policy and jurisprudence regarding marriage. She writes, "in *Carney v. Chapman,* Justice Holmes noted that the passage of the statute made the issue a 'federal question' and without much analysis validated a 'common law' marriage of a Chickasaw couple who had celebrated a traditional Chickasaw ceremony."[265] While this reading provides at least some skepticism of the ruling's quality, it still takes largely at face value the idea that the U.S. Supreme Court is validating Chickasaw domestic sovereignty. As we'll see, the picture of what this case does at each stage of the process is much more muddled.

The footnoting of *Carney v. Chapman* fails to unsettle the violence, white supremacy, and land dispossession at the heart of the case. This case has not been taken to account for the way that it deploys (mis)recognition of Native sovereignty to extend the process of allotment and takes as valid the premise that settler bureaucratic kinship should control and manage relationships to Indigenous lands. Shouldn't the State of Oklahoma, its courts, and the federal judiciary be held to some account for violence that *Carney v. Chapman* enacts upon the

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John Hayden Dossett, "Tribal Nations and Congress's Power to Define Offences Against the Law of Nations" *Montana Law Review* 80, no. 1 (2019): 44 f.n. 24.

[265] Antoinette Sedillo Lopez, "Evolving Indigenous Law: Navajo Marriage—Cultural Traditions and Modern Challenges" *Arizona Journal of International and Comparative Law* 17, no. 2 (2000): 304.

Chickasaw nation, its lands, and its people? The footnoting of this case—particularly as an example of the federal judiciary upholding recognition of sovereignty, erases Chickasaw lands and history while allowing the settler state to claim credit and innocence without redressing it.

Allotmentality Onset: Pre-Trial Legal Maneuvers

The case begins in Pontotoc County court with plaintiff John C. Chapman, a local businessman and realtor, suing the other parties involved in the case to gain possession of the allotment lands of John Alberson, a deceased Chickasaw allottee.[266] The land involved in this case is significant, spanning at least 269 acres within the boundaries of what is now both the Chickasaw Nation reservation and Pontotoc County, Oklahoma.

The defendants in the case include Lottie Carney, John Alberson's aunt; David, Sina, and Salina Alberson, John Alberson's adoptive siblings, and their appointed guardians as they were orphaned minors at the time the trial began; and L. M. Chandler and Tom Pendleton, who leased and sub-leased portions of the property. John Alberson's allotment holdings—in fee simple title—had a number of leases layered on top of it in what amounts to a palimpsest of contracts. To illustrate what I mean, here are these property-centric events in chronological order:

[1] On July 15, 1910, L. M. Chandler signed a four-year lease for a 99-acre portion of the allotment lands for the period of January 1, 1911 to December 31, 1915. Under the terms of the lease, Chandler would pay Alberson $25 per year and build "a good and substantial two-room house" on the premises.[267]

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[266] Wimbish & Duncan, Attorneys for J. C. Chapman, "Petition," filed in the District Court of Pontotoc County, OK, July 23, 1912, in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 14-15.

[267] John Alberson and L. M. Chandler, "Lease Contract," filed as "Defendant Pendleton Exhibit No. 1" in the District Court of Pontotoc County, OK, November 11, 1913, in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 99-101.

[2] A few months later, on September 21st, 1910, Chandler leases 60 acres of that property to Tom Pendleton for a yearly rent of $55.[268]

[3] Under the next one-year lease, on January 18th, 1911, John Alberson leased another 170 acres of allotment land from January 1st, 1912 to January 1st, 1913 for a total of $60.[269]

[4] During June or July, 1911—date uncertain—John Alberson died. Charles Puller claimed to be be the sole inheritor of the lands as John Alberson's father.[270]

[5] On January 20, 1912, Charles Puller in county court, got a ruling finding that he was "a full blood Chickasaw Indian and acquired his interest in said lands by inheritance from his son, John Alberson, deceased" and approving the transfer of this property to John C. Chapman for a sum $1,250.[271]

My point in laying out the details of these leases is first to illustrate how relations between people and land have been redefined. Since John Alberson's allotments passed into fee-simple status, these leases layered on top of each other enmeshed the allotments into settler land policy. These leases are presented by parties to this trial as evidence as to who owns the land—

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[268] L. M. Chandler and Tom Pendleton, "Lease," filed as "Defendant Pendleton Exhibit No. 3" in the District Court of Pontotoc County, OK, November 11, 1913, in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 102-104.

[269] John Alberson and T. A. Pendleton, "Lease," filed as "Defendant Pendleton Exhibit No. 2" in the District Court of Pontotoc County, OK, November 11, 1913, in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 101-102.

[270] The date is listed as June 1911 in "Plaintiff's Amended Petition," filed in the District Court of Pontotoc County, OK, September 16, 1912, in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 20-22. However, it is listed as July 1911 in "In the Matter of the Estate of Charles Puller, Deceased; Charles Puller, Administrator," County Court judgment filed as "Plaintiff's Exhibit B" in the District Court of Pontotoc County, OK, November 11, 1913, in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 69.

[271] Conway O. Barton, Pontotoc County Judge, "In the Matter of the Estate of Charles Puller, Deceased; Charles Puller, Administrator," County Court judgment filed as "Plaintiff's Exhibit B" in the District Court of Pontotoc County, OK, November 11, 1913, in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 69.

there are no treaties cited here, nor is the history of how John Alberson came to be in possession of land in the form of this allotment deeply interrogated. It is taken at more or less face value that allotment policy has successfully transformed land into sellable, abstract property. The description of property in the leases references mathematical descriptions of where they fall on a plat grid. Allotmentality has clearly set in, and the convoluted legal dispute over this land has been essentially manufactured as a direct consequence of white supremacist land policy.

After the pre-trial motions take place between the various parties—mostly oriented around producing evidence and clarifying the legal claims of the parties involved—the central dispute at the heart of the case boils down to the following question: who, if anyone, was John Alberson's mother (Louisa James) married to? Each of the three parties involved provide a distinct answer:

[1] Chapman, the plaintiff, argues that Charles Puller and Louisa James were married, and therefore, the rights to the allotment lands went to Charles Puller upon John Alberson's death, who then sold the land to Chapman.[272]

[2] The Alberson heirs—David, Sina, and Salina—argue that Robert Alberson was John's father and therefore they inherit the land as John's surviving siblings.[273]

[3] Finally, Lottie Carney argues that neither of those marriages are valid—that her sister, Louisa James, never married—therefore she inherits the land as John's aunt.[274]

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[272] Wimbish & Duncan, Attorneys for J. C. Chapman, "Plaintiff's Amended Petition," filed in the District Court of Pontotoc County, OK, September 16, 1912, in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 20-22.

[273] C. E. B. Cutler, attorney for David, Sina, and Salina Alberson, "Third Amended Separate Answer and Cross-Petition of Defendants David Alberson, Sina Alberson, and Salina Alberson," filed in the District Court of Pontotoc County, OK, September 10, 1913, in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 55-58.

Thus, whichever party can convince the judge and jury that their theory about Louisa's marriage(s) is valid will ostensibly receive the rights to the allotment lands involved.

This is where allotmentality intersects with bureaucratic kinship. The "legitimate" landholder(s) will be determined by how legible Louisa's sexual and relationship history can appear to the settler state under surveillance. In order to convince the audience, the parties to this case must submit evidence that illustrates the ways that these relationships conform to (or diverge from) settler ideologies of what constitutes a legitimate marriage. Furthermore, the fact that John Alberson died without being married or having any children illustrates the way that the settler state's insistence upon the primacy of heterosexual monogamy and patriarchal property transfer rendered Alberson, as well as the land itself, especially vulnerable to this kind of theft and fraud. Under the inheritance rules of the state, the Chickasaw parties to this case have been framed as more nebulous inheritors—Lottie Carney as his aunt, and the Albersons as adoptive siblings—whereas Chapman is free to point to Puller's father-son relationship as a "stronger" kinship claim. Effectively, if Chapman proves that Puller is John Alberson's father, the strength of the patriarchal link is enough to override all these other relationships. Of course, the notion that a biological father-son relationship is inherently more valuable than other relationships is not an objective fact but instead the product of social and legal ideologies. As the testimony in the trial indicates, though, Charles Puller and John Alberson had little to do with one another throughout their lives.

Jury Selection: Corruption in Court

[274] C. F. Green, attorney for Lottie Carney, "Defendant Lottie Carney's Amended Answer to Amended Petition of Plaintiff," filed in the District Court of Pontotoc County, OK, July 26, 1913 in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 46-48.

During the jury selection (voir dire) phase of the trial, Lottie Carney's attorneys challenged two of the potential jurors for cause due to their business connections. In each case,

The first challenged juror, C. E. Rector, initially admits that he would be "embarrassed" to render a verdict against Chapman:

> **Q [Mr. Bolen].** Your relation such toward Mr. John Chapman that it would embarrass you to bring in a verdict against him?
> **A.** Yes.[275]

Upon further questioning, Rector vacillates in this perspective as Mr. Wimbish, one of Chapman's attorneys, tries to undermine the challenge:

> **Q [Mr. Wimbish].** While you are well acquainted with Mr. Chapman, and as you stated you would not like to have to bring in a verdict against him, if the law and the testimony warranted it, would you hesitate simply on account of your acquaintance from returning a verdict under the law and the evidence as you would take an oath to do in trying the case?
> **A.** Rather not.
> **Q.** Could you do it?
> **A.** Could do it, yes sir.
> **Q.** Would you do it?
> **A.** Yes I would, if the testimony showed it.[276]

Even under questioning from the judge, Rector continues to express a questionable ability to separate his personal and financial connections to Chapman:

> **Q [Judge Tom McKeown].** You feel that you would hestitate [*sic*] to return a verdict if the law and the evidence warranted it, on account of your friendship for him?
> **A.** That is what I said at first, I would not like to serve on the jury on that account.
> **Q.** Feel there would be some embarrassment to you?
> **A.** Yes sir.[277]

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[275] Voir dire testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 63. Note that only the voir dire testimony for two prospective jurors is included in the case-made record prepared for the Oklahoma Supreme Court and the transcript of record for the U.S. Supreme Court.

[276] Voir dire testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 63.

[277] Voir dire testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 63-64.

After all the questioning is done, though, McKeown overrules Bolen's challenge for bias, forcing Lottie Carney to use up one of her peremptory challenges to remove Rector from the jury.[278]

A similar process unfolds for the second juror whose voir dire testimony is included in the transcripts, August Fischback. This juror is much quicker to take up the language of the judge and lawyers in walking back his bias, evidently learning from the previous exchange. Upon questioning, Fischback reveals a financial stake in Chapman's realty business:

> **Q [Mr. Bolen].** You interested in an estate in which Mr. Chapman is administrator?
> **A.** Yes; Mr. Chapman is administrator of the estate of my wife's brothers and sisters.
> **Q.** Your relation such with Mr. Chapman it would embarrass or might embarrass you to render a verdict against him?
> **A**. Have had a good deal of friendly business dealing. Be hard for me to do, but I would stay with the law and the evidence.[279]

Once again, though, Chapman's attorney Mr. Wimbish guides Fischback toward a script to fight back against the attempt to disqualify him from the jury:

> **Q [Wimbish].** You stated a while ago when Mr. Bolen asked you if you had bias for Mr. Chapman and you said yes; you mean you be bias toward him in this case or friendly toward him?
> **A.** Friendly toward him.
> **Q.** Would you, in this case, disregard your friendship and try this case according to the law and the evidence?
> **A.** Yes sir.
> **Q.** You did not mean to say then, a while ago, you were biased in favor of Chapman in this case, did you?
> **A.** No sir.

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[278] I reference this here because it comes up later as a point of contention (and confusion) in the later court ruling. Unlike striking a juror "for cause," which is what Carney's attorneys attempted to get from the judge here, a "peremptory" challenge is essentially a party's free challenge to dismiss a potential juror without having to explain why. These are limited and serve as a kind of legal currency in jury management; by refusing to strike this juror for cause, the judge is forcing Carney to use up one of her peremptory challenges.

[279] Voir dire testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 64.

> **Q.** You meant you were friendly toward him and that was all, that if you regard he was wrong and the other fellow was right in the case, your friendship not so warm for him you would disregard the evidence, is it?
> **A.** No sir.[280]

And indeed, after another round of questioning by the judge, Fischback continues to waver by describing the act of returning a verdict against Chapman as "hard to do" while still claiming he would follow the evidence. The judge overrules this challenge as well, forcing Lottie Carney to use up another peremptory challenge to remove him from the jury.

Perhaps a judge or lawyer reading exchanges like this today wouldn't see anything that far out of the ordinary—it is at least somewhat difficult to get a juror disqualified for a cause like bias. Yet, applying the reading practice of suspicioning here, this pattern of rulings appears unduly favorable to Chapman's side of the case. Reading beyond the text, it's hardly difficult to imagine that the white businessman who is frequently involved in estate cases would receive judicial favor over the various Chickasaw defendants.

J.C. Chapman's Evidence & Witnesses

After jury selection is over, the attorneys for J. C. Chapman call six witnesses to testify for the plaintiff's side of the case. The direct and cross examinations by each side's attorneys lay out core elements of each party's arguments.

During direct examination of these witnesses, Chapman's attorneys are working to present evidence that Louisa James and Charles Puller entered into a "common law" marriage, and that Charles Puller is John Alberson's father. Thus, they question the witnesses on

[280] Voir dire testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 66.

information such as where Louisa and Charles were living and when, and community knowledge recognizing them as married.

Many of the witnesses called throughout this trial were Chickasaw people who were not fluent in English—at least, not to the standards that the court imposed onto them—and as a result there is an extra layer of mediation between the court and the witness via an interpreter. Yet the translation of testimony does not only create linguistic cacophony in terms of how the attorneys are attempting to orchestrate the witness performance for the judge and jury; Indigenous modes of relationality, sexuality, and kinship challenge the court's comprehension as well.

For instance, Susana Connohotubby, testifying as a witness for the plaintiff, is *supposed to* (according to Chapman's attorneys) say that Louisa and Charles were married, told her that they were married, and that the community generally thought of them as married. Yet, Susana's testimony contradicts the plaintiff's narrative:

> **Q [Mr. Wimbish].** During the time they lived with you, state to the jury whether or not they or either of them, told you they were husband and wife?
> **A.** Didn't say, neither one of them said they were husband and wife, but while they were there at that time, they were not married, they were sleeping together (interpreter says—the way she is speaking it, that means husband and wife); I did not mean to have a whole lot to say, just want to state the facts (interpreter)—just what she knows about it, that is what she is here for.[281]

Already, there is discord over what constitutes "marriage" in the first place, with Susana apparently saying that they were *not* married, but the interpreter "correcting" her to say that she means husband and wife anyway. This English language transcript, as well as the translation and mediation of her words, is an incredible distortive force making it difficult to say what she actually meant. Wimbish's attempts to get clarification only add to this:

[281] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 70-71.

Q [Wimbish]. When you made that statement do you mean to say they were living there at your house as husband and wife?
A. That is all she knows about it, she stated husband and wife, that was her statement, while they were living with her, don't know anything else to state except the facts about it.
By Mr. Wimbish: I can't hear you.
A. She has stated the facts about what she knows.
Q. Do you know how they were considered in that community as to being husband and wife by the neighbors?
A. She did not exactly answer the question, but she said she had stated the facts about what she knows and don't know anything else.[282]

The fact that Wimbish "can't hear" Susana is not just a matter of volume; the translation and mediations imposed onto her testimony by the framing and formatting of the trial renders her voice in many senses "inaudible" to the audience of white male settlers working to extract Chickasaw lands into their hands by instrumentalizing her knowledge of the kinship ties involved. Even through these layers of distortion, I feel that I can hear her frustration with the stilted question and answer format, the interruptions, and clarifications.

The cross-examinations of these witnesses by Carney's attorneys reveals a lot about their strategy as well. They work to sow doubt and confusion about various elements required to draw the legal kinship connections flowing property from John Alberson through Charles Puller to arrive at Chapman. These attorneys raise speculation that Charles was still married to his first wife Louina at the time and therefore couldn't have legitimately married Louisa; that Charles and Louisa did not live in the same house consistently enough to really be married; and that Puller wasn't really John Alberson's father because he did not materially support him as such. At times, these legal strategies are effective in the sense that they attack elements of the relationship that

[282] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 71.

would disqualify it from the jury's notions of what proper, "civilized" domesticity looks like. The fact that Louisa lived in many different places during her life is used to cast aspersions onto her character by implying that she could not *really* have been married if there wasn't a stable domestic setting aligning with settler notions of nuclear heteropatriarchy.

The last witnesses called by Chapman's attorneys in this initial phase of the trial testify to the extent that John Alberson was known in the community to be Charles Puller's son, rather than Robert Alberson's son. In one case, the witness (Mary Cavatt) very clearly states that John was Charles's son. Upon cross-examination, Carney's attorney attempts to sow confusion around this issue:

> **Q [Mr. Bolen].** You know how it happened to be named John Alberson, when Charley Puller was its daddy?
> **A.** I don't know sir why.
> **Q.** I will ask you if they were not always disputing down there whether that was Charles' child or Robert Alberson's child?
> **A.** All I have heard them say—when ever said anything concerning the boy, would always say Charles Puller's boy.
> **Q.** You heard about Robert Alberson being with this woman, didn't you?
> **A.** No sir.[283]

Bolen proposes a theory that John's parentage was contested within the community, a theory that Mary soundly rejects. While not efficient by any means, the plaintiff's initial witnesses appear to describe a mostly consistent case about the relationships between Charles, Louisa, and John, despite Carney's attorneys' attempts to discredit these links.

David, Sina, and Salina Alberson's Witnesses & Evidence

Up to this point, you may have noticed that my analysis has centered the arguments for Chapman and Carney. What, you might wonder, is happening with the legal representation for

[283] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 93.

the Alberson heirs? After all, they were allotted as John's siblings. Shouldn't they have a strong case to make?

In the pre-trial phase, Judge McKeown appoints attorney C. E. B. Cutler to be their "guardian ad litem."[284] What this means, in effect, is that Cutler is a court-appointed attorney for them, since as minors, the court doesn't see them as qualified to make their own decisions about legal representation. While there is no reason to think that a court-appointed attorney wouldn't do a good job representing their assigned parties, this is not one of these cases. Based on the transcripts, Cutler seems largely uninterested in the proceeding. While the attorneys for Carney and Chapman constantly object to each other's examinations, Cutler rarely participates in these exchanges. Further, his cross-examinations are much shorter and less incisive than those of the other attorneys.

Cutler only calls two witnesses to the stand to testify for the Alberson heirs, with the goal of showing that Robert Alberson could've been married to Louisa James and could've been John's father. Yet, neither of the witnesses clearly say this. For instance, here's an exchange with the first witness, Robert Immotochee:

> **Q [Cutler].** Robert [Alberson] ever tell you whose child John was?
> **A.** She had disappeared from where he was, at his place, and when she came back she had that little boy with her.
> **Q.** You know about Robert Alberson and Louisa living together as man and wife?
> **A.** I don't know sir, don't know about that.
> **Q.** Did Robert Alberson at any time state to you that John was his child?
> **A.** Did not say anything to me, but this woman told this Alberson's mother—told his mother from time to time that this child was Alberson's child.[285]

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[284] Tom D. McKeown, judge, "Order Appointing Guardian ad litem," ordered in the District Court of Pontotoc County, OK, May 6, 1913 in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 42. Though during the course of the pre-trial phase, David Alberson becomes a legal adult, C. E. B. Cutler remains the Albersons' guardian ad litem.

[285] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 97.

This exchange hardly builds confidence in the idea of the marital and parental connections that Cutler is ostensibly attempting to prove. While I cannot pretend to know what legal strategies were available to the Alberson heirs if Cutler wanted to make a more incisive argument, creating a context for the allotment card that John Alberson appeared on with them and discussing the possibility of adoptive fatherhood seems like a viable avenue to go down; yet this never comes up in testimony. Though Cutler produces the allotment card for the Albersons as evidence at the trial, he doesn't use witnesses to contextualize this for the jury.[286]

Further, I noticed that in the rare times that Cutler did object, he sided with Chapman's attorneys against Carney's attorneys. For example, during the jury selection challenges, Cutler objected to the challenges for bias. Yet, it is obvious that if a juror has financial and social ties to Chapman, that would undermine the Alberson heirs' chances of succeeding in the trial. Once again, I cannot possibly prove that Cutler intentionally undermined the Alberson heirs case in order to help Chapman. Yet, given the overall pro-Chapman slant of the judge, I once again suspicion whether this court-appointed legal representative was ever invested in asserting the Albersons' claims. At best, I can say that he did not consistently or aggressively perform arguments for the audience of the jury like the other attorneys did.

Lottie Carney's Evidence & Witnesses

After Cutler rests his case for the Albersons, Carney's attorneys begin to present their side's arguments. While up to this point, the trial hasn't exactly been orderly or rational, it's here where things start to go off the rails in a significant way.

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[286] Dawes Roll census card, filed as "Defendants Alberson Minors' Exhibit 'A'" in the District Court of Pontotoc County, OK, November 11, 1913, in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 101-102.

Carney's attorneys—led mainly by Bolen—call a series of witnesses whose job it is to cast doubts over the legitimacy of the possible sexual/marital relationships Louisa James had. However, Chapman's attorneys respond quite aggressively to this testimony, activating many racist tropes to discredit Carney's witnesses.

I have thus far invited you to think about law as performance, and consider the ways that this trial centers the perspectives of a white settler male audience; primarily the judge and jury. Here, Wimbish activates a racialized script:

> **Q [Wimbish].** Steven you ever been to the penitentiary?
> **A.** Yes sir.
> **Q.** What for?
> **By Mr. Green:** Objected to as incompetent, irrelevant, and immaterial.
> **By the Court:** Objection overruled.
> **By Mr. Green:** Defendants Carney and Pendleton except.
> **Q.** What did you go for?
> **A.** Go for people telling lie.
> **Q.** What was your [*sic*] charged with?
> **A.** Whiskey.
> **Q.** Never did go for stealing cattle?
> **A.** No.[287]

Wimbish scripts Steven into the role of a liar and a thief, casting him as a Native antagonist to white male settlers ostensibly concerned with prohibition and securing lands and herds as "their" property.

Continuing his attack on Steven Alexander's credibility, Wimbish sets up a conflict between written testimony and spoken testimony. According to Wimbish, Steven's signed statement to Cutler includes a statement that Robert Alberson and Louisa James were married

[287] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 105-106.

and that John Alberson was born at Hogan Keel's house. Both of these signed statements directly contradict the main thrust of the direct examination:

> **Q [Wimbish].** You knew a man by the name of A. J. Bristoe, who lives down at Coalgate?
> **A.** No sir.
> **Q.** I will ask you if he did not come to you on behalf of the Alberson heirs in this case, and if you did not tell him—
> **A.** That fellow's name is Threadgill.
> **Q.** I am not talking about Threadgill now, I am talking about Bristoe; I will ask you if he did not come to you on behalf of the Alberson heirs in this case, and if you did not tell him that Robert Alberson and this woman lived together as man and wife at your mother's house?
> **A.** No sir; he told me his name was Threadgill.[288]

The first layer of confusion this exchange creates is in terms of the identity of the person who took Alexander's statement. Alexander states the man's name is Threadgill, while Wimbish insists that it was Bristoe.

The next layer occurs as Steven Alexander attempts to explain that he signed the statement but that the statement's version of events isn't accurate to what he knows. Wimbish grills him on this point, using it as a segue to accuse Carney's attorneys for instructing him to change his story:

> **Q [Wimbish].** How came you to tell the other statement if this statement is true, who told you to make that other statement?
> **A.** Nobody.
> **Q.** Didn't Mr. Ford tell you to make that other statement—
> **A.** I might explain—
> **Q.** I want to ask you who told you to make the statement you testified to in direct examination in this case; I will ask you if Mr. Ford didn't do it?
> **By Mr. Green:** Objected to, Bob Ford is not in the case.
> **By Mr. Wimbish:** Bob Ford signed one of the subpoenas as attorney for the defendant Lottie Carney.
> **By the Court:** Objection overruled.

[288] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 107.

> **By Mr. Bolen:** We want the record to show that the attorneys for the plaintiff have been sniggering and laughing over this affidavit in the presence of the jury, and we want to except to it and the Court to instruct the jury to not consider it.
> **By the Court:** Objection overruled.
> **By Mr. Bolen:** Defendant Carney excepts.[289]

I ask here, what is the purpose of laughter in this performance? The plaintiff's attorneys have created a spectacle of Steven, mocking his credibility and inviting the jury to view him with derision. Rhetorically, they've assigned the most value to the signed written statement. On the stand, Steven Alexander is less interested in the signed statement and wants to voice what happened, from his perspective.

> **Q [Wimbish].** Explain to the jury why you testified one thing and you say now this other statement is true; why did you testify to something that was not true?
> **A.** Well, let me tell you; I can't talk english plain enough, I cannot tell you what I want to tell you; get the interpreter for me and I will tell you.
> **Q.** You understood Mr. Green a while ago, didn't you?
> **By Mr. Green:** I think if he calls for the interpreter he should have one.
> **Q.** Don't you understand english, haven't you understood everything been asked you?
> **A.** I understand a little, but now I going to ask you a thing; this way, this different all to me; I cannot tell what you trying now, all tangled up to me; which, Alberson, Puller, Lottie Carney or what.[290]

Here the act of translation looms once again; we can see the direct effects of how the anglocentrism of settler law, in a linguistic sense, has materially caused detriment to the defendant Carney's case because a key witness is not as fluent or "literate" in English. Steven Alexander's struggle on the stand as a witness shouldn't be framed as his moral or rhetorical failing. Instead, the artifice of trial has allowed for Wimbish to script him as unreliable by deploying this linguistic asymmetry of power under settler law.

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[289] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 108.

[290] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 108.

Alexander's frustration with Wimbish is almost audible in the final lines of the testimony quoted above; that "this way" is different and "all tangled up" can be read as a Native critique of settler colonial policy. This system of law, the legal quagmire of bureaucratic kinship and allotmentality, is what has so tangled up the tenure of the land in this case that it requires the interpretations of these abstract rules:

> **Q [Wimbish].** Didn't Mr. Cutler read this over to you?
> **A.** Never read it, showed it to me.
> **Q.** Didn't he read it to you?
> **A.** Showed it to me and said that is your hand writing.
> **Q.** In the presence of Sampson Fulsom here, and didn't you tell him it was so?
> **A.** A child dead, what I understood, I am telling you the truth, that is what I understand, the child dead.[291]

As Wimbish obsesses over the technical details of the written statement, and standing in for settler law, Steven cuts across the bullshit, all the arcane rules and procedures and technicalities, to remind us of the materiality of what matters: the death of a child. I cannot speak to Alexander's intent here—his voice, as recorded as legible to this settler archive, cannot be gleaned. Yet as I read this sequence over, I can't help but hear it as an indictment of the trial itself, the arbitrariness of settler law and its performances. Allotmentality fuses Native death to land-as-property, employing bureaucratic kinship to disappear the settler colonial context of Native dispossession by transforming kinship, marriage, and death into settler statistics to be manipulated by property interests.

During Cutler's cross-examination, Cutler picks up Wimbish's angle, using his line of questioning to further suggest that Carney's attorneys have influenced Steven to change his story:

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[291] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 109.

> **Q [Cutler].** You were in the court room and the case went over until afternoon, you remember that?
> **A.** Yes sir.
> **Q.** And isn't it a fact within thirty minutes after that, you were over in the stairway talking with Mr. Ford and some other darkies [*sic*] about this case?
> **A.** I don't think I was.
> **Q.** Were you standing there talking to him?
> **A.** Yes talking to him today.[292]

For Cutler, proximity to Blackness is itself evidence of immorality, criminality, and untrustworthiness. In the context of a white supremacist legal system, he activates anti-Blackness as a strategy to further undermine Steven in the eyes of the jurors.

After the attorneys for the other parties have thoroughly undermined this witness, Bolen attempts to recover the narrative in his redirect examination.

> **Q [Bolen].** They were trying to get you to swear down there, Puller did not have anything to do with this child?
> **By Mr. Wimbish:** Objected to, statement itself best evidence.
> **By the Court:** Objection overruled.
> **By Mr. Wimbish:** Plaintiff excepts.
> **Q.** They were trying to get you to swear Puller out of Court?
> **A.** Asked me about that child, John Alberson, right to get that land.[293]

Once again, Steven seems to break the fourth wall of settler colonialism by reminding us of the core of the case: that all this is premised on arguments over the ownership of allotment land.

Throughout this phase of the trial, Chapman's attorneys systematically attack the credibility of Carney's witnesses, often activating these racist scripts to do so, performing for the white supremacist audience of judge and jury. But Carney's own attorneys activate racist and

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[292] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 111.

[293] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 11, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 113.

misogynistic scripts as well. Their case revolves around attacking Louisa James's character through three factors: (1) association with Black Chickasaw men; (2) participating in traditions like stomp dances; and (3) surveilling and describing her sexual activity. Carney's attorneys grill two Black Chickasaw men on the stand, getting them to euphemistically describe sexual encounters with Louisa James. I do not wish to create a spectacle of these moments, because I think the harm of describing them in full detail outweighs analytical benefit here.

However, I bring this up because this legal strategy—putting Louisa's life under a microscope like this, using intimate details of her life when she was not able to defend herself and that any reasonable person would think is inappropriate—is a product of the audience of settler law. If your jury is composed of men who are white supremacists and believe in rigid patriarchal views about women's sexuality, it's no surprise that lawyers pursue arguments that validate these beliefs. Every element of this trial brims with these settler colonial ideologies—from the definitions of land and sovereignty, to jury selection, to the expense and access to legal representation, to the types of arguments that are allowed and privileged.

Contesting Definitions of Marriage

Here, in the trial, the witness testimony takes a significant turn away from Louisa James's life; a sequence of witnesses drawn by different parties (though spearheaded by Carney's side) weigh in on Chickasaw Nation marriage laws. Settler state recognition of "Indian custom marriages" is deployed as a mechanism to circumvent Chickasaw Nation laws.

The testimony of former Chickasaw Governor William Byrd, under questioning by Chapman's attorney Wimbish, triggers a fresh wave of witness testimony as the various parties and witnesses attempt to come to some kind of consensus as to what constituted marriage within Chickasaw Nation at the time that Louisa James and Charles Puller were alleged to have lived

together as a couple. As a former governor of the nation, Byrd is well positioned to provide this analysis grounded from within his perspective working within the Chickasaw legal system. Byrd, originally called to the stand by the attorneys for Lottie Carney, testifies under direct examination about his knowledge of Louisa James and Charles Puller, and states that he was not aware of them ever being married.[294]

Wimbish questions Byrd, with the implicit goal of getting Byrd to state on the stand that unlicensed marriages by custom would have been recognized. However, despite the many ways that Wimbish words this question, Byrd refuses to give him the answer that he wants:

> **Q [Wimbish].** When did they commence issuing licenses Governor?
> **A.** 1855.
> **Q.** Governor I will ask you if they did not have a custom that they went—couple people decided to get married that they went to a Minister and entered into the contract before the Minister and he simply gave them the certificate.
> **A.** No sir.
> **Q.** Wasn't that the custom?
> **A.** No sir.
> **Q.** Never was such a custom as that?
> **A.** No sir.[295]

Evidently unsatisfied with this answer, which would invalidate the marriage that Chapman's access to the allotment property hinges upon, Wimbish tries a slightly different tactic:

> **Q [Wimbish].** Governor Byrd, weren't they married all over this country, didn't an Indian man and Indian woman agree to live together as man and wife and go before a Minister and make that agreement without a license, and wasn't such marriages as that recognized among the Chickasaws?
> **A.** No sir, not acknowledged by law as legal.
> **Q.** You say it was not acknowledged by law as legal, by whom was it not acknowledged?
> **A.** By the courts.
> **Q.** I will ask you if white people did not marry that way as late as 1880 and 1890?

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[294] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 12, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 116.

[295] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 12, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 167.

A. I don't know what the white people did, I am not so well acquainted with them as I am for the Indians.[296]

This exchange is notable for a number of reasons. First, we can see here that Wimbish is developing a new layer to the common law marriage analogy. Previously, I have described how federal officials tended to think of the category of Indian custom marriage as analogous to common law marriages, as a way of rendering this kinship system legible to settler colonial law. Wimbish builds upon that faulty analogy by offering this extension: that an Indian custom marriage has the same relationship to marriages under a Native nation's law as a non-Native common law marriage has to a state's laws. That is, Wimbish is creating a frame of comparison by which the possibility of a common law being recognized despite defying official state procedures for marriage, then makes possible by analogy the recognition of a marriage conducted via Indian custom that defies the official procedures of that Native nation if codified in a similar way.

Wimbish produces that comparative framework by explicitly asking about the marriages of white people as a reference point. Byrd's response that he is "not so well acquainted" with the marriage practices of white people in the 1880s can be read as a statement of sovereignty: that Chickasaw law exists independently of settler laws and thus, the customary marriage practices of settlers should have no bearing whatsoever in this conversation.

Following this exchange, Cutler cross examines Byrd with the goal of undermining Byrd as someone who would have expansive knowledge of who was and was not married in Chickasaw Nation during this time period:

[296] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 12, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 168.

> **Q [Cutler].** You would not want to state to this jury every marriage that has ever been perpetrated in the Chickasaw Nation between man and wife was not according to the Chickasaw laws and customs?
> **A.** I don't know about that, some men might have violated the law.
> **Q.** You don't want to tell this jury that you have such extensive knowledge and thorough and wide acquaintance of facts, and such a wide interest in this matter that you could make any assertion of that matter, do you?
> **A.** Had it occurred in a lawful way I think I would have heard of it, as I lived at the Court house.
> **Q.** You don't know whether it occurred in a lawful way or not?
> **A.** No, but if it had I think I would have heard of it.
> **Q.** You don't want to tell this jury that that did not occur?
> **A.** I want to tell them just what I have stated.
> **Q.** They might have and you not heard it?
> **A.** Yes, lots of things might have happened and I not know it.[297]

One can almost hear Byrd's irritation as Cutler presents the groundbreaking legal argument that something beyond the knowledge of a witness may have at some time occurred; yet he remains steadfast in his perspective.

Byrd's testimony presents a significant obstacle to two parties to this case—Chapman and the Alberson Heirs—whose case has been structured to depend upon legal recognition of a marriage between either Louisa James and Charles Puller, or Louisa James and Robert Alberson.

Chapman's attorneys direct the next witness, W. E. Little, to testify about Chickasaw marriage customs:

> **Q [Wimbish].** I will ask you to state whether or not it was the custom for two Indians—state to the jury what the custom was?
> **By Mr. Bolen:** Objected to as incompetent, irrelevant and immaterial, evidence shows there was a statutory enactment since 1855 and could not be a custom in controvention of law.
> **By the Court:** Objection overruled.
> **By Mr. Bolen:** Defendants Carney and Pendleton except.
> **By Mr. Wimbish:** We want to tender to the defendants constitution and laws of the Chickasaw Nation.
> **By Mr. Bolen:** The defendants have closed.

[297] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 12, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 170.

Q [Wimbish]. Answer the question.
A. Great many of them just took up together and lived together along twenty-five or thirty years ago, really up until the time the Arkansas law was put over this country. I was Marshallman at Fort Smith when this Indian Territory law was established in here and the Arkansas law was spread over this country.
Q. They would just take up together as man and wife?
A. Yes.
Q. How were they recognized in your community as to man and wife when make an agreement of that kind?
A. Always recognized among one another and among the people, because it was their custom.
Q. Mr. Little state whether there was a Minister that performed whatever ceremony they had—I will ask you to state whether or not they issued a license?
A. No sir.[298]

The clash between the attorneys for Carney and Chapman here revolves around a fundamental difference in their understanding of Chickasaw sovereignty. Bolen's objections stem from the fact that since marriages of the type being described as "custom" in Wimbish's case were illegal under Chickasaw law at the time, testimony like this is essentially pointless.

In his cross examination, Bolen undermines the relevance of the testimony of a non-Native marshal, which is especially drawn into sharp relief by the fact that the previous witness was an expert in Chickasaw law:

Q [Bolen]. You are not an Indian?
A. No sir.
Q. Never did study the Indian Laws?
A. No sir.
By Mr. Wimbish: Objected to, we are not seeking to prove a law, we are seeking to prove a custom.
By the Court: Objection sustained.
By Mr. Bolen: Defendants except.[299]

[298] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 12, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 175-176.

[299] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 12, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 176.

As we can see here, Wimbish—supported both times by the judge—is marking a sharp distinction between customs and laws, drawing upon the common law analogy that he laid the groundwork for in his questioning of Governor Byrd. In effect, he is trying to create a legal interpretation that sidesteps Chickasaw sovereignty entirely, using the nebulous concept of federally recognized Indian custom marriages as the grounds for doing so. This illustrates the perverse side effects of settler misrecognition of Native nations' domestic powers. While the Chickasaw Nation has used said domestic powers to set a definition of marriage, the vague, slippery nature of federal recognition of those powers allows a legal strategy of ignoring the very powers the concept of Indian custom marriage purports to recognize. And that matters materially here, where J. C. Chapman, a white man, is exploiting this ambiguity in order to steal allotment land from Chickasaw peoples using the state court system.

Chapman's attorneys continue calling and re-calling witnesses to testify as to Chickasaw customs around marriage. What stands out to me here in particular is the ways that Chickasaw kinship strains legibility under the settler legal system. Is Chickasaw kinship so fundamentally different from settler law that applying the label of "marriage," as constructed under settler law, is effectively impossible? Through the settler lens, which provides categories of recognition like civil marriage and common law marriage, and categories of illicit sexuality like bigamy and adultery, Chickasaw kinship systems cannot be fully seen because the state only exist to see these categories of recognition and punishment.

Take, for example, the testimony of recalled witness Daniel Harrison. Under questioning, we see a very divergent analysis:

> **Q [Wimbish].** You may state to the jury there how the Indians married in those days?
> **A.** Did not marry in those days, only mighty few of them; go together and live as man and wife.

Q. Mr. Harrison when they would get together and live together as man and wife that way, I will ask you—I will get you to state to the jury whether or not they were regarded as man and wife in the community?
A. Yes sir.
Q. Their children all recognized as legitimate?
A. Yes sir.
Q. When they did marry, when they had a ceremony; I will ask you to state to the jury how that was done; First, I will ask you this question; was there a license issued?
A. No sir.
Q. State how they would do?
A. When wanted to marry go to the preacher and ask him to marry them, when he married them, he would give them a certificate.
Q. What did they do with that certificate?
A. Some would record it, and some would not.[300]

Note how this series of responses seem contradictory when the settler frame is applied, as it is here. When asked if Chickasaw people married, Harrison essentially says that was not marriage. But when questioned whether their relationship and children were recognized within the community, Harrison's answer is yes. Harrison's answers point to a kinship system that involved cohabitation and community recognition, but whether or not the term "marriage" is applicable in the way that Wimbish is not really resolved. Wimbish, as a proxy for the settler legal system at large here, is willing to see settler civil marriage, settler common law marriage, or criminal sexuality. But Harrison seems to be describing something else, a something else that emerges from Chickasaw political and cultural sovereignty that is difficult to express in terms legible and audible to the settler state due to its unwillingness to recognize Native sovereignties in a way that is accountable to linguistics, protocols, and specificities of Native polities.

Indeed, upon cross examination by Bolen, Daniel Harrison again states that "marriage" is not the relevant label:

[300] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 12, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 180.

> **Q [Bolen].** Daniel they would get a woman to stay with them a few days and then go and get them another one?
> **A.** Lots of that.
> **Q.** Get a woman and lay up with them a few days and then go and get them another one?
> **A.** Yes sir.
> **Q.** Just like they do now?
> **A**. Yes sir.
> **Q.** Did not call that marrying did you?
> **A.** No, not call that marrying.[301]

This apparent ambiguity, reminiscent of Susana's testimony earlier in the trial, goes fundamentally unresolved, and carries forward into further witnesses. For example, in the testimony of John Foster, we see this exchange:

> **Q [Wimbish].** What was that custom; how did they marry?
> **A.** At that age of the world sometimes they married; what I mean by that, did not get no license.
> **Q.** How did they do, just take up with one another?
> **By Mr. Bolen:** Objected to as leading.
> **By the Court:** Objection sustained.
> **Q.** State how they would do?
> **A.** I cannot state the facts about how long it was, but to my remembrance, away back they did not marry, they took up with each other; after they formed the law then this marrying took place.[302]

The frame of "marriage" flickers in exchanges like this, performing a sleight-of-hand that at times excludes Chickasaw kinship from its definitions yet sometimes applies, based on the tone or frame of the question. Especially interesting here is that John Foster's testimony reveals how understandings of marriage changed in response to law—law that is itself a sovereign Chickasaw response against the further encroachment of settlers and their laws targeting Chickasaw lands.

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[301] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 12, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 181.

[302] Witness testimony, transcribed in the District Court of Pontotoc County, OK, November 12, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 181.

As the final component of Lottie Carney's case, Bolen introduces into evidence the Chickasaw Nation's 1876 legislation, "An Act to Record Marriages, Etc." This law sets stricter rules as to what types of marriages are recognized, assigning fines and penalties for those who don't follow the law. In fact, upon examination, many of the provisions are similar to marriage laws under bureaucratic kinship. Take, for example, this provision: "Sec. 2. Be it further enacted; that all persons neglecting to record their marriages, within one month from the time they are married, shall be fined in a sum not less than five nor exceeding ten dollars, at the discretion of the Court having jurisdiction of the same."[303] This foreshadows the Office of Indian Affairs' obsession with creating a reliable record of marriages, using mechanisms of punishment against those whose marriages do not follow this new bureaucratic regime. An impulsive reading of this law without proper context might view this as evidence of the Chickasaw Nation capitulating to assimilative forces, aligning their marriage laws to mirror settler statutes. However, such a reading would miss the more important context: that these regulations were aimed at preventing settlers from using laxer marriage laws as a mechanism for land theft.

As Wendy St. Jean observes in her historical analysis of this law, "Despite the stricter 1872 and 1876 marriage laws, white ranchers continued to seek bargain rangeland by means of marriage to Chickasaw women. Spread by newspapers and word of mouth, rumors circulated about the easy wealth to be had through marriage to a Chickasaw or Choctaw woman."[304] These stricter marriage laws were designed to specifically exclude poor white men from using marriage to gain tribal land. Emphasizing this point, consider a law passed by the Chickasaw Nation only

[303] Chickasaw Nation, "An Act to Record Marriages," Sec. 2, Approved October 12, 1876; printed in: *Constitution and Laws of the Chickasaw Nation Together with the Treaties of 1832, 1833, 1834, 1837, 1852, 1855, and 1866* (Parsons, KS: Foley Railway Printing Company, 1899), 77.

[304] Wendy St. Jean, *Remaining Chickasaw in Indian Territory, 1830s-1907* (Tuscaloosa, AL: University of Alabama Press, 2011), 77.

a week later, "An Act Requiring All Noncitizens to Remain in the Chickasaw Nation for a Period of Two Years Before They Can Procure a License to Marry a Citizen of this Nation."[305] This law is then amended in 1887, mere months after the passage of the Dawes Act. In addition to the requirement self-evident in the title, noncitizens would be required to pay $50 for a marriage license. Such a sum—exorbitant at the time of this legislation—along with the residency requirements, had "an eye toward improving the quality of intermarried whites."[306]

Jury Instructions & Verdict

After the testimony and evidence phase of the trial is over, the attorneys for J. C. Chapman and Lottie Carney submit modified instructions that they want to be read to the jury before deliberations. Their preferred instructions each reflect the version of marriage recognition that would benefit their clients' cases.

On the question of common law marriages, Chapman's attorneys argue for a more expansive and inclusive definition: "You are instructed that a marriage by contract or agreement, without the services of any person authorized by statute to join persons in marriage is valid between the parties competent to enter into the marriage relation, followed by co-habitation, and the issue of such a marriage would in law be legitimate."[307] By contrast, the attorneys for Carney and Pendleton push for a much narrower definition. A portion of their instructions reads as

[305] Chickasaw Nation, "An Act Requiring All Non-Citizens to Remain in the Chickasaw for a Period of Two Years Before They Can Procure a License to Marry a Citizen of This Nation," approved October 19, 1876 and amended September 24, 1887; printed in: *Constitution and Laws of the Chickasaw Nation Together with the Treaties of 1832, 1833, 1834, 1837, 1852, 1855, and 1866* (Parsons, KS: Foley Railway Printing Company, 1899), 77.

[306] St. Jean, *Remaining Chickasaw in Indian Territory,* 77.

[307] Wimbish & Duncan, attorneys for Chapman, "Special Charge Number One Asked by Plaintiff," prospective jury instructions presented in the District Court of Pontotoc County, OK, November 13, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 188.

follows: "It is essential to a common law marriage that there shall be a mutual agreement between the parties to assume toward each other the relation of husband and wife. Cohabitation without such an agreement does not constitute marriage and an agreement to live together is not marriage, if there is no agreement to live as husband and wife."[308] Essentially, these instructions are aimed toward drawing a distinction between "cohabitation" and a "common law marriage," with the difference marking this distinction being that a mutual agreement that they lived together as a married couple. Beyond that, the attorneys for Carney and Pendleton argue for an instruction requiring the jury to consider Chickasaw law in their decision-making, as follows: "The Court instructs the jury that under the laws and customs of the Chickasaw Indians a common law marriage is not recognized and a marriage entered into by and between members of said tribe of Indians without a compliance with their laws is void."[309]

However, Judge McKeown rejects all the suggested jury instructions. In the actual version that he delivers to the jury, he essentially instructs jurors to disregard Chickasaw sovereignty entirely: "The Court instructs the jury that a common law marriage was valid in the Indian Territory, even though the contracting parties did not follow the provisions of the Indian law, even though said Indian law fixed a punishment for the failure of the parties to follow such Indian Statute."[310] Nowhere in the lengthy jury instructions does the judge even mention "Indian

[308] Attorneys for Carney, "Defendant Lottie Carney's Requested Instruction No. One (1)," prospective jury instructions presented in the District Court of Pontotoc County, OK, November 13, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 190-191.

[309] Attorneys for Carney, "Defendant Lottie Carney's Requested Instruction No. Two (2)," prospective jury instructions presented in the District Court of Pontotoc County, OK, November 13, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 191.

[310] Tom D. McKeown, judge, "Charge of the Court," jury instructions presented in the District Court of Pontotoc County, OK, November 13, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 194.

custom marriage," federal recognition of which was used as a mechanism to discredit the relevance of Chickasaw law. The conflation of "custom marriage" with "common law marriage" is never truly disambiguated through the course of the testimony, nor does the judge do so in these instructions.

After hearing these instructions, the jurors meet and return a verdict granting the allotment lands in question to J. C. Chapman. Under the Oklahoma Constitution, for cases such as this, "three-fourths (3/4) of the whole number of jurors concurring shall have power to render a verdict. When a verdict is rendered by less than the whole number of jurors, the verdict shall be signed by each juror concurring therein."[311] The verdict in this case was signed by only ten jurors, implying that there was disagreement among the jury.[312] The objections of the remaining two jurors were not recorded. Indeed, the non-unanimous jury rules mean that, as long as at least nine of the jurors agree with a side of the case, there is no need for further discussion or opportunity for dissenting jurors to force a hung jury or further consideration.

The Chickasaw Nation enacted marriage policies legible to the state under certain aspects of bureaucratic kinship. Their legislation was presented as evidence in this trial, and Governor Byrd testified to the legality of marriages at the time. Yet, under a settler legal apparatus, even the clearest, most accessible definitions of marriage are swept aside to facilitate the theft of Chickasaw lands. And that really is the point, isn't it? The formation of the state of Oklahoma, followed by the Curtis Act's abolition of tribal governments creates the conditions that make this possible. The quagmires of settler marriage categories generate ambiguity that lawyers, judges,

[311] State of Oklahoma, *Constitution of the State of Oklahoma*, Section II-19: Trial By Jury.

[312] Ten of twelve impaneled jurors, "Verdict," filed in in the District Court of Pontotoc County, OK, November 13, 1913, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 202.

and jurors bend and break to get the outcome they want. And the context of the trial, performance of rigor and technicality, gives people the feeling that something rational, logical, and just took place. But is it "rational" to create a racist and sexist spectacle by digging up the sexual history of a Chickasaw woman to condemn her character? Is it "logical" to ignore as irrelevant Chickasaw statute defining marriage under Chickasaw jurisdiction? Is the redefinition and fragmentation of Chickasaw land into allotment parcels and the redistribution of such under the arbitrary rules of the settler state "just"? Clearly, it is not. There is no outcome to this trial that would have been rational, logical, or just, because this legal system is not designed to put such principles into practice. Even considering the skewed outcomes rendered possible here, the outcome still privileged the one option that transferred land out of Native hands and into white hands.

This could've been the end of the trial, its proceedings disappearing into the everyday fabric of injustice under Oklahoma settler law. However, upon appeal by Lottie Carney and her attorneys, its improbable ascent toward consideration by the U.S. Supreme Court continues. Two days after the verdict, all the parties except J. C. Chapman come together with a motion to vacate the verdict and conduct a new trial. Their motion includes twelve enumerated reasons, the most important of which include challenges to the conduct of the trial revolve around the legal inconsistencies in the discussion and presentation of marriage definitions (causes IX and X) and accusations of bias introduced into the jury by the rules of Judge McKeown during jury selection. McKeown overrules this motion, causing the parties to next appeal to the Supreme Court of Oklahoma.

Oklahoma Supreme Court: Incompetence Incoming

Before the Supreme Court of Oklahoma ruling, all parties involved in the case submit a correction to the case-made—that is, the transcripts and records from the trial court submitted to the Supreme Court of Oklahoma for review—that reads as follows:

> It is hereby stipulated and agreed by and between the parties to this action, in the Supreme Court of the State of Oklahoma, through their respective counsels, that: the original case-made herein may be corrected to show that the two jurors, to wit: August Fishbeck and C. B. Rector, did not serve upon the jury that tried said cause, in the District Court of Pontotoc County, Oklahoma, the trial Court below, and that the defendant Lottie Carney and who is now plaintiff in error challenged said jurors peremptory and in doing so exhausted her two peremptory challenges given her by the Statutes in order to remove said two alleged biased jurors from the panel.[313]

Within this correction, a new error appears to have been introduced: in the motion for rehearing at the trial court level, the petitioning parties listed three jurors that were challenged, but the third—Ellard—ultimately did end up serving on the jury and was one of the ten signatures supporting the verdict form. Keep this in mind as it becomes important for the Supreme Court of Oklahoma's decision.

In his opinion, adopted by the Supreme Court of Oklahoma, Commissioner C. Wilson considers three reasons submitted by Lottie Carney for the reversal of the trial court ruling: "first, error of the court in overruling defendants' challenges to two jurors; second, error of the court in its instruction to the jury; and third, error of the court in refusing to give an offered instruction."[314] On the first point, Wilson makes the following observation:

> There is nothing in the record from which it appears that any other juror objectionable to the defendant was permitted to remain on the trial panel by reason of defendant having had to exercise two of her peremptory challenges in excusing the two objectionable jurors in question, nor was it shown that she was denied the right to challenge any other juror

[313] C. F. Green, J. W. Bolen, Wimbish & Duncan, C. E. B. Cutler, attorneys for all parties involved, "Stipulations," filed in the Supreme Court of Oklahoma, November 8, 1915, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 212.

[314] Carney v. Chapman et al., 60 Okla. 49, (Okla. S. Ct., 1916), 50.

> and it isn't shown by the record that she even exercised her third peremptory challenge, she having been entitled to three such challenges.[315]

Even though the stipulation had clarified that Carney had exhausted her peremptory challenges to jurors due to the error introduced, Wilson wrote on the assumption that any error would've been harmless as she had an opportunity to challenge a third juror but did not. Though it is admittedly not foregrounded within the motion for a new trial, as I have previously drawn your attention to, an accusation of bias against a third juror was in fact mentioned in these transcripts.

However, Wilson uses the two vs. three error as a reason to not even consider the transcript evidence as to whether Judge McKeown improperly overruled Carney's challenges for cause against potentially biased jurors: "Without discussing the evidence on the voir dire examination of the objectionable jurors to determine whether the court erred in overruling defendant's challenges for cause we are impelled to the conclusion that the record does not reveal reversible error on the part of the court in respect of its action in that particular."[316] The compounding of errors is notable here: the original trial record needed to be corrected, but then a new error was introduced in the corrections, and then the commissioner writing the opinion for the Supreme Court of Oklahoma builds upon that error to not consider the trial transcripts in more detail.

After that, Wilson considers the disputed jury instructions, weighing in on the distinction between common law marriages and Indian custom marriages. He writes:

> From an examination of the court's instructions in the case we are inclined to believe that the terms 'common law marriage' and 'marriage by custom' were used interchangeably [*sic*] and that the mere misuse of the term 'common law marriage' was harmless. The instruction complained of contained every element necessary to constitute a tribal custom marriage as that kind of a marriage was defined by the undisputed evidence in the case

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[315] Carney v. Chapman et al., 60 Okla. 49, (Okla. S. Ct., 1916), 50.

[316] Carney v. Chapman et al., 60 Okla. 49, (Okla. S. Ct., 1916), 50.

> and if it contained other elements and thereby placed a greater burden of proof on the plaintiff than was warranted by the evidence the defendant cannot be heard to complain of the error, for as to her it was harmless.[317]

Somewhat bizarrely, Wilson describes the evidence of tribal custom marriages as "undisputed," despite the frequent objections within the trial and over the jury instructions which form the basis of this appeal in the first place. But his assertion that common law marriage and Indian custom marriage are interchangeable illustrates once again how the analogy of common law marriage is deployed within settler law to aid with land dispossession. Wilson cites an 1890 act of Congress, "An Act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes," which includes this provision: "That all marriages heretofore contracted under the laws or tribal customs of any Indian nation located in the Indian Territory are hereby declared valid, and the issue of such marriage shall be deemed legitimate and entitled to all inheritances of property or other rights, the same as in the case of issue of other forms of lawful marriage."[318] The "or" between "laws" and "tribal customs" in this legislation is doing a lot of work for the settler state here, creating a flexible tool to bypass the laws of Native nations to recognize marriages as needed to pursue land theft. Indeed, this is what happened in this case, where the recognition of an "Indian custom marriage" that violated Chickasaw law was used as the basis for transferring title to this allotment to J. C. Chapman.

After declaring that all the errors brought forward by Lottie Carney were "harmless," Wilson goes further to argue that for this type of trial, "the intervention of a jury was not

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[317] Carney v. Chapman et al., 60 Okla. 49, (Okla. S. Ct., 1916), 51.

[318] U.S. Congress, "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes," Sec. 38, approved May 2, 1890.

mandatory and any verdict which a jury to which such issues were submitted might have rendered would have been purely advisory and unless approved by the court should properly have been disregarded by it in arriving at its judgment." As such, "whether Puller and Louisa James were married according to a prevailing Indian custom or whether their relations were illegitimate and lustful, there was sufficient evidence to reasonably sustain the judgment of the trial court and that judgment has our approval."[319]

Following this opinion, Carney's attorneys file a motion for rehearing and request the opportunity to present oral arguments about the case. They draw the Supreme Court of Oklahoma's attention, again, to Chickasaw statute, going further this time to argue for tribal sovereignty, noting:

> The court's attention was not called to the decision of our courts holding that the laws of Indian Tribes is a foreign law and subject to the same rule of evidence as any other foreign law:
>
> Porte vs. United States, 104 S. W. 885 (Indian Territory).
>
> Davison vs. Gibson, 56 Fed. 443,
>
> and that such laws cannot be proven orally except by a witness learned in said law, and that the best evidence is a copy of the law duly authenticated; and to the fact that the only proof offered by defendant in error, plaintiff below, was oral evidence by witnesses who did not qualify as expert witnesses.[320]

Carney's attorneys essentially advocate for the recognition of Chickasaw sovereignty. They further cite cases that argue for the inapplicability of common law to Native nations:

The court's attention was not called to the decision of our courts holding that the common law is "utterly at variance with the known habits and customs of the Indians," and can only be invoked upon the total failure of proof as to local laws and customs, and that "it is

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[319] Carney v. Chapman et al., 60 Okla. 49, (Okla. S. Ct., 1916), 52.

[320] C. F. Green, J. W. Bolen, and Kibery Fitzpatrick, attorneys for Lottie Carney, "Motion for Rehearing," filed in the Supreme Court of Oklahoma, June 7, 1916, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 221.

common knowledge of which the courts should take judicial knowledge that the domestic relations of the Indians have never been regulated by the common law of England, and that the law is not adopted to the habits, customs and manners of the Indians." We can see here how an invented category like "domestic dependent nations" generates the kinds of incongruities and ambiguities that are deployed through the interpretative authority of settler courts to arrive at convenient outcomes. The fact that a state court like the district court of Pontotoc County has jurisdiction to interpret laws under a different sovereign entirely speaks to these incongruities. Further, the act of Congress Wilson cites strategically overrides recognition of tribal sovereignty as a mechanism to implement further land theft.

Finally, Carney's attorneys point out the error in terms of the peremptory challenges to jurors, writing:

> The court in holding it is not shown by the record that Lottie Carney exercised her third challenge; the court over-looked Sec. XII of petition in error, reciting that three persons were challenged peremptorily and the stipulation C. M. 396 which recites that defendant below exhausted her challenges; and while said stipulation uses the phrase "two challenges allowed by law" the fact that records show that the case made was withdrawn from this court for the very purpose of correcting the record to show that the plaintiff had exhausted her challenges allowed by the statute, this fact taken with the section of the petition in error, supra, and the statutory provision for three challenges, we respectfully submit should convince the court that the word "two" was a clerical mistake and that the doctrine of harmless error should apply.[321]

However, the Supreme Court of Oklahoma declines this petition, leaving the lower court's ruling in favor of J. C. Chapman in place. Once again, this could've easily been the end of this trial. Yet, the U.S. Supreme Court decides to take up this case regardless.

Lottie Carney's Brief to the U.S. Supreme Court

[321] C. F. Green, J. W. Bolen, and Kibery Fitzpatrick, attorneys for Lottie Carney, "Motion for Rehearing," filed in the Supreme Court of Oklahoma, June 7, 1916, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 222.

After the U.S. Supreme Court agrees to hear this case, the lawyers for Lottie Carney and John Chapman submit briefs laying out their respective arguments. In a case already plagued with bizarre moments of misreading, misplaced documents, and misunderstanding, further trouble arises with the briefs submitted by Carney's legal representatives. According to the affidavit submitted by Carney's "son-in-law and business manager" Robert P. Ford, the lawyer assigned to her case, Kirby Fitzpatrick, enlisted as a Lieutenant in World War I and did not show up to Washington D.C. to file the brief on time as he was stationed overseas. Fitzpatrick then submitted his own affidavit blaming another attorney at the law firm who he says was supposed to submit the brief, and shows up to D.C. to prepare and submit the brief himself. While it's unclear how, if at all, this chaos affected the outcome of the case, I mention it here to draw attention to the chaotic and ad hoc nature of Carney's legal representation.

After summarizing the premise of the case from Carney's perspective, Fitzpatrick draws the U.S. Supreme Court's attention to the federal aspect of the case, writing, "the State Supreme Court in divesting her of title placed what plaintiff contends was an erroneous construction upon the act of Congress of March 2, 1890 (26 Stat. L, 81; Tr. Rec., p. 219), thus raising a Federal question."[322] Fitzpatrick cites the Oklahoma Supreme Court's earlier interpretation of this legislation in a case called *Chancey v. Whinnery,* where that court states, "The act does not attempt to make valid adulterous relations sustained toward each other by tribal members. It simply declares that valid which, according to the tribal laws and customs, was valid."[323]

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[322] Kirby Fitzpatrick, "Brief for the Plaintiff in Error," filed in the U.S. Supreme Court, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 230.

[323] Chancey v. Whinnery, 47 Okla. 272, (Okla. S. Ct. 1915), quoted in Kirby Fitzpatrick, "Brief for the Plaintiff in Error," filed in the U.S. Supreme Court, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 231.

Viewing that statement in the longer context of *Chancey v. Whinnery*, however, the court there also notes that "it is expressive of the intention of Congress to give full recognition to the validity of Indian marriages, and the legitimacy of the issue thereof, where the marriages were contracted according to the laws or tribal customs."[324]

By selectively citing from this case, Fitzpatrick appears to be arguing that the relationship between Charles Puller and Louisa James was "adulterous" because it did not follow the rules for marriage laid out by the Chickasaw Nation. There is a certain murkiness between the legal concepts of "adultery" and "Indian custom marriages" because of the pejorative view of Native kinship systems offered by settler scrutiny. The tropes of "civilization" loom here, precisely because settler society mislabels as "deviant" kinship practices that might be in total accord with Indigenous polities' protocols. Fitzpatrick, working on behalf of Carney here, is encouraging the U.S. Supreme Court to see the contested marriage through this pejorative lens so that their legal arguments will prevail.

Another argument that Fitzpatrick makes is that the witnesses in the lower court were not qualified as "experts" to testify to Chickasaw laws or customs. He notes, "We submit that defendant in error [Chapman] nowhere attempts to introduce duly authenticated copies of the law and in no single instance attempts to qualify as an expert any witness by which he sought to prove the Indian customs as to marriage."[325] This feels like a more salient point, at least to me, given that Carney's attorneys brought Governor Byrd to testify as to Chickasaw policy on marriage and introduced copies of those policies into evidence. This points to the unevenness

[324] Chancey v. Whinnery, 47 Okla. 272, (Okla. S. Ct. 1915), 279.

[325] Kirby Fitzpatrick, "Brief for the Plaintiff in Error," filed in the U.S. Supreme Court, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 232.

with which "expertise" is deemed necessary. For example, at the trial court level, you'll recall that Chapman's attorneys brought in a white marshal from Fort Smith to testify about Chickasaw customs on marriage. Indigenous legal systems are subject to rampant misinterpretation in settler courts because settler law does not make it a priority to engage with the legal systems the settler state is attempting to destroy.

At the end of Fitzpatrick's description of the issues involved in the case, he makes the following statement:

> In the trial of the case, in the motion for a new trial, in the assignment of error, in the brief, in the State court, in the petition for re-hearing, in the prayer for reversal, and here in this forum this old Indian woman, unable to speak the English language, has stood as the champion, not only of her own rights under the Indian statutes governing marriage, but has stood for the dignity of the laws of her people and the sanctity of the marriage contract.[326]

This rhetorical moment, while not necessarily a legalistic argument, is nevertheless part of the performance for the audience of the U.S. Supreme Court, with some unsettling implications—both in a positive and negative sense. On the positive side, it's unsettling because Fitzpatrick is forcing the U.S. Supreme Court to see Lottie Carney, not as an abstract set of arguments but instead as a person. In this analysis, I've spent so much time dissecting the legal strategies and inconsistencies, tying them back to the unjust ideologies and practices of the settler legal system. On a human level, I appreciate these rare moments late in the transcripts where the materiality and humanity of the case resurfaces despite the way that settler law attempts to erase that component.

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[326] Kirby Fitzpatrick, "Brief for the Plaintiff in Error," filed in the U.S. Supreme Court, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 234.

Yet, the implications of this statement are unsettling in another way, that circles back to allotmentality and the deployment of settler gender politics as a strategy to circumvent land dispossession. Fitzpatrick positions Carney as a champion for "the sanctity of the marriage contract," calling back to the ways that Carney's attorneys have attempted to systematically discredit the marriages of Louisa James by deploying the pejorative frame that settler heteronormativity applies against Native kinship systems. This legal strategy takes what Mark Rifkin calls "the bribe of straightness." This bribe, according to Rifkin, describes a situation where marginalized communities:

> play aspects of normality against each other as part of a counterhegemonic claim to legitimacy, distinguishing themselves from other, more stigmatized modes of deviance. This dynamic … includes arguing for the validity of [I]ndigenous kinship systems (native family formations, homemaking, and land tenure) in ways that make them more acceptable/respectable to whites, disavowing the presence of sexual and gender practices deemed perverse within Euramerican sexology.[327]

This description almost perfectly applies here. Fitzpatrick situates Lottie Carney, and the Chickasaw nation more broadly, as adopting marriage policy and practices that are "straighter"—that is, more aligned with settler norms of "civilization"—and thus position her as more deserving of land and justice. We can see, once again, how the settler judiciary and its conflict-oriented framing, incentivizes participants to make arguments that bolster some aspect of settler colonialism. Carney is a Chickasaw woman trying to prevent white settler theft of her land, so her attorneys argue in a way that bolsters settler heteropatriarchy.

The next section of the brief, where Fitzpatrick focuses on making his legal arguments, reinforces these ideas further. Fitzpatrick argues against the Oklahoma Supreme Court's dismissal of Chickasaw marriage laws, making the case that, "The time was when 'Nature

[327] Mark Rifkin, *When Did Indians Become Straight?: Kinship, the History of Sexuality, and Native Sovereignty* (New York, NY: Oxford University Press, 2011), 22-23.

Mating,' such as sought here to be established, which had neither the sanction of priests nor judiciary, obtained among the uncivilized Indians, but such customs have ceased to exist long prior to the marriage in question." [328]Fitzpatrick's argument takes one premise that is reasonable—the idea that Chickasaw law should be considered in a case about Chickasaw land and people—but couches that argument in virulent settler tropes about Indigenous "backwardness." In effect, this amounts to an argument where Chickasaw people are framed as "advancing" into civilization, rather than already always having had legitimate practices around gender and sexuality. Fitzpatrick mobilizes tropes against Indigenous peoples to uplift the Chickasaw nation's standing under settler law, a move that takes the "bribe of straightness" and necessarily reinforces ideologies of settler colonialism in the process.

Emphasizing this further, Fitzpatrick writes, "Will it be contended that this 'Nature Mating' is in all things similar to the common-law marriage, upon which rests the legitimacy of the ancestors of this republic, and which had obtained in its dignity and solemnity in parts of the nation in some of the States of the Union?"[329] This takes the settler ideology a layer deeper. Fitzpatrick is appealing to the Court to take a stand against the common law vs. custom marriage analogy, not because that analogy is an inappropriate misrecognition of Native kinship systems, but instead because common law marriages are much more "civilized." This is an implicitly white supremacist argument, because the legitimacy attained by common law marriages vis-a-vis Indian custom marriages is not based on a description of how these practices differ, but instead

[328] Kirby Fitzpatrick, "Brief for the Plaintiff in Error," filed in the U.S. Supreme Court, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 236.

[329] Kirby Fitzpatrick, "Brief for the Plaintiff in Error," filed in the U.S. Supreme Court, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 237.

dog whistles the whiteness of the "ancestors of this republic." What he's really saying is, "What? You're not going to compare us to *those people*, right?"

At the end of this brief, Fitzpatrick wraps these arguments together. He accuses the opposing side as being "willing to assail the marital status of an honorable race, long since advanced beyond their primeval custom of "Nature Mating", and who at the time of this alleged marriage had a Senate, a Supreme Court, public schools, orphan homes, and a code of written laws prohibiting adultery, governing marriage, and forbidding horse racing, ball playing, and gambling on Sunday." His recitation of these various features of a "civilized" society, while not only calling to mind Henri Day from *Miko Kings*, attempts to align the Chickasaw nation to Christian progressivism of the era. In sum, though Fitzpatrick's brief is an instrument to retain Chickasaw land in the hands of a Chickasaw woman, the arguments presented traffic in white supremacist and heteropatriarchal ideologies for the audience of the settler judiciary.

J. C. Chapman's Brief to the U.S. Supreme Court

In their responding brief, the attorneys for Chapman lay out two main arguments. The first is a question of jurisdiction. Chapman's attorneys argue that the case does not raise a "federal question," which would be required for a federal jurisdiction like the Supreme Court to weigh in on a matter originating within state courts. They draw attention to the fact that Carney's attorneys did not raise federal questions in lower court, writing:

> In the instant case the court will see that in no part of the proceedings from the petition to the verdict of the jury, or in the motion for new trial, was there any Federal question concerning either the statutes or the Constitution of the United States called in question, nor was any claim made in any of the proceedings that any local statute was in conflict with, or repugnant to the terms of the United States statute or the Constitution of the United States.[330]

[330] W. C. Duncan, "Brief for Defendants in Error," filed in the U.S. Supreme Court, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 251-252..

They further argue, considering the Act of 1890 brought out as the source of the federal question Carney's attorneys used to draw the U.S. Supreme Court's attention, "If Charles Puller and Louisa James were married in 1887, the above act of Congress does validate their marriage, if that validation was necessary."[331] This section of the brief makes an argument via omission, that because federal law wasn't referenced by Carney in lower courts, it isn't relevant here—and even if it was, the law mentioned only validates the marriage that Carney is contesting.

While this is perhaps a salient argument for the audience of federal jurists themselves, reading this case across the fourth wall of settler colonialism illustrates just how deeply entangled federal power is with the land redefinition and dispossession in this case. It is precisely because of allotment, precisely because of the entangled ideologies of domesticity and settler supremacy that such courts operate. This "lack" of a federal question is an arbitrary legal distinction that operates as yet another pathway preventing recognition of Chickasaw law. If the intervention of Chickasaw law is not enough to turn the course of this case at the state level, or at the federal level, what jurisdiction even exists under settler state where it could? This typifies the trope of "jurisdictional decay," which involves the gradual erosion of sovereignty/autonomy by Indigenous polities over their own affairs under settler colonialism. Here, though, the settler state is using jurisdictional decay in a different way: eroding the federality of questions involving Indigenous lands and kinship to leave the day-to-day practice of land dispossession in local and state courts undisturbed.

The remainder of the brief by Chapman's attorneys recaps the arguments made by the Supreme Court of Oklahoma, namely that the relationship between Charles Puller and Louisa

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[331] W. C. Duncan, "Brief for Defendants in Error," filed in the U.S. Supreme Court, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 253.

James met all the requirements necessary for recognition as an "Indian custom marriage" regardless of the lower court's mislabeling of it as a "common law marriage," and that this recognition does not require reference to Chickasaw law because it is a "custom" being recognized, not a "law." As they conclude their arguments, they once again draw attention to the questions of fact ruled upon by the lower court process:

> That but two questions were raised in the lower courts by the pleadings and evidence, both questions of fact. (1) Whether marriage by tribal custom prevailed among the Chickasaw Indians in 1887, when Charles and Louisa were married, and (2) whether they were married in accordance therewith. Both these questions were answered in favor of the Defendant in Error.[332]

Thus, this case rests once again upon a failure to recognize the Chickasaw nation's promulgation of law to redress concerns about the way that marriage recognition was being weaponized by settlers as a land dispossession tool. I wonder what—if any—law the Chickasaw nation could have passed that would have been specific enough or strong enough to prevent land dispossession in this case under settler jurisdiction. The answer seems to be that no law would've been enough. As long as the settler state takes as valid the premise that Congress's plenary power allows it to systematically reject whatever elements of tribal sovereignty it sees fit; the powerful "or" in the Act of 1890 made it irrelevant to federal courts whether or not the Chickasaw nation used its sovereignty to modify recognition of marriages.

"Somewhat Remote": The U.S. Supreme Court Opinion

On May 20th, 1918, Justice Oliver Wendell Holmes, Jr., delivered the opinion of the U.S. Supreme Court for *Carney v. Chapman*. After summarizing the contours of the case and its central contentions, Justice Holmes offers the following analysis:

[332] W. C. Duncan, "Brief for Defendants in Error," filed in the U.S. Supreme Court, printed in Transcript of Record for Lottie Carney v. J. C. Chapman, David Alberson, Salina Alberson, et. al., 247 US 102 (1918), 262.

> Taking all the requests for rulings and the rulings together, we are inclined to agree with the court below that common law marriage and marriage under the customs of the tribe were used as equivalent phrases, and to assume in favor of the plaintiff in error [Lottie Carney] that the request means that *a marriage of Chickasaws, although in accord with their customs, was invalid under a Chickasaw Act of October 12, 1876*, unless solemnized by a judge or ordained preacher of the Gospel. This assumption would seem to carry with it the implication that the Act of Congress did not validate a marriage in accordance with still prevailing custom if no judge or preacher added his sanction, and so to ask a construction of that Act that, again by implication, was refused. [emphasis added][333]

Holmes's argument effectively boils down to the argument that the Chickasaw Nation's law defining the validity of marriages cannot override Congress's decision to recognize marriages by custom. Yet, he does so without climbing deeper into the thicket of federal Indian policy and tribal sovereignty. In previous sections, I have discussed how recognition of Indian custom marriages and divorces are built upon attempts to make Native kinship systems legible to property-oriented settler bureaucracy. An assumption underlying this is that Native polities do not have "laws" that are recognizable as such. In this case, though, the Chickasaw Nation has developed a system of bureaucratic kinship, creating a state-like interface with settler legal systems with the intent of curtailing land theft via marriage. The Chickasaw Nation has used the tools of state power to gain leverage by offering a governmental interface that settler law could recognize as such. Yet, by applying the Act of Congress here in this way, that Chickasaw law is swept aside so that the recognition of "prevailing custom" can be used to facilitate land dispossession via the interpretative abstraction of settler courts. Concluding his opinion, Holmes writes:

> In this somewhat remote way a federal question is opened, but it cannot profit the plaintiff in error. There was some evidence that Charles Puller and Louisa James held themselves out as man and wife and were reputed married. There was evidence also that it was customary to disregard solemnization before a judge or preacher. It would be going somewhat far to construe the Chickasaw statute as purporting to invalidate marriages not

[333] Carney v. Chapman, 247 US 102 (1918), 102.

> so solemnized. The Act of Congress made valid marriages under *either custom or law*. Whatever may be the requisites to satisfy that Act, the above-mentioned evidence warranted a finding that they had been complied with, as is expressly provided by statute for the case of a marriage of a white man with an Indian woman. Act of August 9, 1888, c. 818, § 3, 25 Stat. 392. The reason for the rule is stronger here. [emphasis added][334]

Holmes affirms the Oklahoma Supreme Court's opinion, finding for Chapman "with costs" making Lottie Carney responsible for the legal fees associated with the appeal.[335] The application of the phrase "either custom or law" shows how, while in some cases, expansion of marriage recognition by Congress for the purposes of assigning property rights appears on the surface to be beneficial, in cases like this, the flexibility of that recognition provides opportunities for settler power to retrench itself and facilitate land theft.

Of everything I've read in these transcripts, briefs, and decisions, there is perhaps no phrase that has called out to me more than Holmes writing, "In this somewhat remote way a federal question is opened." On direct textual level, Holmes is arguing for the U.S. Supreme Court's jurisdiction to rule on this case, stating that the very edge of the case brushes against federal law just enough to warrant this opinion. But I can't help but read it in another way, thinking about the "remoteness" as the layers upon layers of abstraction piled onto this land, these families, and this community by settler courts. This case is fundamentally about land, right? Yet even in the final opinion, Holmes states, in a throwaway line, that "the right of possession is immaterial now."[336] Why hear a case like this at all? Just to flex judicial power in support of damaging interpretations of Congress's "plenary power"?

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[334] Carney v. Chapman, 247 US 102 (1918), 103-104.

[335] U.S. Supreme Court, Engrossed Docket for the October Term, 1917, 47.

[336] Carney v. Chapman, 247 US 102 (1918), 102.

This case, in my view, typifies allotmentality. Allotment is the root cause of the case, the destructive ideology that aligns white supremacy, heterosexism, and property together, incentivizing community members to leverage aspects of settler colonialism against each other to maintain control of that land-redefined-as-property in the context of dispossession and death. The premise that land tenure should be decided not by Indigenous protocols, kinship networks, and community accountability and instead be determined by hundreds of pages of legal texts, thousands of dollars, abstract legal arguments, and the attention of multiple courts—including the highest settler court—is allotmentality.

As I wrote about this case, struggling through not only the arbitrary legal terminology but also the spectacles of virulent sexism, anti-Blackness, and bashing of Native sexualities and kinship practices, I was often tempted to wonder what the point of all this was. Would a different decision by the Supreme Court, for example, provide justice? Should Lottie Carney have been granted title to the land over John C. Chapman? Would seeing her prevail, despite the sexist and anti-Black arguments trafficked by her lawyers been justice? Would overturning recognition of Indian custom marriages, while it would've avoided the transfer of title out of Chickasaw hands in this one case, be weaponized later against other Native people whose kinship systems weren't "straight" or "civilized" enough according to toxic settler standards? And what about the Albersons, whose claims disappear from the record after they don't pursue appeal. John Alberson was allotted as their brother, allotted with their family, yet their lawyer made the weakest arguments and perhaps they did not have access to the immense resources required to pursue appeals to the U.S. Supreme Court. Would seeing the case decided differently have been justice?

No, it would not. The very framework of a case in settler court deciding who has title to an allotment is inimical to justice. This is again, where we have to break the fourth wall of settler colonialism and see the case and its narratives as artificial, as impositions. When considering works of fiction, one must sometimes think about the "in-universe" justification of events. For example, that a certain character makes a certain choice because the world that the author wrote into existence is not our own, and has its own rules and factors. While not fictional in that sense, the rules of this trial take for granted the powers of Congress and the judiciary, take for granted the idea that Native land is and should be parcels of private property, that white supremacy and cisheteronormativity are natural, inevitable, and desirable. Where these "rules" are exposed, where participants in the trial break the fourth wall of the case and call out to the viewer that everything happening is a performance, that the audience of these trials were white settler judges and jurors, that no outcome of this case could resemble justice, perhaps then, finally, we see what it means when Ezol Day casually says, "Documents lie."[337]

[337] Howe, *Miko Kings*, 28.

PART II: CONCLUSION

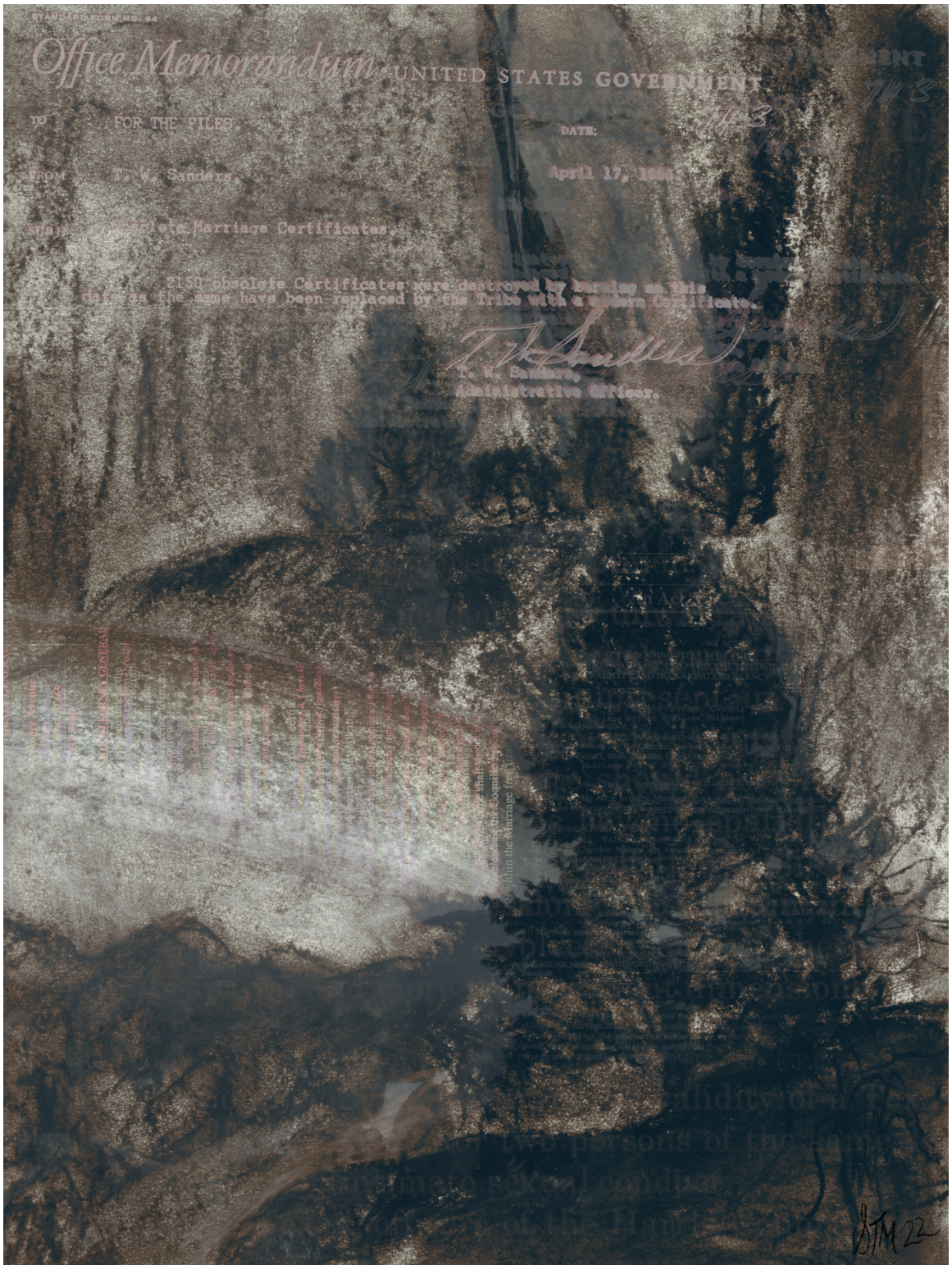
It is my hope that "allotmentality" has proven to be a useful analytic tool. In Part II, I laid out my case for the term, building it out from existing scholarship in Native American and Indigenous studies, and illustrating its applications with examples from existing law. And yes, a term may just be a term, but I find it useful in the way that it pushes me to place land dispossession at the center of a conversation about marriage law—law that on its surface, appears to be about something entirely different.

Allotmentality in marriage law, to me, is about the development of bureaucratic kinship toward the particular goal of land dispossession. And in cases, especially around this time period, where Indigenous kinship systems were being defined and described by settler courts, allotment logics are never far from mind. I originally had planned to do more case studies, but found *Carney v. Chapman* to be worthy of a more thorough accounting. When viewed through this lens, *Carney v. Chapman* vividly reveals white supremacy and heteropatriarchy in these courts. The definition of the land as an allotment makes it vulnerable to being recast as settler property; the definitions of marriage and usurped interpretative power of the courts are the methods by which this story about land gets told.

We also see acts of defiance, resistance, and agency of (especially) Chickasaw people in this courtroom in the face of virulent racism and tactics of dispossession. And that's the note that I want to end this section on—allotmentality is important because of its failures, because it illustrates how settler attempts to logic their way into legitimate ownership over Indigenous lands fail even under their own terms. Allotmentality fails not by accident, but because of active contestation, resistance, questioning, reframing, reshaping. And yes, allotment is ongoing, its

dispossession continues, but it is dispossession that can be rejected and through concerted and collective efforts, overturned. Land will never be just ink on settler paper. Land is land.

PART III: THE OVERHEAD OF LEGITIMACY



ARTIST STATEMENT

"The Overhead of Legitimacy," July 2022. The text of decisions legalizing and banning same-sex marriages sit at cross purposes amidst a smoky charcoal rendering overlaying a photograph taken at the base of Lower Yosemite Falls in March 2022. The iconic rainbow symbol of the national gay rights movement sits oddly pale in the haze of the Washburn fire. Written overhead is an Office of Indian Affairs memo describing the fate of 2,150 "obsolete" marriage certificates destroyed by burning to make way for placement by "a modern Certificate."[338]

[338] T. W. Sanders, Administrative Officer, Office Memorandum, 17 April 1956, General Records of the Bureau of Indian Affairs, Record Group 75, Warm Springs, Decimal Subject No. 743 (Seattle, WA: National Archives and Records Administration).

PART III: INTRODUCTION

Unlike the previous two parts, Part III is divided into three shorter chapters. In Chapter 5, "Toward a Theory of the Overhead of Legitimacy," I make the case for the "overhead of legitimacy" as a method of interrogating the politics of recognition. My goal with this section is to show the overlapping ways that Native and Indigenous studies and gender/sexuality studies have considered questions about recognition. In particular, I am interested in exploring how seeking recognition amidst an inequitable power dynamic incurs costs that are both material and ideological: the overhead of legitimacy. The sovereign power to recognize or not recognize marriages is a consequential one under bureaucratic kinship, where the fates of people and land are tethered to civil contracts.

After establishing this framework, I use it to investigate U.S. Native nations' decisions to legalize or prohibit same-sex marriage. In Chapter 6, "Present Precedent: Unfixing Tradition in U.S. Indigenous Same-Sex Marriage Discourse," I describe the multiple ways that "tradition" is deployed in arguments about same-sex marriage prohibitions and legalizations, both in terms of how Native nations themselves discuss and debate the issue, but how scholars in federal Indian law and queer Indigenous studies have approached the topic. In Chapter 7, "Temporal Overhead: The Nationalist Drag of Legitimacy," I explore the arguments around nationalism manifested in these policy decisions, with a particular emphasis on the case study of the Cherokee Nation's 2016 legalization of same-sex marriage and how it responds to the 2015 landmark Supreme Court case *Obergefell v. Hodges*, which overturned all remaining state-level same-sex marriage bans in the United States.

In my view, it is essential to place the decisions of Native polities regarding marriage recognition within a context that makes visible settler colonial pressures and the ongoing facets

of bureaucratic kinship, while also foregrounding Indigenous agency in shaping national futures. Doing both things simultaneously is a challenging task, as evidenced by the existing scholarship on the subject. Throughout these chapters, I will highlight tensions that I could not see easily resolved, and aim to be honest about places where I am still uncertain. By using "the overhead of legitimacy" as an overarching framework for this section, I hope to illustrate the insidious ways that ongoing settler colonial governance influences the choices that Native nations make, in terms that I hope will be helpful. With that, let's get started.

CHAPTER 5: TOWARD A THEORY OF THE OVERHEAD OF LEGITIMACY

On the August 16, 2019 edition of National Public Radio's news broadcast All Things Considered, host Mary Louise Kelly introduced a story about the Oglala Lakota Nation's legalization of same-sex marriage with the statement, "While across the U.S. same-sex marriage has been legal for four years, some Native American tribes still fail to recognize it. Tribes are empowered to make their own laws, and some are just now wrestling with new rights."[339] In just these two sentences, Kelly weaves together a temporal framework that presents Native nations as behind the times, out of step with the progress that swept "across the U.S." Consider tribes' "failure to recognize" same-sex marriage; that they are "just now" engaging with these "new" rights.

In the remainder of this segment of just under four minutes, Kelly turns to Chynna Lockett, reporter from South Dakota Public Broadcasting, who narrates the efforts of enrolled members, wives Muffie Mousseau and Felipa De Leon, to advocate for their nation's legalization of same-sex marriage. Lockett puts their advocacy into context of the Suquamish tribe's 2011 legalization of same-sex marriage, which she notes took place "before the state did" without further comment.

What, I wonder, is the purpose of this relativistic framing of same-sex marriage progress? How can Native nations be both pre-empting states and lagging behind the U.S. at once? My goal here is not to roast NPR's coverage of the issue, but rather to observe how the terms of politics that sprung to mind for this national reporting on the issue of same-sex marriage in tribal jurisdictions raises questions relevant to the field. Why are these actions by these nations

[339] Chynna Lockett, "Native American Tribes are Wrestling with Decision to Legalize Same-Sex Marriage," *All Things Considered, National Public Radio* (Washington, DC: National Public Radio, Aug. 16, 2019).

rendered visible in this way, in this context? What are the costs of that visibility, and how might insights from Native/Indigenous and gender/sexuality studies describe and clarify these costs?

In previous sections, we have seen the development of what I termed "bureaucratic kinship," and further, the development of "allotmentality." These terms represent concepts that are not entirely distinct; rather, they focus on different aspects of the topics at hand. For this final major section, I am introducing a third concept: "the overhead of legitimacy." Overhead is a term used in bureaucratic contexts, describing essentially the cost of running the bureaucracy itself as an organization attempts to complete some task. In academia, this term often comes up in the context of grants—for instance, if one were to have research funded by a federal grant in association with a university, the university would take a certain percentage of that grant as overhead. It is a percentage of everyone's time, effort, and resources that perform a kind of disappearing trick—vanishing into the navigation and operation of the organization. When targeted for reduction, overhead might be brought into focus as inefficiency, but the interests and logic of an organization's work often make it difficult to pinpoint where all the expenses actually went. Overhead is largely opaque to an outside viewer of an organization, but even within an organization, it takes a special expenditure of attention and perspective to really understand the labyrinthine processes at hand.

By describing the overhead of legitimacy, I am specifying this concept as an analogy to politics of recognition. That is, there are growing costs to attaining a status of recognition or legitimacy in relation to a settler colonial state—costs that are often difficult to bring into focus and address. What is the cost of federal recognition for Native polities in the U.S., for instance? If accepting the standards by which a settler state can understand another political entity as legitimate, or recognizable, this incurs a cost. For Native polities that develop state-like

bureaucracies in order to gain access to recognition and resources that a settler state might disburse, this can coincide with an internalization of the logics and structures of settler colonialism. That is to say, what notions of citizenship, race, gender, and sexuality might become baked into a Native nation while attaining this type of recognition? What costs does this incur, on different registers, and how can that overhead—the overhead of legitimacy—be made visible?

These are big questions, no doubt, but also ones that can slip into abstraction. Fortunately, there are a few things we can do to alleviate this. First, it's important to acknowledge that versions of these questions echo throughout much of the work of queer studies and especially Native and Indigenous studies. In the first section of Part 3, I aim to contextualize the overhead of legitimacy within related terms and concepts that I found instructive in challenging my thinking around this issue. Following this, we will use the overhead of legitimacy and its attendant questions as a lens for analysis on a particular policy area—same-sex marriage bans and legalizations in U.S. Native nations. It is my hope that this framework will extend existing conversations about civil marriage policy while contributing something meaningful toward the questions I have raised here.

But before departing for those destinations, a quick note on terminology. I use the term "same-sex marriage" repeatedly and extensively throughout this analysis. It is a term that is strangely both too vague and too specific at once. It is too vague in the sense that what is really meant by "marriage" when used in this context is, essentially, "a state-legitimized civil contract acknowledging the legality of marriage." Essentially, marriage under the terms of bureaucratic kinship. And "same-sex" is also too specific, because "sex" is being used in place of a more expansive or appropriate term like "gender," and furthermore, what does it even mean to have

the "same" sex when even the concept of sex itself lacks the stability to neatly cleave human population into two complementary categories?

So, I suppose in a pedantic way, were I naming the concept from scratch, I would call it something like "gender-neutral civil marriage." While no term or category is perfect, it captures the essence of what this type of law actually does: it stops specifically accounting for the sex/gender of contractees in a state-recognized marriage. Despite this, whenever I have tried replacing "same-sex marriage" with "gender-neutral civil marriage," in this analysis, I find that the term "same-sex marriage" is so pervasive in the literature, in people's everyday understanding of the term, and in my memory, that it feels somehow dishonest to make the substitution. So there you have it—same-sex marriage, an inadequate yet oddly hegemonic concept, that I have been unable to remove despite my criticisms.

With that acknowledgment in mind, let's take a closer look at the genealogy of "the overhead of legitimacy" and how this idea extends discussions taken place in the fields of Native/Indigenous and gender/sexuality studies.

Recognition and the Overhead of Legitimacy

Questions surrounding the politics of recognition occupy a central position in Native and Indigenous studies in particular. Skewed forms of recognition, or outright refusals of recognition, are central factors underpinning settler land theft. After all, recognizing a people as autonomous, sovereign, and met on equitable terms, should foreclose the possibility of genocide. Recognition is particularly vexing because it appears to require compromise and negotiation with the terms set by the same settler state currently occupying Indigenous lands and unwilling to meaningfully redress its past and ongoing violence against Indigenous peoples. That many Native polities fight to be recognized by the very nation-state that instigates and maintains settler colonialism, even

when they know this relationship to be exploitative, illustrates just how damaging the alternative of non-recognition can be. I don't aim here to provide an exhaustive account of recognition politics—but rather, I aim to thread together some critical perspectives that have been instructive in developing a framework for considering the issue.

A natural entry point to this discussion, in my view, is Vine Deloria Jr. And Clifford M. Lytle's *The Nations Within*, a study focusing primarily on the development of the 1934 Indian Reorganization Act.[340] In particular, Deloria and Lytle draw attention to the contradictory notion of "self-government" embedded into this policy. Namely, that the self-government prescribed within takes the form of, effectively, boilerplate tribal constitutions mirroring the U.S. federal constitution. They note, "though local tribes were given the opportunity to write their own constitutions, too often the lack of expertise and experience meant that local Indian communities relied heavily on the legal experts from [the Department of the] Interior."[341] Deloria and Lytle's analysis indicates a dilemma within legislation, where Native polities were offered "choice" in their type of government, while being pushed toward a governance model that would fit neatly within federal constitutional jurisprudence.

In distinguishing "nationhood" from "self-government," Deloria and Lytle offer the trenchant critique that self-government "implies a recognition by the superior political power that some measure of local decision making is necessary but that this process must be monitored very carefully so that its products are compatible with the goals and policies of the larger political power."[342] This strikes at the core of what recognition looks like in this settler colonial context.

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[340] Vine Deloria, Jr. and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York, NY: Pantheon Books, 1984).

[341] Deloria and Lytle, *The Nations Within*, 173.

[342] Deloria and Lytle, *The Nations Within*, 14.

To be recognized according to the terms and conditions a settler state demands results in a strained choice—to become recognizable for the purposes of the political benefits that might entail, paradoxically incurs a cost of eroded political distinctiveness.

This dilemma has been discussed in several ways. Elizabeth Povinelli helpfully characterizes it as the "cunning of recognition," which she further elaborates, asking, "What is the nation recognizing, capital commodifying, and the court trying to save from the breach of history when difference is recognized?"[343] Though Povinelli writes from the context of Aboriginal recognition in Australia, her analysis is resonant for U.S. Settler colonialism as well. She observes, in effect, that these standards for recognition are a scheme by which a settler state aims to incorporate Indigenous peoples as part of multiculturalism. This results in a situation where:

> although state courts and publics demand evidence of the continuity of traditional beliefs, practices, and dispositions as the condition of cultural recognition and, through this, land title, some features and practices of 'customary law' are prohibited by common and statutory law and by a public sense of moral decency—what constitutes the socially and culturally repugnant and the limits of recognition.[344]

The settler state gestures toward a flattened notion of tradition as evidence of cultural difference, and away from elements of Indigenous ways of knowing and being in the world that are overtly oppositional to white supremacy, heteropatriarchy, and in particular, liberal-capitalist schemes of property and citizenship.

Lenape scholar Joanne Barker offers her own analysis of recognition that links with the above, observing that:

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[343] Elizabeth A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham, NC: Duke University Press, 2002), 17.

[344] Povinelli, *The Cunning of Recognition*, 3.

> the recognition of Native status and rights is really about the coercion of Native peoples to *recognize themselves* to be under federal power within federal terms. The importance of these discursive maneuvers is not merely in the subjugation of Native peoples to federal authority but in the kinds of 'Indian tribes' that Native peoples see themselves as and then assert in their relationships with one another."[345]

In this configuration of perspective, Barker tips the focus away from the (at this point) more evident benefits for the settler state in setting the terms, and toward the internalization of the terms of recognition and how the practice of being recognizable affects Indigenous peoples' sets of relationships within and between polities. This is what I am more interested in when I consider the "overhead of legitimacy." When one repeatedly reaches for a flawed tool (state-like bureaucracy) to solve problems created by ongoing settler colonialism, it's as though treading and retreading that path creates an institutional memory of settler logics.

Barker illustrates further the way that "The seamless articulation of Native legal legitimacy to cultural authenticity by recognition, however, marks the racist ideologies and identificatory practices that undergird its function in reinforcing Native subjugation."[346] She draws a direct line between settler rubrics of what an "authentic" Indigenous tradition should look like and the coercive power lining settler colonial logics. Importantly, though, Barker reminds us to focus on "How Native peoples choose to navigate these demands and the implications of their choices within Native social formations," re-centering Indigenous agency, adaptability, and futurity even in the face of the costs of recognition.[347]

Bringing that agency further into view is Jean Dennison's notion of "colonial entanglement," which she derives as a metaphor from the work of Osage artists:

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[345] Joanne Barker, *Native Acts: Law, Recognition, and Cultural Authenticity* (Durham, NC: Duke University Press, 2011), 22.

[346] Barker, *Native Acts*, 28.

[347] Barker, *Native Acts,* 6.

> In picking up the pieces, both those shattered by and created through the colonial process, and weaving them into their own original patterns, Osage artists formed the tangled pieces of colonialism into their own statements of Osage sovereignty. Osage ribbon work reminds us that it is possible to create new and powerful forms out of an ongoing colonial process."[348]

What I find so important about this, in the context of a discussion critical of the politics of recognition, is the reminder that while such politics may incur the overhead of legitimacy, the creative and inventive use of these tools of governance can yet be an assertion of (in this case, Osage) sovereignty. There's an apparent incongruity here—how does one both acknowledge and address the costs of recognizability, without reproducing it as a simplistic narrative of loss? Even as Dennison emphasizes the agency inherent to this view of Osage sovereignty, she notes that "The term 'entanglement' also serves to negate the easy divide of colonized and colonizer, illustrating the ways few can escape the logic of settler colonialism that permeates these spaces."[349] In this formulation, settler colonialism is at once all-entangling and workable, permeable, and navigable.

In a related move, Beth Piatote characterizes this type of entanglement as "entwined consent," which draws from her analysis of how the gender-citizenship matrix of Canada's Indian Act "sought to transfer property, cultural, and legal rights from [I]ndigenous polities into the settler-national domestic under the rubric of consent and love."[350] Piatote's use of consent as framing metaphor is significant in the way it reveals the complex structure of these choices. In her analysis of the Indian Act, she shows how by consenting to a recognized marriage,

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[348] Jean Dennison, *Colonial Entanglement: Constituting a Twenty-First-Century Osage Nation* (Chapel Hill, NC: University of North Carolina Press, 2012), 7.

[349] Dennison, *Colonial Entanglement*, 8.

[350] Beth H. Piatote, *Domestic Subjects: Gender, Citizenship, and Law in Native American Literature* (New Haven, CT: Yale University Press, 2013), 18.

Indigenous women also "consented" to "the surrender of legal and cultural rights" due to their entwinement with marriage policy.[351] It's this very entwinement that draws into focus both the ability to choose, and the dubious consent of that choice under the entwinement of settler colonial logics into that decision. The concept of "entwined consent" operates on the registers of both agency and duress, highlighting the tensions concomitant with the politics of settler colonial recognition.

Scholars working at the intersections of Native/Indigenous studies and queer studies have illustrated that, while each field and its attendant politics cannot be reduced away to function interchangeably, there is nonetheless a benefit in finding and exploring connections between them. Making this point, Mark Rifkin observes "a resonance between the kinds of conceptual and political work performed by *queerness* and *indigeneity* in order to highlight the possibilities for hierarchies of authenticity and/or relevance within Indigenous movements."[352] This resonance is revealing of the overhead of legitimacy, because it makes audible the ways that political movements seeking the recognition of a settler state are incentivized to pit themselves against each other in order to attain that legitimacy. Describing this phenomenon, Jodi Byrd writes:

> civil rights, queer rights, and other rights struggles have often cathected liberal democracy as the best possible avenue to redress the historical violences of and exclusions from the state, scholars and activists committed to social justice have been left with impossible choices: to articulate freedom at the expense of another, to seek power and recognition in the hopes that we might avoid the syllogisms of democracy created through colonialism.[353]

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[351] Piatote, *Domestic Subjects,* 18.

[352] Mark Rifkin, "Indigenous is to queer as … : Queer questions for Indigenous Studies," in *Sources and Methods in Indigenous Studies*, ed. Chris Andersen and Jean M. O'Brien (New York, NY: Routledge, 2017), 205.

[353] Jodi A. Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis, MN: University of Minnesota Press, 2011), xxiv.

By embracing the tools of liberal democracy in order to seek rights and recognition within a settler colonial framework, these movements can reinscribe the very logics that are foundational to settler colonial governance. In other words, these logics become part of the overhead—the ongoing costs of the legitimacy sought.

On this point, though—the *resonance* between the politics of movements for Indigenous sovereignty and recognition, and queer civil rights movements, there is something I still want to draw our attention to. Describing the politics of recognition, Rifkin articulates what he terms a "bribe of straightness" which "includes arguing for the validity of [I]ndigenous kinship systems (native family formations, homemaking, and land tenure) in ways that make them more acceptable/respectable to whites, disavowing the presence of sexual and gender practices deemed perverse within Euramerican sexology."[354] The bribe is for Native polities to frame themselves as "straight" in a social and political sense: to obscure practices of gender, sexuality, and kinship that settler society has labeled as perverse. The suppression of these practices becomes part of the cost of the legitimacy that results—the ability to be recognized apparently requires legibility under the rubric of acceptable gender and sexuality imposed by settler governance.

There is a notable resonance between Rifkin's "bribe of straightness," and what sociologist Jaye Cee Whitehead describes in her case study of a national organization promoting same-sex marriage rights as "the nuptial deal," an arrangement where "marriage equality activists set aside their desires for national health insurance and economic redistribution and instead appeal to the state's interest in marriage as a neo-liberal technology of governance that shifts responsibility for managing social problems from the state to individual couples."[355]

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[354] Mark Rifkin, *When Did Indians Become Straight?: Kinship, the History of Sexuality, and Native Sovereignty* (New York, NY: Oxford University Press, 2011), 23.

Whitehead describes a process where more radical queer advocacy gets funneled toward aims compatible with neoliberal governance, that is to say, specifically seeking access to the powerful institution of civil marriage and its attendant politics.

In particular, Whitehead emphasizes the shift in focus from collective rights to individualism. But there other ways in which the "nuptial deal" functions like a "bribe of straightness," because these politics involve same-sex marriage advocates articulating a need for civil rights that gains legitimacy by condemning other aspects of sexuality (in particular, non-monogamy and plural marriages). Though not a focus for Whitehead, analysis like T. J. Tallie's critique of the organization Equality California's response to the legalization of same-sex marriage in Oregon illustrates how the same-sex marriage movement's legitimacy relied upon connections to "histories of settler colonialism, anti-black legislation, and anti-Indigenous violence."[356] So in these two examples, the "bribe of straightness" and the "nuptial deal," we can see how recognition within a settler colonial frame (of Indigenous sovereignty on one hand, and of same-sex marriages on the other) incentivizes the retrenchment of settler logics and their attendant complicities.

From Recognition to Refusal

I hope it is evident by this point that articulating the "overhead of legitimacy" is an aspect of an existing extensive conversation about the politics of recognition. These authors, and many others, have developed theoretical tools and ways of thinking about these difficult questions that bring the stakes and dilemmas of recognition into focus. However, before using Native same-sex

[355] Jaye Cee Whitehead, *The Nuptial Deal: Same-Sex Marriage and Neo-Liberal Governance* (Chicago, IL: Chicago University Press, 2012), 30.

[356] T. J. Tallie, "Failing to Ford the River: 'Oregon Trail,' Same-Sex Marriage Rhetoric, and the Intersections of Anti-Blackness and Settler Colonialism," *Decolonization: Indigeneity, Education, and Society* (blog), June 4, 2014, https://decolonization.wordpress.com/2014/06/04/failing-to-ford-the-river-oregon-trail-same-sex-marriage-rhetoric-and-the-intersections-of-anti-blackness-and-settler-colonialism/.

marriage bans and legalization as a policy case study, there is one more key intervention from Native studies that is indispensable: the politics of rejecting or refusing recognition.

Drawing focus to the incongruities of recognition, Glen Coulthard observes, "instead of ushering in an era of peaceful coexistence grounded on the ideal of *reciprocity* or *mutual* recognition, the politics of recognition in its contemporary liberal form promises to reproduce the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples' demands for recognition have historically sought to transcend."[357] Coulthard makes a case for rejecting this form of recognition because, essentially, if the goal of recognition is to assert Indigenous ways of knowing and being in the world and reject settler colonial governance, this is not accomplished by meeting the legitimacy standards of that settler colonial governance.

Building on this in her incisive critiques of recognition politics, Audra Simpson centers "refusal" as a stance for Indigenous peoples and polities to take against these politics. She characterizes "refusal" as:

> a political and ethical stance that stands in stark contrast to the desire to have one's distinctiveness as a culture, as a people, recognized. Refusal comes with the requirement of having one's *political* sovereignty acknowledged and upheld, and raises the question of legitimacy for those who are usually in the position of recognizing: What is their authority to do so? Where does it come from? Who are they to do so?[358]

In this framing, refusing the settler state's standards for recognition results in, effectively, a different kind of recognition that dislodges the settler state from the usurped position of setting the terms of acknowledgment.

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[357] Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, MN: University of Minnesota Press, 2014), 3.

[358] Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham, NC: Duke University Press, 2014).

Citing these arguments Jennifer Nez Denetdale notes that "principles of western democracy actually straitjacket our nations and peoples into acquiescence to on-going exploitation of our lands and resources, and acceptance of a society based upon heterosexual patriarchal values."[359] For Denetdale, refusing the politics of western democracy is essential because the ongoing costs of these politics are continued self-exploitation. She advocates instead for the centering of "traditional Diné principles of K'é, of kinship and belonging" where "we imagine once again our capacity to be loving, generous, and compassionate."[360] In effect, the stance of recognition-seeking does not offer the freedom that it appears to promise, making the refusal of this "gift" a more holistic healing from ongoing settler colonialism.

Conclusion

With this review, I aim to provide texture to the "overhead of legitimacy," illustrating how the questions invoked around recognition are central, and perhaps irreducible questions of Native and Indigenous studies at present. As I've argued in this literature review, the overhead of legitimacy is a way of describing the costs and consequences of recognition in various forms. Though state recognition of marriages, and state recognition of Indigenous polities have fundamental differences, considering these ideas together is important in order to develop a more thorough consideration of how logics of race and gender intersect with nationalism, sovereign relations, and Indigenous survivals of ongoing settler colonialism.

Now that our toolkit is assembled, we can see how these debates play out in a relevant policy context—same-sex marriage laws in Native nations in the U.S.

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[359] Jennifer Nez Denetdale, "Refusing the Gift of Democracy and Embracing Diné Concepts of Kinship: The Navajo Nation, Kinship, and Practices of Gender," *Theory & Event* 23, no. 4 (2020): 1059.

[360] Denetdale, "Refusing the Gift of Democracy," 1063.

CHAPTER 6: PRESENT PRECEDENT: UNFIXING TRADITION IN U.S. INDIGENOUS SAME-SEX MARRIAGE DISCOURSE

Perhaps no term has more inflected political and academic discussions over same-sex marriage in US Indigenous jurisdictions than "tradition." Nearly every source in the secondary literature on this topic, including law review articles and scholarly texts in Native and Indigenous gender and sexuality studies deploys or comments on the deployment of tradition in some way or another. Broadly, the term has been activated in three key ways: (1) by opponents of same-sex marriage, arguing that heterosexual marriage is the "traditional" format for socially and politically recognized couplehood, thereby framing same-sex marriage bans as preserving tradition from colonial or otherwise external influences; (2) by proponents of same-sex marriage, arguing that Indigenous societies have pre-colonial traditional gender roles beyond male and female, and therefore same-sex marriage bans are rooted in colonial influence via the imposition of a compulsorily heterosexual gender binary; and (3) by critics who observe that the fact that these two opposing viewpoints can both be rooted in rhetoric of "tradition" reveals a flattening of the fluid and contested nature of living Indigenous traditions. Using the "overhead of legitimacy" as a lens, it is evident that these gestures toward flattening tradition are associated with the costs of recognition and legitimacy. Let's take these questions one at a time and see what these same-sex marriage debates can reveal about the potency and limitations of "tradition" as a vehicle for legal action by Indigenous jurisdictions.

Reactionary Deployments of Tradition Against Same-Sex Marriage

Two particular cases of same-sex marriage bans in Indigenous jurisdictions are hyper-visible in the academic literature on this topic due to the prominence of these Native nations: the Cherokee Nation same-sex marriage ban in 2004 (since overturned), and the extant Navajo

Nation same-sex marriage ban in 2005. It is important to contextualize that these are not the earliest or only Indigenous engagements with same-sex marriage law in the U.S.

These cases rose to prominence likely due to two main factors. First, same-sex marriage discourse in the U.S. In general was high during 2004, as a key campaign issue in the 2004 U.S. presidential election between Republican George W. Bush and Democrat John Kerry. During that election, eleven states—including Oklahoma, whose imposed jurisdiction overlaps with the Cherokee Nation's—held referenda on state constitutional amendments banning same-sex marriage, all of which were passed by a majority of participating voters.[361] Second, the Cherokee Nation and Navajo Nation are the two federally recognized tribes with the highest enrolled citizen populations. Considering the prominence of the topic and nations involved, it's not altogether surprising that these two nations drew so much attention compared to other tribal jurisdictions that have enacted explicit same-sex marriage bans.[362]

Cherokee Nation Marriage and Family Protection Act of 2004. The first prominent case study in the literature is the Cherokee Nation. Multiple academic articles have investigated the rhetorical and legal processes by which the Cherokee Nation banned same-sex marriage in 2004. Christopher Kannady describes the chain of events, starting with a same-sex couple's (Dawn McKinley and Kathy Reynolds) successful attempt to get a marriage license from a deputy court clerk due to the ostensibly gender neutral language of the statute at the time.[363] This led to a

[361] Daniel A. Smith, Matthew DeSantis, and Jason Kassel, "Same-Sex Marriage Ballot Measures and the 2004 Presidential Election," *State and Local Government Review* 38, no. 2 (2006): 78.

[362] According to Ann Tweedy, author of thus far the most comprehensive source published on the topic, at least ten other tribal jurisdictions have explicitly instituted same-sex marriage bans or interpreted their statutes to prohibit recognition of same-sex marriage. Ann E. Tweedy, "Tribal Laws & Same-Sex Marriage: Theory, Process, and Content," *Columbia Human Rights Law Review* 46, no. 3 (2015): 131-132.

[363] Christopher L. Kannady, "The State, Cherokee Nation, and Same-Sex Unions: In Re: Marriage License of McKinley & Reynolds," *American Indian Law Review* 29, no. 2 (2004/2005): 366.

chain reaction of governmental responses within the Nation, most prominently the Cherokee Nation Council's passage of the *Cherokee Nation Marriage and Family Protection Act of 2004*, and the subsequent lawsuit attempting to invalidate McKinley and Reynolds's marriage license.[364]

This legislation amended Title 43, Section 3 of the Cherokee Code to add a prohibition of marriage "between parties of the same gender" to the end of a longer list of banned marriages.[365] Additionally, the act defines new crimes, including adultery and bigamy.[366] The legislation states its purpose as "to define Marriage as one man and one woman to protect the traditional definition of Marriage in the Cherokee Nation and define other crimes of moral character."[367] Thus, the legislation specifically invokes heterosexual monogamy as Cherokee tradition, and associates same-sex marriage with adultery and bigamy as "crimes of moral character."

Of particular interest in exploring how tradition can be constructed as having always been heterosexual, it's worth a closer examination of how Cherokee council members presented their arguments at the meeting where they unanimously adopted the Marriage Act, as recorded in the Cherokee Tribal Council minutes.

There are two votes on the legislation—the first is a process vote to officially place the legislation on the meeting agenda. However, this procedural motion generates discussion as several members of the council were surprised by the move to introduce the legislation,

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[364] Kannady, "The State, Cherokee Nation, and Same-Sex Unions," 367.

[365] Cherokee Nation, *The Cherokee Nation Marriage and Family Protection Act of 2004,* Legislative Act 26-04, Section 4, §3.

[366] Cherokee Nation, *The Cherokee Nation Marriage and Family Protection Act of 2004,* Legislative Act 26-04, Section 4, §10-14.

[367] Cherokee Nation, *The Cherokee Nation Marriage and Family Protection Act of 2004,* Legislative Act 26-04, Section 2.

bypassing the committee process. In introducing the motion, Councilman Baker also draws attention to the fact that "several local ministers are in attendance and he has received several petitions."[368] This frames the audience of the council meeting as composed primarily of Christians/religious authorities opposed to same-sex marriage, with the implied support of the nation's citizens at large. If there are supporters of same-sex marriage in the audience, they are not called out in this way. Councilman Baker goes on to state that "the Tribunal has made it quite clear that it is the Council's position to clarify what the Cherokee peoples traditions and beliefs are and he would not have brought it forward if he did not believe it was most important to the Cherokee people."[369] This series of rhetorical moves accomplishes several key ideas: (1) Cherokee Christians oppose same-sex marriage; (2) it is the role of the council to enact policy aligned with Cherokee traditions; and (3) the same-sex marriage ban, as written, accomplishes this.

After the motion to place the law on the agenda is introduced and seconded, Councilman Martin "commented he does not want to appear that he is against the bill but there is a policy, a mutual agreement, they would not allow any surprises."[370] Council Member Cowan aligns with this objection, noting that "they have not had an opportunity to review the legislation, not only does it deal with the very serious matter of same sex civil unions but also deals with adultery and bigamy. These are all very serious issues that deserve proper consideration and discussion through the procedure and are a complete surprise until five minutes ago she did not know this was going to be proposed this evening."[371] Both of these Council Members frame their

[368] Cherokee Nation Council, Minutes, Regular Session, June 14, 2004, 2.

[369] Cherokee Nation Council, Minutes, Regular Session, June 14, 2004, 2.

[370] Cherokee Nation Council, Minutes, Regular Session, June 14, 2004, 2.

opposition as procedural, rather than substantive. Martin's insistence that he does not want to appear against the bill, in addition to Cowan's "apolog[y] to the audience," illustrates the political and moral weight of the ministers in attendance in directing their responses to the legislation. Further, Cowan argues that Cherokee legislation already "very specifically talks about husband and wife," questioning the need for additional legislation while not making a specific argument about whether same-sex marriages should be allowed or not.[372] A vote on the motion is called, and it passes 11-4, with two Council Members joining Martin and Cowan in opposition to placing the legislation on that meeting's agenda.

When the legislation comes up for passage, Council Attorney Todd Hembree gives an explanation for the rushed procedure, saying that "the legislation was drafted at the request of Council member O'Leary on Friday and he provided a copy to her today."[373] This Council Meeting took place on June 14, 2004, which is a Monday, indicating that the law was essentially written over a weekend to be presented at the Monday evening meeting. Hembree directs the Council "to focus on is that the Act [has] the primary purpose to define 'marriage' within the Cherokee Nation," a rhetorical move to sidestep the procedural objections.[374] Hembree further explains that he has filed an opposition to the court's moratorium with a hearing scheduled for that Friday, hence the interest in hastily foreclosing the possibility that marriage licenses might be issued to same-sex couples.

During the debate on the law's passage, O'Leary becomes the leading proponent, stating that "It is something this Nation should had all along and should not have been left out of the

[371] Cherokee Nation Council, Minutes, Regular Session, June 14, 2004, 2.

[372] Cherokee Nation Council, Minutes, Regular Session, June 14, 2004, 2.

[373] Cherokee Nation Council, Minutes, Regular Session, June 14, 2004, 8.

[374] Cherokee Nation Council, Minutes, Regular Session, June 14, 2004, 8.

Constitution. She challenged the Council before the people, God and Jesus Christ what is in the legislation they could vote against."[375] O'Leary's deployment of tradition here does not mark a distinction between Christianity and Cherokee tradition—her declaration frames this vision as commonsense truth and inarguable. Most other speakers echo her support, but framed around different issues. For instance, Councilman Hoskin raises the objection that "as an individual he really takes a sharp view of the government entering into areas which he feels are the rights of an individual," yet nevertheless he supports the legislation because "he must represent those who elected him."[376] In perhaps the most comical illustration of the rushed procedure, "Councilman Garvin as a Baptist deacon said he strongly supports this legislation and thinks it is a good piece of legislation although he has not read it yet."[377] As Daniel Heath Justice remarks in his analysis of this council meeting, "the vote circumvented standard tribal council procedures, which include passage through committee before a vote and a standard ten-day notice of changes in agenda," and further, the "emergency clause" in the legislation allowed it to go in effect immediately.[378]

The legislation passes unanimously with all present members, and is signed into law by Principal Chief Chadwick Smith four days later on June 18, 2004.[379] After this, litigation continued for as Hembree attempted to have McKinley and Reynolds's license voided by the Judicial Appeals Tribunal.[380] Hembree argued to the tribunal that "same-sex marriages were not

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[375] Cherokee Nation Council, Minutes, Regular Session, June 14, 2004, 8.

[376] Cherokee Nation Council, Minutes, Regular Session, June 14, 2004, 8.

[377] Cherokee Nation Council, Minutes, Regular Session, June 14, 2004, 9.

[378] Daniel Heath Justice, "Notes Toward a Theory of Anomaly," *GLQ: A Journal of Lesbian and Gay Studies* 16, no. 1-2 (2010): 212-213.

[379] Cherokee Nation, *The Cherokee Nation Marriage and Family Protection Act of 2004,* Legislative Act 26-04.

[380] Kannady, "The State, Cherokee Nation, and Same-Sex Unions," 367.

part of Cherokee history or tradition."[381] As sociologist Melanie Heath remarks, Hembree's "language draws on the frame used by the religious right to suggest that proponents for same-sex marriage are attempting to redefine 'traditional' morality" and further "suggests a universal form of marriage among the Cherokee."[382] Tradition is invoked as a key justification for limiting marriage recognition to heterosexual couples, presented as a commonsense assumption not requiring further analysis. As we'll see later, tradition cannot be so neatly flattened, and indeed, supporters of same-sex marriage also deploy notions of tradition in support of their arguments. But before proceeding, I would like to sketch out the use of tradition by opponents of same-sex marriage in the other major case study, the Diné Marriage Act of 2005.

Diné Marriage Act. On April 22, 2005, the Navajo Nation Council passed the Diné Marriage Act of 2005 by a unanimous 67-0 vote. Navajo Nation President Joe Shirley Jr. attempted to veto this same-sex marriage ban, and is quoted in the Native American Times describing the legislation as "unnecessary," "discriminatory," and "going against traditional Navajo teachings."[383] However, the Navajo Nation Council overrode his veto on June 3, 2005 by a vote of 62-14, causing the law to go into full effect.[384] To date, this legislation has not been repealed.

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[381] Todd Hembree, Petition for Declaratory Judgment, In re: marriage license of Dawn McKinley & Kathy Reynolds, no. CV-04-36, cited in Kannady, "The State, Cherokee Nation, and Same-Sex Unions," 270.

[382] Melanie Heath, *One Marriage Under God: The Campaign to Promote Marriage in America* (New York, NY: New York University Press, 2012), 170-171.

[383] Sam Lewin, "Cherokees Ban Gay Marriage; Unanimous Vote Follows Last Minute Change to Agenda," *Native American Times* (Tulsa, OK), May 4, 2005.

[384] Brenda Norrell, "Same-sex marriage ban becomes law; Navajos debate tradition and clanship beliefs for the modern era," *Indian Country Today* (Oneida, NY), Jun. 15, 2005.

This legislation added two categories of marriage deemed "void and prohibited." First, the legislation adds a description of a ban on marriages based on degree of blood-relatedness (i.e., banning incestuous marriages).[385] The law further states, "Marriage between persons of the same sex is void and prohibited," which was the main focus of the legislation.[386] Finally, the Navajo Nation Council adds a section describing the purpose of the act: "The purposes of marriage on the Navajo Nation are to promote strong families and to preserve and strengthen family values."[387] Taken together, these developments illustrate a tradition-based framing for this same-sex marriage ban. The term "perverse," in particular, suggests that exclusively heterosexual marriage must be secured against the external threat of same-sex marriage. The addition of a ban on incestuous marriages alongside the same-sex marriage gestures toward a false equivalency, implying that same-sex marriage is as abhorrent as other categories of illicit sexual relations.

The invocation of tradition by the Navajo Nation Council has been critically examined, especially in the field of Indigenous feminist and queer studies. Responding to the legislation, Jennifer Nez Denetdale observes that "While [the legislation's sponsor, Delegate Larry] Anderson has insisted that his only interest in the matter is the preservation of Navajo traditional practices, critics have pointed out that the passage of the Act coincides with American obsessions with family values, including monogamy, nuclear family preservation, and sexuality."[388] The phrase "family values" is highly coded language, made potent by Christian

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[385] Navajo Nation, *Diné Marriage Act of 2005*, CAP-29-05, §2, B.

[386] Navajo Nation, *Diné Marriage Act of 2005*, CAP-29-05, §2, C.

[387] Navajo Nation, *Diné Marriage Act of 2005*, CAP-29-05, §3.

[388] Jennifer Nez Denetdale, "Securing Navajo National Boundaries: War, Patriotism, Tradition, and the Diné Marriage Act of 2005," *Wicazo Sa Review* 24, no. 2 (2009): 142.

conservative forces in US as a tool to tar pushes for ending sexist, homophobic, and/or transphobic legislation as perverse and immoral. That a seemingly innocuous term like "family values" draws to mind a normatively white, monogamous, heterosexual nuclear family is not "common sense", but rather the result of conservative rhetorical tactic in mobilizing reactionary grievances against growing calls for reforms. Denetdale's observation, then, shows how the Navajo Nation is using a parallel political tactic, invoking a vision of Diné tradition that aligns with US conservative notions of "tradition." This is, in effect, an appeal to legitimacy by embracing settler colonial logics of gender, sexuality, and citizenship.

In her analysis of the internal political conflict within Navajo Nation over the Diné Marriage Act, Joanne Barker notes a tactic that proponents of the legislation used, framing themselves as "merely *applying* Navajo tradition and not as politically *interpreting* it [emphasis in original]."[389] Barker further notes that they described their critics as having "been manipulated by 'outside,' 'gay', influences and agendas." Barker's analysis reveals that framing tradition as supporting a reactionary political position, via common sense, and casting opponents as outside influences, is politically potent. The correlation between the use of this tactic by Native nations and settler political movements is an example of Rifkin's "bribe of straightness," which he describes as a dynamic of "marginalized persons and groups to play aspect of normality against each other as part of a counterhegemonic claim to legitimacy, distinguishing themselves from other, more stigmatized modes of deviance."[390] In effect, the anti-same-sex-marriage Navajo delegates mobilize state gender politics to legitimize their own political claims, aligning

[389] Joanne Barker, *Native Acts: Law, Recognition, and Cultural Authenticity* (Durham, NC: Duke University Press, 2011), 203.

[390] Mark Rifkin, *When Did Indians Become Straight?: Kinship, the History of Sexuality, and Native Sovereignty* (New York, NY: Oxford University Press, 2011), 22-23.

themselves with heteronormativity using claims of tradition as a buttress against further settler-state erosion of Navajo sovereignty. With these deployments of tradition by opponents of same-sex marriage established, it's now time to explore how supporters of same-sex marriage in the Cherokee and Navajo nation cases similarly argue a case of tradition.

Rhetorical Inversions: Assertions of Same-Sex Marriage as Traditional

In the previous section, I illustrated how opponents of same-sex marriage constructed and invoked narratives of tradition that framed heterosexual monogamy as Indigenous tradition, while simultaneously framing attempts to legalize same-sex marriage and, more generally, nonheterosexuality, as an alien, external influence threatening to corrupt Native communities, traditions, and families. However, same-sex marriage opponents were not the only ones tethering their political directives to tradition. Proponents of same-sex marriage argue that their side of the argument is in effect, the more traditional one.

Many of the law review articles discussing tribal actions and responses to same-sex marriage present, in some form or another, the argument that settler colonial ideology has, in a sense, corrupted Indigenous peoples away from their precolonial traditions, which in turn are sometimes presented as gender utopias. Yet this framing, as we'll see, is deeply flawed. Not only does it elide Indigenous peoples' agency in determining their own traditions that change over time, but it also flattens Indigenous genders and sexualities due to a general lack of tribal specificity.

Take, for instance, Jeffrey S. Jacobi's 2005 analysis of the Cherokee Nation case. He argues in favor of what I think of as the archetypal unappealing centrist compromise of this time period, same-sex civil unions which are in effect marriage without the specific legal label of marriage.[33] Jacobi's position is that same-sex civil unions "strike a compromise that resolves the

compromise between traditional and modern interests."[391] He writes, "In order to reconcile the conflict between tradition and contemporary religious and cultural values, all tribes should consider their traditions surrounding homosexuality and two-spirit individuals. Inquiry into historical views will likely motivate some tribes to incorporate tradition into their modern policies."[392] In this construction, "tradition" refers to Jacobi's assertion that "many tribes allowed two-spirit individuals to have relationships with members of the same biological sex, although most tribes still valued heterosexual relationships more than homosexual relationships."[393] This is contrasted with "contemporary religious and cultural values," by which he means "a large faction of Native Americans condemn homosexuality and completely reject same-sex unions largely because of the influence of European and American religion and culture." Jacobi has accepted a traditional-modern binary, but has essentially reversed the perspective from what same-sex marriage opponents have offered by framing compulsory heterosexuality as the alien intervention. While there is some utility, certainly, in not accepting homophobic definitions of Indigenous traditions as the universal commonsense truth, Jacobi's implication that tribes simply don't understand their own histories and need to research them more is simply replacing faulty universality with a different faulty universality, erasing the pluralism of tradition in the process.

In a similar way, Trista Wilson's 2011 law review comment "endorses tribal government recognition of same-sex marriage, with the goals of returning to traditional tribal values, promoting inclusivity within the tribal community, and suppressing negative social and political

[391] Jeffrey S. Jacobi, "Two Spirits, Two Eras, Same Sex: For a Traditionalist Perspective on Native American Tribal Same-Sex Marriage Policy," *University of Michigan Journal of Law Reform* 39, no. 4 (2006): 826.

[392] Jacobi, "Two Spirits, Two Eras, Same Sex," 826.

[393] Jacobi, "Two Spirits, Two Eras, Same Sex," 826.

influences from outside Indian Country."[394] Wilson's assertion that same-sex marriage is a return to "traditional tribal values," and that as a corollary, heterosexism is an influence external to Indian Country, relies on the notion that an "authentic" tradition can be neatly teased out from settler colonial influences. Wilson is especially focused on the idea of Christian ideology as informing the decisions of the Cherokee and Navajo nations, reflecting that "While some supporters [of the Dine Marriage Act] believed that the Act reflected the values of the Navajo Tribe, there was also strong support promoting a traditionalist view of Navajo culture that embraced two-spirits and was not influenced by Christian ideology."[395] It is undeniable that Christianity is a vector by which settler colonialism has imposed heterosexual monogamy, as part of a genocidal program of forcible assimilation, perhaps most typified by the boarding school system.

Yet, it is also the case that "Christian ideology" has become interwoven into Indigenous traditions. That is to say, part of how many Indigenous traditions have grown and changed over hundreds of years at this point has involved Christianity, and that this has happened in the context of Indigenous peoples surviving, resisting, and adapting. The idea that the settler state gets all the credit—or all the blame, depending on your perspective—for any changes in Indigenous tradition elides the agency of Indigenous peoples. Ultimately, an argument—even one advocating for something as morally defensible as the expansion of civil marriage rights to include nonheterosexual couples—that attempts a framing of a once-pure Indigenous tradition that has been corrupted and can/should be restored to that purity, fundamentally misunderstands

[394] Trista Wilson, "Changed Embraces, Changes Embraced?: Renouncing the Heterosexist Majority in Favor of a Return to Traditional Two-Spirit Culture," *American Indian Law Review* 36, no. 1 (2011-2012): 163.

[395] Wilson, "Changed Embraces, Changes Embraced?" 180.

what can and cannot be done with tradition, and indeed reinforces a more insidious settler colonial trope whereby Indigenous tradition is always "disappearing." This attempt to frame tradition in a form that is recognizable by settler politics *as* tradition incurs the overhead of legitimacy, precisely because it perpetuates those logics.

Attempting to navigate the thorny politics of tradition, Ann Tweedy acknowledges the challenges to invoking tradition in support of a political position, noting:

> Sweeping generalizations about tribal traditions are made on both sides of the same-sex marriage controversy. Perhaps most familiarly, tribal customs and traditions across different tribes are often monolithically described as friendly to LGBT persons, although, in fact, there is a lack of historical evidence on these issues among many tribes to support such assertions.[396]

She tries to find some balance between this idea—that invocations of tradition are difficult to historicize and result in generalization—and her position, which here is that tribes should research their traditions to inform whether or not to apply *U.S. v. Windsor* in their own jurisdictions.[397] She writes, "Tribal courts should require some clear evidence of a tradition or custom of lack of openness to same-sex relationships or LGBT identities as a justification for not applying either *Windsor* or tribally-derived protections against discrimination in a marriage equality case under the ICRA."[398] In other words, she would ask tribes to research their own traditions but place the onus on opponents of same-sex marriage to find enough evidence to disprove acceptance of same-sex couples, and assume that if there is a lack of evidence that it favors the pro same-sex marriage side.

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[396] Tweedy, "Tribal Laws & Same-Sex Marriage," 154.

[397] United States v. Windsor, 570 U.S. 744 (2013). In this case, the U.S. Supreme Court overturned section three of the Defense of Marriage Act on the grounds that it violated the due process clause of the Fifth Amendment. In a practical sense, this allowed for federal recognition of same-sex marriages (but did not require states or tribes to legalize same-sex marriage).

[398] Tweedy, "Tribal Laws & Same-Sex Marriage," 155.

Responding to Tweedy's recommendation, Steven Alagna notes that "Professor Tweedy's argument is valuable because it recognizes that tribal law should be rooted in tribal history and tradition rather than in federal law," but offers two major criticisms:

> First, it is unclear whether oral history would meet Professor Tweedy's 'clear evidence' standard. Considering that documented information related to the status of same-sex couples in tribal histories is limited and difficult to detangle from colonialist accounts of tribal culture, oral history will likely be a useful tool for tribal courts reviewing an ICRA challenge to tribal marriage laws. Second, automatically applying *Obergefell* absent clear evidence of a tribal history to justify bans on same-sex-marriage would undermine self-determination.[399]

As Alagna's criticisms reveal, Tweedy's attempts to resolve contradictory perspectives on tradition end up potentially undermining self-determination by privileging U.S. Supreme Court decisions as the default interpretation. Further commenting on Tweedy's recommendation, Valerie Lambert notes that "While such a directive is likely to raise many more questions than it answers, it hints at how messy it can be when the tribal processes that regulate domestic relations involve the evaluation of proposed rules or actions in terms of culture and tradition."[400] These conversations illustrate how a "top-down" interpretation of tradition on same-sex marriage is rarely particularly productive.

I detect a tension in these arguments, where advocates for same-sex marriage in tribal jurisdictions want to be able to point to the historical and ongoing colonial influence of heteronormativity in order to debunk the formations of tradition same-sex marriage opponents rely upon. Yet, truly attending to this influence requires a deeper assessment, essentially, of bureaucratic kinship and its role in shaping marriage *in general*. The civil contractual model of

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[399] Steven J. Alagna, "Why *Obergefell* Should Not Impact American Indian Tribal Marriage Laws," *Washington University Law Review* 93 (2016): 1608.

[400] Valerie Lambert, "Negotiating American Indian Inclusion: Sovereignty, Same-Sex Marriage, and Sexual Minorities in Indian Country," *American Indian Culture and Research Journal* 41, no. 2 (2017): 13.

marriage is a core part of that colonial influence, which cannot be neatly disentangled from the associated regimes of gender, sex, and sexuality. There's a palpable desire for Indigenous jurisdictions to invoke their domestic sovereignty on the issue, provided that they invoke this sovereignty "correctly." And that, in my view, is where the tension can't be pulled apart—sovereignty means agency to make decisions whether or not law review analysts approve, yet I still cannot leave this argument feeling like it makes any sense for an Indigenous jurisdiction to specifically ban same-sex marriage given the context of heteronormativity as a pillar of settler colonialism.

Fortunately, many other scholars working in the fields of Indigenous and Native gender and sexuality studies have been working on just these questions—let's look to them next for insight about how these circuitous debates over tradition interface with settler colonialism and how we might better engage this topic.

In the Thicket: Queer Indigenous Studies and the Thorny Implications of Tradition

As we have seen in the preceding sections, the invocation of tradition in favor of or in opposition to same-sex marriage has drawn a lot of critical attention. In particular, I want to emphasize the way in which actors within tribal governmental bodies—including councils and courts—view the expression of sovereignty through promoting or interpreting tradition. The use of tradition in this way can function like an oral or social form of legal precedent.

To illustrate what I mean, I'd first like to turn to queer theorist Siobhan Somerville's analysis of legal precedent in case law. Siobhan Somerville writes, "As a method of judicial reasoning, the production of precedent is often an enabling (though not uncontested) argumentative tool; as a method of historical thinking, however, it entails inevitable loss through

its tendency to discard the contexts that yielded a legal principle in the first place."[401] A precedent-based legal system functions by affixing and decontextualizing moments of text from past decisions to standardize some contemporary decision. In other words, the textual past is fixed in time by eroding that agency and context. For instance, as previously discussed in citational practices around the *Carney v. Chapman* case, the specificities of the case itself were shrouded over, with only the final determination of the U.S. Supreme Court surviving in future citations. This is hardly uncommon, indeed, as the point of Somerville's analysis is to show how regimes of heteronormativity were affirmed in *Loving v. Virginia* then strategically "forgotten," while a similar process unfolded via race in *Lawrence v. Texas*.[402]

When this analysis of textual legal precedent is brought into conversation with the way that scholars in queer Indigenous studies have critiqued the use of tradition in same-sex marriage discourse, it raises important new questions. Namely, what does a specifically oral citational practice of tradition in jurisprudence have in common with the strategic "forgetting" of textual legal precedent? And further, what are the stakes of claims of tradition as precedent given the urgency of confronting the weight of ongoing settler colonialism upon these processes?

In her trenchant analysis of the topic, Joanne Barker summarizes the way that (especially non-Indigenous) LGBTQ+ activists grounded their expectations for Native nations' support of their cause in problematic assumptions. She writes:

> Generally, the narratives go that Natives have been radically accepting and even have had great spiritual reverence for same-sex-oriented people and those of 'third gendered' or 'two spirit' identities; that those traditions offer viable alternatives for understanding gender and sexuality away from the binary and hierarchical terms of 'Western culture' and its 'compulsory heterosexuality' and, that lesbian, gay; bisexual, and transgendered (LGBT)

[401] Siobhan B. Somerville, "Queer *Loving*," *GLQ: A Journal of Lesbian and Gay Studies* 11, no. 3 (2005): 336.

[402] Somerville, "Queer *Loving*," 336.

> people were and are viable members of Native communities who often hold public office and spiritual leadership roles. These representations have been put to work in many different contexts to challenge 'compulsory heterosexual' norms, avow the humanity of nonheterosexual people, and assert nonheterosexual human and civil rights—often against the acrimony of sexist and homophobic discrimination and hate-crime violence.[403]

What Barker details here is the layer of assumptions built upon the idea of a pre-colonial Indigenous gender utopia that is remarkably flat and universal, ascribing all anti-queer animus to the influence of settler colonial nation-states. As Barker explains, "The belief is that if Native cultures and identities can be fixed in a specific time and place, they can be measured for degrees of deviation and loss from that place to another. This logic makes a flawed assumption, however, that Native culture and identity—or any other for that matter—*can be* frozen in time as if they were then whole and pure to be measured against another time."[404] This process of temporally freezing tradition entrenches narratives of cultural loss precisely by ignoring Indigenous agency to grow and change. The debates on same-sex marriage illustrate Barker's point so clearly because activists on multiple sides of the issue have accepted this limiting frame for tradition in pursuit of political leverage. She observes that "it is not self-evident that a necessarily radical or oppositional form of Native governance will result if based on Native cultural traditions—at least not as those traditions are being articulated by many tribal officials and members through the kinds of racist, sexist, homophobic, and religiously fundamentalist discourses and ideologies that are dominant in U.S. National narrations."[405] Invoking "tradition" or "the traditional," while politically potent, can easily enfold reductive or harmful ideas if not honestly and thoughtfully challenged.

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[403] Barker, *Native Acts,* 196.

[404] Barker, *Native Acts,* 197.

[405] Barker, *Native Acts,* 216.

Several scholars working in the field intersecting queer Indigenous studies have reached similar conclusions about such tradition-oriented arguments. Craig Womack describes the question as to whether Cherokee tradition endorses same-sex marriage as "impossible to resolve and philosophically untenable," focusing instead on the argument that the Cherokee Nation's constitutional democracy provides an opportunity to avoid creating multiple classes of citizens with stratified access to the rights citizenship should afford.[406]

Commenting further on "tradition" as a locus of legal meaning-making, Mark Rifkin observes that "tradition serves as the discursive terrain on which both proponents and opponents of same-sex marriage in tribal nations are moving, each side claiming to be the proper inheritor of the people's honored past and most cherished principles and each implicitly casting its position as a defense against the erosion produced by ongoing imperial intrusion."[407] This illustrates, in summary, how the framework of tradition-vs-colonial-influence dyad necessarily attempts to flatten and affix tradition in order to use it in favor of one side or another. Thinking about this in relation to the analogy I'm making with regards to textual legal precedent, the contestation resembles legal cases where conflicting precedent cases (and their associated "amnesias") fight for narrative and substantive legitimacy through the decision of the arbiter (courts).

Investigating how attempts to research and arbitrate the authenticity of tradition played out for the Diné marriage case, Jennifer Nez Denetdale describes the results of the Diné Policy Institute's research into Navajo traditions around gender, family, and marriage. She observes that

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[406] Craig S. Womack, *Art as Performance, Story as Criticism: Reflections on Native Literary Aesthetics* (Norman, OK: University of Oklahoma Press, 2009), 385.

[407] Rifkin, *When Did Indians Become Straight?*, 276.

there was "an almost unified agreement among the participants that Navajos had traditionally recognized more than two genders," but that "there were sharp disagreements on whether the 'nádleehí' had engaged in same-sex sexual activity" and that "at least two Navajos questioned the link being made between 'nádleehí' and modern-day gay and lesbian."[408] Denetdale's analysis illustrates how "tradition" can't be understood as a monolithic body of knowledge waiting to be "uncovered" by researchers, but is an always-contested space with plural perspectives that can't be fixed to one singular interpretation. Hasn't it already been well established that the interests of the researcher and the lens of analysis shapes what becomes visible? It's as though the vitality of tradition requires not reducing it to a singular form, yet the goal of a bureaucratic government is often to eliminate plurality in favor of standardization. Federal court cases arise precisely because conflicts in precedent invite the clarification by the Supreme Court (however shoddily executed).

Thinking about how state-like government bodies are structured around making the past legible by a process of forgetting allows for some further critical connections to become apparent. Jessica Harkins locates the connection between these flattening discourses about tradition and U.S. liberalism, observing, "by asserting that Cherokees have 'failed to recognize' their misunderstanding of tradition while this couple has somehow been able to recognize this, as evidenced by their adherence to mainstream U.S. liberalism, the message is that proper manifestations of tradition take the shape of mainstream liberalism."[409] In this way, the narrative of progress as formulated by the settler state becomes the rubric against which Indigenous

[408] Denetdale, "Securing Navajo National Boundaries," 142.

[409] Jessica A. F. Harkins, "Same-Sex Marriage in the Cherokee Nation: Toward Decolonial Queer Indigeneities," in *Sovereign Acts: Contesting Colonialism Across Indigenous Nations and Latinx America*, ed. Frances Negrón-Muntaner (Tucson, AZ: University of Arizona Press, 2017), 189.

traditions are graded for authenticity. There's a sense of co-optation here—tracing the ideologies of a liberal present to Indigenous pasts as though to imbue them with legitimacy at the same that contemporary Indigenous traditions that are discordant get framed as corrupted by settler colonialism. This discussion shows us something important about tradition in these contexts. External settler pressure encourages the amnesia of elements of tradition marked as "out of step with progress" through a kind of "heads I win, tails you lose" settler colonial judgment.

Given all this, it's not altogether surprising to encounter Daniel Heath Justice's observation that, "given that hostile community and governmental responses to same-sex desire and same-sex relations are justified via claims to 'tradition,' it's fair to ask whether any recourse to the traditional could have much efficacy or value."[410] Yet, despite all the thicket of dilemmas twined around this issue, Justice declines to cede discussion of tradition. He instead proposes a different configuration that "values adaptation, not stasis or assimilation; inclusivity of the strengths of our differences, not rejectionist claims to false purity; a generous engagement of expansive kinship values … and unflinching honesty in its attention to both historical and contemporary tribal realities."[411] So, instead of merely taking the frame of tradition proffered by opponents of same-sex marriage and reversing the outcome of the analysis, Justice instead recommends expanding the frame of "tradition" to be attentive to the factors described therein. This is a useful acknowledgment that "tradition" does not have to be abandoned as a conceptual frame due to being seen as narrow and exclusionary, but instead can be as capacious as Indigenous notions of kinship.

[410] Justice, "Notes Toward a Theory of Anomaly," 213.

[411] Justice, "Notes Toward a Theory of Anomaly," 214.

In her article on same-sex marriage in Indian Country, Valerie Lambert cogently describes the formulation of tradition as follows:

> An Indian tribe's culture, for example, is often simply presumed to be singular, or what are recognized as such, are often constructed by outsiders as cloudless, uncomplicated, and immobile, treated like a time capsule from an implicitly static, simple past. For these stereotypes to be replaced by more accurate and productive conceptualizations of Indian traditions and cultures, each tribe's culture should be treated as a collection of diverse practices and ideas, as collective creative assemblages.[412]

Taken together with Heath Justice's analysis, this criticism of, yet optimism toward traditions, especially a textured, pluralistic, and living tradition seems emblematic of a broader project of Indigenous futurity—that the easy-seeming answers have been made "easy" by settler colonial pressure, and the investment in Indigenous ways of being and remembering requires tangling with these dilemmas.

Conclusion

Tradition is rhetorically powerful. Imbuing a political position with tradition can position it as commonsense and free from external influence. Appeals to tradition are especially potent for Native peoples because the historical and ongoing settler state intervention to destroy Indigenous distinctiveness is casting such a long shadow over Indigenous futures. Yet these appeals can easily slip into ready-made settler frames that perpetuate foundational forces of settler colonialism. Conservative propagandizing about how "the gays" are going to destroy the fabric of society and corrupt your children through a vicious campaign of compulsory pronoun recognition—provides an easy framework of grievance that connects negative sociopolitical conditions in the present to a lack of adherence to heteronormativity, framing a source of those negative sociopolitical conditions as its own solution and therefore maintaining its power.

[412] Lambert, "Negotiating American Indian Inclusion," 13.

In writing this section, I have found it at times frustrating that arguments about tradition have seemed so circular. Have I really shown anything of value by exploring tradition's deployment in this discourse? Am I a vulture merely picking at the bones of a dead argument? But upon reflection, I do think we've learned a few things.

Perhaps the debate over tradition is itself "tradition"; that is, by contesting these notions of tradition internally within Indigenous nations and communities, this is how tradition is growing and changing in the present. In a sense, the fact that Native peoples have had such varying responses to a political issue confirms what should already be obvious—that there is no singular "Native perspective" on an issue and there are endless facets of complexity within and between communities. At the same time, beyond the fourth wall of these debates is a settler audience overprepared to eject Indigenous peoples into the past, narrating them as out of step with purported settler progress.

As a settler in this figurative audience, I find myself wondering, what is at stake in settler surveillance of these debates on tradition? I think it boils down to a hunger to consume digestible versions of Indigenous tradition that nourish contemporary settler political ideologies. By that I mean it seems to be a form of appropriation or co-optation. Imbuing a settler conservative (or liberal, or socialist, etc.) position with the gloss that some version of that idea was already present precolonially is just another way for settler observers to take ownership over Indigenous knowledges. And further, the idea that Indigenous peoples have "lost" their traditions, or had them "corrupted" by settler colonialism slips easily to ideas about land—that Indigenous rights or titles have been lost or corrupted by ensuing legal property regimes. Indigenous peoples narrating themselves as present and futuring) agents with ongoing claims and experimenting with legal tools adapted to contemporary contexts—whether on marriage, land, property, citizenship,

or anything else—unsettles that settler audience's presumed authority to act as arbiter of legitimacy.

I see parallels here to the way that the Bureau of Indian Affairs wanted to find a unilateral definition for "Indian Custom Marriage" that could apply in all contexts, or to supersede Indigenous marriage practices with settler state law after an arbitrary expiration date. This idea of codifying tradition, making it legible and reproducible to settler bureaucracy seems to require making tradition less capacious and less fluid. A "thicker" understanding of tradition (and kinship) requires law and jurisprudence that similarly contends with the nuances of tradition as changeable and contested. And because it requires deeper engagement with holders of these knowledges and tradition, it displaces the mechanics of state-like mechanics of settler mechanics in favor of something that (re)centers Indigenous formations of governance.

In the next section, we will move from tradition to a closely interlinked concept in the queer Indigenous studies analysis of same-sex marriage—nationalism.

CHAPTER 7: TEMPORAL OVERHEAD:

THE NATIONALIST DRAG OF LEGITIMACY

"Nationalism" in Native theory and politics is a highly contested term. One of the principal lines of criticism, relevant here to this conversation about same-sex marriage and the overhead of legitimacy, is the extent to which projects of contemporary Native nation-building have imbricated power structures of U.S. settler nationalism. Namely, to what extent have Native polities become invested in aspects of U.S. statecraft—such as anti-Blackness, heteronormativity, and resource extraction? What do these investments look like, why have they been made, and how can they be thoughtfully critiqued without inadvertently buttressing settler attempts to invalidate Indigenous sovereignty and claims?

The title of this chapter plays upon queer studies scholar Elizabeth Freeman's concept of "temporal drag," a method for analyzing queer political movements.[413] The goal of this term, according to Freeman, is to highlight "the associations that the word 'drag' has with retrogression, delay, and the pull of the past on the present."[414] Put another way, "temporal drag" is a way of describing the ideological weight of the past within the present. The formulations of tradition discussed and critiqued in the previous chapter are an example of this; deploying tradition in support of a policy decision pulls—or drags—the present into a future weighted by an articulation of what the past mandates. "Temporal drag" may even be the main mode of time deployed in precedent-based jurisprudence, with legal arguments orienting around which side can accumulate enough of a convincing past to weigh upon the present.

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[413] Elizabeth Freeman, *Time Binds: Queer Temporalities, Queer Histories* (Durham, NC: Duke University Press, 2010), 61-62.

[414] Freeman, *Time Binds*, 62.

In considering the overhead of legitimacy—that is, the ideological and material costs of maintaining a form of government that is recognizable as legitimate to a settler state like the U.S.—one facet of that overhead is temporal. Mark Rifkin describes the idea of "temporal sovereignty" as emerging from "the effort to track the force exerted through processes of temporal recognition … while envisioning Native being and becoming as nonidentical to these imposed frames of reference, even as Indigenous temporalities are affected and shifted by such colonial imperatives."[415] Building nationalisms that contest settler colonial spacetime while simultaneously gaining levels of settler colonial recognition reads like a paradox. But is it? Marriage policy and its relationship to Indigenous nationalisms is a good place to explore this question.

Settler Colonial Spacetimes of Same-Sex Marriage

Same-sex marriage—and indeed, Indigenous nonconformity to heteropatriarchy—is positioned within what we might think of as a "heads I win, tails you lose" temporality. Jessica Harkins describes this well, writing: "Native peoples who follow mainstream heteronormative scripts are folded into the U.S., nation once their Native culture has been safely secured in the past, while those 'conservative' Native peoples who are unable to 'get over' the heteronormative patriarchal effects of colonialism are positioned as backward and not yet includable into the U.S. Nation."[416] There's a seeming incongruence between these temporalities. On one hand, an Indigenous society's settler-perceived lack of heterosexual monogamy is used as evidence of "savagery" or "barbarism" that needed to be "progressed past" by accepting the institution of

[415] Mark Rifkin, *Beyond Settler Time: Temporal Sovereignty and Indigenous Self-Determination* (Durham, NC: Duke University Press, 2019), 179.

[416] Jessica A. F. Harkins, "Same-Sex Marriage in the Cherokee Nation: Toward Decolonial Queer Indigeneities," in *Sovereign Acts: Contesting Colonialism Across Indigenous Nations and Latinx America*, ed. Frances Negrón-Muntaner (Tucson, AZ: University of Arizona Press, 2017), 189.

settler heteropatriarchy. But later, when same-sex marriage legalization gains legitimacy as a civil rights frontier, Native nations are seen as inhibiting that progress.

The "always-behindness" of settler temporalities imposed onto Indigenous peoples resonates with Jasbir Puar's discussion of "pinkwashing" and "homonationalism." Put succinctly, Puar argues that "For contemporary forms of U.S. nationalism and patriotism, the production of gay and queer bodies is crucial to the deployment of nationalism, insofar as these perverse bodies reiterate heterosexuality as the norm but also because certain domesticated homosexual bodies provide ammunition to reinforce nationalist projects."[417] Despite the precarity of queer inclusion within U.S. Nationalism, Puar draws attention to the ways that the U.S. Deploys its newfound toleration for queerness as a justification for military and political intervention in, especially, the Middle East. Scott Morgensen draws further critical attention to what he terms "settler homonationalism," acknowledging the building of these national narratives upon stolen Indigenous lands and further, the appropriation of Indigenous genders and sexualities into U.S. nationalism.[418]

A relevant example of this logic in action would be Kanaka Maoli activism in relation to same-sex marriage in Hawai'i. As J. Kēhaulani Kauanui observes in her analysis of this issue, the 1993 Hawaii State Supreme Court case *Baehr v. Miike,* the first legalizing same-sex marriage at the state level, instigated the 1996 passage of the Defense of Marriage Act as backlash.[419] Kauanui illustrates how Kanaka Maoli activism was at the center of this "early" push,

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[417] Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham, NC: Duke University Press, 2007), 39.

[418] Scott Lauria Morgensen, *Spaces Between Us: Queer Settler Colonialism and Indigenous Decolonization* (Minneapolis, MN: University of Minnesota Press, 2011), 2.

[419] J. Kēhaulani Kauanui, "Indigenous Hawaiian Sexuality and the Politics of Nationalist Decolonization," in *Critically Sovereign: Indigenous Gender, Sexuality, and Feminist Studies*, ed. Joanne Barker (Durham, NC: Duke University Press, 2017), 47.

associating Hawai'i sovereignty with recognition of same-sex marriage—assertions of nationalism that foregrounded (though not in an uncontested way) Kanaka Maoli notions of gender and sexuality.[420] Nevertheless, "Once taken out of the Hawaiian context, public discourse of Kanaka Maoli tradition and sexuality waned in some ways, and the same-sex marriage debate seemed to drop out of the Indigenous nationalist context."[421] Key origins for the legal push for same-sex marriage are folded into settler homonationalism, Indigenous contributions "disappearing" in the process. In her critique of 2013 activism toward the legalization of same-sex marriage in the state, Kauanui observes that "same-sex marriage extends the colonial imposition of male-female marriage to the contemporary politics of assimilation and affirmation of U.S. Occupation under the cover of inclusion in a multiracial liberal democracy in the 'land of aloha.'"[422] What I find so remarkable in Kauanui's analysis is the "vanishment" of Kanako Maoli decolonial work around gender and sexuality, only for it to "reappear" in a form more palatable to settler politics—an extraction of the overhead of legitimacy. Of course, such "vanishment" and "reappearance" is a kind of settler colonial parlor trick, rendering Indigenous nationalisms visible according to its own national narrative of progress.

In the context of federal Indian policy, this temporality can be helpfully visualized by Matthew Fletcher's analysis of same-sex marriage and its jurisdictional formation between tribal, federal, and state law. In a 2006 law review article, Fletcher reflects on the possibility that tribal government decisions legalizing same-sex marriage might intersect with efforts to add an anti-same-sex marriage amendment to the U.S. Constitution.[423] Fletcher notes that it is more likely

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[420] Kauanui, "Indigenous Hawaiian Sexuality," 51.

[421] Kauanui, "Indigenous Hawaiian Sexuality," 47.

[422] Kauanui, "Indigenous Hawaiian Sexuality," 49.

for the U.S. to enact such an amendment that does not explicitly reference tribes as sovereign jurisdiction, creating a scenario where "tribes could become islands of nonconforming law" that would result in federal courts weighing tribal sovereignty and federal Indian law precedent against settler marriage law.[424] As Fletcher goes on to note, the Supreme Court has "overwhelmingly favored non-Indian interests" in applying its authority to apply the U.S. Constitution.[425]

By contrast, in a scenario where Native nations were explicitly referenced within a same-sex marriage amendment, Fletcher argues that such inclusion would implicitly recognize, modify, and/or create the following federal Indian law doctrines:

> (1) Indian tribes are sovereigns, with inherent authority over domestic relations; (2) Indian tribes (somehow) are part of Our Federalism, even if they are not states or other entities; (3) state laws do not apply in Indian Country, in general; (4) Indian tribes are not subject to the Constitution's limits or mandates; and (5) the remainder of the Constitution's limitations on federal and state governmental power do not, by negative inference, apply to Indian tribes.[426]

Fletcher's article illustrates the stakes for how the U.S. national same-sex marriage issue could directly interface with, or perhaps "reset" federal Indian law.[427] While this precise scenario did not come to pass, there now exists a situation where the reverse—"islands of nonconforming law" *banning* same-sex marriage—exists amidst the post-*Obergefell* legal context. The continuance of same-sex marriage bans within tribal jurisdictions suddenly pop into focus for their discontinuity with this "landmarked" case.

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[423] Matthew L. M. Fletcher, "Same-Sex Marriage, Indian Tribes, and the Constitution," *University of Miami Law Review* 61 no. 1 (2006): 53-86.

[424] Fletcher, "Same-Sex Marriage," 60.

[425] Fletcher, "Same-Sex Marriage," 68.

[426] Fletcher, "Same-Sex Marriage," 71-72.

[427] Fletcher, "Same-Sex Marriage," 85.

How does this spatial representation of jurisdiction interface with the temporality of progress discussed above? The development of discourse about same-sex marriage has created what I would describe as a photo-negative effect between U.S. nationalist narratives of "progress" that focuses critical scrutiny on Native nations that are "out of step" with the U.S.'s rather self-congratulatory notions of human rights progress. Here's the analogy—in a photo negative, colors are reversed. Areas that might appear light on the negative would appear dark, and so forth. The moment that the film is developed, however, the colors flip and, though the underlying patterns of the image remain the same, this new perspective redirects the attention of the viewer to different areas of the photograph. In the mid-to-late 00s era, Native nations who legalized same-sex marriage in contrast to state laws/constitutions drew scrutiny for being out of step with settler law. The *Obergefell* decision is akin to developing that photograph, suddenly bringing the settler state in line with Native nations who had legalized same-sex marriage and causing Native nations with standing same-sex marriage bans to suddenly pop out as hypervisible relative to what the settler state is doing.[428]

When an institution of settler power like the U.S. Supreme Court acts as arbiter of the proper pace of progress, tribes will always appear "backwards" relative to its timeline. Either tribes had failed to yet develop a heteropatriachal nuclear family structure conforming to settler "morality", or they were lagging behind the civil rights frontier the Court has taken upon itself to mark. This always behindness is a key indicator of the overhead of legitimacy—when the settler

[428] As Mishuana Goeman observes, "For Indigenous people traveling through constrcted colonial and imperial spaces, the body can be hypervisible as the abnormal body, and at times hyper-invisible as it becomes spatially disjointed from the map of the nation in both physical and mental imaginings." This is evidently applicable in the example of same-sex marriage law under discussion. Goeman, *Mark My Words*, 12.

state sets the terms of progress, tribal actions in contradiction are deployed as evidence to undermine the legitimacy of tribal sovereignty.

In their conclusion to *Queer Indigenous Studies*, Qwo-Li Driskill et al. criticize the Cherokee Nation and Navajo Nation same-sex marriage bans as "national formations, while maintaining tribal sovereignty, [that] do not challenge colonialism or the legitimacy of nation-state interference in tribal governance."[429] They note, however, that these instances of nationalist homophobia should not serve as a stand-in for all Native nations, considering that most Indigenous polities in the U.S. have not banned same-sex marriage.[430] And, as a further example, they cite the Coquille Nation case of same-sex marriage legalization. This viewpoint is helpful in dispelling the notion that heteropatriarchy is in some way a foundational element of Native nationalisms.

However, I question the implication that either a lack of explicit marriage policy or the legalization of same-sex marriage necessarily "challenge colonialism or the legitimacy of nation-state interference in tribal governance."[431] In the first situation, a Native nation's decision to not exercise a sovereign power to issue civil marriage licenses could be seen as a deferral to state law governing marriage. It might also suggest that a Native nation is taking a form less legible to state-like bureaucracies—a "refusal," in Audra Simpson's parlance, to center settler models for civil/contractual marriage. In the second situation, the Coquille Nation case, Julie Bushyhead's

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[429] Qwo-Li Driskill et al., "The Revolution is for Everyone: Imagining an Emancipatory Future through Queer Indigenous Critical Theories," in *Queer Indigenous Studies: Critical Interventions in Theory, Politics, and Literature,* ed. Qwo-Li Driskill et al. (Tucson, AZ: University of Arizona Press, 2011), 213.

[430] Driskill et al., "The Revolution is for Everyone," 214.

[431] Driskill et al, "The Revolution is for Everyone," 213.

analysis illustrates how the Coquille Nation's law was specifically crafted to avoid conflicting with federal court precedent.[432]

Further, the fact that the Coquille Nation does not have allotments avoids what—at least at the time—could have raised a federal conflict. As section three of the Defense of Marriage Act dictated, "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[433] In consideration of allotments, the federal government's refusal to recognize same-sex marriages would likely extend to the Department of Interior and Bureau of Indian Affairs. An allotment probate case that required consideration of a tribally-issued same-sex marriage license during DOMA's time of effect could raise a federal question for the Supreme Court, pitting the sovereign power of tribes to set domestic policy against an act of Congress.

My point here is that the Coquille Nation's law was expertly crafted with both Oregon law and federal law in mind to avoid these conflicts. Arguably, this attempt to create a policy that is frictionless with settler state power, while a sovereign act in its own right and certainly with practical merits, reinforces the jurisdictional context imposed by settler colonialism. In considering Driskill et al.'s analysis, then, I suggest a need to extend their logic about how same-sex marriage bans might align tribal sovereignty with settler colonialism to same-sex marriage legalizations as well.

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[432] Julie Bushyhead, "The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide," *Arizona Journal of International and Comparative Law* 26, no. 2 (2009): 509-546.

[433] *Defense of Marriage Act*, Public Law 104-199, *U.S. Statutes at Large* 110 (1996): 2419.

Steven Alagna makes this point cogently in his discussion of the use of self-determination as a justification for same-sex marriage bans. Following the parallel logic that tradition can be used as a potent discursive tool for multiple sides of this issue, he notes that "as easily as self-determination can be an argument for supporting same-sex marriage, it may also support a tribal sovereign's decision to ban same-sex marriage. In fact, Native nations may be especially likely to cite self-determination as a reason for supporting bans on same-sex marriage now that the unions are legal in all states."[434] The analysis that, essentially, same-sex marriage bans in tribal jurisdictions are deployments of sovereignty that rely upon state scripts of homophobia and therefore reinscribe that state power, is critical, but potentially obscures a larger point. Legalizations of same-sex marriage also reinscribe settler state power—that is, the regulatory power over marriage that bundles marriage recognition with benefits, property, and citizenship. That is to say, using bureaucratic kinship as key lens of analysis for tribal actions on same-sex marriage reveals increased regulation of marriage—even in forms that are ostensibly expand access to the status—in the model of settler civil marriage licensing.

For an example of what I mean, let's take a look at the Coquille Tribe's 2008 legalization of same-sex marriage, widely regarded as the first explicit legalization of same-sex marriage by a tribal jurisdiction in the U.S.[435] Writing for ABC News in a contemporaneous article Sarah Netter reports, "Before the tribe ruled on Kitzen Branting's request in May, the Coquilles did not have a policy defining marriage and did not perform ceremonies or hand out marriage licenses of any kind."[436] This is noteworthy in that, unlike repeals of same-sex marriage bans which simplify

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[434] Steven J. Alagna, "Why *Obergefell* Should Not Impact American Indian Tribal Laws," *Washington University Law Review* 93 (2016): 1589.

[435] Ann E. Tweedy, "Tribal Laws & Same-Sex Marriage: Theory, Process, and Content," *Columbia Human Rights Law Review* 46, no. 3 (2015): 112.

marriage policies by striking the sex or gender requirements of participants, the legalization of same-sex marriage was a move that expanded the Coquille Tribe's regulatory framework.

Noting the jurisdictional context of the Coquille Tribe, Bushyhead observes that despite the federal Defense of Marriage Act's restriction on recognition:

> Same-sex couples married by the Coquille Tribe are in a unique position to receive equal and respected recognition as 'married' by the Coquille Tribe, extensive health benefits provided by the Coquille Tribe, and extensive spousal benefits provided by the Oregon Family Fairness Act if those couples register as domestic partners in Oregon.[437]

The state of Oregon effectively created a context in which Coquille legalization of same-sex marriage conferred material benefits to members, and so this decision was, in one sense, a successful navigation of settler law. It is explicitly something other than a refusal—a "working with" rather than a "working against" the civil contractual model of marriage put forward under bureaucratic kinship. It resembles the idea of "malicious compliance," where one strictly follows the rules in such a way that it contradicts the goals of a system. Here, however, the goals of the Coquille Tribe are hardly malicious. We might think of this instead as a "countercolonial compliance," a creative advancement of Coquille sovereignty that follows legal methods deemed legitimate by the settler state but nonetheless thwarts settler attempts to restrict Indigenous gender expression.

In the final section on the "overhead of legitimacy," I want to take a closer look at both the *Obergefell* decision and a case study of the Cherokee Nation's response, which will further extend this conversation.

Without *Loving*: The Cherokee Nation Legalizes Same-Sex Marriage

[436] Sarah Netter, "Brides Look Forward to Marrying Under Tribal Same-Sex Marriage Law," *ABC News* (New York, NY), Aug. 28, 2008.

[437] Bushyhead, "The Coquille Indian Tribe," 510.

With its decision in the 2015 case *Obergefell v. Hodges*, the U.S. Supreme Court held that, under the due process and equal protection clauses of the U.S. Constitution, "same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."[438] In writing the Court's majority opinion, Justice Anthony Kennedy explicitly cites the 1967 decision in *Loving v. Virginia* as precedent, participating in the analogizing of civil rights of same-sex marriage to interracial marriage.[439]

This analogy arises in a few key places in the *Obergefell* decision, illustrating the Court's thinking on the political power of marriage and how that arises within a liberal/individualistic civil rights framework. First, Kennedy writes, "A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause."[440] What Kennedy finds important in the reasoning applied in *Loving* is its focus on "personal choice" and "individual autonomy." According to this reasoning, the state's regulatory power around marriage was not mis-applied in the sanctioning of interracial marriage bans because of the white supremacist or settler colonial logics underpinning such a power, but rather because it inhibits individualism.

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[438] Obergefell v. Hodges, 576 U.S. 644 (2015): 28.

[439] Loving v. Virginia, 388 U.S. 1 (1967).

[440] Obergefell v. Hodges, 576 U.S. 644 (2015): 12.

This is noteworthy because it illustrates how the Court arrives at a "progressive" decision by hard-wiring precedent that buttresses the U.S. model for citizenship and atomized individual rights. Citing *Loving* further, Kennedy remarks:

> In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. … The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.[441]

Kennedy's establishment that marriage is a fundamental right sits upon a logic of "colorblindness," that the issue with miscegenation statutes are that they treated couples "unequally" and this resulted in "hurt." It should not really be surprising that the Supreme Court, one of the architectural institutions of U.S. settler colonial governance displays a reluctance to interrogate structural injustice more deeply.

In her study of the *Loving v. Virginia* case, Peggy Pascoe notes how, in order to build a consensus on the Court, Chief Justice Earl Warren (author of the *Loving v. Virginia* majority opinion) "agree[d] to tone down—but not eliminate—the language about the right to marry,"[442] and deliberately avoided "issuing an across-the-board ban on race classifications."[443] Warren abandoned more radical approaches to resolving the question before the Court in order to foster a stronger sense of legitimacy for the decision. Pascoe further describes how this case is accompanied by a "concerted, and surprisingly successful effort to push the three-century-long history of bans on interracial marriage out of public memory."[444] Because of how the Supreme

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[441] Obergefell v. Hodges, 576 U.S. 644 (2015): 18-19.

[442] Peggy A. Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York, NY: Oxford University Press, 2009), 283.

[443] Pascoe, *What Comes Naturally*, 287.

[444] Pascoe, *What Comes Naturally*, 291.

Court navigated framing and answering the question about interracial marriage bans, the case is remembered less for its incrementalism and more as evidence of U.S. progress toward its "post-racial" present.

I cite this analysis here because the fact that Kennedy uses this analogy between *Loving* and *Obergefell* is the result of an (evidently successful) strategy by same-sex marriage advocates, academics, and lawyers to promote this analogy to generate a favorable result. The "*Loving* analogy" has been the subject of critical attention from writers in the fields of queer studies and critical race theory, revolving around the ways in which this analogy foregrounds a linear narrative of U.S. social progress that embeds logics of heteropatriarchy and white supremacy within notionally "good" civil rights decisions. Siobhan Somerville argues that the "miscegenation analogy seems to have widespread appeal, but whatever its rhetorical power, it has obscured the complicated ways in which race and sexual orientation have been intertwined in U.S. law."[445] Part of her analytical strategy here is to read *Loving v. Virginia* alongside contemporaneous cases that reveal how this decision, landmarked as a civil rights victory, shored up the political power constellating around heterosexuality, citizenship, and property. She observes:

> In the eye of the law, the interracial couple [in *Loving*] was imagined as having a legitimate claim on the state at the same time that the nation was defensively constituted as heterosexual, incapable of incorporating the sexually suspect body. That the Supreme Court had reaffirmed the exclusion of homosexuals from citizenship only three weeks earlier makes it particularly ironic that *Loving* is currently read as a precursor to gay and lesbian rights.[446]

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[445] Siobhan B. Somerville, "Queer *Loving*," *GLQ: A Journal of Lesbian and Gay Studies* 11, no. 3 (2005): 336.

[446] Somerville, "Queer *Loving*," 357.

She performs a similar move in her discussion of *Lawrence v. Texas*.[447] In this 2003 case, the Court overturned a Texas law criminalizing "sodomy," arguing that "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[448] In effect, due to the "right to privacy" established by the Due Process clause of the Fourteenth Amendment[449]—states do not have the right to criminalize consensual homosexuality. But as Somerville, highlighting the logics of police surveillance, white supremacy, and privacy in play, describes how the challenge to the law originated due to a neighbor calling the police on John Lawrence, a white man, and Tyron Garner, a Black man, by making a false claim about a weapons disturbance that "set the conditions for the lawful entry of the police into Lawrence's apartment."[450] Somerville observes how the racialization of this case is "unmarked in the official documents related to the Supreme Court decision," despite the fact that the case arose precisely because of conditions precipitated by the interactions between white supremacy, anti-Blackness, and heteropatriarchy.[451]

Configured through the overhead of legitimacy as a lens, it becomes evident that the entrenchment of cisheterosexual marriage was a cost incurred by *Loving*, while the individualist, liberal logics of the "right to privacy" are similarly part of the upkeep of *Lawrence.* Emphasizing this point, David Eng notes how:

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[447] Lawrence v. Texas, 539 U.S. 558 (2003).

[448] Lawrence v. Texas, 539 U.S. 558 (2003), 578.

[449] A right that has now been apparently vacated by the Court in Dobbs v. Jackson Women's Health Organization, 579 U.S. ___ (2022), overturning Roe v. Wade 410 U.S. 113 (1973), which originated the Court's interpretation that the "right to privacy" exists in this clause of the Constitution.

[450] Somerville, "Queer *Loving*," 346.

[451] Somerville, "Queer *Loving*," 346.

> *Lawrence's* legal victory might be something, in Spivak's words, that we "cannot not want." Needless to say, the decriminalization of same-sex sodomy in U.S. law is an event of tremendous political significance. Nevertheless, it is crucial to explore the historical conditions of possibility as well as the social costs and limits of this latest episode in the story of human freedom and progress.[452]

Eng's analysis of *Lawrence* illustrates how the rhetorical move to create legal analogy to *Loving* positions racial inequality as a resolved issue, feeding into self-congratulatory U.S. narrations of progress. He notes, "When queer liberals insist that *Lawrence* is 'our *Loving*' or 'our *Brown*,' they foreclose the possibility of reading the *Lawrence* decision as part of a long legal tradition maintaining interlocking, indeed, constitutive, systems of white supremacy and heterosexism foundational to liberal modernity's unending march of freedom and progress."[453] Thus, it is critically important to analyze such legal precedents less for the progress promised, and more for the systems maintained.

Applying this mode of analysis in the context of Native and Indigenous studies, Jodi Byrd reads the 2013 decision in *U.S. v. Windsor* into context with three other high-profile decisions the court released in that same month. *Windsor*, a case where the Supreme Court voided a section of the Defense of Marriage Act in order to secure inheritance rights to same-sex partners, illustrates how a recognition-seeking stance entrenches the very regime of property that dispossesses Indigenous peoples of land as its overhead.[454] This is a case about bureaucratic kinship, essentially resolving a problem of discrimination in the maintenance of property transfer.

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[452] David L. Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham, NC: Duke University Press, 2010), 25.

[453] Eng, *The Feeling of Kinship*, 41.

[454] United States v. Windsor, 570 U.S. 744 (2013).

Once again, *Windsor* is a case that is correctly decided—federal law should very obviously not discriminate against same-sex couples—but Jodi Byrd's suggestion that we read the Court's decisions alongside one another is productive:

> Indeed, the trifecta of political issues surrounding these cases,[455] with the undermining of Indigenous sovereignty and voting rights for minorities on the one hand, and the tepid affirmation of same-sex couples' rights to federal benefits and marriage recognition on the other, demonstrates the trenchant need for queer, Indigenous, feminist, and critical race theories to continue hammering home how U.S. neoliberal biopolitics govern bodies, rights, and access through state-sanctioned normativities that expand access only to ensure incorporation as non-transformation.[456]

The objective of this type of analysis is to unsettle the ways in which same-sex marriage rights amplify settler colonial logics. Byrd is critical of how, in their words, a "tepid affirmation" of rights is deployed as evidence of U.S. progressivism at the same time that Court restricts rights elsewhere.

So, what has this critical review of the *Loving* analogy revealed? In summation, it is a call to critical attention of these judicial decisions, and in particular, how ostensibly "good" decisions rest on a foundation of the unaddressed settler colonial gears that continue their grinding. In effect, what is revealed through this mode of analysis is the way in which settler colonial institutions redirect radical aspirations toward incremental (or merely lateral) change that maintains more than it discards.

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[455] Byrd is referring to United States v. Windsor, 570 U.S. 744 (2013) as described already; Shelby County v. Holder, 570 U.S. 529 (2013), which overturned section 4(b) of the Voting Rights Act of 1965; Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013), which held that several clauses of the Indian Child Welfare Act do not apply to a non-custodial Native American father of a Native American child; and Hollingsworth v. Perry, 570 U.S. 693 (2013), which rejected an appeal to a lower court decision overturning California's same-sex marriage ban (Proposition 8) on the basis of standing.

[456] Jodi A. Byrd, "*Loving* Unbecoming: The Queer Politics of the Transitive Native," in *Critically Sovereign: Indigenous Gender, Sexuality, and Feminist Studies*, ed. Joanne Barker, (Durham, NC: Duke University Press, 2017), 208.

I turn now to a case study of the Cherokee Nation's legalization of same-sex marriage as an instructive example of these logics at work. For context, it will be important to be aware of the applicability of *Obergefell's* relevant constitutional clauses—due process and equal protection—to the Cherokee Nation (and other Native nations). As Vine Deloria Jr. and David Wilkins explain, the Fourteenth Amendment—where both clauses are located—does not automatically apply to tribes as a result of their pre- and extra-constitutional status.[457] However, the 1968 Indian Civil Rights Act was an attempt by Congress to use its plenary power to extend civil rights protections afforded by the constitutional amendments to tribes.[458] However, this legislation "did not establish a federal enforcement mechanism for violations of the Act, nor did it abrogate tribal sovereign immunity. Thus, ICRA strikes a delicate, and often controversial, balance between tribal sovereignty and individual liberties."[459] In practice then, ICRA positions tribes—and especially, tribal judiciaries—as arbiters interpreting the enumerated constitutional clauses in ways that are politically and culturally relevant.

In the case of the Cherokee Nation, the nation independently added its own due process and equal protection clauses to the Cherokee constitution, which are still in effect. Section 1 of Article III of the Cherokee constitution reads, "Speedy and certain remedy, and equal protection, shall be afforded under the laws of the Cherokee Nation," while Section 3 of the same states that "the Cherokee Nation shall not deprive any person of life, liberty or property without due process

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[457] Vine Deloria, Jr., and David E. Wilkins, *Tribes, Treaties, and Constitutional Tribulations* (Austin, TX: University of Texas Press, 1999), 97.

[458] Deloria and Wilkins, *Tribes, Treaties, and Constitutional Tribulations*, 157.

[459] Kristen A. Carpenter, Matthew L. M. Fletcher, and Angela R. Riley, "Introduction" to *The Indian Civil Rights Act at Forty,* ed. Kristen A. Carpenter, Matthew L. M. Fletcher, and Angela R. Riley (Los Angeles, CA: UCLA American Indian Studies Center, 2012), xi-xii.

of law."[460] In order to avoid confusion later, then, it's important to remember that there are three distinct sets of due process and equal protections clauses: the ones that exist in the federal Constitution, which do not apply with respect to the internal sovereignty of Native nations; the ones that exist in the ICRA, which can be interpreted by tribal courts if they choose to waive sovereign immunity to do so; and the set that exist within the Cherokee Nation's own constitution.

Providing a theoretical tool that is helpful in evaluating the decisions of tribal judiciaries on these individual civil rights issues, Mark Rosen enumerates five distinct strategies that tribes use.[461] The relevant one to today's discussion is what Rosen terms "fitted incorporation." This mode—which differs from "stock incorporation," a situation where a tribal judiciary applies federal reasoning or precedent without further comment—is a situation where "tribal courts that incorporate may conceptualize the federal approach as consistent with or derivable from tribal culture and values, and this may have important social meaning to the tribal community, which would be lost if the adjudication had taken place in a federal court."[462] In effect, the Cherokee Nation decision legalizing same-sex marriage within its jurisdiction is a form of fitted incorporation—it parallels the logic of *Obergefell* but does so situated within Cherokee Nation constitutional law and jurisprudence. So let's take a closer look at that decision, and tease out the associated overhead of legitimacy.

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[460] Cherokee Nation Constitution, Article III, §1 and §3.

[461] Mark D. Rosen, "Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act," in *The Indian Civil Rights Act at Forty,* ed. Kristen A. Carpenter, Matthew L. M. Fletcher, and Angela R. Riley (Los Angeles, CA: UCLA American Indian Studies Center, 2012).

[462] Rosen, "Evaluating Tribal Courts' Interpretations," 279.

Given the critical attention applied to the Cherokee Nation's same-sex marriage ban at the time, it's surprising that the Cherokee Nation's legalization of same-sex marriage in 2016 has garnered much less commentary. Perhaps it's because the *Obergefell* decision—despite explicitly not applying to federally recognized Native nations in its actions overturning state-level same-sex marriage bans—has apparently "settled" the issue of marriage that the Cherokee Nation case has appeared as an afterthought. But, observers of the current reactionary court's moves to destabilize precedent based on the equal protection and due process clauses as it applies to abortion rights might question how "settled" *Obergefell* really is.

In my view, it's precisely because *Obergefell* did not require Native nations to legalize same-sex marriage that I find the Cherokee Nation case noteworthy—and further, because Todd Hembree, who was the author and architect of the Cherokee Nation Marriage and Family Protection Act of 2004, is also the author of its repeal.

As Attorney General of the Cherokee Nation, Todd Hembree issued a legal opinion on December 9, 2016 that declares the same-sex marriage ban in the CNMFPA unconstitutional, on the basis that it violates the equal protection and due process clauses of the Cherokee Nation Constitution.[463]

The case originates as a query from the Cherokee Nation Tax Commission. The Tax Commission issues motor vehicle license tags to its citizens, which requires applicants to submit documentation. As Hembree explains in his legal opinion:

> For a recently-married individual, the Commission will accept a valid marriage certificate. The issue before us today arose when a recently-married individual offered a marriage certificate issued to her and a person of the same-sex as offer proof of her identity. Upon receipt, the Commission was unsure whether it could accept the same-sex

[463] Cherokee Nation, Office of the Attorney General, Opinion 2016-CNAG-01, December 9, 2016.

> marriage certificate in light of the Cherokee law expressly defining marriage "[a]s a civil contract between *one man* and *one woman.*"[464]

Despite all the tense ideological debates over same-sex marriage, the heated negotiations over tradition, the issue before the Cherokee Nation Tax Commission is a very practical one. Simply put, Cherokee Nation's refusal to recognize same-sex marriages as valid was proving to be a bureaucratic hurdle. And, in the specific scenario that Hembree cites as an example, this bureaucratic challenge arises specifically as a result of the fact that the Cherokee Nation is, to continue applying Fletcher's term, an "island of nonconforming law." Though same-sex marriage had been legalized in the overlapping state of Oklahoma on October 6, 2014, it was not until *Obergefell v. Hodges* resolved a split-circuit decision and ensured that same-sex marriage would continue to be legal in Oklahoma. This created a situation where Cherokee Nation citizens could contract a same-sex marriage from the state but not the tribe. It's not altogether surprising that, within two years of this discordant jurisdiction, the Cherokee Nation government and its citizens would encounter just such situations.

So, we see the same-sex marriage ban reach an ignominious end at the hands of practical tax policy. Had tradition really been so incontrovertible in its opposition to same-sex marriage, one could imagine that the Cherokee Nation would be willing to stand its ground on something as comparatively unimportant as motor vehicle license tags.

The legal opinion, however, makes some important rhetorical and political moves that I think are worth commenting upon. The most striking aspect of the decision is how much it relies upon Justice Anthony Kennedy's majority opinion in *Obergefell* for its reasoning. For instance, in his opinion, Kennedy has a (rather grandiose) description of the historical importance of marriage, writing, "The history of marriage is one of both continuity and change. That

[464] Cherokee Nation Attorney General, Opinion 2016-CNAG-01, 3.

institution—even as confined to opposite-sex relations—has evolved over time."[465] In his own opinion, Hembree writes, "Before addressing the principles and precedents that govern our answer, it is appropriate to note the history of marriage in the Cherokee Nation. The history of marriage among the Cherokees is one of both continuity and change."[466] (Hembree 3). Without direct citation, Hembree implants the language of *Obergefell* directly into his opinion, adding "among the Cherokees" to locate the grand sweep of Kennedy's analysis within a Cherokee context.

Describing this Cherokee historical context, Hembree specifically invokes a notion of plural traditions, writing:

> Indeed, while the majority of Cherokees subscribed to culturally defined gender roles, evidence suggests a tradition of homosexuality or alternative sexuality among a minority of Cherokees. Though such traditions are infrequently recorded, in his papers, John Howard Payne describes a ceremony that bonded two people of the same sex together for life. The relationship described in some respects would seem to parallel a modern day same-sex marriage in the depth of its commitment, its permanence, and its recognition by the other members of the tribe.[467]

The centering of this discussion of tradition breaks from *Obergefell's* sweep—as part of a "fitted incorporation," locating the non-heteronormativity of Cherokee tradition positions same-sex marriage rights as an extension of tradition, rather than an external ideology imposed upon Cherokee people, an argument that councilors themselves made at the time they passed the ban.

Hembree's 2016 decision argues that "Prior to 2004, Cherokee marriage laws were gender-neutral."[468] What's noteworthy about this observation is that Hembree argued the

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[465] Obergefell v. Hodges, 576 U.S. 644 (2015): 6.

[466] Cherokee Nation Attorney General, Opinion 2016-CNAG-01, 3.

[467] Cherokee Nation Attorney General, Opinion 2016-CNAG-01, 4-5.

[468] Cherokee Nation Attorney General, Opinion 2016-CNAG-01, 7.

opposite in front of the Judicial Appeals Tribunal in the McKinley and Reynolds case, when he stated that "Same sex marriages were not part of Cherokee history or tradition. Cherokee society in 1892 did not allow nor contemplate same-sex marriage."[469] I point this out less as a "gotcha" revealing hypocrisy, but more to illustrate once again how the citation of tradition as precedent can easily be put forward for or against same-sex marriage, even by the exact same person in different years.

Based on my presentation of this analysis thus far, you may be wondering how the *Loving* analogy translates from *Obergefell* into Hembree's fitted incorporation. In describing the Cherokee Council's history of legislation on marriage, Hembree writes, "Most notably, the National Council did enact a law *prohibiting* Cherokees by blood from marrying 'any person of color,' 'under the penalty of such corporeal punishment as the courts may deem it necessary and proper to inflict, and which shall not exceed fifty stripes for every such offense."[470] However, this standalone sentence is the only acknowledgement of this legislation. There is no discussion of the law's repeal, or case law wherein it was overturned. In effect, while creating a parallel decision to *Obergefell*, Hembree gestures toward a *Loving* analogy but appears not to find it within a Cherokee legal context.

What does it mean to proceed with legalizing same-sex marriage without *Loving*? What does it reveal about the overhead of legitimacy, the logics entrenched in such a decision? Applying the theoretical frames offered by Somerville, Eng, and Byrd above, it is apparent that the Cherokee Nation's ban and legalization of same-sex marriage coincide with an accounting of

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[469] Todd Hembree, quoted in Christopher L. Kannady, "The State, Cherokee Nation, and Same-Sex Unions: In Re: Marriage License of McKinley & Reynolds," *American Indian Law Review* 29, no. 2 (2004/2005): 370.

[470] Cherokee Nation Attorney General, Opinion 2016-CNAG-01, 7.

anti-Blackness as well. Mark Rifkin notes how the same-sex marriage ban corresponded to the tribal council's decision to disenfranchise Freedmen citizens via constitutional amendment, observing that the "process of linking normative family formation to the history and futurity of Cherokee nationality is suggested by the invocation of tradition to legitimize both the denial of same-sex marriage and the alien(-)ation of the Freedmen."[471] The simultaneous investment in anti-Blackness and heterosexism as a strategy for promoting Cherokee sovereignty illustrates how the politics of recognition, even when internalized, incur costs required to produce a nation that is "recognizable."

But we might further ask, in light of Hembree's citation of Cherokee nation's interracial marriage ban without discussion of its repeal, how the logics of anti-Blackness attend to this legalization of same-sex marriage. Months after this legalization, in September 2017, the Cherokee Nation Supreme Court recognized Todd Hembree's petition to have the court to follow the federal district court decision in *Cherokee Nation vs. Nash et al.*, overturning the 2007 amendment disenfranchising Cherokee Freedmen citizens. The Cherokee Nation Supreme Court, dismissing attempted interventions by Cherokee citizens in allowing the federal ruling to take effect, observes that "a Cherokee citizen must show that they will suffer an individualized harm by a decision determining that Freedman individuals are entitled to citizenship and all the rights said citizenship includes to properly intervene."[472] Connecting this case back to the primary focus of my analysis—the same-sex marriage legalization—the role of the federal court in

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[471] Mark Rifkin, *The Erotics of Sovereignty: Queer Native Writing in the Era of Self-Determination* (Minneapolis, MN: University of Minnesota Press, 2012), 46.

[472] Cherokee Nation Supreme Court, "In re: Effect of Cherokee Nation v. Nash and Vann v. Zinke, District Court for the District of Columbia, Case No. 13-01313 (TFH) and Petition For Write of Mandamus requiring the Cherokee Nation Registrar to Begin Processing Citizenship Applications," SC-17-07 (2017): 2.

shaping the Cherokee Nation's coinciding focuses on same-sex marriage and Freedmen citizenship, echoing over the course of a decade, illustrates the costs of legitimacy.

Both the 2016 and 2017 decisions bring Cherokee Nation into alignment with federal court precedent, reducing potential friction between Cherokee and federal sovereignty. Under the model of fitted incorporation Rosen describes, the Cherokee Nation has contextualized federal rulings within Cherokee jurisprudence. Thought in these terms, the floating citation of Cherokee Nation's miscegenation statute illustrates the incongruity of creating a parallel to federal civil rights logic without the associated precedent—it seems strangely unaccountable, a history acknowledged in passing but stripped away from the type of moral authority Kennedy claims to draw from *Loving v. Virginia*.

Hembree concludes his opinion, writing that "the Cherokee Nation Constitution protects the fundamental right to marry, establish a family, raise children and enjoy the full protection of the Nation's marital laws. The Constitution affords these rights to all Cherokee citizens, regardless of sexual orientation."[473] In practice, this is a decision that alleviates the nation's homophobic legislation, but there's a lingering precarity—Hembree notes that because he is making same-sex marriage legal by his role as Attorney General, the legislation is "null and void until a differing opinion or order are entered by a Cherokee Nation Court."[474] This sense of precarity haunts *Obergefell* as well. All four conservative justices who dissented from Kennedy's majority opinion felt the need to enter a searing dissent against the ruling.

With the present even-more-reactionary makeup of the U.S. Supreme Court, the instability of progress under the terms of settler colonial recognition is laid bare. My point here is

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[473] Cherokee Nation Attorney General, Opinion 2016-CNAG-01, 11.

[474] Cherokee Nation Attorney General, Opinion 2016-CNAG-01, 11.

not to suggest that Cherokee Nation (or the U.S., for that matter) will re-ban same-sex marriage; but rather, I want to conclude this section by underscoring how, because of the overhead of these decisions, the underlying structural problems of settler colonialism have not truly been made accountable.

Conclusion

In this chapter, I explored the temporal overhead associated with nationalism, considering the costs incurred by moves to legitimacy. In particular, I focused on reading judicial decisions, and how they are structured to retain settler colonial logics even as they frame themselves as beneficial redress against discrimination. As I was revising this chapter in June and July 2022, the U.S. Supreme Court released a string of alarming reactionary decisions, whose impact is still forthcoming. Among these decisions was *Dobbs v. Jackson Women's Health Organization*, where the Court overturned the constitutional right to an abortion—previously decided in *Roe v. Wade* in 1973 along "right to privacy" grounds. In a concurrence to the majority opinion, Justice Clarence Thomas ominously writes, "in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold, Lawrence,* and *Obergefell*."[475] This suggests, if nothing else, that relying on narrow incremental decisions as the basis for progress is tenuous.

Whether the Court will ultimately end the right to same-sex marriage after previously establishing it is unknowable at present. Native nations retain their inherent sovereign right to set their own marriage laws. However, it would be wise to take heed of Jodi Byrd's strategy of reading Court decisions aside one another. Within a week of the *Dobbs* ruling, the Court released another ruling in *Oklahoma v. Castro-Huerta*, holding that the state of Oklahoma held

[475] Dobbs v. Jackson Women's Health Organization, 579 U.S. ___ (2022).

concurrent criminal jurisdiction with the federal government in cases of a non-Indian committing a crime against a tribal citizen in Indian country.[476]

The extension of state-level jurisdiction over Native nations, coupled with the erosion of federal civil rights, at the very least signals a future where tribal jurisdiction over marriage laws could face sovereign conflicts with states should the Court continue its current controlling whatever-the-right-wing-wants doctrine. Regardless of the Court's choices, Native nations will continue to build futures that resist the rules and restrictions of settler colonial governance.

[476] Oklahoma v. Castro-Huerta, 597 U.S. ___ (2022).

PART III: CONCLUSION

It is tempting to leave Part III on a pessimistic note. As I wrote the chapters in this section during 2021 and 2022, conservative backlash against liberatory politics of gender and sexuality has once again surged. The climate crisis continues, seemingly unabated—sections of this Part were written under eerie gray-brown skies consumed with wildfire smoke. There's a dark irony in the fact that, given the time it took me to write this study, where it seemed that same-sex marriage was a "settled" issue politically, potentially rendering commentary on it irrelevant, the topic has been reopened by an increasingly radical Supreme Court. But doesn't that just go to show the instability of "settlement;" that settler colonial claims to jurisdictional permanence are mirages, paper undone even by its own purported logic?

Concerning the "overhead of legitimacy," I have critiqued the ideological and material costs of Native nations choosing to use their sovereignty to ostensibly affirm settler colonial logics like heteropatriarchy and private property. I think it's worth investigating how ideas like tradition and nationalism are deployed in these arguments over the legalization of same-sex marriage, because they are incredibly revealing of, certainly, the power inequality and pressures that surviving under settler colonialism imposes. But it *is* survival. And that's why I think that pessimism is ultimately misguided.

To survive and dismantle U.S. settler colonialism is taking an all of the above approach. An incremental approach to safeguard sovereignty, or protect certain people or lands today might allow for a more radical future. More radical approaches to challenge settler colonialism in places where it is vulnerable today might force change to happen faster when it needs to. I think it's necessary to reveal the overhead of legitimacy, to see what the cost of different choices are on different registers, and to advocate with the most change, the most quickly, that is sustainable.

Indigenous peoples have now been surviving, effectively, centuries of political, social, and ecological crisis, building futures that resist and contest settler states at every turn. If Part III of this project can contribute anything meaningful for those thinking through the difficult dilemmas associated with recognition, refusal, and alliances between different political movements toward a project of dismantling the systems of settler colonial violence, then perhaps it will be worth the paper it may one day be printed on.

CONCLUSION

At the beginning of this study, I set these central questions: (1) What is the institutional framework of marriage policy in the United States as it applies distinctively to Native Americans? (2) How does marriage policy function to reproduce the racial and gender hierarchy of settler colonial governance? (3) Under what conditions did/do Native Americans resist and co-create marriage policy? And (4) How do Native narratives of place and time disrupt the futures that settler colonial marriage policy aims to produce?

In my attempts to respond these questions, I developed three keywords that I used to organize my analysis: bureaucratic kinship, allotmentality, and the overhead of legitimacy. Each of these keywords represents my attempt to synthesize what I was seeing in this legal history; namely, how settler colonial relations produce and make use of marriage regulations in order to maintain the dispossession of Indigenous lands. With bureaucratic kinship, I expressed the state attempt to standardize and thin out the category of kin, to transform peoples and lands into property, and to proliferate ambiguous rules and regulations that could be strategically (mis)interpreted to assert settler preferences. With allotmentality, I wanted to describe another way of placing land at the center of discussions of settler colonial marriage law, attaching the fates of bodies and lands to the recognitions of marriages and divorces, and the role of the courts in this process. Finally, with the overhead of legitimacy, I endeavored to describe the material and ideological costs of seeking recognition, and particularly how Native nations grappling with the legalization and prohibition of same-sex marriages interface with settler politics.

During the course of writing this study, there were many occasions where I arrived at a crossroads and had to decide which branching path to take. I asked questions that ended up being deceptively broad, but in the process found more specific queries that I ultimately chose not to

pursue here. However, I think the conclusion is as good a place as any to point these out. Perhaps I will do that work myself, or perhaps some future reader will take up some of these questions. I hope so, because I think they are worthy of consideration.

Bureaucratic Kinship

In Part I, "Bureaucratic Kinship," alongside the jurisdictional quagmire around marriage, I repeatedly saw efforts to criminalize Indigenous sexualities and the use of Indian Agencies as sites of incarceration. You may recall from the introduction, for instance, the description from Pine Ridge Superintendent John R. Brennan about how he would unlawfully incarcerate cohabiting couples in order to coerce them into marriage.[477] This is far from the only description of this aspect of settler state violence in these archives. This opens a number of important questions. How rampant was this incarceration in Indian agencies and boarding schools? And specifically, how was this violence used to mandate settler state norms of gender and sexuality? What role did state and federal courts play in this surveillance?

Two court cases come to mind as relevant to some of these questions. The first is *U.S v. Quiver*, a 1916 case where an Oglala Lakota man named Dennis Quiver was indicted in federal court in South Dakota for adultery.[478] In this case, the U.S. Supreme Court overturned the indictment on the basis that "adultery" was not a specific crime enumerated by Congress in legislation that (in my view) usurps tribal jurisdiction, such as the Major Crimes Act. But it raises a question of why federal courts were even attempting to prosecute cases of adultery, and implicates bureaucratic kinship and other forms of punitive sexual surveillance in the process.

[477] John R. Brennan, Superintendent of Pine Ridge Indian School, Correspondence to Frederick H. Abbott, Assistant Commissioner of Indian Affairs, 5 January 1910, General Records of the Bureau of Indian Affairs, Record Group 75, Pine Ridge, Decimal Subject No. 740, File No. 85994-09 (Washington, DC: National Archives and Records Administration).

[478] United States v. Quiver, 241 U.S. 602 (1916).

Another relevant case is *U.S. v. Clapox*, an 1888 case concerning the arrest of a Native woman on the Umatilla reservation for adultery by a court of Indian offenses, and the subsequent efforts by her friends to break her out of jail.[479] In this case, the federal district court of Oregon noted that "It is also doubted whether the interior department has authority to define 'Indian offenses,' or establish courts for the punishment of Indian offenders, as set forth in said rules,"[480] questioning the legitimacy of the Courts themselves, but nonetheless supporting the criminalization of the efforts to break her out of jail on the basis that "the act with which these defendants are charged is in flagrant opposition to the authority of the United States on this reservation, and directly subversive of this laudable effort to accustom and educate these Indians in the habit and knowledge of self-government."[481] This is exactly the kind of case that would appear to hold a powerful story behind it, potentially revealing of the ways in which settler agents attempt to enforce bureaucratic kinship.

In my discussion of "Indian custom marriages" as a category of marriage recognition in Part I, I observed multiple occasions where officials in the Department of the Interior argued for—or hoped for—Congress to pass legislation ending recognition of Indian custom marriages. As far as I have been able to tell, this legislation may have been introduced but not passed. Given how damaging this type of legislation could've been in terms of abrogating tribal authority to set their own definitions of marriage, it seems important to discern who advocated against this legislation and caused it to fail, and why. In the process of researching this question, I did find an occasion where Congress enacted a restriction on Indian custom marriages in 1944 applying

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[479] United States v. Clapox, 35 F. 575 (D. Or. 1888).

[480] United States v. Clapox, 35 F. 575 (D. Or. 1888), 576.

[481] United States v. Clapox, 35 F. 575 (D. Or. 1888), 579.

specifically to the Klamath tribes, apparently in response to a request by the tribes.[482] It would be worth investigating this legislation further, and searching for other examples of state and federal legislation related to the restriction or prohibition of Indian custom marriages.

Allotmentality

For Part II, "Allotmentality," there are a couple of directions this could be taken in. First, I would recommend to anyone attempting to research the history of a particular parcel of land that was a part of allotment or in federal trust status, to research any probate cases connected to the file, and if there were disputes over marital status, to look for any state or federal cases where Indian custom marriages or divorces, superintendent-issued licenses, divorces in state court, etc., might have impacted the history of that property. Because allotmentality thrives in ambiguity, looking to nexuses of power where binding decisions are made—such as settler courts, or the Probate Division of the Bureau of Indian Affairs—often reveals how legal concepts are invented and deployed in dispossessions.

For instance, there is another Supreme Court case, *Barnett v. Kunkel*, which concerns a Muscogee Creek allotment that underwent multiple rounds in federal court due to conflicts over whether or not a marriage would be recognized.[483] Another aspect of this case that I think is important is that the corporation Prairie Oil & Gas was named as a co-defendant due to the mineral leases related to the allotment. One area of allotmentality that I didn't focus on much in this study was the role of corporations, particularly mining companies like this one, in leveraging ambiguities in marriage laws to gain increased access to allotment lands. There are a number of

[482] *An Act Relating to Marriage and Divorce Among Members of the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians*, Public Law 477, *U.S. Statutes at Large* 58 (1944): 800.

[483] Barnett v. Kunkel, 264 U.S. 16 (1924). See also: Kunkel v. Barnett, 10 F.2d 804 (N.D. Okla. 1926).

other state and federal court cases that consider marriage and divorce recognition in deciding who has lawful title to lands.[484] A comprehensive study of these cases, exploring the allotmentality of courts using marriage law in land dispossession, would be a useful legal history text that does not currently exist.

Another area that allotmentality can be connected to is miscegenation laws, or other restrictions on interracial marriage, at the federal, state, and tribal levels. While there have certainly been studies on interracial marriage bans, a study focusing specifically on how this body of sexual regulation interfaces with Indigenous lands and particularly allotments would be an important addition to this area of scholarship. Because so much of this legislation is animated by white supremacy, it's important to make visible a critique of these laws that accounts for the disparate aims of white supremacy in different contexts. A court might pick up and interpret even the same miscegenation statute differently, depending on whether it is more intent on pathologizing Blackness or Indigeneity, for instance, or aimed at keeping land-as-property in white hands.

Finally, in consideration of my discussion of *Carney v. Chapman*,[485] I would invite anyone who sees cases reduced to only their precedents without the full story and context, and find that context not substantially covered in existing scholarship, to look closer. This case was not at all what I expected it to be based on how its precedent is described, so I can only imagine

[484] For example: Chancey v. Whinnery, 47 Okla. 272 (1915), an Oklahoma Supreme Court case regarding the recognition and challenges to the validity of marriages; Ortley v. Ross, 78 Neb. 339 (1907), a Nebraska Supreme Court ruling concerning recognition of "Indian custom marriages" by the state; Yakima Joe v. To-is-lap, 191 F. 516 (1910), a federal ruling in the District of Oregon interpreting marriages for the purpose of deciding who has rights to an allotment; McKay v. Kalyton, 204 U.S. 458 (1907), a U.S. Supreme Court ruling regarding state jurisdiction over probates involving allotments.

[485] Carney v. Chapman, 247 US 102 (1918).

what other under-discussed precedent has been floating around in federal Indian law that is worthy of reconsideration.

The Overhead of Legitimacy

In consideration of Part III, "The Overhead of Legitimacy," regarding same-sex marriage, I have a particular recommendation. Recently, the U.S. Supreme Court has expressed interest in overturning *Obergefell v. Hodges*,[486] which would restore the ability for state governments to ban recognition of same-sex marriages. This same court is also interested in extending state jurisdiction further over Native nations. Combining these two reactionary interests, I'd recommend any Native nation within a state that might restrict same-sex marriages to evaluate their own marriage laws and consider how state-level marriage bans might impede the rights, bodily autonomy, and land title of tribal citizens.

While it's true that following the rules even as written is no guarantee of justice in institutions as deranged as settler courts, it's better to consider this now than after the fact. I don't know what this would look like, as each case must consider the context of a community's own needs, the history of the relationship between that community with their state(s) and the federal government, and the specific types of land title currently in place that might change as the result of rules tethering land to recognition or nonrecognition of marriages. It may be the case that the Supreme Court declines to overturn *Obergefell v. Hodges*, I can hardly predict the future. But given this Court's willingness to take extraordinary measures to restrict existing rights, it may be worth considering.

Final Thoughts

[486] Obergefell v. Hodges, 576 U.S. 644 (2015).

On a more personal note, I want to express some last observations on the process of writing this project.

Most of this project was written in isolation during the ongoing COVID-19 pandemic, in the midst of another wave of fascism in the United States, and under the intensifying effects of climate change. I don't mean to exaggerate the difficulty of the task, but rather to say that written work always reflects the state of the author in some way. The state of *this* author has not often particularly optimistic, giving, or kind during this time. As I revised sections, I could see ways that my outlook shaped this study. I can't shake the feeling that, with or without this dissertation, the world has not been doing particularly well. Despite this, I know I have been lucky to have the opportunity to write something like this, and I hope that some piece of it lives on, supporting efforts to redress and dismantle U.S. settler colonialism.

During the course of writing, I taught an Introduction to Native American Literature class for a number of quarters, and there's a particular poem that I like to end on, "Pedagogy," by Cherokee Two-Spirit writer Qwo-Li Driskill. This poem captures, for me, the feeling I have today in writing the end of this dissertation. I choose to leave you with these words as well. Driskill concludes:

> I pray you take some words with you
> like sharpened spoons
> Ferry them away up your sleeves
> Under your tongues
>
> I pray I can teach you
> to saw through
> the iron bars of this country
>
> This country
> waiting for us
> teeth
> just sharpened

this morning[487]

[487] Qwo-Li Driskill, "Pedagogy," in *Sovereign Erotics: A Collection of Two-Spirit Literature*, ed. Qwo-Li Driskill, Daniel Heath Justice, Deborah Miranda, and Lisa Tatonetti (Tucson, AZ: University of Arizona Press, 2011), 184.

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