Journal of Law and Religion 36, no. 2 (2021): 181–201 © The Author(s), 2021. Published by Cambridge University Press on behalf of the Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2021.28

STORYTELLING AND THE HIGH COUNTRY: READING LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION (1988)

DANA LLOYD
Assistant Professor of Global Interdisciplinary Studies, Villanova University

ABSTRACT

In *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), the Supreme Court declared constitutional the Forest Service's development plan in an area of the Six Rivers National Forest (known as the High Country) that is central to the religious practice of the Yurok, Karuk, and Tolowa Nations. The Court admitted that "[i]t is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion" (447). Nevertheless, because the disputed area was on public land, the Court thought that the government should be allowed to manage its property in any way it saw fit, regardless of the severe adverse effects on the religious practice of the local Indigenous nations. In this article, I read materials from the trial that led to the *Lyng* decision, focusing on the Indigenous witnesses and their testimony that has been largely ignored in the *Lyng* decision. The U.S. legal framework of free exercise does not allow the courts to fully consider the stories told by the Indigenous witnesses in trial. A law-and-literature approach allows me, though, to tell a different story about the High Country, one that centers Indigenous knowledge and sovereignty.

KEYWORDS: Native American religious freedom, law and literature, sacred sites, settler colonialism, Indigenous law, Indigenous religion, Yurok, Karuk, Tolowa

LOWANNA'S STORY

> I was raised by my grandparents, so I was taught by the elders about our tradition, about our church, about our people. I was fortunate. Today I'll say "fortunate." Many times I thought it was not fortunate that I was born to four of the biggest houses in the Yurok strip where the famous dances had come up, the White Deerskin Dance, the Jump Dance and the Brush Dance and many other games, and how the Indians had to use the High Country to go and pray so that when they come back to the lowlands, we can share with one another. My place has been that I have a lot of those relics that I share with my neighbors, the Hoopas, the Karok's [*sic*] and my own people to uphold and to see that our religion go on as it has for thousands of years past.[1]

Thus begins the testimony of Lowanna Brantner, a Yurok elder, who was one of the witnesses for the plaintiffs in the trial that led to the 1988 landmark U.S. Supreme Court case *Lyng*

1 "Transcript of Trial" (unpublished), at 227. (Hereafter this source is cited as Reporter's Transcript.) Court decision published as *Northwest Indian Cemetery Protective Association v. Peterson*, 565 F. Supp. 586 (N.D. Calif. 1983).

v. Northwest Indian Cemetery Protective Association. The Yuroks call it "the G-O Road case," because it revolved around opposition to the construction of a road connecting the towns Gasquet and Orleans in northern California. Asked what she means by "sharing" the relics, Lowanna continues:

> Well, down through the years, due to the fact that there were soldiers and people who came through and destroyed, burned, killed, a lot of the relics were burned or taken. So now, a few of us are left in the three tribes and we take and share. So and so's got a Brush Dance. Their time come, their time to dance, we give them so many piece relics they need and the other people do the same so that the dance can be performed the true way as it has been for thousands of years.[2]

This testimony was offered in support of the Yurok, Karuk, and Tolowa Indigenous nations of northwest California, who claimed in the U.S. District Court for the Northern District of California that the plan of the Forest Service to develop the Six Rivers National Forest would impose a substantial burden on the nations' ability to freely exercise their religious ceremonies in the area, which they consider sacred.[3] In her testimony, Lowanna draws a connection between the importance of these ceremonies and the violent conquest of the area by settlers. Developing the National Forest, according to Lowanna's testimony, would be a continuation of this violence and destruction. Constructing a road through the sacred area and cutting the trees there is not any different than destroying, burning, and killing, which had happened in earlier generations.

Lowanna's testimony was powerful and seems to have had the greatest effect on Judge Stanley Weigel—greater than that of any of the other witnesses testifying in the two-week 1983 trial. Nevertheless, her words have no resonance in the opinion of any of the judges who decided the case in three different federal courts. My argument in this article is that, even though Lowanna's story was not considered in the G-O Road decision, it is essential to understanding the dispute, because the case was argued and decided as one about religious freedom, based on the First Amendment's Free Exercise Clause and on the American Indian Religious Freedom Act of 1978 (AIRFA).[4] The legal framework of free exercise is limited in its ability to allow stories like the one told by Lowanna in the trial because, shaped in *Sherbert v. Verner* (1963),[5] all it requires (really, all it *allows*) plaintiffs to prove is that a religious practice they seek to protect is based on a sincerely held belief, and that this practice would be substantially burdened by government actions.

As we can see in the bits we have already read from Lowanna's testimony, it is difficult to fit her story into the categories of sincerely held belief and substantial burden. This is true, as I show in what follows, for the other Yurok and Karuk witnesses' stories. In this article I focus on these stories nevertheless, because I believe that knowing them is necessary to our understanding of this landmark case. As Yurok leader Chris Peters, one of the named plaintiffs and central witnesses in the G-O Road case, tells us, to understand this case fully, "one must understand that for Indigenous peoples of Northwestern California, religious beliefs and everyday lifeways are one

2 Reporter's Transcript, 228.

3 A note on terminology is in order here. Throughout this article I refer to specific Indigenous nations by name (such as Yurok). I prefer the terms *Indigenous* or *Native* to the terms *Indian* or *American Indian*, and I prefer the term *nation* to the term *tribe*. However, many of the materials quoted here are from a 1980s trial, when the terms *tribe* and *Indian* were in common use, and I use those terms in direct quotations. Additionally, throughout this article, I refer to the Indigenous witnesses by their first names, because the stories they tell are importantly personal, even when they also relate a collective story. This practice is not meant to be condescending.

4 42 U.S.C. § 1996 (2019).

5 374 U.S. 398 (1963).

in the same."[6] Going back to the G-O Road trial and reading the Yurok and Karuk witnesses' testimony will lead to such greater understanding.

In the G-O Road case, the Supreme Court declared constitutional the National Forest Service's development plan in an area of the Six Rivers National Forest (known as the High Country) that is considered central to the religious practice of the Yurok, Karuk, and Tolowa nations.[7] The Court admitted that "[i]t is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion."[8] Nevertheless, because the disputed area was on public land, the Court thought that the government should be allowed to manage its property in any way it saw fit, regardless of the severe adverse effects on the religious practice of the local Indigenous nations. The Court's disregard for Lowanna's contextualization of the development plan within a longer history of colonial destruction and dispossession is not unusual or surprising. However, the decision also overlooked an observation made in a study of the area that comprised the central evidence in the case, known as the Theodoratus Report, according to which seeing the practice in question as religious is problematic: "Because of the particular nature of the Indian perceptual experience, as opposed to the particular nature of the predominant non-Indian, Western perceptual experience, any division into 'religious' or 'sacred' is in reality an exercise which forces Indian concepts into non-Indian categories, and distorts the original conceptualization in the process."[9]

The Theodoratus Report was conducted by Theodoratus Cultural Research for the Forest Service as part of the consultation process required by the AIRFA. This five-hundred-page report, composed of ethnographic, historical, and archaeological studies of the High Country, concluded that the G-O Road should not be constructed through the High Country, only to be ignored by the Forest Service. But if this study is correct in observing that religion is not the right category through which to understand Native practice, we need to ask why the G-O Road case was argued and decided as one about religion. If it is not about religion, what is it about? The Supreme Court decision, as well as the decisions by both the district court and the court of appeals, seems to ignore and even contradict parts of the testimony and evidence presented in the trial. I therefore approach the trial from the point of view of law and literature to suggest a reading of the G-O Road case that centers the voices of the Native plaintiffs without imposing the religious freedom question upon the stories that they tell.[10] Such a reading will broaden our understanding not only of religion but also of law.

---

6 Chris Peters and Chisa Oros, "Protecting Our Sacred Sites: Lyng v. Northwest Indian Cemetery Protective Association," in *Ka'm-t'em: A Journey Toward Healing*, ed. Kishan Lara-Cooper and Walter J. Lara Sr. (Pechanga: Great Oak Press, 2019), 161–86, at 161.

7 Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988). It is important to note that the development plan was never executed. In 1984, while the case was still pending, Congress passed the California Wilderness Act of 1984, which protected most of the area from logging. Pub. L. No. 98-425, 98 Stat. 1619 (1984). In 1990, two years after the Supreme Court decision in *Lyng*, Congress passed the Smith River National Recreation Area Act, which protects the remaining area from the road construction. Pub. L. No. 101-612, 104 Stat. 3209 (1990), *codified at* 16 U.S.C. § 460bbb.

8 *Lyng*, 485 U.S. at 447.

9 Dorothea J. Theodoratus, Joseph L. Chartkoff, and Jerry K. Chartkoff, *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest* (Fair Oaks: Theodoratus Cultural Center, 1979), 44. (Hereafter this source is cited as the Theodoratus Report.)

10 There is vast legal and religious studies scholarship on this case that offers a sharp critique of the Supreme Court decision but ultimately agrees that the main issue here is free exercise. See, for example, Donald Falk, "*Lyng v. Northwest Indian Cemetery Protective Association*: Bulldozing First Amendment Protection of Indian Sacred Lands," *Ecology Law Quarterly* 16, no. 2 (1989): 515–70; Todd Allin Morman, *Many Nations under Many*

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

Specifically, in the case of Indigenous law and religion, we must take seriously what Indigenous law is, and how it differs from U.S. law.[11] As Winnifred Fallers Sullivan writes, "We need to widen our lenses and work comparatively, seeing how other folks do religion and law."[12] Métis anthropologist Zoe Todd notes Anishinaabe legal scholar John Borrows's statement, "Law is the us. And it's the animals, and it's our dreams, and it's our stories, and it's our relationships. It's the way we talk with one another and try to persuade one another, and that persuasion of course involves many different traditions now. But that persuasion is a part of our law, and it's not just for the parliaments and it's not just for the courts. We have a role in taking that kind of action."[13]

So if law is "our stories," as Borrows argues, then Lowanna's testimony should count as law just as much as the Court's decision counts as law. Moreover, it should count as relevant and valuable knowledge, just as much as the testimonies of expert witnesses count—but more on this below.

The point of departure for this article is, nevertheless, a U.S. Supreme Court decision, a landmark case in constitutional law, studied by every first-year law student in the United States. But what I propose here is to tell a story about this case that is more robust than the one we can tell based solely on a reading of the Supreme Court decision. Scholars of law and literature can offer useful insight into such a project when they propose, for example, to read legal text as literature and trial testimony as storytelling. In *Indigeneity: Before and beyond the Law*, Kathleen Birrell examines the articulation and recognition of Indigenous identity within land-rights law, and the subversive expression of identity within Indigenous literature that transcends the appeal to the colonial gaze for recognition of the Indigenous subject.[14] Birrell considers Indigenous literature as part of a longer, broader, oral tradition through which knowledge and law are passed from one generation to another. She also reads Indigenous literature as a form of resistance to the colonial narrative of law. Birrell explores the ways in which both law and literature "create and legislate" the meaning of indigeneity.[15] This exploration responds to a common notion of indigeneity as "authentic"—fixed, natural, prediscursive—and Birrell concludes that, on the contrary, indigeneities are constructed through deep colonization but also disrupt or deconstruct colonization. In order to appear before the law, the Indigenous subject must perform its indigeneity in a specific way—

Gods: Public Land Management and American Indian Sacred Sites (Norman: University of Oklahoma Press, 2018); and Michael D. McNally, *Defend the Sacred: Native American Religious Freedom beyond the First Amendment* (Princeton: Princeton University Press, 2020). Bryan Rose's critique has gone as far as suggesting that "a proper historical analysis in a case like *Lyng* is essential, because only in the context of the tragic loss of land the Indians underwent can one comprehend the stakes of that case, or the insufficiency of an analysis of who owns the land. When coupled with a proper conception of the role of land in Indian religion, a historical understanding of the Indians' loss of place would seem to compel a much different result in cases like *Lyng*. . . . When considered in proper historical context, these cases deprive Indians of the very kind of religious freedoms other Americans take for granted such as undisturbed access to their sacred sites." Bryan J. Rose, "A Judicial Dilemma: Indian Religion, Indian Land, and the Religion Clauses," *Virginia Journal of Social Policy & the Law* 7, no. 1 (1999): 103–40, at 139. While I agree with these various critiques, I propose here to forego the lens of religious freedom altogether when reading *Lyng* and the trial testimonies.

11 I talk here about Indigenous or tribal law, as opposed to federal Indian law, which is integral part of U.S. law.

12 Winnifred Fallers Sullivan, "Afterword," in *Religion, Law, USA*, ed. Joshua Dubler and Isaac Weiner (New York: New York University Press, 2019), 283–88, at 284.

13 John Borrows, "The First Nations Quest for Justice in Canada," public address, Victoria, BC, April 26, 2013, YouTube Video, 35:05 (at 30:08), posted my Murdith McLean, May 4, 20212, https://www.youtube.com/watch?v=8PlAb20OxzE, cited in Zoe Todd, "(An Answer)," *Anthrodendum* (blog), January 27, 2020, https://anthrodendum.org/2020/01/27/an-answer/.

14 Kathleen Birrell, *Indigeneity: Before and beyond the Law* (New York: Routledge, 2016).

15 Birrell, 4.

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

through attachment to the past—constructing indigeneity as static. Indigenous literature, on the other hand, portrays indigeneity as "articulated" or "fluid."[16]

Batchewana scholar Cheryl Suzack, in her book *Indigenous Women Writers and the Cultural Study of Law*, asks "how to account for legal practices that have devalued Indigenous women leading to their political marginalization and cultural disposability."[17] She argues that gender justice is crucial to the survival of Indigenous peoples. The novels she examines demonstrate how "colonial law and legislation limit Indigenous women's political, cultural, and social authority. Yet, they also establish how Indigenous women's identities and cultural knowledge are foundational to social reform."[18] While "law may do better to facilitate and protect Indigenous women's rights,"[19] Suzack concludes "rights alone are inadequate to compensate for women's historical exploitation and marginalization."[20] The literary voices she allows to be heard in her book "advance our understanding of colonial-legal gender injustice" beyond the rights discourse promoted by legal texts.[21] Storytelling, then, intervenes in the "collective[] social imaginary,"[22] and allows us—I argue, following Birrell and Suzack—to visualize justice anew.

THE G-O ROAD CASE

In 1982, the U.S. Forest Service planned to harvest timber and construct a paved road through federal land, including the Chimney Rock area of the Six Rivers National Forest. This area, as reported in the Theodoratus Report—a study of the area commissioned by the Forest Service—has historically been used by the Yurok, Karuk, and Tolowa nations for rituals that depend upon privacy, silence, and an undisturbed natural setting. Rejecting the study's recommendation that the road not be completed through the Chimney Rock area because it would irreparably damage the sacred sites, and also rejecting alternative routes outside the National Forest, the Forest Service selected a route through the Chimney Rock area. After exhausting administrative remedies, the Yurok, Karuk, and Tolowa filed suit in the U.S. District Court, challenging both the road-building and timber-harvesting decisions. The court issued a permanent injunction that prohibited the government from constructing the Chimney Rock section of the road or putting the timber-harvesting plan into effect, holding, *inter alia*, that such actions would violate the plaintiffs' First Amendment right to freely exercise their religion. The Ninth Circuit Court of Appeals affirmed in pertinent part,[23] and the Supreme Court reversed the decision.[24] The government's plan, according to the Supreme Court, did not violate the nations' free-exercise rights regardless of the plan's effect on their religious practices, because it compelled no behavior contrary to their belief. In other words, the government can do whatever it wants with its land, even if it virtually destroys

16 For an overview of Birrell's discussion of the contrast between indigeneity in law and literature and in Indigenous literature, see Birrell, chapter 1, especially 3–7.

17 Cheryl Suzack, *Indigenous Women Writers and the Cultural Study of Law* (Toronto: University of Toronto Press, 2017), 4.

18 Suzack, *Indigenous Women Writers*, 6.

19 Suzack, 125.

20 Suzack, 123.

21 Suzack, 87.

22 Suzack, 100.

23 Northwest Indian Cemetery Protective Association v. Peterson, 764 F.2d 581 (9th Cir. 1985).

24 Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

a religious practice, as long as the destruction of this religious practice is not the explicit target of the government's actions.

In her majority opinion, Justice Sandra Day O'Connor quotes from Justice William O. Douglas's concurrence in *Sherbert*: "The Free Exercise Clause is written in terms of what the Government cannot do to the individual, not in terms of what the individual can exact from the Government."[25] She thus presents an interpretation of the religion clauses of the First Amendment as protecting an individual—rather than collective—right. Justice O'Connor's interpretation of religious freedom is tightly related to the Court's understanding of land as private property rather than a place of worship. Justice William J. Brennan Jr., dissenting, points to the absurdity created by focusing on one aspect of this land (as federal property) and ignoring another aspect of it (as a place of worship), which causes the "gravest threat to [respondents'] religious practices."[26] As he puts it, "the Court believes that Native Americans who request that the Government refrain from destroying their religion effectively seek to exact from the Government *de facto* beneficial ownership of federal property."[27] Justice Brennan in his dissent lays the ground to critiquing U.S. legal conceptions of land and of religious freedom as deeply intertwined. Moreover, according to Justice Brennan's reading of the case, it is a conception of land as property—rather than an interpretation of religious freedom—that leads to the majority opinion and ultimately to the Court's decision.

But Brennan's dissent, which is often celebrated as both politically progressive and legally correct, essentializes indigeneity in the ways that Birrell and others critique, and I believe that it is the framework of religious freedom that allows for this essentialization and depoliticization of indigeneity. In other words, the framework of religious freedom allows Brennan—or perhaps requires him—to ignore Lowanna's testimony in his dissent. One of the characteristics of Indigenous difference as it is produced in legal discourse is the connection between Indigenous peoples and the past, making Indigenous identity static, ignoring its fluidity and evolvement with time, especially through its encounter with and survival of colonial encounters. Here is how Brennan does it in his final words about *Lyng*: "[T]oday's ruling sacrifices a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents, so that the Forest Service can build a 6-mile segment of road that two lower courts found had only the most marginal and speculative utility, both to the Government itself and to the private lumber interests that might conceivably use it."[28]

Following scholars of law and literature, I therefore ask to read the testimonies in the case as a way of resistance through storytelling. When we listen to the witnesses, we can hear a story that cannot be told in the court decision because of the limitations that the legal framework of religious freedom imposes. In what follows, I let the witnesses in the G-O Road trial take the stage. The point is to show that what the plaintiffs seek to protect is their survival, which is tightly connected with the nations' relationships with the High Country as their home. This relationship includes religion, so my argument is not that the G-O Road case is not about religion, but that the religious-freedom framework conceals the political nature of both indigeneity and religion. The witnesses refuse to accept these limitations, and thus their testimony tells a much larger story than the one we learn if we read only the Supreme Court decision.

25 *Lyng*, 485 U.S. at 451 (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) (quotation marks omitted)).

26 *Lyng*, 485 U.S. at 459 (Brennan, J., dissenting).

27 *Lyng*, 485 U.S. at 458.

28 *Lyng*, 485 U.S. at 476 (Brennan, J., dissenting).

THE HIGH COUNTRY

The proposed section of the G-O Road is 6.02 miles long, and, surprised that a case about a six-mile segment of a road reached all the way to the Supreme Court, I decided to go back and listen to the voices of Yurok, Karuk, and Tolowa members who reside in the area and use the High Country for religious purposes. Their voices are heard here through their testimony in the G-O Road trial and as consultants for the Theodoratus Report. They portray their religion as fundamentally territorial, as opposed to the approach of the courts to religion, which favors a Tillichian definition of religion as "ultimate concern." In other words, religion, according to the Yurok, Karuk, and Tolowa plaintiffs, is grounded in place, while according to the Court, it is grounded in belief. This portrayal invokes the problematic described at the opening of this article—the practice in question is described at once as religious and as transcending the category of religion.

Christopher Peters (Yurok/Karuk) begins his testimony in the G-O Road trial thus:

> The Yurok, Karok [*sic*] and Tolowa Indian tribes live in the northwestern corner of California. These tribes share the use of a very special religious area. That area is located in the southern portion of the Siskiyou mountains, and referred to by the Indian people as the "High Country." Doctor Rock, Chimney Rock, Peak 8 and Little Medicine Mountain are located within this religious area and are some of the more sacred places within the High Country. They have been used throughout the years by Indian people who go there to pray for special purposes or special powers, or medicine. The High Country was placed there by the Creator as a place where Indian people could seek religious power.[29]

The Theodoratus Report similarly explains the use of the High Country, highlighting the search for spiritual power as permeating all daily life and Native culture.[30] Scholarship on Native American religions echoes these descriptions.[31] This means that religion cannot be separated from other aspects—either cultural or ethical—of everyday life. And the geographical area similarly cannot be divided into sacred and nonsacred areas; specific sites are not supposed to be singled out or isolated. In fact, the Theodoratus Report explains the concept of "site" as more than "a limited measurable locality." A religious site can be a condition (psychological, visual, or other sensory quality)—silence, for example. "In order to understand what a site means to Native American residents of this area," the report proposes, "a mental shift must be made away from the purely physical aspect of a site to an extended definition which includes various qualitative, psychological and sensory aspects."[32]

Treating specific geographic locations as separate, as well as treating some aspects of local Native lives as secular and others as religious, is a colonial practice that results in forcing a non-Western practice into a Western category (religion). This distortion has to do with language as well. As Chris explains in his testimony, "It is difficult to talk about traditional types of things in translating it into the English language. I think the court will find [that]. . . converting Indian concepts into European language loses something in the translation."[33] It is nevertheless unavoidable to use English terms when arguing a case in U.S. courts, and it is worth asking, therefore, whether the legal route is appropriate in cases of Indigenous sacred sites.[34]

---

29 Reporter's Transcript, 75–76.

30 Theodoratus Report, 12.

31 See, for example, Russel Lawrence Barsh, "The Illusion of Religious Freedom for Indigenous Americans," *Oregon Law Review* 65, no. 1 (1986): 363–412.

32 Theodoratus Report, 10–11.

33 Reporter's Transcript, 70.

34 The question is even broader: can a colonized people successfully argue against their colonization in the court of the colonizer? This broader question is beyond the scope of this article.

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

The religious practice of the Yurok, Karuk, and Tolowa nations is described as focused on world renewal, aiming to stabilize and preserve the earth from catastrophe, and humanity from disease.[35] In trial, Chris explains that "world renewal" has both physical and spiritual aspects: "[T]hey are world renewal ceremonies, and most of the time when people think of world renewal, the general understanding, the image or the concept is making the physical world over again. The ceremonies do do that deed, but also they make a spiritual world over again, a spiritual bond that holds tribal people together."[36]

The religious practitioners believe that world-renewal ceremonies were initiated by prehuman spirits who inhabited the world and brought all living things and culture to humankind.[37] The Karuk call these spirits *ixkareya* and see them as guides for human behavior; the Yurok call them *woge* and believe that they are afraid of contamination by mortals.[38] Ceremonies of world renewal include reciting of what the Theodoratus Report calls, following anthropologist Alfred Kroeber, "origin stories."[39] Here is one example:

> The Yurok myths . . . belong to a time period when the earth was inhabited by a race of beings called *woge* . . . small humanoid beings who reluctantly yielded the earth to mankind. There is an eerie sense of nostalgic sadness and loss whenever the *woge* are mentioned . . . the *woge* withdrew into the mountains or across the sea or turned into landmarks, birds, or animals in order to escape close contact with newly created man. Yet the *woge* are still present in some sense, and they are depicted as being glad to be called upon (in ritual formulas and the like[)].[40]

The use of the High Country is described in detail in the Theodoratus Report. The knowledge related in the Report is valuable to Yurok, Karuk, and Tolowa members who may want to revitalize traditional practices, as a lot of the traditional knowledge has been lost in the era of assimilation policy (more on this later). However, it is also problematic, not only because of the reliance on Kroeber and other non-Native "experts," but because, as one of the unnamed consultants quoted in the Theodoratus Report says, "One of our religious beliefs is that we don't expose our sacred practices. It is a personal thing."[41] Reading this sentence with Kahnawake Mohawk anthropologist Audra Simpson's concept of "ethnographic refusal" in mind, one can see in this secrecy a political act. Simpson writes that such a declaration "involves an ethnographic calculus of what you need to

35 Theodoratus Report, 45.

36 Reporter's Transcript, 112.

37 For more about Yurok cosmology see Chris Peters and Chisa Oros, "Voices from the Sacred: An Indigenous Worldview and Epistemology of Northwestern California," in *Ka'm-t'em: A Journey toward Healing*, ed. Kishan Lara-Cooper and Walter J. Lara Sr. (Pechanga: Great Oak Press, 2019), 3–14.

38 Theodoratus Report, 45.

39 Theodoratus Report, 45. Infamous Berkeley anthropologist Alfred Kroeber, a student of Franz Boaz, was the first to study northern California Indigenous communities, including the Yuroks; and the Theodoratus Report greatly relied on his book *Yurok Myths* (Berkeley: University of California Press, 1976). But Kroeber has been harshly criticized by Indigenous scholars for his unethical ethnographic practices and for describing Indigenous cultures as "vanishing," mentioning neither their persecution nor their genocide. See, for example, Karl Kroeber and Clifton Kroeber, eds., *Ishi in Three Centuries* (Lincoln: University of Nebraska Press, 2003), Winona LaDuke, *Recovering the Sacred: The Power of Naming and Claiming* (Chicago: Haymarket Books, 2015), 67–86; and Cutcha Risling Baldy, *We Are Dancing for You: Native Feminisms and the Revitalization of Women's Coming-of-Age Ceremonies* (Seattle: University of Washington Press, 2018), 73–99.

40 Theodoratus Report, 46 (citations omitted).

41 Theodoratus Report, 70.

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

know and what I refuse to write. This is not because of the centrality of esoteric and sacred knowledge. Rather, the deep context of dispossession, of containment, of a skewed authoritative axis and the ongoing structure of both settler colonialism and its disavowal make writing and analysis a careful, complex, instantiation of jurisdiction and authority, what Robert Warrior has called 'literary sovereignty.'"[42] I therefore struggle to decide how much of the detail about the practice to describe here, and I find myself more interested in the meaning of the existence of a document such as the Theodoratus Report than in its specific content.

The Theodoratus Report mentions a "bitter disagreement" between different Forest Service employees regarding the impact of the development plan. One of the employees is Arnold Pilling, who will later become an expert witness in the trial. The Theodoratus Report was commissioned because of this disagreement. Thomas Buckley describes this disagreement at length in his chapter on the G-O Road in *Standing Ground*, his 2002 book that resulted from his extensive ethnographic work with the Yurok people.[43] While both Buckley himself and Arnold Pilling objected to the completion of the road, the Forest Service archaeologist, Donald Miller, having overseen a few interviews with local Yurok and Karuk members and consulted the Kroeberian literature, concluded that the Indigenous nations had no case against the Chimney Rock section. But after a substantial back and forth between Miller and Buckley, the Forest Service was forced to start over. They hired a contract anthropologist, Dorothea Theodoratus, and gave her a free hand to design and execute her study as she saw fit, with only one condition: that she not consult Pilling and Buckley. "The 'Theodoratus Report' (USDA/FS 1979a) finally came in at nearly five hundred pages and cost the government over $200,000. While the report contained an invaluable wealth of information and new native testimony, its conclusions were rather simple: the GO-road should not be completed for precisely the reasons that both Pilling and Buckley had made clear by 1976," Buckley writes, adding that Pilling worked pro bono and Buckley himself was paid a total of $200 for his report.[44]

Conducting ethnographic work in the area, as well as relying on earlier work of salvage anthropologists in the area, is problematic; using this knowledge in policymaking and in the courts is even more troubling. Given that the ethnographic insight into Indigenous lives portrays Indigenous peoples as "primitive" and as "dying cultures," thus justifying (even if unintentionally) their colonization, dispossession, and genocide, relying on this knowledge in court cannot be expected to lead to any form of decolonization. As Hupa scholar Cutcha Risling Baldy writes:

> It was thought that the research and documentation being done by Western scholars were essential to preserving knowledge about Native cultures before they disappeared into the annals of history. In the early twentieth century, following some of the most violent periods of colonial history, many anthropologists, archaeologists, linguists, and other scholars became interested in documenting Indian life to preserve what they perceived as a "dying culture." This phenomenon of salvage ethnography implied that Native cultures had been static in nature before contact, and therefore the once pristine, untouched Indian society would have no ability to survive the continuing intrusion of Western culture nor change or adapt to a new way of life.[45]

42 Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* (Durham: Duke University Press, 2014), 105.

43 Thomas Buckley, *Standing Ground: Yurok Indian Spirituality, 1850–1990* (Berkeley: University of California Press, 2002), 170–201.

44 Buckley, 180.

45 Risling Baldy, *We Are Dancing for You*, 5.

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

Risling Baldy adds another aspect of salvage ethnography that is ethically dubious: though the anthropologists themselves usually rely on Native consultants, it is the anthropologists and archaeologists who are considered to be experts and authorities on Indigenous peoples. "Subsequently, these scholars were depended on as expert witnesses, and their ideas, theories, and findings were given more weight and consideration than that of Indigenous peoples."[46] I keep all this in mind when I cite the Theodoratus Report here, and I give most of my attention to the Indigenous plaintiffs' testimony (and not at all to the expert witnesses), as a way to center Indigenous knowledge and sovereignty.

What, then, do we learn from the plaintiffs about their communities' use of the High Country? We learn that people seeking power continue to go to the High Country to achieve personal medicine and curing medicine. Some Karuk members who use the Blue Creek area were originally trained somewhere else, but their sites were desecrated, so they have switched to this new area.[47] In trial, Chris estimated that about forty people physically or actively used the area at the time. But he explains that there is also a spiritual use of the area that does not require attending it physically. He calls it "a spiritual visitation . . . through the mind."[48]

In a letter to Judge Weigel, Kickapoo attorney Marilyn Miles explains that the number of people directly using the High Country is unknown—and probably very small—thus, "only a limited number of people are called or chosen by the Creator or Spirits to be such persons. Thus, only certain people can go to the Doctor Rock area on behalf of the rest of the community, and only then for a proper purpose and at a proper time. But this is not unlike other religions; not all members of a particular faith are permitted on the alter [*sic*], for the alter [*sic*] is reserved for the priest or spiritual leader."[49]

Miles explains that the few people allowed in the High Country use the powers that they get there in ceremonies that benefit the entire community. Adding a photo to illustrate her point, Miles describes the photo: "Enclosed for the Court's assistance is a photograph from a recent ceremony in Weitchpec. The medicine woman in the center of the photograph was required to go to the sacred high country for guidance and power to pray for the Indian child held by her mother and for others in the community, and all those in attendance are dependent upon the powers and Spirits of the area, and thereby 'use' the sacred region."[50]

Miles concludes her letter to Judge Weigel thus: "This is the best, and perhaps the only answer Indian plaintiffs can give the Court. The number of persons who physically go to the [H]igh [C]ountry is not known, although Indian plaintiffs recognize that the numbers may not be large. As explained above, however, it is wrong to measure the religious values of this sacred area and the associated practices in terms of the number who set foot there."[51]

When asked about their religion, the Yurok and Karuk witnesses describe a religious system that begins with community and its relation to the natural world, rather than with the individual and her relationship with God. Witness Jimmie James (Yurok/Hupa) tells the court that "[t]he most important thing was to have an understanding of nature. Love your people, and always remember

46 Risling Baldy, 5. For additional critique of the ethnographic study of Native communities see, for example, Vine Deloria, Jr., "Anthropologists and Other Friends," in *Custer Died for Your Sins: An Indian Manifesto* (New York: Macmillan, 1969), 79–100; and Thomas Biolsi and Larry J. Zimmerman (eds.), *Indians and Anthropologists: Vine Deloria, Jr., and the Critique of Anthropology* (Tucson: University of Arizona Press, 1997).

47 Theodoratus Report, 70.

48 Reporter's Transcript, 85.

49 Letter from Marilyn Miles to Judge Weigel, December 7, 1982, p. 1, National Archives at San Francisco, San Bruno.

50 Miles to Judge Weigel, 2.

51 Miles to Judge Weigel, 2.

to follow out the command of the Great Spirit, the Great Creator, and this up-to-date, I have tried to be obedient to those commands."[52] The most important religious virtue is an understanding of nature, because nature, or specific natural settings, is considered to be sacred. Sacred places are those in which communication with the Creator, or the Great Spirit, can be conducted. As Chris explains, "the High Country[—]Doctor Rock, Chimney Rock[—]is essential to our religious beliefs, and serves as the very core of our cultural identity." Therefore, "this area is our church: cannot be moved or disturbed in any way."[53]

The witnesses often compare the High Country to a church, perhaps because they assume (probably justifiably) that it would be easier for the court to understand the importance or centrality of the area to their religion through this analogy: the High Country is to Yurok, Karuk, and Tolowa religion what a church is to a Christian congregation. But this analogy is misleading, because, as Marc DeGirolami points out, "destroying Saint Patrick's Cathedral, dreadful as that would be, would not destroy or even severely impair Roman Catholicism."[54] And while moving a church structure to the other side of a street to accommodate a development plan is not unheard of, the peaks in the Six Rivers National Forest cannot be moved; moreover, one cannot simply declare another part of the forest a new place of worship (thus allowing for the Chimney Rock area to be developed). As Justice Brennan writes in his dissent: "respondents here do not even have the option, however unattractive it might be, of migrating to more hospitable locales; the site-specific nature of their belief system renders it nontransportable."[55] The witnesses explain that the specific area is central to their religious practice because it was given to them by the Creator. "This is where we meet with the Great Spirit, that area, and that's why we all get a call to go there."[56]

Questions about the specific ways in which the area is being used by religious communities and individuals are being addressed through specific stories. This is another advantage of reading the testimony rather than the Theodoratus Report. The report was conducted in consultation with the local communities, but the consultants' explanation of the use of the High Country is generalized, supplemented by academic accounts, and thus loses the quality that I am looking for, of centering the concrete and the specific instead of generalizing and abstracting. Beyond Chris Peters's general explanation that the area has "been used throughout the years by Indian people who go there to pray for special purposes or special powers, or medicine,"[57] and that "the High Country is used by Indian people who have dedicated years for special training and preparation,"[58] Jimmie tells about his grandmother, who "lived to be about 110 years old . . . and has fought the spirits of the devil for our people, she's well known": "And then she goes back to Elk Valley and stays there quite a number of days to give thanks, and you might say give praise to the Creator. Then, from there, she is all going to different areas wherever she is called, wherever she is called, she goes, regardless of what kind of weather. She charges nothing, and whatever they give her, she smiled."[59]

52 Reporter's Transcript, 57.
53 Reporter's Transcript, 77.
54 Marc O. DeGirolami, *The Tragedy of Religious Freedom* (Cambridge, MA: Harvard University Press, 2013), 170, note 16.
55 *Lyng*, 485 U.S. at 468 (Brennan, J., dissenting).
56 Reporter's Transcript, 64. Vine Deloria, Jr. writes that Indigenous sacred sites are places of revelation and therefore cannot be replaced or removed. See Vine Deloria, Jr., *God is Red: A Native View of Religion* (New York: Fulcrum Publishing, 1973), 276–77.
57 Reporter's Transcript, 76.
58 Reporter's Transcript, 77.
59 Reporter's Transcript, 59.

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

Jimmie has also used the area himself:

> I had a beautiful experience there. I went up there because I felt that my family had a friction against me, and I went up there and I come out of there with a pleased answer, and it was not long when one of my boys was in a car wreck in the canyon, 300 feet down the mountain, in the car. There was nothing left to it. And his head was split, his shoulder was busted up, two fractures in his back, a chunk of his arm was taken off, and when the doctor saw him, he said he would live only three days. I finally took him to another doctor. He said, that is all, he would live three days. But we talked with the Great Spirit about it, and that has been in '68, and he is still alive. I wish I brought him with me today. That area means a lot to me.[60]

These stories of the High Country highlight family relations, suggesting that what the nations are seeking to protect is more than their religious practice but their home, their past, and future. I return to this point in the next section.

It is interesting to note the different ways different witnesses describe the High Country. Jimmie says he is familiar with the area "because [his] grandmother was a Pomo Indian Doctor, and she went through very much before she could get the power from the Great Creator": "Here is Doctor Rock, and this is where they start out their dancing, and Elk Valley is where they come first to meditate, to clean themselves, clean their hearts, so that they can thank the Great Spirit, the Great Spirit will be pleased before they can even talk to him. . . . Then they go down to the Doctor Rock and do their dancing, and they don't get involved with other voices but the Great Spirit, and from there, they are told what to do before they begin or are granted the power."[61]

Chris provides two descriptions of the area—a physical one and a spiritual one:

> First, let me describe it physically. The area has had many intrusions already. There has been a Jeep road, there has been trails put there by the U.S. Forest Service. That intrusion has been limited when compared to the proposed harvesting plan and G-O Road development. The area still maintains significant acres of quality roadless, pristine environment. Significant strands of old growth still exist there. There is animal life there that is not found in other places, and in an abundant form. It is a wilderness area as closely defined in terms of wilderness areas set aside in other areas throughout the country. It's as close to a natural setting as exists in today's society.[62]

This description brings together the quality of the area that is most important to the lawsuit—the wild, or pristine, condition of it—and the fact of its invasion by the settler state. The first thing Chris tells the court when he is asked to describe the High Country is that "the area has had many intrusions already." This may come as a surprise to the listener or reader. The other components of Chris's answer sound much more like a physical description of the area (there are trees and animal life; it is pristine), but the most important point Chris has to convey is that the area has suffered intrusions. He then continues to provide a spiritual description of the area: "The area, in terms of my conversations with older generations, the area has spiritual qualities. It is a sacred area. The area is a place where people can engage in an emotional interaction with a spiritual world. A translation to that in the English language may be likened to a prayer, but a lot more significant than a prayer. It is said that that area is not even a part of this world that we live in here. That that place up there, the High Country, belongs to the Spirit and it exists in another world apart from us."[63]

60 Reporter's Transcript, 59–60.
61 Reporter's Transcript, 58.
62 Reporter's Transcript, 73–74.
63 Reporter's Transcript, 74.

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

THE BURDEN OF INVASION

Because *Lyng* is a religious-freedom case, those who read it tend to focus on the religious practice of the Indigenous plaintiffs. But when we free ourselves from this legal framework and listen to the witnesses, we hear a story about a place, a home, "a spiritual world . . . that holds tribal people together."[64] Similarly, if we are not bound by the religious-freedom framework, we are free from searching for the "substantial burden" that the government's development plan imposes on the Yurok, Karuk, and Tolowa's exercise of religion, and we can hear what the witnesses describe as more than such burden. What they talk about is invasion, contextualizing the "adverse effects" on religious practice within the colonial structure of which invasion is an integral part. Once we hear the story as one about colonial invasion, the government's arguments—that the High Country is one of many areas the nations hold as sacred,[65] and that very few people actually use the area[66]—become insignificant.

The notion of desecration of the sacred High Country is highlighted by the following analogy: "Empty beer cans and used condoms are about as appropriate on Doctor Rock as they would be on the altar of a cathedral; traditional Indian religion places great emphasis on abstinence from physical pleasures while seeking spiritual energy."[67] The nations are concerned that with increased access to the High Country, there is increased possibility that the area will be improperly used. Indeed, journalist Sarah Neustadtl describes one of the medicine caves in the High Country as "a soot-blackened grotto littered with beer cans."[68] A Yurok woman expresses concern that her children or grandchildren might be called to be doctors and that there might not be a place for them to go when they are ready to receive power. A Karuk woman adds:

> These areas need to be there when a new Indian person gets the "calling" to become a medicine person. Suppose the "calling" is received and the person arrives to find an army of tourists to take pictures and make tape recordings of a real live medicine person in the process of training. Also the trees are gone, the whole area logged off. The solitude and atmosphere for meditation is totally lost. How will that person train properly? . . . The culture has been torn apart by progress and now people are asking for the pieces to be torn in smaller pieces.[69]

The Theodoratus Report dedicates a short chapter to "contemporary attitudes toward non-Indian incursions."[70] It discusses the anticipated impact of the G-O Road on the High Country and the rituals that Yurok, Karuk, and Tolowa people conduct there. This discussion is presented within a more general context of Native-white contact, which suggests that the researchers understand that the problem is larger than the immediate impact of the construction of the road on the ability to perform specific rituals in specific locales. Because the Yurok, Karuk, and Tolowa view the environment holistically (the report refers to their approach as an "environmental viewpoint"), the question of mitigation is also irrelevant here—no matter where the road is built, it would pose a

64 Reporter's Transcript, 112.
65 Reporter's Transcript, 1201–02.
66 Letter from U.S. Attorney Joseph Russoniello to Judge Weigel, December 7, 1982 (National Archives at San Francisco, San Bruno).
67 Theodoratus Report, 75 (citations omitted).
68 Sara Neustadtl, *Moving Mountains: Coping with Change in Mountain Communities* (Boston: Appalachian Mountain Club, 1987), 180.
69 Theodoratus Report, 75.
70 Theodoratus Report, 96–106.

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

substantial burden on the local religious practice: "[T]he mountains, rivers, wildlife, and ocean are viewed as a whole in which each part is related to each other part. Thus, a discussion of the religious use of the [H]igh [C]ountry around Doctor Rock leads to consideration of the effect that a road there might have on the visual and aural properties of the area, then to the effects of logging on the environment, especially natural plant growth, then to the effects on the streams, silting of the river and finally to salmon fishing."[71] This approach to the environment teaches us something about religion as well. "*The religious aspect is not a thing apart*, it is part of the whole."[72]

Consultants have felt that the Forest Service had declared a systematic war on sacred sites. In their description of the impact of the development plan, they explain that they believe the road would lead to logging regardless of the specific route chosen, and because of the religious characteristics of the area, it must be treated as a whole rather than as consisting of distinguishable individual sites: "Many consultants stated that because of the religious characteristics of this area, nothing should be removed. It is believed that living things, especially trees and other plants, should not be removed from the [H]igh [C]ountry unless it is done following the specified procedures of Indian culture. To do so is considered irreligious. It is also believed, and reinforced by tradition, that 'improper' removal is likely to bring extremely bad luck or disease to the offender (whether he/she be a believer *or* a non-believer)."[73]

This passage highlights that the Supreme Court's understanding of "substantial burden" on religious practice cannot capture the harm to the High Country that the nations anticipate if the development plan is executed. The practitioners in this case cannot—as they could have in *Yoder*[74] or in *Sherbert*—disobey and avoid "extremely bad luck" in the cost of a fine, imprisonment, or loss of unemployment benefits.[75] Because the trees themselves are considered living beings, their removal would be irreligious. But if the trees are considered to be living beings, part of the community, then their removal is an attack on the community, and it should be thought of as continuation of genocidal policy that I address below. In other descriptions, we can read a story that seems more in line with the prohibition interpretation: the construction of the road would result in heavier traffic, which would have an adverse effect on the audiovisual conditions of the area (which, as we have seen, are themselves considered to be a "sacred site"), which in turn means that the religious ceremonies that take place in the area would not be effective, which would lead to more adverse effects. When this is the story, one might say that the government's development plan does not prohibit the nations from using the High Country for their rituals (even though there is some adverse impact on the rituals). But the interpretation according to which the logging itself is desecration of the sacred area does not lend itself to the interpretation of burden as prohibition or coercion.

When the witnesses in trial are asked whether (and why) the High Country should remain undeveloped, they give several different answers. Jimmie James explains: "Let me put it this way: if we took a bulldozer and run it through the white man's church, it is like if they went in there and felled

71 Theodoratus Report, 96.

72 Theodoratus Report, 96–97 (italics in original).

73 Theodoratus Report, 100.

74 Wisconsin v. Yoder, 406 U.S. 205 (1972).

75 Justice Brennan compares, in his dissent, the situation in *Lyng* and that in *Yoder*: "Here the threat posed by the desecration of sacred lands that are indisputably essential to respondents' religious practices is both more direct and more substantial than that raised by a compulsory school law that simply exposed Amish children to an alien value system. And of course respondents here do not even have the option, however unattractive it might be, of migrating to more hospitable locales; the site-specific nature of their belief system renders it nontransportable." Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 467–68 (1988) (Brennan, J., dissenting).

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

the trees, it would be like pulling the lumber and everything off of the walls, and then destroy their Bible[—]it is the same as that."[76] Chris Peters adds that the pristine nature of the area is its main religious characteristic, and this would be destroyed with development.[77] In reference to the difference between the existing jeep road and the new proposed section of the road, he explains:

> The road is a dirt road, and it connects, it goes through the area. The use of the area disturbs the quiet and the solitude of the area, though the road itself, as discussed earlier in previous hearings, may not have a direct adverse effect. The use of the road has a significant and destructive impact on the ability to engage or maintain engagement with the spiritual world. . . . The new road would provide significantly greater numbers of people using the area. It is also the basis of whether further development will occur. . . . You know, in Indian customs generally, a decision of this magnitude is not only made for the current generation but is made for six or seven generations to come. The management plan may produce some immediate jobs and stimulate some economies today, but it will have a destructing effect on generations to come . . . . [C]ultures are not dying, they are coming back stronger."[78]

Chris's story is much more in line with Justice O'Connor's interpretation, according to which, the road in and of itself does not substantially burden the religious practice. It is the use of the road that would disrupt communication with the spiritual world. But when asked directly how the 6.02-mile proposed section of the road would burden the religious practice he has just described, Chris explains: "The whole area, the High Country, as I've indicated, the belief was that it's there for Indian people to prepare themselves and then go up into and communicate with a spiritual world. What we're talking about here is what I refer to as spiritual trespass, that is when people on the far extreme of manifest destiny can say they can manage something better than the Creator, and this is the Creator's land, and to build a road to intrude directly through that spiritual land is spiritual trespass, and that is what the Forest Service has perpetrated."[79]

This was an unexpected response to the question about burden, which demonstrated how different the witness's view of the conflict is than the court's. For Chris, the construction of the road was unacceptable because it interferes with the Creator's plan for the area and its use. Judge Weigel did not accept such an answer, and even though he was generally very sympathetic to the witness, here he told him that his answer has not been responsive. The witness, who probably knew well that this is not an answer that the court can accept, immediately agreed and returned to the question of burden: "The road development in the area, once it is completed, would bring with it a lot of damage and more destruction. The road itself represents something down here in this world, asphalt for one, signs for another, and that intrusion in the area is significant. The dirt road intrusion has not been as significant as to what it would bring with it in terms of the new road, which is the asphalt."[80]

Again, the judge did not understand what the problem is with asphalt. The witness illustrated this point with a story: "last night a woman . . . prayed for us, and to do that effectively, she had to take off everything that was a white man's stuff, jewelry and things like that, to engage the powers that she has. In the same respect here, you are bringing into a spiritual area something that is foreign to that area, and it is an intrusion."[81] This answer helpfully ties together religious

76 Reporter's Transcript, 64.
77 Reporter's Transcript, 80.
78 Reporter's Transcript, 81.
79 Reporter's Transcript, 90.
80 Reporter's Transcript, 91.
81 Reporter's Transcript, 91.

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

burden with colonial invasion. The road does not belong in the High Country because white settlers do not belong in the High Country. It is the Yurok, Karuk, and Tolowa home that the government proposes to invade, and it is only in this context that we can fully understand the G-O Road case.

To understand the G-O Road case within the context of colonial invasion (and its religious aspects), we should start with the Doctrine of Discovery. Two papal bulls, from 1455 and 1492, had declared the legitimacy of Christian domination over "pagans," sanctifying enslavement and expropriation of property, specifically in the lands discovered by Christopher Columbus. What was termed "the Doctrine of Christian Discovery" saw Indigenous Americans as subhuman because they were not Christian. Chief Justice John Marshall used the language of these papal bulls in his infamous decision in *Johnson v. M'Intosh* (1823), to justify state dominion over Indigenous peoples, replacing the terms "Christian" and "pagans" with "European" and "savages"[82]—a term that similarly dehumanizes Indigenous Americans, even if this dehumanization was secularized.

Based on the notion that Indigenous peoples could not possess title to land, Native title was a colonial fiction, created by Marshall in order to grant Native peoples some property rights while allowing the U.S. government to maintain control over land, especially its sale and distribution. Marshall ruled that Indigenous nations had only "the right of occupancy."[83] They can do whatever they want with the land while they occupy it, but they cannot sell it to anyone but the sovereign. According to Marshall, discovery of a given territory granted the European discoverer the right, against other European nations, to acquire Native land (by purchase or conquest) and then grant that land to non-Natives. On one hand, the Supreme Court created a new property right for Natives, one that all parties, including the state, were bound to respect. On the other hand, the Court took away absolute control of Native land by Natives.[84]

The Court said that Natives possessed an occupancy right that only the discovering sovereign could extinguish.[85] Thus, discovery did not vest title in the discoverer; it gave the discovering nation the right to extinguish Native title via purchase or conquest. The rights of the discoverer were against those of other European nations staking a claim to Indigenous land; they were not necessarily rights over Indigenous peoples. The Court now said that Natives could convey their land to the discovering sovereign and to no one else. Thus, the sovereign's rights derived from discovery, and the Natives' rights came from occupancy. Residence in a given area conferred Native title upon an Indigenous nation.

We can ask how come such a revolutionary property expropriation did not do anything to the institution of property, and one possible answer would be that the people whose property was expropriated were already considered nonmembers of the community and therefore not worthy of property rights. In the Native American case, they were also considered too nomadic to own land and too unwilling to make significant improvements that would clarify their claim and give them moral weight.[86] Thus, to de-essentialize and re-politicize indigeneity, we can say that taking Natives' land required dehumanizing them and denying their sovereignty and autonomy.

The nineteenth-century Marshall Court—in addition to creating Native title—also sought to "domesticate" Native American nations, referring to them as "domestic dependent nations."

82 Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

83 *Johnson*, 21 U.S. (8 Wheat.) at 574.

84 *Johnson*, 21 U.S. (8 Wheat.) at 577–88.

85 *Johnson*, 21 U.S. (8 Wheat.) at 577–88.

86 Carol M. Rose, "Property and Expropriation: Themes and Variations in American Law," *Utah Law Review* 2000, no. 1 (2000): 1–38, at 30.

When I talk about this domestication, I mean, following Nez Perce scholar Beth Piatote, three things: (1) the discourse of domesticating or civilizing the "savage Indian" ("kill the Indian and save the man"[87]), which called for implementing policies that, despite rhetoric of humanization, violated the dignity of Native Americans, infantilized them, and destructed their communities; (2) the attack on Indigenous sovereignty through the domestic sphere (including the practice of out-adoption, the forced removal of Indigenous children from their families to attend government-funded boarding schools, and the allotment of reservation land in severalty); and (3) the legal definition of Native Americans as "domestic dependent nations" in the Supreme Court in the nineteenth century.[88]

In *Cherokee Nation v. Georgia* (1831), the U.S. Supreme Court recognized that the nationhood of Indigenous communities was limited primarily by U.S. military conquest. It defined the Native American political organization as "domestic dependent nations" and their members as "ward[s]" of the nation, existing in "a state of pupilage." According to the Supreme Court: "Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the [p]resident as their great father."[89] Piatote writes that "Assimilation-era policies . . . were driven by the notion that the tribal-national polity, as a competing national sovereignty, must be destroyed. And the way to break up the tribe was to break up the Indian family and to cultivate children's allegiance to the United States rather than to the tribe."[90]

The discourse of domesticity appears here as a special tool for domination, but it can also provide a site of resistance. Piatote shows "the resilience of the tribal-national domestic by centering the intimate domestic (the Indian home and family) as the primary site of struggle against the foreign force of U.S. national domestication."[91] At this point, I bring religion back into the story.

REVITALIZATION

The federal government began regulating Native religiosity during the era of the government's domestication policy—when the United States stopped signing treaties with Indigenous nations, treating them as foreign, sovereign nations, and started making policies for them, treating them as wards of the federal government. Together with limiting the movement of Indigenous communities and invading every aspect of their domestic life, this policy also made religion an object of regulation. "Policies about religion were at the core of this invasion," Susan Staiger Gooding writes.[92] In the second half of the nineteenth century, all recognized Indigenous nations were assigned one of the thirteen recognized Christian denominations, and Christian boarding schools were institutionalized on a national scale. But these policies, Gooding argues, were the result of a concern not with Natives' belief but with their ceremonial practices. In 1883, Courts of Indian Offences were founded on all reservations to enforce the prohibition on traditional practices

87 See, for example, Richard H. Pratt's 1892 speech, "Kill the Indian, Save the Man," reprinted in Richard H. Pratt, "The Advantages of Mingling Indians with Whites," *Americanizing the American Indians: Writings by the "Friends of the Indian" 1880–1900* (Cambridge, MA: Harvard University Press, 1973), 260–71.

88 Beth H. Piatote, *Domestic Subjects: Gender, Citizenship, and Law in Native American Literature* (New Haven: Yale University Press, 2013), quoting Cherokee Nation v. Georgia, 30 U.S. (5 Peters) 1, 17 (1831).

89 Cherokee Nation v. Georgia, 30 U.S. (5 Peters) 1, 2 (1831).

90 Piatote, *Domestic Subjects*, 5.

91 Piatote, 4.

92 Susan Staiger Gooding, "At the Boundaries of Religious Identity: Native American Religions and American Legal Culture," *Numen* 43, no. 2 (1996): 157–83, at 160.

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

referred to as "the old heathenish dances, such as the sun-dance, scalp-dance, etc."[93] The prohibited practices suggest that the policy aimed at eliminating the social and political communities created and maintained through them rather than at any religious belief.[94]

Yurok attorney Amy Bowers and legal scholar Kristen Carpenter provide context for the G-O Road case that invokes domestication. As part of the assimilation policy of the early twentieth century, Indigenous religion was outlawed and referred to as "the devil's religion." As a result, many Indigenous peoples stopped performing certain rituals or were forced to go underground. In the face of racism and discrimination, many Natives tried hard to conceal their "Indianness," undergoing a kind of identity crisis. The worst identity crisis was experienced by the generation of Natives sent to boarding schools run by the Bureau of Indian Affairs (BIA)—the most devastating manifestation of the assimilation policy. Native children from the Lower Klamath River (including Yurok, Karuk, and Hupa children) were sent to residential schools in Northern Oregon. According to Bowers and Carpenter: "These children left the Reservation speaking tribal languages, believing in their cultural covenants, and practicing the religion—only to be beaten and punished for exactly these traditional practices by boarding school teachers and administrators. These students became the first generation of Indian people from the Klamath River not to live in their aboriginal territory or participate in annual tribal religious ceremonies."[95]

One of the witnesses in the G-O Road trial, Earl Joseph Aubrey Jr., a thirty-four-year-old Karuk timber faller, mentioned his schooling offhandedly in his testimony. When asked to describe his early training in the Karuk tradition, he responded:

> A. It started when I was about[—]well, when I was real young, but when I was twelve years old, it took affect [*sic*], I was shipped away to Chemaw Indian School for about seven years.
>
> Q. Could you tell us where that school is located?
>
> A. It's about one mile south of Salem, Oregon.
>
> Q. Is it a BIA school?
>
> A. It's a BIA school. I was shipped away for seven years, but in summer days I was let to come home for two months out of the year, and I was chosen by our grandmother, who was the carrier for Daisy Jacobs, who was our medicine lady at the time.[96]

Earl's story is unique in that he maintained his connection to the High Country, to medicine making, and to dancing (albeit partially) throughout his years in boarding school. His testimony is therefore useful for a religious-freedom case that requires proving the continuity of the religious practice in the area (which, of course, erases the colonial effects of domestication policies on Indigenous identity in general and on their religious practice in particular). Earl's story nevertheless alludes to this policy, even when what he needs to prove is continuity rather than change. Having this story told in a settler court and becoming part of the public record is important, and I see it as a form of resistance through storytelling—of speaking truth to power, if you will.

---

93 Gooding, "At the Boundaries of Religious Identity," 161 (citation omitted).

94 A similar argument is made in Tisa Wenger, *We Have a Religion: The 1920s Pueblo Indian Dance Controversy and American Religious Freedom* (Chapel Hill: University of North Carolina Press, 2009). See also Lee Irwin, "Freedom, Law, and Prophecy: A Brief History of Native American Religious Resistance," *American Indian Quarterly* 21, no. 1 (1997): 35–55.

95 Amy Bowers and Kristen A. Carpenter, "Challenging the Narrative of Conquest: The Story of *Lyng v. Northwest Indian Cemetery Protective Association*," in *Indian Law Stories*, ed. Carole Goldberg, Kevin K. Washburn, and Phillip P. Frickey (St. Paul: Foundation Press, 2011), 489–533, at 501.

96 Reporter's Transcript, 329.

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

When Earl's generation returned from boarding schools to the reservation, they found extreme poverty, no job opportunities, and alienation from their traditional ways of life. "Yet, even at this low point," observe Bowers and Carpenter, "hope was on the horizon—the civil rights era of the 1960s was headed to the Klamath River. The generation raised pre-contact was still alive. Although they were weary to 'be Indian,' they still knew their traditions. Children born in the 1940s and later were not sent away to boarding schools and in fact, they had been exposed to a better education in local public schools. Some of them had made it to college, graduated, and headed home."[97]

Their experiences at the university had politicized them, having exposed them to Indigenous activism at Alcatraz and Wounded Knee. They were eager to reassert their Indigenous identity and to engage their elders in a political movement. Nonprofit organizations in Northwest California, funded by the U.S. government as part of its "war on poverty," were involved in organizing local Natives. "Remarkably," write Bowers and Carpenter, "within a few years the people began to dance again."[98] Medicine women returned to the High Country. "These events were significant to revitalizing the tribal religion and many of the participants would later become plaintiffs in the *Lyng* litigation."[99]

In the G-O Road trial, when Judge Weigel asks witness Chris Peters about the impact that the development plan in the High Country might have on the revitalization of Yurok and Karuk ceremonies, Chris explains that the High Country is "[w]here we get personal power that reaffirms our Indianness and our way of life. To disrupt it and to destroy it, as the Forest Service is proposing to do, would definitely have an impact on the regeneration of Indian people. Currently it would totally destroy any hope of our grandchildren from knowing what that area has for them."[100]

CONCLUSION

Chris's testimony begins to clarify that what the G-O Road plaintiffs are interested in protecting is their identity and their way of life. But if we pay attention to what the witnesses tell the court, we can see that what they mean by protection is revitalization rather than preservation—as preservation assumes continuation, which is what the framework of religious freedom requires them to prove.

An important component of this revitalization is access to knowledge about the tradition, the dances, and the centrality of the High Country to the livelihood of the Yurok, Karuk, and Tolowa nations. But relying on white anthropologists for recounting this knowledge—as both the Forest Service and the court did—is just another aspect of the colonial structure revealed in the witnesses' storytelling.[101] As Chris Peters told Thomas Buckley when Buckley started his ethnographic work with the Yuroks, a few years before the commission of the Theodoratus Report: "We want to do our own anthropology now. We may not do it as well as white people from the universities, but we'll do it as well as we can."[102] For justice to be restored through the

97 Bowers and Carpenter, "Challenging the Narrative of Conquest," 502–03.
98 Bowers and Carpenter, 503.
99 Bowers and Carpenter, 503.
100 Reporter's Transcript, 83.
101 On colonialism as a structure, rather than a discrete event, see Patrick Wolfe "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 387–409.
102 Buckley, *Standing Ground*, 62. For a critique of salvage ethnography and its role in revitalizing Indigenous ceremonies see Risling Baldy, *We Are Dancing for You*, 73–99.

https://doi.org/10.1017/jlr.2021.28 Published online by Cambridge University Press

revitalization of Indigenous ceremony, the sacred area, just like the ethnographic knowledge, needs to be "unsettled."

Judge Weigel's exchange with Lowanna Brantner at the end of her testimony suggests that he understood this point:

> [W]e [are] the people from Bluff Creek, which is no more now[—]that's where we had our Boat Dance or our White Deerskin Dance. Unbeknownst, unknown to me and my people, we didn't know that the BIA, even though we had a treaty which we didn't know later that it was not ratified[—]we gave all we had promised, way beyond the mountains for them and for the land that we were to have in there, to keep our homes. In that way we lost everything and now we are standing on the last peak, Doctor Rock, Chimney Rock. My neighbors have lost a lot of their ceremonial grounds due to mismanagement of the people, not because they were cruel, but because they didn't understand.
>
> The court: Not because they were what?
>
> The witness: They are not cruel.
>
> The court: Cruel?
>
> The witness: Or unkind. They just did not understand.
>
> The court: Who was it that didn't understand?
>
> The witness: The new people that came into the Indian country.
>
> The court: By the "new people," who do you mean?
>
> The witness: The white people.
>
> The court: The white people? Well, you are generous in saying they aren't cruel.[103]

The judge was clearly affected by Lowanna's testimony, and as she left the stand, he summarized her testimony, to make sure he understood what she wanted to convey, promising her that she had been very helpful: "You see, the one thing that I got from your testimony very clearly is that . . . due to the deprivations occasioned by the whites, such as the pollution of the streams and the like, and the taking over of more and more land, that the preservation of this particular piece of sacred land has become all the more important."[104]

But it is not the understanding of the judge in a settler court that can meaningfully restore justice and autonomy to Lowanna or to her people. Because the attack on Indigenous lifeways and well-being was done through an attack on the domestic, the tool for restoration must come from there.

I therefore end this essay with the words of Abby Abinanti, chief judge of the Yurok Tribal Court, who was involved in the litigation of the G-O Road case as a young lawyer. In an open letter to Justice O'Connor about the G-O Road case, she writes: "My belief in the High Country emanates from what I believe you would call 'the soul.' I have never been farther than the former end of the road, yet I know of its importance. But how do I explain that to you? Must I find concepts that are familiar to you? Things you think are important to protect? Is that how we can survive, by somehow showing you how alike we are? The problem is that we are not alike."[105]

The legal stories told in court decisions seek to generalize and abstract—to make us all alike. As Abinanti says, "the problem is that we are not alike." It is through storytelling that we might maintain our differences and still be heard. What I am interested in is the kind of protection that would recognize both Indigenous communities' power to decide how to use their sacred sites and the responsibility of the United States to promote the well-being of Indigenous communities—all this

103 Reporter's Transcript, 230–31.

104 Reporter's Transcript, 233.

105 Abby Abinanti, "A Letter to Justice O'Connor," *Indigenous Peoples' Journal of Law, Culture, and Resistance* 1, no. 1 (2004): 1–22, at 1.

while recognizing differences without essentializing them. And so, I am not calling us to completely transcend legal categories (Indigenous communities have been using the legal category of religious freedom strategically, and, in the case of the G-O Road they even succeeded in the two lower courts). Instead, I would like these categories to open up and the way we imagine justice to expand with them. For this to happen, storytelling is key.

ACKNOWLEDGMENTS

An earlier version of this article was presented at the American Political Thought 2020 workshop, funded by the Salvatori Center at Claremont McKenna College. I thank the organizers and the participants in this workshop for their comments and suggestions. I also thank Natalie Avalos, Sarah Dees, Abel Gomez, and Michael McNally for their insight and inspiration.