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“You have your Laws and Customs, so have we”: White Property Rights in Legal Definitions of Native Identity and Tribal Disenrollment

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Race and politics in the United States are bound inextricably to one another as notions of phenotypic, cultural, and social differences were transposed into a hierarchical ordering of privileges. One of these political realms in which race predominated, was citizenship and U.S. legal actions to parcel out who would receive full political privileges that has been debated since the foundation of the United States. In these discourses on racial identity and political privileges, the issue of "blood" is bound to arise as statutes like "blood quantum" and the "one drop rule" are debated quite frequently. Yet, what most people fail to recognize is how these legacies of "racially contingent forms of property and property rights" emerged from slavery and conquest since the foundation of the United States.[1] As Cheryl Harris brilliantly posited in "Whiteness as Property," the intangible identity of whiteness became the basis of "racialized privilege" and an "object" reified in the law that allocates private and public societal benefits such as all of a person's legal rights and the right to exclude others, among many others.[2]

Although Harris does an exceptional job of chronologizing the legal history of the basis of whiteness and property rights from the beginning of U.S. legislation to contemporary debates about affirmative action, she rightly focuses on African Americans. Harris does lay a substantial groundwork for how Anglo-American settler colonial law imposed its custom that racially subordinated Native people in order to seize and appropriate Native land. Her argument beautifully illustrates how white occupation and possession of Native land was validated "as the basis for property rights."[3] However, I believe that there is a need to trace the legacy of the inscription of whiteness and property rights in conceptions of Native "blood" and race from nineteenth century legislation like the Dawes Act of 1887 to current tribal disenrollment with

[1] Harris, Cheryl, "Whiteness as Property," *Harvard Law Review* (1993): 1709, 1730.
[2] Ibid., 1709.
[3] Ibid., 1716.

more detail. Native peoples were confined to exercising sovereignty and self-determination either by working within the U.S. legal system as litigants in order to obtain rights or by opposing the legal system entirely because of sovereignty being introduced my conquest in order to create the guise of legality for the theft of Native land.[4]

In these questions of inclusion that were brought up by queries of Native citizenship, the boundaries and notions of Native race were given form through the U.S. legal system. This requires the disentanglement of federal Indian law's legal convolutions that prioritize and serve the interests of the settler colonial power, the United States. As a response to this, I aim to deconstruct and explicate the colonizing processes at work in U.S. legal practices. I contend that the federal imposition of blood quantum conceptions of race and, as a result, Native nations' continued reliance on them to define tribal membership perpetuates the settler colonial legacy of inscribing white property rights on Native land. In the eyes of the U.S. settler colonial state, blood quantum purportedly fortified Native nations against claims of indigeneity from settlers aiming to expropriate land, yet concomitantly racialized the property relationship of Native peoples and the land through a blood requirement.[5] In other words, it severely limited the definition of indigeneity so as to exercise authority over every aspect of the ownership, sale, and transfer of Native land. For instance, the 1823 *Johnson v. M'Intosh* decision subordinated "Indian title" to that of the federal government which left indigenous property rights nonexistent and justified "discovery's" removal of Native claim to the land (beside the right of occupancy) that validated white land possession and rights.[6]

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[4] Harris, "Whiteness as Property," 1727.
[5] Million, Diane, "Policing the Rez: Keeping No Peace in Indian Country," 104.
[6] Harris, "Whiteness as Property," 1716, 1721.

Still blood quantum has crafted indigeneity in the eyes of U.S. law that excludes and erases Native peoples from enrollment. How are Native peoples exercising sovereignty in these settler colonial spaces of the law? First and foremost, Eve Tuck's caution against damage-based frameworks takes precedence, especially when conducting a legal history since U.S. law necessitates damage in order to provide remedy. This proves difficult considering U.S. legal culture in which Native litigants are absent in the legal archives that is most likely attributable to the U.S. legal system's knowledge recognition that demands a certain form of oral testimony predicated on the norms of Western narrative structure. Indigenous forms of knowing or recounting histories are not deemed permissible in a court of law. These challenges that the legal archive present are not irrevocable, but equally valuable, as silences in the archive are indicative of the nature and reception of the history itself.[7] This is not a simple repetition of archival content, but a reflection of the incompleteness and obscurity of the legal archive for Native peoples that speaks to the uneven power in the production of sources, archives, and narratives.[8] [9] Alice Piper, a young Paiute girl, petitioned within the California court systems in order to integrate into a white school in Big Pine School District of Inyo County. Cited as a precedent of integration for *Brown v. Board of Educatio*n in 1954, *Piper v. Big Pine* elucidates how indigeneity and whiteness were viewed by the court in the twentieth century and how Native people operated within settler colonial legal spaces.

Her 1923 writ of mandamus to compel the Big Pine School District of Inyo County in California to admit her to a white school following her exclusion from attending "because of

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[7] Farge, Arlette, "Allure of the Archives," (New Haven: Yale University Press, 1981) 98.
[8] Ibid., 98.
[9] Trouillot, Michel-Rolph, *Silencing the Past: Power and the Production of History*, (Boston: Beacon Press, 1995) 27.

blood differences alone" depicts how important white behaviors were in performing a valid claim to white property rights.[10] *Piper v. Big Pine School District of Inyo County* debated the controversies of race- and ethnic-based school segregation and federal policies for Native American education. In the preliminary review of the California Supreme Court in 1924, Justice Seawell wrote that since Alice and her parents Pike and Annie Piper had never lived in tribal relations, acknowledged allegiance or fealty to any "tribe or 'nation' of Indians," lived upon a "government Indian reservation," or been wards or dependents of the nation, that they were U.S. and state citizens.[11]

Alice's habits, character, health, and desire to obtain an education were imperative to her positive and white portrayal to the court and their perception of her as "civilized" enough to attend a school with white children.[12] Yet, none of her testimony or record of testimony appears in the court decision. The court was compelled to permit her attendance to a white school and issue the writ of mandamus due to the Dawes Act of 1887.[13] Section 5 of the Dawes Act mandated that maintaining a separate residence from tribal Indians and taking up civilized habits entitled Native Americans to the rights, privileges, and immunities of citizenship.[14] By not living on an Indian reservation or in tribal relations, one was considered white enough to be entitled to what white citizens enjoyed. Although this might not portray the social reality of how Alice's integration actually occurred, it reflects the legal rationale underpinning white property rights and the assimilation of Native peoples. It becomes clear that U.S. law contrasted white property

[10] *Piper v. Big Pine School District of Inyo County*. 193 Cal. 666 (1924).
[11] *Piper v. Big Pine*, 666.
[12] Ibid., 666.
[13] Ibid., 671.
[14] General Allotment Act, Section 5.

rights with Native land claims in order to bolster their colonial claim of land ownership. Race was and continues to be at the nexus of these assimilationist policies.

In U.S. law, specifically the Naturalization Act of 1790, citizenship was originally articulated as land ownership and whiteness. When Native peoples were forced to become individual land owners through the General (Dawes) Allotment Act of 1887, there was an explicit tie made between "blood" and property owning, thus making the intangible colonial concept of race necessary for land ownership. One had to be "Indian" enough and "white" enough to own property in the eyes of the agent of the state who approximated indigeneity solely by looking at Native peoples. In the process, it did not recognize Afro-Native people and confined indigeneity to a racialized "look" while seeking recognition from the settler colonial government in order to lay claim to Native land through the American legal system.

Whiteness was defined as "civility," or race as performance of white settler customs and lifestyles, which destroyed Native cultural customs and made them "white" in the eyes of the law even if they were not viewed as such by other whites. This legacy persists today with blood quantum requirements for membership in Native nations that replicate the racialization and deracialization of Native peoples by either defining them as "Indian" when they meet the specified blood requirement and labeling them "white" if they do not. In this "logic of possession through whiteness,"[15] racialization and deracialization act as two prongs of a colonial tool to exclude Native peoples from whiteness. Thus, the colonial plundering of Native peoples disappears with this traceable amount of indigeneity in order to assimilate to the preferred white

[15] Arvin, Maile, *Possessing Polynesians: The Science of Settler Colonial Whiteness in Hawai'i and Oceania*, (Durham: Duke University Press, 2019) 20.

class. Assimilation has always been the intent of the settler colonial force as it removes any contest to their domination of Native land.

For instance, assimilation in the U.S. has taken the form of policies like the American Indian Citizenship Act of 1924 that implicitly intended to erase indigeneity. By accepting Native peoples into the class of citizens, property rights to land were closely associated with whiteness and citizenship. In reality, legislation like the 1924 statute did not have a lasting positive effect for Native peoples exercising the rights of citizenship such as voting since there was rampant disenfranchisement. That is not to say that all Native peoples wanted citizenship since it was a hallmark of assimilation that some resisted and some advocated for. Nevertheless, by tying whiteness to property rights in land, it positioned indigeneity in opposition to whiteness as a colonial practice.

I consider disenrollment to be a modern continuation of these assimilation practices. Disenrollment removes members from tribal citizenship, a decision of each sovereign Native nation, but continues to inscribe indigeneity in the fiction of blood and ascribes it racial and political meaning. Although it arose largely due to the distribution of gaming revenues to tribal members in the last 25 years, it is a foreign concept to Native nations that contributes further to the implicit divestiture of Native sovereignty.[16] Since Native race and political statuses are intertwined,[17] disenrollment fixes indigeneity on a precarious racial concept that originated from white property rights that aims to remove a claim to Native land and de-property Native peoples.

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[16] Galanda, Gabriel S. and Ryan D. Dreveskracht, "Curing the Tribal Disenrollment Epidemic: In Search of a Remedy," *Arizona Law Review* Vol. 57 (2015): 385.
[17] Ablavsky, Gregory, "With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings," *Stanford Law Review* Vol. 70 (2018): 1068.

The federal government bears the responsibility for promoting tribal membership criteria on blood quantum since the formal tribal enrollment of members is a post-contact invention. Previously, Native peoples did not have a concept of race. They did have ideas of descent and ancestry that were and continue to be a tribal concern originating from a Native culture's most sacred narratives.[18] However, non-Native courts have rejected descent-based criteria while racializing tribal membership and imposing cultural performance requirements that misunderstand the nature of tribal membership.[19] As a result, tribal membership criteria, or fundamental kinship and clan ties, are associated with legally prescribed racial classifications.[20] I argue that these practices are in place as part of the protection of white property rights as they deracialize indigeneity in order to erase Native peoples and racialize indigeneity in order to distance Native peoples from achieving rights equitable to whites.

Central to this is a logic of possession through whiteness[21] and its relation to "whiteness as property."[22] Whiteness has been inscribed with legal privileges deriving from European concepts of personhood and citizenship, but constructs a fiction of indigeneity to Native lands in order to justify their continuous occupation and expropriation of land through settler colonialism. As a result, the place and the people become exoticized and feminized "possessions of whiteness," possessions that are rendered unable to obtain the privileges of whiteness themselves.[23] Through the economy, law, and ideology, settler colonialism reinscribes its power

[18] Goldberg, Carole, "Descent Into Race," *UCLA Law Review* Vol. 49 (2002): 1392.
[19] Ibid., 1393.
[20] Ibid., 1394.
[21] Arvin, *Possessing Polynesians*, 20.
[22] Harris, "Whiteness as Property," 1709.
[23] Arvin, *Possessing Polynesians*, 3.

by commodifying land and natural resources, imposing a non-Indigenous legal-political apparatus, and defining ways of being and knowing in European post-Enlightenment terms.[24]

Yet, one must understand what tribal membership and disenrollment truly mean, consider the limits of Native sovereignty, and take these concepts out of their Anglo-American legal context in order to view the colonial legacy. A tribal government's ability to determine, define, and limit membership is distinct from retracting membership from an individual who has satisfied pre-existing criteria.[25] The distinction lies in membership being part of inherent sovereignty while disenrollment is not since it is a construct of federal law. "Membership" and "enrollment" from Anglo-American law do not conceive of Native "citizenship," "kinship," or "belonging" in the same way as Native nations.[26] According to the Little River Band of Ottawa Indians Tribal Court of Appeals, "tribal membership for Indian people is more than mere citizenship in an Indian tribe. It is the essence of one's identity, belonging to community, connection to one's heritage and an affirmation of their human being place in this life and world."[27] Thus, dispossession of land and of tribal membership are closely tied and interdependent which U.S. law aimed to diminish from contact onward through "possessions of whiteness."

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[24] Arvin, *Possessing Polynesians*, 15.
[25] Galanda and Dreveskracht, "Curing the Tribal Disenrollment Epidemic," 389-390.
[26] Ibid., 389-390.
[27] Ibid., 390.

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