

TRUTH. REGARDLESS OF RECONCILIATION?

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Formal responses to historical injustices have typically taken one of two fundamental forms in the past hundred years. The first form is familiar to legal systems—a retributive process in which an adjudicative body measures the conduct of alleged wrongdoers against some set of established standards (think Nuremberg Trials). The second form is often labeled “alternative,” particularly in Western legal systems, despite its long history and increasing prevalence within the past few generations. It focuses on broad inclusion, shared responsibility for the outcomes, and a forward-looking perspective on the next steps beyond or in lieu of traditional criminal sanctions (think South Africa’s Truth and Reconciliation Commissions). Some cases of historical injustice on larger timescales, however, do not lend themselves neatly to either of these basic models. Sometimes, clarifying foundational factual matters is essential, but testimony by people with first-hand knowledge of the incidents in question is impossible. What then?

This Article takes up the case of the 1850 wrongful execution of five Cayuse Indians, men who became known as the Cayuse Five. The Five had been convicted of murdering Dr. Marcus Whitman in 1847, in what would eventually become the Oregon Territory. Their conviction came despite considerable evidence that some or all had no direct involvement, after a deeply problematic trial. Where the Five were buried is unknown, and that fact stands in the way of repatriation. The ongoing search for their burial location sits astride the prospect of a non-adjudicative process aimed at reconciliation, justice, healing, or whatever the living may deem the best course of action. The Article provides background on the undertold history of the Cayuse and white settlers in the mid-nineteenth century and then notes the ongoing significance of the fact that the burial locations of the Cayuse Five remain unknown. The Article then argues that although this work is not focused on resolution, it nonetheless belongs

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under the broad umbrella of dispute resolution, peacemaking, and conflict resolution. The Tribe's ongoing search (as well as the assistance others are providing to them) is best understood through the lenses of ethics and practice within dispute resolution—even though the search does not share the familiar trappings of classic reconciliation or restorative processes.

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INTRODUCTION

History is too complex for a single telling, and yet one must begin a story somewhere, from some perspective. What follows, therefore, is one part of one story, one history, told in one way. Some parts of this history are contested, as is often true. To the extent possible, however, in the pages that follow, I have tried to stick to those things about which there is consensus.

On June 3, 1850, five men from the Cayuse Nation were publicly executed in Oregon City, Oregon.¹ The Five had been convicted of murdering a

¹ ROBERT H. RUBY & JOHN A. BROWN, *THE CAYUSE INDIANS: IMPERIAL TRIBESMEN OF OLD OREGON* 303 (1972).

Protestant missionary, Dr. Marcus Whitman, four years prior at Waiilatpu,² near modern-day Walla Walla.³ The judgment against the Five came at the hands of an all-white male jury,⁴ following a trial held in a dance hall above a tavern,⁵ shortly after the U.S. Congress made Oregon an official U.S. Territory.⁶ The conviction came in spite of overwhelming evidence that at least some of the Five had no direct involvement with Whitman's death.⁷

To many historians, and to most within the Cayuse tribal community, these men are referred to as the Cayuse Five. Although it is often useful to refer to them collectively, these were also individuals, each of whom had a separate story and history. The Five were Ti'ílaka'aykt, Tamáhas, 'Iceyéey2 Cíluukiis, K'oy'am'á Šuumkiin, and Łókomus.⁸

We have considerable detail about the trial of the Cayuse Five and about their execution. In short, both were problematic. From there, however, the light fades. We presume that the Five were buried the same day as their execution, but we do not know where. Without this knowledge, the descendants

² The location is now known as the Whitman Mission National Historical Site. For more information, see *Whitman Mission National Historic Site*, NAT'L PARK SERV., <https://www.nps.gov/whmi/index.htm> [<https://perma.cc/P4VF-ALNC>].

³ RONALD B. LANSING, *JUGGERNAUT: THE WHITMAN MASSACRE TRIAL 1850*, at 18 (1993) (“Marcus Whitman was a Protestant missionary doctor who had settled his mission at Waiilatpu way back in 1836.”). Twelve other people were killed at the Mission in the same incident, but the indictment and charge resulting in the conviction of the Five related only to the killing of Dr. Whitman. *Id.* at 15–16.

⁴ *Id.* at 46 (“Jurors had to be qualified to vote. That left out womenfolk and boys under age twenty-one. There was no such thing as jurywomen. Then too, law said jurymen were not allowed to be gospel minsters, doctors, or men over age sixty.”); see also OR. STATE ARCHIVES: REFERENCE ROOM TRANSCRIPTION, VERDICT IN WHITMAN MASSACRE TRIAL (1850); OREGON STATE ARCHIVES: REFERENCE ROOM TRANSCRIPTION, WHITMAN TRIAL INDICTMENT, 1850 (1850).

⁵ LANSING, *supra* note 3, at 4 (stating that the trial took place in a “hotel saloon with an upstairs dance hall.”).

⁶ CASSANDRA TATE, *UNSETTLED GROUND: THE WHITMAN MASSACRE AND ITS SHIFTING LEGACY IN THE AMERICAN WEST* 9–10 (2020).

⁷ LANSING, *supra* note 3, at 83 (“Hunsaker stood alone against the other eleven. He believed Kiamasumkin was innocent. Back in 1846, Kiamasumkin was kind to Hunsaker and his family in leading them over a difficult part of the Overland Trail. It was not easy now for Hunsaker to sit in judgment on an Indian who had been comfort in hard times. So Hunsaker listened with care to the witnesses for some sign that his friend took part in the killing. He heard none. Not one witness had spoken the name Kiamasumkin.”) Note to readers: Kiamasumkin is one of the English transliterations of the name K'oy'am'á Šuumkiin.

⁸ These spellings come from Wil Phinney, *UO Students Advance the Search for the Cayuse Five*, *UNDERScore NEWS* (Aug. 31, 2022), <https://www.underscore.news/reporting/uo-students-advance-the-search-for-the-cayuse-five> [<https://perma.cc/L5D7-92P2>]. The Americanist representation of their names is also common: Ti'ílaka'aykt, 'Iceyéey2 Siléqis, Koyomá Šamqúinm Tamáhas, and Łókomoooc. The criminal case was, in English, captioned *U.S. v. Telakite et al.* LANSING, *supra* note 3, at 86. “Defendant Chief Telokite’s name was spelled many different ways in the trial record: Telokite, Telakite, Tilikite, Telquoit, and whatever else.” *Id.* at 43.

and other tribespeople of the Cayuse Five, whose members are part of the Confederated Tribes of the Umatilla Indian Reservation, have no opportunity for repatriation or other actions aimed at putting their kin to rest. There is also little prospect of a non-adjudicative process aimed at reconciliation, justice, healing, or whatever the living may deem the best course of action.

This Article will proceed in two parts. In Part I, I provide a brief account of the relevant background and history surrounding the Cayuse Five. The killings both at the Whitman Mission and at the gallows were rooted in circumstances that have been (but should not be) easily summarized using simplistic narratives. I then describe some of the ongoing, modern search for the burial location of the Cayuse Five, and I provide some additional information about the salience of this search. Finding the burial locations of the Cayuse Five is not merely an academic exercise. Instead, the search is among the highest priorities for the descendants of the Cayuse Five and the larger Cayuse community.⁹ In Part II, I explore the potential link between this search and the work of peacemakers, conflict management specialists, and dispute resolvers. Our field has periodically drawn boundaries around its practices and its practitioners. Even if line drawing were necessary, I challenge the assumption that efforts must be resolution-focused in order to fall under our field's definitional tent. What might we collectively learn from the search for the Cayuse Five?

I am honored to contribute these thoughts to the Saltman Center for Conflict Resolution and the Beecroft Memorial Lecture on Conflict Resolution.

I. ONE HISTORY

A. *The Region, the Cayuse Indians, and the Missionaries*

In many traditions, including those of the Cayuse Indians, stories typically begin by situating place and people. And in this case, the most relevant places all appear in the Pacific Northwest. The Cayuse homeland, from time immemorial, sits in the region around what is now commonly known as the Blue Mountains.¹⁰ As one of several peoples inhabiting the area near the Big River (the Columbia), the Cayuse had robust (and sometimes conflictual or

⁹ E-mail from Jennifer Karson Engum, Cultural Anthropologist and NAGPRA Coordinator for the Confederated Tribes of the Umatilla Indian Rsrv., to author (Oct. 3, 2023, 8:09 AM) (on file with Nevada Law Journal) (“Elders remind us that these ancestors are not at rest and we must do all that we can to find them, and if we can, bring them home.”). It is not, of course, the only priority. *See, e.g.*, Roberta Conner et al., *Honoring Homeland Heritage*, 58 HIST. NEWS 10, 11 (2003).

¹⁰ RUBY & BROWN, *supra* note 1, at 3; SARAH KOENIG, PROVIDENCE AND THE INVENTION OF AMERICAN HISTORY 30 (2021). *See generally* EUGENE S. HUNN ET AL., CÁW PAWÁ LÁAKNI THEY ARE NOT FORGOTTEN: SAHAPTIAN PLACE NAMES ATLAS OF THE CAYUSE, UMATILLA, AND WALLA WALLA (2015).

challenging) relationships with other tribes and bands in the area.¹¹ They traded with each other, married in and among each other, shared certain fishing and hunting regions, and sometimes fought each other—in the case of the Cayuse, often very effectively.¹²

No records document the first contact between Cayuse and white settlers. The Cayuse may have encountered Lewis and Clark,¹³ but more likely the contact at this stage was indirect. By 1810, however, the Cayuse had clearly encountered both “Boston men” and “King George m[e]n”¹⁴ as well as agents of the Hudson’s Bay Company.¹⁵ By 1812, Cayuse had traded for guns and routinely engaged in trade with a number of non-native newcomers.¹⁶ The following decades were marked by cross-cultural curiosities, tensions, opportunities, learnings, and still more trade.

Further complicating the fabric of interactions between the Cayuse and white settlers was the introduction—or more accurately the competing introductions—of Christianity through missionaries from a number of different faith traditions.¹⁷ Dr. Elijah White,¹⁸ for example, the U.S. Indian agent for

¹¹ See RUBY & BROWN, *supra* note 1, at 4. See generally PETER POCHOCKI MARBACH, *HEALING THE BIG RIVER: SALMON DREAMS AND THE COLUMBIA RIVER TREATY* (2019).

¹² KOENIG, *supra* note 10, at 30–31. See generally *Lewis & Dryden’s Official Railway Guide for the North Pacific Coast*, 12 LEWIS & DRYDEN PRINTING CO. 2, 29, 31 (1891); GEORGE M. COCHRAN, *INDIAN PORTRAITS OF THE PACIFIC NORTHWEST* (1959).

¹³ RUBY & BROWN, *supra* note 1, at 22–23; Roberta Conner & William L. Lang, *Early Contact and Incursion, 1700–1850*, in *AS DAYS GO BY: OUR HISTORY, OUR LAND, AND OUR PEOPLE—THE CAYUSE, UMATILLA, AND WALLA WALLA* 23, 40 (Jennifer Karson ed., 2006); MERIWETHER LEWIS & WILLIAM CLARK, *JOURNALS OF THE LEWIS & CLARK EXPEDITION* (1806), reprinted in <https://lewisandclarkjournals.unl.edu/item/lc.jrn.1806-06-08> [<https://perma.cc/77M5-AXYE>].

¹⁴ Rena V. Grant, *The Chinook Jargon, Past and Present*, 3 CAL. FOLKLORE Q. 259, 259, 264 (1944). Chinook Jargon was a trading language utilized by tribes, fur traders, missionaries, and travelers primarily in the Pacific Northwest. In Chinook Jargon terms “Boston men” were Americans (loosely speaking) while “King George men” were English. *Id.* at 264.

¹⁵ RUBY & BROWN, *supra* note 1, at 10–11 (showing a map of “Oregon country at the time of white contact, about 1810”); Roberta Conner, *Our People Have Always Been Here*, in *LEWIS AND CLARK THROUGH INDIAN EYES*, 85, 114 (Alvin M. Josephy, Jr. ed., 2006).

¹⁶ Cameron Addis, *The Whitman Massacre: Religion and Manifest Destiny on the Columbia Plateau, 1809–1858*, 25 J. EARLY REPUBLIC 221, 225–26 (2005).

¹⁷ Kris A. White & Janice St. Laurent, *Mysterious Journey: The Catholic Ladder of 1840*, 97 OR. HIST. Q. 70, 71–72 (1996); Melinda Marie Jetté, “We Have Almost [sic] Every Religion but Our Own”: *French-Indian Community Initiatives and Social Relations in French Prairie, Oregon, 1834–1837*, 108 OR. HIST. Q. 222, 222 (2007). Missionaries from Methodist, Catholic, and Presbyterian traditions were, at the time, increasingly present in the region. The Methodist missions, led by Reverend Jason Lee, settled in the Willamette Valley and French Prairie in 1834. Lee was later accompanied by Dr. Elijah White and Reverend David Leslie to reinforce and expand the influence of the mission. *Id.* at 229. In 1836, Marcus and Narcissa Whitman established their Presbyterian mission east of the Cascade Mountains. *Id.* at 239. In 1838, Fr. François Norbert Blanchett established his first Catholic mission, St. Francis Xavier, in the Columbia region near Cowlitz River. *Id.* at 237.

¹⁸ LANSING, *supra* note 3, at 21.

the region, came to view himself as “an American Moses.”¹⁹ Others, most notably religious leaders in the missionary movement, considered White “a notorious blockhead,”²⁰ but White was important in laying the foundational patterns of interaction in this region.²¹ In particular, he presented a list of laws to the Indians in the region, including to the Cayuse.²² Likely no coincidence, given his conception of himself, White handed down ten laws—a decalogue, from this American Moses. History notes, with divine humor, that the Nez Percés insisted on adding an eleventh law before they would agree to adopt them.²³ And that proposed, additional, would-be divine law dealt exclusively with dog control.²⁴ The differences between Protestant and Catholic missions were sometimes stark.²⁵

To the Catholic missionaries Christianity entailed participation in the sacraments—an adoption of a new, albeit somewhat familiar set of religious practices—yet it did not necessarily entail changes in patterns of work, recreation, dress, farming, and property ownership. Protestants required more. Though they insisted that the experience of an inner, spiritual conversion was what made someone a Christian, they also believed that such an inner change would be marked by a new set of habits centered on a new set of objects. Western-style clothing, spinning wheels, plows, and cattle all served as proofs of conversion.²⁶

Even within Protestantism, differences and tensions between missionaries in the region led to conspicuous differences in their messages and methods of interaction.²⁷ Congregationalist missionaries, for example, unlike the Presbyterians, “smoked pipes and drank wine . . . [but] frowned on women

¹⁹ RUBY & BROWN, *supra* note 1, at 85 (“White truly deemed himself a nineteenth-century Moses.”).

²⁰ *Id.* at 86.

²¹ *See, e.g., id.* at 87.

²² *Id.* at 86.

²³ *Id.*

²⁴ *Id.*

²⁵ *See id.* at 104–05; Addis, *supra* note 16, at 229. The question of intermarriages was among those on which Protestant and Catholic missionaries differed. The latter favored, or at least supported, such marriages, which the Hudson’s Bay Company saw as favorable to its efforts in the region. This, in turn, fueled some portion of the anti-Catholic views of Whitman and others in the 1830s and 1840s.

²⁶ KOENIG, *supra* note 10, at 37. It is difficult to overstate some aspects of the regional tensions between Catholics and Protestants at this time. At one point, missionaries from each began to create visual aids to help reinforce their lessons. The Catholic visual aid included a prominent image of Martin Luther being cast into the pits of hell. The Protestants, not long after, created a similar image, except that it was the Pope who was “falling into hell-fire.” *Id.*

²⁷ *Id.* at 32–35. Because cleansed history is sometimes scrubbed of juicy details that probably deserve mention, I would note that one of the other prominent missionaries in the region was Henry Spaulding. Spaulding had attended school with—and had proposed marriage to—Narcissa Whitman, who chose to wed Marcus Whitman instead. This spurning led to years of “bicker[ing]” and “rifts” between two missionaries who, on paper, would have appeared otherwise to be allied. *Id.* at 32.

speaking in prayer meetings.”²⁸ In the same way that it would be a mistake to speak of “Indians” as though they were monolithic or homogenous, “missionaries” in the region differed in important ways.

B. The Oregon Trail, the Whitman Mission, and the Cayuse

To the extent any part of this story finds its way into the public (via public school textbooks or otherwise), the Oregon Trail is typically the central reference point.²⁹ The Trail’s intersection with this story is partly geographic (because it brought settlers into direct and frequent contact with the Cayuse) and partly symbolic because the Oregon Trail perhaps more than anything else came to capture the imaginations not only of those who traveled it but also of a broader (and more influential) set of political figures in the East. An early and important fixture along the trail was the site of the mission established by Dr. Marcus Whitman, a physician and Protestant minister who came to the region in 1835.³⁰ The mission, located near a Cayuse settlement called Waiilatpu (“people of the place of the waving grass”) attracted many along the trail, including the Cayuse, as a place of refuge, communication, and trade. Whitman’s relationship with the Cayuse was complex throughout his time there. He provided his assistance as a physician to all who came, including both settlers and the local Cayuse.³¹ In an age when missionaries were often evaluated based on the number of conversations they attained or souls they saved,³² Whitman was something of a curiosity, or even a failure, as a missionary.³³ By some accounts, in all the years he was there, he baptized no Cayuse Indians.³⁴

²⁸ *Id.* at 36.

²⁹ *Id.* at 1–2. Marcus Whitman was central to a different telling, prominent in the first fifty years following his death. According to this narrative, used as part of a stump speech by President Warren Harding, Whitman “raced [in 1842] from Oregon Territory to Washington, DC, arriving just in time to stop President John Tyler from signing a treaty granting possession of Oregon Territory to Great Britain.” *Id.* at 1. About this narrative, lifting Whitman as the savior of the region and champion of “providentialism, Manifest Destiny, and American exceptionalism[.]” Harding later said, “I like the story of Whitman . . . If it isn’t true, it ought to be.” *Id.* at 2. The narrative was, as a factual matter, decidedly untrue. For a thoughtful and detailed scholarly treatment of the changing narrative(s) about Whitman, *see generally id.*

³⁰ *Id.* at 24 (Whitman had advertised himself to the American Board of Commissioners for Foreign Missions as “a ‘P[h]ysician Teacher or Agriculteralist’ [sic].” (alteration in original)).

³¹ LANSING, *supra* note 3, at 18 (“The hospitality, medicine, and spirit comfort of Waiilatpu had been a special welcome to the sick, the lame, and those too tired to go on.”).

³² *See* TATE, *supra* note 6, at 48.

³³ KOENIG, *supra* note 10, at 18 (describing the mission as a “spectacular failure”).

³⁴ Antone Minthorn, *Wars, Treaties, and the Beginning of Reservation Life*, in *AS DAYS GO BY: OUR HISTORY, OUR LAND, AND OUR PEOPLE—THE CAYUSE, UMATILLA, AND WALLA WALLA* 61, 64 (Jennifer Karson ed., 2006); KOENIG, *supra* note 10, at 19 (“The Whitman Mission never won a single convert.”). One can imagine multiple interpretations of the small number of baptisms. But particularly when juxtaposed against the focus of other

Tensions between Whitman and the Cayuse grew over time. Some were understandable as cultural differences—for example, a clashing view over the proper number of wives or the role(s) of women in daily life.³⁵ Other of the disagreements essentially paralleled landlord-tenant disputes—including competing views of proper usage of the land and even compensation arrangements.³⁶ One of Whitman's colleagues at the mission at one point developed a concern that the Cayuse were stealing from his melon garden, so he injected melons at the edge of the garden with a powerful emetic.³⁷ This proved effective by making the Cayuse sick when they took and ate those melons.³⁸ Later, Indian dogs were killed by poisoned bait people at the mission put out for wolves.³⁹ Unlike some other missionaries in the region, Whitman never learned to speak Cayuse, and the language had no common written form at the time, exacerbating the communication challenges.⁴⁰ None of the tensions between Whitman and the Cayuse resulted in outright hostility in the early years, but relations were increasingly strained.

Meanwhile, disease ravaged the region in the 1840s.⁴¹ The deadliest of the settler-brought diseases—measles—⁴² struck brutally, with a mortality rate of

missionaries in the region, Whitman's stands out as different. Sarah Koenig, for example, argues that Whitman shifted the focus of his efforts from conversion of Cayuse to “encouraging white, Protestant, American settlers to populate . . . the Cayuse homeland.” *Id.*

³⁵ RUBY & BROWN, *supra* note 1, at 75; *see also* KOENIG, *supra* note 10, at 18 (“Historians have examined the Whitman missions as a classic case of cultural misunderstanding, emphasizing the Whitmans’ inability to fully learn the Nez Perce language and respect Cayuse customs, the different ways in which the Whitmans and Cayuse people understood medicine, and conflicts over increasing Anglo-American settlement.”). *See generally* Addis, *supra* note 16, at 237 (“Most vexing on a day-to-day basis was communication, complicated by the plateau’s linguistic diversity. Marcus learned some Nez Percé but not Cayuse, while Narcissa lamented she could not ‘do much more than stammer’ in Cayuse. Since the area had no written language, they translated the Bible phonetically with English characters. The missionaries filtered their discussions through métis, who better understood the Chinookan *lingua franca*, but that jargon was constructed for basic trade and communication. The tangled web of Calvinist doctrine could scarcely be explained with chalkboard drawings or simple sign languages.” (footnote omitted)).

³⁶ KOENIG, *supra* note 10, at 41–42; Julie Roy Jeffrey, *Narcissa Whitman: The Significance of a Missionary’s Life*, 41 MONT. MAG. W. HIST. 3, 13 (1991).

³⁷ RUBY & BROWN, *supra* note 1, at 99.

³⁸ *Id.*; KOENIG, *supra* note 10, at 43.

³⁹ RUBY & BROWN, *supra* note 1, at 99; KOENIG, *supra* note 10, at 43.

⁴⁰ *See generally* Addis, *supra* note 16. To be clear, Whitman’s exhortations likely were encumbered not only with linguistic challenge, but also theological challenge. After all, he relied on Chinook trade jargon to tell the Cayuses they were “lost, ruined and condemned” and could not be saved by prayer alone. *Id.* at 238; *see also* KOENIG, *supra* note 10, at 18.

⁴¹ KOENIG, *supra* note 10, at 44 (naming measles, cholera, and dysentery).

⁴² *See* RUBY & BROWN, *supra* note 1, at 69; *see also* Addis, *supra* note 16, at 225 (“Sporadic epidemics converged from the coast and plains, wiping out entire villages and bypassing others as populations built up resistance over time. By the end of the nineteenth century, epidemics reduced the region’s Indian population by roughly three-quarters, from approximately 180,000 to 40,000.”).

about one-third of the tribe⁴³ in a short span of time. “Like other Christian missions in the North American West, the Whitman Mission inadvertently served as a disease vector, a place where people carrying Old World diseases mixed with nonimmune populations in close quarters.”⁴⁴ “At Waiilatpu[,] Whitman cared for both white and Native victims of the outbreak, but nearly half of Whitman’s Native patients died, while only one white child succumbed to the epidemic.”⁴⁵

Healers were understandably prominent in the minds of all at the time, and yet the role of healer or medicine man in the Cayuse tradition was different from that of physician in the settler culture. Cayuse *tewats*, or medicine men, sought to address “the spiritual source of illness.”⁴⁶ Such healers “held great spiritual power that could be used to heal or to destroy.”⁴⁷ Whitman focused instead on delivering such physical medicines as his training and field experience suggested were appropriate for the conditions.⁴⁸ Whereas many Cayuse had at least ambivalence about Western medicine, the Whitmans’ view of the *tewats* was decidedly uncharitable. He referred to the *tewats* as “fake because [they] gave ‘no medicine’ and relied on ‘incantation,’ ‘horrible’ singing, and other practices [Whitman] regarded as heathen.”⁴⁹ Meanwhile, in “Cayuse culture . . . [i]f a patient under the care of a *tewat* died, the family of the deceased had the right to kill the *tewat* in retribution.”⁵⁰ This aspect of Cayuse law or tradition was known to the settlers,

⁴³ TATE, *supra* note 6, at 164; J. B. A. BROUILLET, AUTHENTIC ACCOUNT OF THE MURDER OF DR. WHITMAN AND OTHER MISSIONARIES, BY THE CAYUSE INDIANS OF OREGON, IN 1847, AND THE CAUSES WHICH LED TO THAT HORRIBLE CATASTROPHE 9 (2d ed. 1869); RUBY & BROWN, *supra* note 1, at 94 (explaining that the disease became known as “Oregon Fever”).

⁴⁴ KOENIG, *supra* note 10, at 44 (“Missionaries rarely realized their culpability in spreading disease: germ theory was in its infancy in the nineteenth century, and white Christians were more likely to attribute the high rates of disease and death to God’s providence as a sign that the Indians were a doomed race.”).

⁴⁵ KOENIG, *supra* note 10, at 45. There is some evidence to suggest that some French-Canadians and others

“kept the pot [of suspicion] boiling . . . rehears[ing] all the old stories of whites uncorking bottles to release disease germs to kill the Indians so that they could take their land, tales of . . . overhear[ing] the Whitmans plotting to poison the Indians, and other fabrications which had been making the rounds since a smallpox epidemic of a decade before.”

RUBY & BROWN, *supra* note 1, at 104.

⁴⁶ Jeffrey, *supra* note 36, at 13; *see also* Ronald J. Pond & Daniel W. Hester, *Through Change and Transition: Treaty Commitments Made and Broken*, in *AS DAYS GO BY: OUR HISTORY, OUR LAND, OUR PEOPLE—THE CAYUSE, UMATILLA, AND WALLA WALLA* 93, 125 (Jennifer Karson ed., 2006).

⁴⁷ KOENIG, *supra* note 10, at 42.

⁴⁸ Whitman had, by modern standards, few tools or training available to him. But by the standards of the 1840s, his knowledge and medicines were consistent with then-modern understanding. For a detailed description of the medical knowledge and practices Whitman used at the time, *see* O. Larsell, *Whitman: “The Good Doctor”*, 37 *OR. HIST. Q.* 217, 217, 234 (1936).

⁴⁹ Jeffrey, *supra* note 36, at 13.

⁵⁰ KOENIG, *supra* note 10, at 42 (emphasis added).

including the Whitmans.⁵¹ In fact, Narcissa Whitman wrote in 1837 that she had witnessed “a *tewat* [who] was shot and killed by a Cayuse because the *tewat* allowed a relative to die of sickness.”⁵² The Cayuse understood well that the diseases were associated with the arrival of the settlers, making the stakes even higher for Whitman. “Since measles was a white man’s disease and since Whitman, a white doctor, surely knew the cure, they believed that he was deliberately withholding that cure from them.”⁵³

By 1847, therefore, a patchwork of dynamics led to increasing hostility between Whitman and the Cayuse: (1) unimaginable and inexplicable suffering and death, (2) a fear that Whitman was poisoning the Cayuse (recall the melons and the dogs),⁵⁴ (3) the easily-observed reality (with no germ theory or immunology-based explanation available) that the white settlers who Whitman treated tended to recover and the Cayuse he treated tended to die,⁵⁵ and (4) Cayuse tradition and law that medicine men who fail to heal are subject to punishment, up to and including death.⁵⁶

Several Cayuse warned Whitman that he ought “not stay long in this place” and that “his life was in danger.”⁵⁷ But he, his wife, and others stayed at the Mission anyway.⁵⁸

C. Killings at Mission and Aftermath

On November 29, 1847, Whitman and about a dozen others were killed at the mission site.⁵⁹ Cayuse Indians were blamed for the killings.⁶⁰ And to be clear, it was almost certainly Cayuse Indians who killed Whitman, his wife, and the others at the mission that day.⁶¹ This is not an example of a false accusation. At least, not in that particular sense.

⁵¹ RUBY & BROWN, *supra* note 1, at 166 (“Dr. John McLoughlin, the first [defense] witness called, testified that as early as 1840 and 1841 he had warned Whitman of danger. The former Hudson’s Bay Company factor also corroborated others’ testimony that the Cayuses killed their medicine men for failing to cure patients.”); *see also Trial of Cayuse Murderers*, OR. SPECTATOR, May 30, 1850, <https://oregonnews.uoregon.edu/lccn/sn84022662/1850-05-30/ed-1/seq-2/> [<https://perma.cc/RFJ9-PJFG>].

⁵² LANSING, *supra* note 3, at 129 n.146.

⁵³ *Whitman Mission National Historic Site: The Gathering Storm*, NAT’L PARK SERV., https://www.nps.gov/parkhistory/online_books/hh/37/hh37p.htm [<https://perma.cc/328X-NWA3>] (Sept. 28, 2002, 10:00 PM).

⁵⁴ *See, e.g.*, Statement of Rev. A. M. A. Blanchette’s Interpreter Concerning the Whitman Massacre, in OR. HIST. SOC’Y RSCH. LIBR. COLLECTION NO. MSS 1203 (Marcus and Narcissa Whitman Collection, 1834–1947); KOENIG, *supra* note 10, at 43.

⁵⁵ RUBY & BROWN, *supra* note 1, at 73–74.

⁵⁶ Minthorn, *supra* note 34, at 64.

⁵⁷ *Id.*; RUBY & BROWN, *supra* note 1, at 108; KOENIG, *supra* note 10, at 45.

⁵⁸ TATE, *supra* note 6, at 152.

⁵⁹ BLAINE HARDEN, *MURDER AT THE MISSION 84–87* (2021).

⁶⁰ LANSING, *supra* note 3, at 6.

⁶¹ HARDEN, *supra* note 59, at 87.

The months that followed were complex—in some ways more complex even than the fog of war one sometimes finds in conflicts. The Cayuse took some number of women and children from the Mission as prisoners (or depending on whose account you credit, as slaves).⁶² In response to the killing at Waiilatpu, Governor Abernethy organized a posse⁶³ whose actions were not bounded by the particulars of the incident involving the Whitmans, nor were its targets limited to the Cayuse.

Negotiations took place at various instances, with different representatives. The initial negotiations focused on the return of prisoners from the mission, but the whites quickly also made demands that the Cayuse deliver those responsible for the killings as a condition⁶⁴ to avoid war. From the perspective of a Negotiation scholar, the various councils and meetings are fascinating.⁶⁵ To the extent the Cayuse had hoped to succeed with broader coalition-building with other regional tribes, those coalitions failed to materialize or to hold.⁶⁶ The Cayuse eventually released prisoners (or at least most of them) in exchange for certain goods and promises, but they did not hand over those responsible for the Whitman killings.⁶⁷ In the words of a prominent scholar of this history, “[t]he [Cayuse] chiefs were in a difficult situation: if they attempted to deliver [the killers, over whom they did not necessarily have control] there could be war among their people; if they did not do so, there would be war with the whites.”⁶⁸

Some historians refer to the years that follow as “The Cayuse War,” but to treat it as a war in a classic sense is flawed.⁶⁹ Although many died, they were virtually all Native Americans, and few of them were Cayuse.⁷⁰

⁶² RUBY & BROWN, *supra* note 1, at 113; KOENIG, *supra* note 10, at 46.

⁶³ RUBY & BROWN, *supra* note 1, at 116.

⁶⁴ *Id.* at 117–21.

⁶⁵ For a more thorough account of the treaty-making process, see *generally* AS DAYS GO BY: OUR HISTORY, OUR LAND, OUR PEOPLE—THE CAYUSE, UMATILLA, AND WALLA WALLA (Jennifer Karson ed., 2006) [hereinafter AS DAYS GO BY]; C. F. Coan, *The Adoption of the Reservation Policy in the Pacific Northwest, 1853–1855*, 23 Q. OR. HIST. SOC’Y 1 (1922).

⁶⁶ RUBY & BROWN, *supra* note 1, at 124. Some scholars believe that the Cayuse sought not only to form a “grand alliance” with other tribes, but also with the Catholics, “Hudson’s Bay Company personnel, and French-Canadians on French Prairie in the Willamette Valley.” *Id.*

⁶⁷ *Id.* at 120.

⁶⁸ *Id.* at 146.

⁶⁹ LANSING, *supra* note 3, at 7; RUBY & BROWN, *supra* note 1, at 128; KOENIG, *supra* note 10, at 47. See *generally* COCHRAN, *supra* note 12; JEFF ZUCKER ET AL., OREGON INDIANS: CULTURE, HISTORY & CURRENT AFFAIRS (1983).

⁷⁰ See TATE, *supra* note 6, at 182. After the Whitman killings, the volunteer posse reportedly committed numerous acts of violence against different Native communities as far away as the Rogue River in Southern Oregon, hundreds of miles from the Cayuse peoples and their lands.

Meanwhile, a man named Joe Meek traveled to Washington, D.C.⁷¹ to beg for federal protection, citing the killing of the Whitmans as grounds. Meek's connection to the case was political, geographic, and personal. His daughter died during the killings at Waiilatpu. He was eventually successful with his appeal, and in 1848, Congress created the Oregon Territory. That same year, Joe Meek was appointed as U.S. Marshal for the Oregon Territory.⁷² In 1850, Governor Joseph Lane delivered his first address saying, "[t]he Cayuse Nation remains unpunished for the Massacre at Waiilatpu."⁷³ "The trial and punishment of Indians, in the presence of their tribe and other . . . bands . . . [should] ma[k]e an impression upon their minds sufficient to deter them from similar offenses."⁷⁴ The case of Whitman and the Cayuse held an enduring and troublesome place in the public and political dialogues of the late 1840s.

D. *The Five to Oregon City*

History is contested about the series of circumstances that led to five Cayuse men coming into the control of the territorial government. Depending on whose history one credits, the Five were captured,⁷⁵ or arrested,⁷⁶ or surrendered,⁷⁷ or volunteered to be witnesses who could provide testimony about the actual killers,⁷⁸ or came only to parlay with the whites,⁷⁹ or decided to submit themselves "in lieu of the murderers so that the Cayuses could have peace."⁸⁰ One of the Five is said to have asked, "Did not your missionaries teach us that Christ died to save his people? So die we to save our people."⁸¹ Whatever the antecedent circumstances, the Five came into the custody of the posse, who took them, in chains, more than a hundred and fifty miles to Oregon City.⁸² Governor Lane was content that he had five culprits (a number

⁷¹ RUBY & BROWN, *supra* note 1, at 121.

⁷² LANSING, *supra* note 3, at 22; HOWARD MCKINLEY CORNING, *Meek, Joseph Lafayette*, in *DICTIONARY OF OREGON HISTORY* 164, 164 (1956); RUBY & BROWN, *supra* note 1, at 153.

⁷³ RUBY & BROWN, *supra* note 1, at 154.

⁷⁴ LANSING, *supra* note 3, at 6.

⁷⁵ *Players of the Cayuse War Revisited*, MEANDERING THROUGH THE PROLOGUE (Feb. 4, 2023), <https://meanderingthroughtheprologue.com/players-of-the-cayuse-war-revisited/> [https://perma.cc/86WD-5ET4].

⁷⁶ Nathan Douthit, *Joseph Lane and the Rogue River Indians: Personal Relations Across a Cultural Divide*, 95 OR. HIST. Q. 472, 477 (1994).

⁷⁷ LANSING, *supra* note 3, at 10; RUBY & BROWN, *supra* note 1, at 162.

⁷⁸ LANSING, *supra* note 3, at 82; *Reminiscences of Early Days*, CATH. SENTINEL, Apr. 20, 1872 (saying that "five were found to consent to go down, not as murderers, but to give information as to who were the murderers").

⁷⁹ RUBY & BROWN, *supra* note 1, at 163.

⁸⁰ *Id.*

⁸¹ *Id.* This account is questioned, if not rejected outright, in the Catholic telling of the narrative. See *Reminiscences of Early Days*, *supra* note 78.

⁸² LANSING, *supra* note 3, at 10.

for which there was no particular historical support),⁸³ but he had his five and they were to be put on trial for Dr. Whitman's murder.

E. The Trial

Through the lens of a modern understanding of criminal justice, the trial was fascinating and, in some ways, horrifying. It presented almost a treasure trove of legal complications and oddities, befitting a law school final examination. But despite the (entirely predictable) conviction, it would be an error to gloss this trial over as merely a kangaroo court proceeding, a pro forma precursor to a lynching. The appointed defense attorneys were atypically energetic and effective. They mounted jurisdictional challenges,⁸⁴ and sought a change in venue.⁸⁵ The case presented multiple fascinating choice of law challenges, several of which were entirely without direct precedent.⁸⁶ The testimony included multiple out-of-court statements that would today surely raise concerns about jury tainting,⁸⁷ among other things. Meanwhile, in ways that are almost inconceivable in modern criminal defense contexts, these defense attorneys jointly represented all five defendants—to the clear disadvantage of at least some of the defendants, given that at least some of them had no direct involvement with the killings.⁸⁸ Indeed, one of the defendants had apparently intended to testify that his own son was one of the killers.⁸⁹

⁸³ RUBY & BROWN, *supra* note 1, at 162 (“How the decision to deliver only five prisoners was reached is not known.”); LANSING, *supra* note 3, at 6–7.

⁸⁴ LANSING, *supra* note 3, at 34–37. The Whitman Mission was outside of the United States at the time of the killings. The British had ceded any claim to the area by 1846. It was more likely that, as a legal matter, the Whitman Mission sat in “Indian Country” in 1847 than within the jurisdictional reach of the United States. Indeed, although no one involved knew of the timing, three days after the Cayuse Five were hanged, the U.S. Congress amended the laws governing the region, acknowledging that until that amendment, the Oregon Territory was part of Indian Country.

⁸⁵ *Id.* at 38–42.

⁸⁶ *Id.* at 73–74. Recall the overlapping jurisdictional question. If this was Indian Country, should the federal district court be applying substantive Cayuse law to the question? What criminal law(s) did the indictment allege the defendants violated? Defense attorneys raised these as objections. Even after those objections were (predictably) rejected, the defense attorneys sought to introduce Cayuse custom and law into evidence in the trial. Their efforts were denied.

⁸⁷ *Id.* at 17, 92–93.

⁸⁸ *See id.* at 31 (“As things turned out, defendant Kiamasumkin would have been helped by separate trial or separate lawyering.”). The choice of law issue noted above presents one of the most conspicuous challenges associated with the joint defense: A defense attorney might reasonably decide to mount a defense of “my client’s actions in killing the doctor were consistent ‘in keeping with Cayuse nature and custom,’” if one represents a defendant who was identified by witnesses as one of the killers. *Id.* at 74. But this over-arching theory of the case clearly would disserve a defendant who was never identified as being directly involved in the killings.

⁸⁹ RUBY & BROWN, *supra* note 1, at 169 (“In [Archbishop] Blanchet’s declarations Tiloukaikt maintained that all the Indians who had committed the crimes were dead, two of them his sons Kiamasumpkin asserted that he was not at Waiilatpu at the time of

At least one was apparently nowhere near Waiilatpu on the day of the killings.⁹⁰ The judge not only permitted, but also seemed to encourage a breathtaking set of inferences in his charge to the jury.⁹¹ And the entire trial took place in a language none of the defendants spoke and was translated from English to an auxiliary trading language and then into the defendants' dialect.⁹²

Nevertheless, the jury convicted all five defendants, and the judge sentenced the Cayuse Five to death by hanging.⁹³ The defense had laid multiple grounds for appeals, but another complication arose. There were no appellate judges in the Territory at the time, so under the Act creating the Oregon Territory, any such appeal would have needed to go directly to the Supreme Court of the United States.⁹⁴ The judge, however, refused to stay the execution, which he set for ten days later.⁹⁵ Officials in Oregon City needed those ten days to mill the lumber to construct a scaffold large enough to execute all five at the same time.⁹⁶

the massacre; Klokamas, that he was present but, like Tiloukaikt, blameless and that the ten murderers were all dead; Isaiachalakis, like the others, that ten, all dead, had done the deed, which in no way had been instigated by the Catholics.”). One notes the final of these declarations with a particular eye toward the anti-Catholic sentiments rampant in some parts of the Oregon Territory by the time of the trial. *See also* FRANCIS NORBERT BLANCHET, *HISTORICAL SKETCHES OF THE CATHOLIC CHURCH IN OREGON, DURING THE PAST FORTY YEARS 140–41* (1878).

⁹⁰ LANSING, *supra* note 3, at 79.

⁹¹ *Id.* at 82. For example, the judge instructed the jury that “the surrender by the Cayuse nation of the Defendants as the murderers of Marcus Whitman (the nation knowing best who those murderers were), now communicated by the Court as official fact should go to the Jury and be received by them as evidence of the identity of the accused.” *Id.* at 80. Recall, however, that the matter of how the five came into the possession of the posse was (and remains) a contested matter. *See infra* notes 75 to 80 and accompanying text. Defense lawyers pointed out that the judge was putting into evidence something new in his jury charge, essentially becoming an unsworn witness.

⁹² LANSING, *supra* note 3, 11–12 (“Two interpreters were needed because three languages would be spoken at trial: English, Cayuse, and the Jargon. . . . That meant that when white man’s English was spoken at trial, one of the interpreters had to translate it into the Jargon, so that the other interpreter could go from Jargon to the Cayuse-Nez Perce tongue.”).

⁹³ *Verdict in Whitman Massacre Trial*, OR. STATE ARCHIVES, <https://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/7255112> [<https://perma.cc/ME77-E4KR>]; *see also* LANSING, *supra* note 3, at 91.

⁹⁴ As a practical matter, this meant that no appeal was possible. LANSING, *supra* note 3, at 88 (“[A]ny right to appeal to the [Supreme] Court back in Washington City was a right made of paper that did not serve distant outskirts. . . . To cross from one ocean to the other and then back again took one year. There were no jails in the Oregon frontier decent enough to hold the five men while an appeal . . . was going on.”).

⁹⁵ *Id.* at 88, 90–91.

⁹⁶ *Id.* at 96.

F. *The Hanging*

On June 3, 1850, the Five were hanged at a site not far from the Willamette River in downtown Oregon City.⁹⁷ One of the Five is said to have begged on the gallows to be killed with a knife rather than be hanged. As one prominent scholar explained, “[n]o Indian wished death by [hanging]. A rope around the neck choked life within. Cutting let life go out.”⁹⁸ Not surprisingly, Joe Meek—the Marshal overseeing the execution—declined this request. Indeed, to the extent we can imagine the exchange, and to the extent Meek even understood the request, each likely viewed the other as barbaric, each thinking the other to be uncivilized.

Accounts vary about the public hanging, with some calling it somber, and others describing it as spectacle.⁹⁹ All agree that many were present in town, possibly upwards of two thousand.¹⁰⁰ Not in town, however, were those Cayuse who had originally come with the Five. They left town prior to the execution,¹⁰¹ and one can reasonably imagine the safety reasons for the decision to head back east.

After thirty-five minutes, the Five were pronounced dead and were cut down.¹⁰² A Catholic Archbishop was present at the execution to attend to last rites for the Cayuse men.¹⁰³ Some evidence suggests that their bodies were loaded onto one or more carts and taken up Abernethy Creek, “[about] a half

⁹⁷ RUBY & BROWN, *supra* note 1, at 303; *Important Declaration Made June 2nd and 3rd, 1850*, OR. HIST. SOC’Y RSCH. LIBR. COLLECTION NO. MSS 1203 (Marcus and Narcissa Whitman Collection, 1837–1947), <https://digitalcollections.ohs.org/mss-1203-marcus-and-narcissa-whitman-collection-1834-1947> [<https://perma.cc/KT5Y-YYP4>].

⁹⁸ LANSING, *supra* note 3, at 97. The contemporaneous newspaper account of the execution describes a similar, but slightly different exchange. In that telling, one of the five “plead[ed] earnestly to be shot, as hanging, in his view, was not only an ignominious fate, but not in exact accordance with the true principles of retributive justice.” *Execution of the Cayuse Indians*, THE SPECTATOR, June 27, 1850. And *both* of these accounts are contradicted by the Catholic records of the time, which declared this a “calumnious falsehood,” suggesting instead that “the truth is that [he] proudly refused to let his hands be tied. But upon the archbishop showing him the crucifix, he became resigned and kept silence.” BLANCHET, *supra* note 89, at 182; *see also Reminiscences of Early Days*, *supra* note 78 (calling the assertion about the request to be killed with a knife “somewhat fictitious and did not take place.”).

⁹⁹ RUBY & BROWN, *supra* note 1, at 171 (highlighting that the New York Times described the executions as a “spectacle” (quoting New York Tribune, August 21, 1850)). Compare VERA LYNCH, *FREE LAND FOR FREE MEN: A STORY OF CLACKAMAS COUNTY* 35 (1973) (highlighting the onlooker’s curiosity), *with* LANSING, *supra* note 3, at 98 (“That was the look I saw—forsaking. Not rejoicing, not pitying. It was regret for the passing of old ways. Each step away from the wild country makes the heart heavy with forsaking.”).

¹⁰⁰ LANSING, *supra* note 3, at 95; *see also Execution of the Cayuse Indians*, *supra* note 98.

¹⁰¹ LANSING, *supra* note 3, at 95.

¹⁰² RUBY & BROWN, *supra* note 1, at 171.

¹⁰³ *Reminiscences of Early Days*, *supra* note 78

mile or so.”¹⁰⁴ Beyond that, the fate of the Cayuse Five is unknown to all living.

G. *The Immediate Aftermath*

The execution of the Five did not, in fact, mark the end of tensions between the Cayuse and white settlers. Ongoing racialized violence against Native Americans continued to mark life in the region. Furthermore, the decade that followed included a series of negotiations that resulted in treaties that established the reservation systems still present today.¹⁰⁵

No shortage of accounts of the “Whitman Massacre” arose in the nineteenth and early twentieth centuries. Many of these followed well-rehearsed, simplistic, settler-centric narratives about the events.¹⁰⁶ To the extent they discussed the Cayuse Five at all, they focused almost exclusively on the killing of Whitman and ended with accounts of the public execution. None of them, to my knowledge, took up the question of what happened with the bodies of the Five.

As an outsider, I cannot today say with certainty the extent to which the Cayuse Five were discussed within the Cayuse community. It may be that the Five were discussed at some length and across generations, but that those accounts were not shared beyond the confines of the Tribe. It may also be that the events at Waiilatpu, in Oregon City, and throughout the region in the years that followed can best be understood through the lens of collective trauma, or even generational silence. Through those lenses, and with our evolving understanding of the multi-generational psychological effects of trauma, one could easily also imagine that the Cayuse Five were discussed only in hushed conversations, perhaps only among a certain generation.¹⁰⁷

¹⁰⁴ In *Juggernaut*, Ronald Lansing writes, “The bodies were taken down and carted up Abernethy Road over here across the bridge a half mile or so,” a location he credits E.C. Hackett as having offered. *see also Five Deaths: A Sequel to Marcus Whitman*, SUNDAY OREGONIAN, Sept. 24, 1933 (“Mr. Hackett says that the Indians were buried up Abernethy Road, on the right, hardly a half mile from Abernethy bridge. There is no marker, but Mr. Hackett’s father often pointed the spot out to the lad as they were passing the place.”).

¹⁰⁵ RUBY & BROWN, *supra* note 1, at 270; TATE, *supra* note 6, at 188–190; Kevin Fraley, *Treaty of Walla Walla, 1855*, GOVERNOR’S OFF. INDIAN AFF. (Jan. 21, 1997) <https://goia.wa.gov/tribal-government/treaty-walla-walla-1855> [<https://perma.cc/2RSP-QATV>].

¹⁰⁶ *See, e.g., Oregonian Article About O.F. Canfield and His Recollections of the Whitman Killings (Typescript Copy)*, ARCHIVES WEST, <https://archiveswest.orbiscascade.org/ark:80444/xv05143> [<https://perma.cc/T2HW-DURJ>]; MATILDA J. SAGER DELANEY, A SURVIVOR’S RECOLLECTIONS OF THE WHITMAN MASSACRE 19 (1920).

¹⁰⁷ For a heart-wrenching example of the ways in which traumatic experiences may—or may not—be shared between generations, even within cultures that prioritize oral histories, *see* Denise Lajimodiere, *A Healing Journey*, 27 WICAZO SA REV. 5, 6 (2012) (recounting experiences learning of a prior generation’s experiences in the Chemawa Indian Boarding School). Generational differences in their openness to speak of traumatic events is well documented. *See, e.g.,* Linda O’Neill et al., *Hidden Burdens: A Review of Intergenerational, Historical and Complex Trauma, Implications for Indigenous Families*, 11 J. CHILD

There is some oral history to suggest that at least one point, Cayuse people visited Oregon City, hundreds of miles away, to pay homage to the Five. These accounts raise multiple possibilities. Maybe they came to pay their respects generally, but not to a particular site. Maybe they came to a particular site, and that site was erroneously identified as the burial location of the Cayuse Five. Maybe they came to the burial location of the Cayuse Five, but the bodies were subsequently moved. Maybe the burial location of the Cayuse Five was known a hundred years ago, even though it is unknown today.

H. The Modern Search for the Cayuse Five

The fact that the burial locations remain unknown is not because people have not been trying to find them. Cayuse Elders continue to name finding the burial locations among the Tribe's top priorities. One of the elders, born in 1933, holds the name Cougar Shirt, K'oy'am'a Šuumkiin, after one of the Five. He expressed his firm desire to help lay his namesake to rest before his passing.¹⁰⁸ The Confederated Tribes of the Umatilla Indian Reservation ("CTUIR"), which includes the Cayuse, has dedicated incredible resources to the search over the years. This has included the direct allocation of their own time and staff and that of the Tamástslikt Cultural Institute. It also has involved outreaches to others who might aid in the search. National Park Service employees have dedicated weeks to searching through specific records. Tim Nitz, the former Superintendent of the Whitman Mission National Historic Site, has spent more than two decades "following leads and chasing

ADOLESCENT TRAUMA 173, 181 (2016) ("A phenomenon involving the third generation is the survivors' willingness to talk to their grandchildren rather than to their children. The hypothesis is that it takes 'a time-span of two generations to stimulate the willingness and motivation to return to traumatic past'" (quoting Pierre Fossion et al., *Family Approach with Grandchildren of Holocaust Survivors*, 57 AM. J. PSYCHOTHERAPY 519, 524 (2003))). Recent research has revealed some of the mechanisms, beyond communication, by which the effects of trauma may be generationally transmitted. See, e.g., Karina L. Walters et al., *Bodies Don't Just Tell Stories, They Tell Histories: Embodiment of Historical Trauma Among American Indians and Alaska Natives*, 8 DU BOIS REV. 179, 185 (2011); Amy Lehrner & Rachel Yehuda, *Cultural Trauma and Epigenetic Inheritance*, 30 DEV. PSYCHOPATHOLOGY 1763, 1766 (2018). Here, the more immediate question is whether or how the Cayuse Five were even discussed within the relatively safer context conversations among the Cayuse themselves. And accounts on this question have varied. The National Park Service has, at a minimum, embraced the idea that these kinds of generational dynamics may be at play. See Feliks Banel, *Whitman Mission Attack and the Lost Graves of the 'Cayuse Five'*, MYNORTHWEST, <https://mynorthwest.com/830534/> (Nov. 29, 2022, 7:30 AM) [<https://perma.cc/339Q-8MQN>] (suggesting that Tribal people may have similar intergenerational communication patterns observed in families with connections to the Holocaust).

¹⁰⁸ Note to readers: The elder in question regrettably passed away between the date of my speech at the Saltman Center and the publication of this Article, his namesake and other ancestors not yet having been put to rest. See *Official Obituary of Leslie Everett Minthorn*, PENDLETON PIONEER CHAPEL, <https://www.pioneerchapel.com/obituary/Leslie-Minthorn> [<https://perma.cc/L7WB-FES7>].

opportunities.”¹⁰⁹ The CTUIR entered partnerships with both the Whitman Mission National Historic Site and Whitman College. In addition to search related activities, these partnerships aimed to provide a more thorough and inclusive history of the Cayuse Five and the Whitman Killings as well as to collaborate on educational projects.¹¹⁰ Tribal officials sought out, found, and interviewed Oregon City residents whose family stories included mentions of the Cayuse Five and their burials. Historians have revisited the narratives, resulting in a flurry of scholarly and other activity on the killing of the Whitmans over the last decade.¹¹¹ Oregon City officials have offered their time and expertise which has aided the search for specific information about the history of the city and potential sites of interest. Museums like the Oregon Historical Society, the Museum of the Oregon Territory, and the State Archives of Oregon have offered their aid by providing access to their repositories. In these, the Tribe and their partners have found information that has influenced the search in profound ways.

Over the last two years, I have had the honor of joining this search by collaborating with Bobbie Conner, Director of Tamástslíkt Cultural Institute. Our collaboration took the principal form of multiple undergraduate colloquia, taught out of the Robert D. Clark Honors College at the University of Oregon. My students, all of whom were chosen through a competitive application process, have been deeply engaged in a search that looks much like a love song to the liberal arts. One week, we mostly made eye contact with the students who were fluent in French, so that we could make meaning of a priest’s diary and of church records. One week, those who understood physics were at the center of attention, as we tried to determine the maximum grade up which a handcart built in 1850 could ascend if laden with five bodies. One week, we were led by the spatial data scientists, as we tried to overlay historical maps against more modern maps to visually reimagine historical Oregon City in the modern day. One week, our geologists and geographers were in the foreground, as we tried to use LIDAR data to understand how the creek, along which one account suggests the Five were buried, may have avulsed over the last 170 years. One week, folklorists helped us to understand variations in burial customs at the time. Often, my students who are enrolled members of the CTUIR provided context into their own research efforts. And so on. In all, my students and I have spent more than 5000 hours so far,

¹⁰⁹ Email from Roberta Conner, Exec. Dir., Tamástslíkt Cultural Inst., to author (Sept. 4, 2023, 5:29 PM) (on file with Nevada Law Journal).

¹¹⁰ FOUNDATION DOCUMENT WHITMAN MISSION NATIONAL HISTORIC SITE, NAT’L PARK SERV. 20 (2017); *Whitman College Advisory Council for CTUIR Collaboration (WCACCC)*, WHITMAN COLL., [https://www.whitman.edu/provost/collaboration-with-the-confederate-d-tribes-of-the-umatilla-indian-reservation-\(ctuir\)](https://www.whitman.edu/provost/collaboration-with-the-confederate-d-tribes-of-the-umatilla-indian-reservation-(ctuir)) [<https://perma.cc/SHZ6-72E7>]; *Whitman Mission: History & Culture*, NAT’L PARK SERV., <https://www.nps.gov/whmi/learn/historyculture/index.htm> [<https://perma.cc/4P28-SKNC>] (Jan. 25, 2023).

¹¹¹ HARDEN, *supra* note 59; TATE, *supra* note 6, at xx; AS DAYS GO BY, *supra* note 65, at 64–65; KOENIG, *supra* note 10, at 7; *see also* LANSING, *supra* note 3, at 6.

leaning into the search—always in close coordination with our colleagues in the Tribe. We believe we are getting closer. But the burial location remains unknown. The Five have not been put to rest.

II. THE REACH OF CONFLICT AND DISPUTE RESOLUTION AS A FIELD

To treat the search for the burial locations of the Cayuse Five as merely a historical mystery would be to miss its current, living implications. As many in the conflict resolution world know, the past is present in some contexts.¹¹² This is one of those cases. The mere existence of a historical question does not, of course, cause the question to fall within the scope of conflict resolution. Nor does the involvement of an Alternative Dispute Resolution (“ADR”) professor render this effort somehow automatically part of the field. And yet, I am convinced that this work belongs appropriately under the broad umbrella of conflict resolution, without respect to any questions of what additional steps might follow. This work has brought me insights into my “home” field unlike any work I have done in the more than three decades in the practice and study of conflict resolution.¹¹³

There is a conspicuous conflict resolution “hook” to the search for the Cayuse Five. About twenty years ago, someone from the state of Oregon approached the Cayuse, after looking at this record, and said, essentially, “That’s awful. We’re sorry. And we wonder whether maybe it would make sense to engage in some sort of historical reconciliation work?” And the Cayuse responded, by saying, essentially, “Historical reconciliation? Maybe. First, give us our guys back.” And someone in Oregon said, “What? I mean, we don’t know where they are.” And the Cayuse said, “You get back to us.”¹¹⁴

I was not present for this exchange. Indeed, I only heard about it a couple of decades later. But even if I had been there, it is clear to me that what the Cayuse did *not* need was a speech from an ADR guy about why they should, in fact, consider reconciliation. Their judgment was (is) that they needed to find their ancestors, to put them to rest. And so, my students and I leaned into the search.

That there was the prospect of some conflict resolution connection at one of the junctions in the search does not resolve the question of whether the

¹¹² See, e.g., Brady Wagoner & Ignacio Brescó, *Conflict and Memory: The Past in the Present*, 22 J. PEACE PSYCH. 3, 3 (2016).

¹¹³ The experience of designing and leading these classes has also stretched my imagination as a professor. And I expect I will spend a long time in the coming months and years unpacking the lessons, opportunities, pitfalls, and joys embedded in the pedagogical, administrative, and other aspects of these courses. As a small preview, I am increasingly convinced that there is some version of clinical education one can responsibly bring to an undergraduate population. But this is not the forum for that particular discussion.

¹¹⁴ William S. Boyd School of Law, *2023 Memorial Beecroft Lecture: Truth. Regardless of Reconciliation?*, BOX (Feb. 21, 2023), <https://bsl.app.box.com/s/b8xb000zvrw05p43sdsdsvvxb2c9bvze>.

search itself is fairly placed under the umbrella of conflict management, dispute resolution, or peacemaking. Before making my case that it does, in fact, belong there, I want to give voice to some of the most potentially persuasive reasons one might conclude otherwise.

A. *Our Field's Traditional Responses to Historical Injustices*

Most within our field would agree that we ought not to be pigeonholed into the narrowest possible conception of ourselves. We are about small claims court and community mediation, but we are not just about that.¹¹⁵ We are about consensual changes to family structures, but we are not just about that.¹¹⁶ We are about streamlined and customized dispute processing for business, and at least arguably, for a broader population of consumers, employees, patients, and students.¹¹⁷ The vision of a specific dispute, arising within a particular context, involving identifiable parties, each of whom has identifiable

¹¹⁵ For a sense of the breadth of community-based mediation centers and the important work they do, see NAT'L ASS'N FOR CMTY. MEDIATION, <https://www.nafcm.org/#> [<https://perma.cc/PY6C-SVTC>]; and the various state community mediation programs around the country. See, e.g., *Oregon Office for Community Dispute Resolution*, UNIV. OR. SCH. OF L., <https://law.uoregon.edu/academics/centers/adr/oocdr> [<https://perma.cc/7FFB-942B>]; *CDRP Mediation*, CMTY. DISP. RESOL. PROGRAM, <https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/CDRP/> [<https://perma.cc/6XSV-WRMH>]; RESOL. MASS., <https://www.resolutionma.org/> [<https://perma.cc/4Z2R-E24N>]; N.Y. STATE DISP. RESOL. ASS'N, <https://www.nysdra.org/> [<https://perma.cc/C4QX-SJJZ>]; *About Us*, RESOL. WASH., <https://www.resolutionwa.org/> [<https://perma.cc/TQQ9-HV63>].

¹¹⁶ The ABA Family Law Section has a standing committee on Alternative Dispute Resolution, and the ABA Section on Dispute Resolution has a standing committee on Collaborative Law—an indication of how deeply embedded dispute resolution is within family law. *Alternative Dispute Resolution*, AM. BAR ASS'N., https://www.americanbar.org/groups/family_law/committees/alternative-dispute-resolution/ [<https://perma.cc/CUX7-LVJA>]; *Dispute Resolution Section*, AM. BAR ASS'N., https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/dr-committee-descriptions.pdf [<https://perma.cc/8WSZ-38TW>]. Child custody cases are subject to mandatory mediation in most states, although most have exceptions for circumstances involving intimate partner violence. See Anne M. Sidwell, *Mandatory Child Custody Mediation: A Call on California to Protect Domestic Violence Survivors*, 57 U. S.F. L. REV. 135, 136 (2022) (critiquing California's lack of a domestic violence exception).

¹¹⁷ Arbitration represents the most conspicuous example of this promise. For an overview of arbitration in labor and commercial contexts, see generally GARY BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* (3d ed., 2012); CARRIE MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 311–21 (2005); LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 369–78 (4th ed. 2009). Many have raised concerns about the application of (or more accurately, imposition of) labor and business-to-business dispute resolution processes such as arbitration into contexts involving less sophisticated disputants with fewer choices and fewer resources. See, e.g., Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1634–35 (2005); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1253–54 (2009); IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (2013). But see Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29, 31 (2017).

interests and the agency to pursue those interests in an exercise of autonomy is not necessarily inappropriate. Our field has considerable experience assisting a single plaintiff and a single defendant to find consensual resolution to the single legal dispute that encompasses all differences between the two parties. That has just never been the only thing within which our field has concerned itself.

Many of the intellectual forebearers to our field concerned themselves first, and in some cases principally, with far larger, current, threatening, and forward-looking mass scale conflicts. The Cold War, for example, was a catalyst for many things, and among them, a drive toward an understanding of how humans deal with differences in a way that does not threaten the existence of the species.¹¹⁸ Others, at a more local level, envisioned nonetheless wholesale changes in the ways humans dealt with their differences, through things like community boards and other mechanisms for community engagement and empowerment.¹¹⁹

Still, others in our field have dedicated their creative and professional energies toward thinking about how properly to address historical injustices—wrongs that have occurred already—in ways that are superior to adjudicative and retributive systems. Such undertakings assume that the punitive strategy of the Nuremberg Trials¹²⁰ represents only one of a range of different possible responses to historical injustices. The two most prominent examples of this category of ADR applied toward historical injustices are Truth & Reconciliation Commissions (“TRCs”) and the broad umbrella of Restorative Justice initiatives.

¹¹⁸ Many of the leaders of one strand of conflict resolution research and theory drew their initial inspirations and examples from the Cold War. *See, e.g.*, ROGER FISHER, *INTERNATIONAL CONFLICT FOR BEGINNERS* 845 (1969); THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 221 (1960); WILLIAM ZARTMAN & MAUREEN R. BERMAN, *THE PRACTICAL NEGOTIATOR* 1–2 (1982); ROGER FISHER, ET AL., *BEYOND MACHIAVELLI* 17 (1994); ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 60–61 (1984); R. DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS* 10 (1957).

¹¹⁹ *See, e.g.*, Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 L. & SOC. REV. 709, 709 (1988); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. DISP. RESOL. 1, 1–2 (2000); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U.L.Q. 787, 789–91 (2001).

¹²⁰ The Nuremberg Trials raised a number of complex legal questions, and punishment was not the only motivation for the proceedings. Indeed, the Holocaust itself was central to only one part of the proceedings. *See* 60TH ANNIVERSARY INT'L CONF., *THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945* 11–12 (Herbert R. Reginbogin et al. eds., 2006). Still, I think it accurate to say that the Nuremberg Trials represent a prominent example of a process centered on law and, to some extent, retribution. *See* Robert H. Jackson, *Nuremberg in Retrospect: Legal Answer to International Lawlessness*, 35 AM. BAR ASS'N J. 813, 813 (1949).

Truth and Reconciliation Commissions entered at least modern political and academic consciousness in post-apartheid South Africa in the 1990s.¹²¹ There, witnesses and victims of human rights violations were given an opportunity to provide testimony about that which they experienced and that which they suffered. Many alleged and actual perpetrators also testified, often with promises of amnesty in exchange for their testimony.¹²² Structurally, the South African TRC sought to establish a shared understanding of the past and then link it both to statements of regret and the potential, depending on the context, of forgiveness or reparation.¹²³

We have seen TRCs in many other instances as well.¹²⁴ Within the United States, the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission¹²⁵ stands out as potentially the most relevant to the case of the Cayuse. Established about a decade ago, the Wabanaki-State Child Welfare Truth and Reconciliation Commission's mandate was to give voice to the Wabanaki people and to other involved parties, regarding their experiences with

¹²¹ For a thought-provoking perspective on the South African TRC process, *see generally* DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* (2000).

¹²² The nature and structure of the amnesty provided in the South African TRC differs from some other TRC models. *See* ADAM SITZE, *THE IMPOSSIBLE MACHINE: A GENEALOGY OF SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 3-4* (2013) (describing and then critiquing the scholarly consensus that "because of the individual and conditional, rather than general, scope of the amnesty [the South African TRC] offers: this unique twist on amnesty not only gave the TRC a middle way between the retributive justice of Nuremberg and the blanket amnesties of Chile and Argentina; it also allowed the TRC to exchange amnesty for truth"). Still, most if not all TRCs offer some form of amnesty to those who participate.

¹²³ The literature on the South African Truth and Reconciliation Commission is extensive and thoughtful. *See, e.g.*, SITZE, *supra* note 122, at 20; Alex Boraine, *The Truth and Reconciliation Commission in South Africa*, in *HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD* 89, 89-90 (Kamal Hossain et al. eds., 2000). *See generally* ANTJIE KROG ET AL., *THE LIMITS OF TRANSITION: THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION 20 YEARS ON* (Mia Swart & Karin van Marle eds., 2017); RICHARD A. WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* (2001).

¹²⁴ Truth and reconciliation work was among the constellation of initiatives focused on the abhorrent history of Indian Residential Schools in Canada. *See generally, e.g.*, DAVID B. MACDONALD, *THE SLEEPING GIANT AWAKENS: GENOCIDE, INDIAN RESIDENTIAL SCHOOLS, AND THE CHALLENGE OF CONCILIATION* (2019); PAULETTE REGAN, *UNSETTLING THE SETTLER WITHIN: INDIAN RESIDENTIAL SCHOOLS, TRUTH TELLING, AND RECONCILIATION IN CANADA* (2010). For a brief summary of TRC work in Sierra Leone, Ghana, Nigeria, Chad, and Morocco, *see generally* JOHN PERRY & T. DEBEY SAYNDEE, *AFRICAN TRUTH COMMISSIONS AND TRANSITIONAL JUSTICE* (2015); *FLOWERS IN THE WALL: TRUTH AND RECONCILIATION IN TIMOR-LESTE, INDONESIA, AND MELANESIA* (David Webster ed., 2017); REBEKKA FRIEDMAN, *COMPETING MEMORIES: TRUTH AND RECONCILIATION IN SIERRA LEONE AND PERU* (2017) (describing TRCs as "important but contentious mechanisms for conflict resolution," and contextualizing their use in post-conflict societies).

¹²⁵ Esther Altvater Attean et al., *Truth, Healing, and Systems Change: The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission Process*, 91 *CHILD WELFARE* 15, 16-17 (2012).

the Indian Child Welfare Act.¹²⁶ The Commission was also charged with formulating recommendations stemming from the truths it unearthed. The Commission's final report, almost one hundred pages in length, made sixteen specific factual findings and offered fourteen policy recommendations.¹²⁷

The second major archetype of alternative processes for addressing historical injustices falls under the umbrella label of Restorative Justice. They draw from a range of cultural and religious traditions around the world, and they have considerable variation in practice.¹²⁸ Put briefly, however, restorative justice conceptualizes the scope of participation far more broadly than adjudicative systems. Courts may ask about rights holders, about standing, and about the jurisdictional reach of tribunals. Restorative justice asks also about those who might have been affected more broadly, as well as about those who might have a potential role to play in moving beyond the effects of the specific actions in question.¹²⁹ Victim-offender circles, for example, bring together not only those who the law might narrowly define as the perpetrator and the victim, but also the community or communities that are affected by or contribute to both the past actions and the potential paths forward.¹³⁰ In this way, the idea is that the prospect of a wrong from the past might be addressed in some manner more appropriate than would a typical punitive or criminal process.

The case of the Cayuse Five *may* represent the kind of historical injustice to which some process or processes might usefully be applied. I could debate that assertion. But I think we can (and should) all agree that whatever else this search has been, it has *not* been an exemplar of either of these two classic approaches to conflict resolution or peacemaking.

¹²⁶ 25 U.S.C. § 1902.

¹²⁷ See *Beyond the Mandate: Continuing the Conversation*, ME. WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMM'N (June 14, 2015), https://www.wabanakireach.org/maine_wabanaki_state_child_welfare_truth_and_reconciliation_commission [<https://perma.cc/9DU6-DQTN>].

¹²⁸ For a succinct summary of restorative justice, its foundational concepts, and the traditions upon which it builds, see generally HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (2014). I do note that Zehr joins my characterization of restorative justice as distinct from the work of reconciliation: "Restorative justice is not primarily about forgiveness or reconciliation." *Id.* at 8. Zehr might not join me in my taxonomy in which it sits opposite of adversarial, adjudicative methods: "Restorative justice is not necessarily the opposite of retribution." *Id.* at 13. One finds, within the broad history of the umbrella of restorative practices, a great number of indigenous practices: see, e.g., Trevor Reed, *Restorative Justice for Indigenous Culture*, 70 UCLA L. REV. 516, 516–95 (2023).

¹²⁹ See generally John Braithwaite, *Restorative Justice and a Better Future*, in *A RESTORATIVE JUSTICE READER* (Gerry Johnston ed., 2012); HOWARD ZEHR, *CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES* (2015); AMY LEVAD, *RESTORATIVE JUSTICE: THEORIES AND PRACTICES OF MORAL IMAGINATION* (2012).

¹³⁰ For an overview of victim-offender mediation processes, see generally MARK S. UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENGIAL GUIDE TO PRACTICE AND RESEARCH* (1st ed. 2000).

At least three features distinguish this work from that of TRCs. First, TRCs have generally arisen in the context of transitional justice—of societies emerging from one political reality (a civil war, for example), seeking to establish the conditions for peace, justice, or stability. It is true that we live in a moment when comparatively more people are examining our racialized past in critical ways—in Oregon and beyond. Still, Oregon is a far cry from a society emerging from a civil war, the removal of a bloody dictatorship, or some other conspicuously transitional moment. To be clear, TRCs need not be, and have not been, relevant only in transitional justice contexts.¹³¹ One sees examples within the United States, in the Maine-Wabanaki and Greensboro commissions, for example.¹³² Still, the TRCs in South Africa, Chile, Uganda, Haiti, Rwanda, and Peru are the ones with which the public is most familiar.¹³³ And the United Nations High Commissioner for Human Rights categorizes Truth Commissions as part of the work of transitional justice—quite different from the context of this search.¹³⁴

Second, the Commissions at the heart of TRCs are almost always intra-governmental. Members, for example, may be diverse political, military, or economic leaders. Others may participate, like eyewitnesses or spiritual or social leaders, but the Commissions at the heart are almost always appointed. They come from the ranks of those ascending into power, those transitioning out of power, or those able to affect the viability of the new order. Those involved in the Cayuse Five search efforts meet these descriptions in essentially no ways. We are not a commission. We are not appointed (other than self-appointment, with all concomitant risks). And we do not reflect an intra-governmental exchange. If anything, the collaboration with the Cayuse is a government-to-government relationship.¹³⁵ The Cayuse, through the

¹³¹ Dr. Bongani Finca, *Foreword* to LISA MAGARRELL & JOYA WESLEY, *LEARNING FROM GREENSBORO: TRUTH AND RECONCILIATION IN THE UNITED STATES* viii (2008) (“[Q]uestion[ing] the assumption that truth commissions are instruments designed for emergent or fragile states of the Third World, coming out of conflict to peace, dictatorship to democracy, or a breakdown of the rule of law to civility. . . . Many so-called stable democracies have a number of skeletons in their closets. There are several historical acts of national shame that will not go away until the wounds are cut open and addressed, not to seek vengeance but understanding, not for retaliation but for reparation, not to victimize perpetrators but to heal wounded memories.”).

¹³² See generally *id.*

¹³³ The Greensboro TRC was “[c]onsciously modeled on experiences in South Africa and other countries around the world.” *Id.* at 4.

¹³⁴ *Truth: OHCHR and Transitional Justice*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/transitional-justice/truth> [<https://perma.cc/JL4Y-W698>].

¹³⁵ Videotape: Searching for the Cayuse Five (University of Oregon Clark Honors College 2022) (on file with the Nevada Law Journal). At the conclusion of each of the Clark Honors College courses, students presented their findings to tribal members and leaders during a ceremony in the Many Nations Longhouse on the campus of the University of Oregon. Jason Younker, Assistant Vice President and Advisor to the President on Sovereignty and Government-to-Government Relations at the University of Oregon, attended each of these. Also, the chief of the Coquille Indian Tribe, said of the students’ work “for you

Confederated Tribes of the Umatilla Indian Reservation, on the one hand, and on the other, government officials of various flavors, acting in official or quasi-official ways. City officials, state government employees, and faculty and administrative leaders from the state flagship research university are all representatives of different sovereigns. Our work is, and should be coordinated, but this is not the official action of any single sovereign.

Third, and perhaps most conspicuously, TRCs link their work explicitly to the goal of reconciliation. It is right there in the acronym: Truth and *Reconciliation* Commissions. And the process is designed with the specific aim of achieving this goal. To be clear, I am not anti-reconciliation. It is just that reconciliation is not the point of this work. We are searching for Truth: the factual answer to a specific motivating question. We are no commission, and we are not aimed at reconciliation. Whatever else this is, it is not TRC work.

Similarly, this is not restorative justice work, even as that umbrella is sometimes broadly conceived. Again, it is not that those searching for the Cayuse Five are opposed to restoration or to justice. Instead, it is that restorative justice work almost always sits aside (or within) the criminal justice system or some other disciplinary process. In that context, it serves either a diversionary function or a post-conviction remediation function. Here, no person or people lives under the threat of trial. No person or people sit in jail for any of the above actions. Briefly, although restoration may be lacking and justice may yet be elusive, the search for the Cayuse Five is not properly understood as restorative justice work, as that term has come to be understood.

A final, and perhaps most enduringly challenging distinction for me intellectually, stems from the fact that this modern-day work relates to a set of historical questions to which no living person can speak directly. A critical piece of this work examines long-ago history. It is not that this search does not matter to anyone alive. I promise you this matters quite a bit. And it is not that ADR is any stranger to the idea that in some contexts, the past is present—both in the temporal sense (it is alive in the hearts and minds of people today) and in the geospatial sense (it is here, among us, with us). That does not distinguish the Cayuse Five context. But we must note that this is no TRC hearing, with eyewitnesses giving accounts of what they saw, and what they did. This is no restorative circle, with communities engaged in collective processing, with an eye toward moving forward. The living can speak directly as witnesses to only two aspects of the Cayuse Five case: the enduring impacts on those communities most affected, and oral histories handed down over generations. We have heard both and seek to hear more of each. But that is not the stuff of traditional conflict resolution.

students[, t]his is how you do research with tribal people. You are responsible to them when you get done. Even as a tribal person, I am responsible to the people I have studied and in my tribe[, b]ut for you, this is absolutely the appropriate way to finish up what you have done. So thank you very much for that as well.”

B. Shared Conflict Resolution Process Values

Before conceding to this line of thinking, however, I want at least to point out three animating values this work shares with our field's efforts in the face of historical injustice. These are so central that I believe they support the assertion that this work belongs under the broad test of our field.

1. Truth Exists, and Matters, and Should Probably Come First.

In brief, the postmodernists are wrong. The post-truth dystopia some have declared already to be *our* reality is wrong, both descriptively and normatively.¹³⁶ I recognize fully that many ADR processes, particularly consensual processes like mediation, steer away from backward-looking truth-seeking, favoring instead the elevation of forward-looking interests and problem-solving.¹³⁷ This future orientation makes great sense, particularly in contexts of clashing perceptions and values. But let us not get carried away. Sometimes there is a difference between true and untrue. Sometimes truth matters. And when it does, establishing the truth should probably come first. Even in TRC contexts, the declarations of a commission are predicated on the establishment of a common set of facts, of the truth.¹³⁸ The search for the Cayuse Five is not predicated on establishing a singular historical account of exactly what happened at the Whitman Mission, much less of why those things happened that way. Those are not factual questions capable of a singular, enduring answer. Instead, here, the animating question is a profoundly factual one: Can one locate the burial locations of the Cayuse Five? That is a factual question. It matters. And to the extent we are able to, we should get on with answering that question, even if many other questions remain unaddressed.

¹³⁶ I do not intend here casually to dismiss all of epistemic, relativistic, or postmodern thinking. This is not the forum for that particular argument, and quite likely, I am not qualified (even if I am dispositionally inclined) to make such an argument. Here, instead, I merely suggest that although some aspects of history may forever sit as subjective or unknowable, and although some aspects of policymaking may frustratingly center on appeals to emotion or personal belief, rather than on objective fact, the question at the heart of this Article is—and should be—different.

¹³⁷ See, e.g., GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING 129–31 (2008); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 53 (2005). For a critique of the legal system's failure to recognize the potential importance of including forward-looking information, see Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727, 745–47 (2005).

¹³⁸ This choice to elevate truth is not without cost. In the words of South African Minister Kadar Asmal, “[w]e must deliberately sacrifice the formal trappings of justice, the courts, and the trials, for an even higher good: Truth.” quoted in PERRY & SAYNDEE, *supra* note 124, at 18. See generally SITZE, *supra* note 122.

2. *Process Design Matters, Particularly with Respect to Participation.*

Everything we have learned about dispute systems design urges a set of questions: Whose interests matter? Whose voices must we hear? In what sequence? Who should play which roles? And so on.¹³⁹ Depending on the process, we see different answers here. Restorative circles cast the net differently than TRCs. And who is invited to participate in a mediation is different from who is invited (or compelled) into arbitration. In the Cayuse Five context, the Tribe has been playing the role of process designer and principal participant. They have sometimes drawn careful boundaries around who is involved. Quite reasonably, they have data sovereignty interests, and they expect all who participate in the search to respect those interests.¹⁴⁰ They also recognize that great mischief would result from trying to crowdsource the search. What a nightmare it would be to have hundreds of would-be “helpers” with metal detectors and pickaxes, wandering around Oregon City. What cacophony would result from having hundreds of amateur sleuths digging through materials at random? And yet, the Tribe recognizes the likelihood that they need others engaged in this work, in order to move forward on the search. The CTUIR and Tamástslíkt cannot hold every possible perspective, skill set, or professional training. Nor do they necessarily have the same immediate access to research and resources academic institutions so often take for granted. Furthermore, given the amount of information this search engages with, they need additional bandwidth to digest the hundreds of gigabytes of potentially relevant information. And of course, sometimes, an extra set of fresh eyes may spot that which had been elusive.

3. *Participation Itself Matters.*

Doing the work has an impact. Even witnessing the work has an impact. Virtually every form of consensual dispute resolution shares a foundational belief that if done correctly, participating in the ADR process has the potential to change the perspective or experience of the participant—one that extends

¹³⁹ For overviews of dispute systems design questions, *see generally* LISA BLOMGREN AMSLER ET AL., *DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT* (1st ed. 2020); WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1st ed. 1988); CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1st ed. 1995).

¹⁴⁰ As one of many indications of the CTUIR’s sovereignty, although perhaps none is needed, *see Declaration of Sovereignty, in* COMPREHENSIVE PLAN: THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, 43–46 (2018), https://ctuir.org/media/sychezsg/2018updated-2010_comprehensiveplan-webversion.pdf [<https://perma.cc/4V85-LDY7>]. Regarding the concept of data sovereignty, particularly in work with indigenous communities, *see* Stephanie Russo Carroll et al., *The CARE Principles for Indigenous Data Governance*, 19 DATA SCI. J. 1, 1 (2020); *see also* Allyson Kelley et al., *Research Ethics and Indigenous Communities*, 103 AM. J. PUB. HEALTH 2146, 2146 (2013).

beyond the conditional reactions of other participants. Speaking one's truth, even if not in a way that persuades another to a particular course of action, affects the speaker. Similarly, hearing and witnessing others' work matters. Every conception of restorative circles of which I am aware recognizes this dual potential—impact on speaker and impact on listener, witness, or participant.¹⁴¹ In the context of the Cayuse Five, I hesitate to speak to the experiences of others outside of the class. But I do not hesitate in the least to share that I have been changed—by the tribal ceremonies, the drums, the songs, the ritual of the *washat*, the blanketing, my naming ceremony, the elders' stories, my students' efforts and professionalism, the generosity of others who are aiding in the search. During the second offering of my course, six students piled into a barely-road-worthy car and spent their weekend going through nineteenth-century receipts in an archive more than a hundred miles from our campus. Four other students catalogued boxes of manuscripts and notes. Two students developed complex project management systems to track the work. And every Friday morning, these students reported on their previous week's activities not only to each other, but also to tribal partners whose appetite for learning matches that of my students. I am—we are—affected by the mere fact of participation.

C. *Is This Pre-Conflict Resolution?*

Returning to the question of whether this belongs under the umbrella of our field, some have suggested that this is not conflict resolution work. They note, however, that if the search is successful, it could lay the groundwork for the kind of process conflict resolution *is* actually equipped to provide. “So,” they declare, with a sort of clever mediator's joy in their voice, “good news, it's pre-Conflict Resolution!”

I am not persuaded. I have been deeply and enduringly skeptical of our field's periodic initiatives to draw definitional boundaries. One of my earliest law review articles took to task some of the hard work being done to try to define “mediation.”¹⁴² My oppositional energy is particularly heightened when it comes to distinctions that are essentially temporal. For example, some

¹⁴¹ For an overview of such processes and their underlying principles, *see generally* A RESTORATIVE JUSTICE READER (Gerry Johnstone ed., 2d ed. 2013); LORRAINE STUTZMAN AMSTUTZ, THE LITTLE BOOK OF VICTIM OFFENDER CONFERENCING: BRINGING VICTIMS AND OFFENDERS TOGETHER IN DIALOGUE (2009); BOB COSTELLO ET AL., RESTORATIVE CIRCLES IN SCHOOLS: BUILDING COMMUNITY AND ENHANCING LEARNING (2010); RESTORATIVE JUSTICE: PROMOTING PEACE AND WELLBEING 134 (Gabriel Velez & Theo Gavrielides eds., 2022) (“[M]ost participants (victims and offenders) found it valuable and satisfying, having felt ‘listened to, understood and taken seriously’ as well as feeling secure and safe in the process”).

¹⁴² Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69, 72 (2005).

mediators extol the virtues of caucus-free mediating.¹⁴³ They argue that mediators ought only to meet with all parties together, in joint sessions. And there are some good reasons for this stance, based on the potential impacts on the disputants' direct interactions with each other. But scratch a little deeper, and you will often find that the very same mediators engage in deep and substantive "pre-mediation" sessions with the disputants individually. I am not arguing against the idea of talking with disputants separately, early on, even potentially as a first step. Indeed, doing so may be critical to designing an effective process. But for virtually all purposes, those meetings with disputants are part of mediating, regardless of whether the talismanic phrases that typically accompany a mediation's opening session have yet been uttered.

Similarly, outside of the mediation context, one finds any number of efforts to describe certain kinds of work as separate from, antecedent to, the work itself. But I can discern no theoretical justification for this line-drawing. Nor can I find anything in my experience as a practitioner to suggest that this distinction is meaningful. I once spent two days of my precious time on this planet engaged in meetings with representatives of an international negotiation I was helping to facilitate. Those meetings were almost entirely taken up by arguments over the shape of the table, the seating arrangement, and the timing and duration of the coffee breaks. To an outside reporter, perhaps, these were insubstantial to the point of being non-issues. Perhaps these meetings would be deemed as not even part of the "real" negotiations.¹⁴⁴ Those of us in the room with experience, though, knew that these were utterly crucial components of the negotiation. They were "pre" in the sense that they were issues that had to be resolved before some other issues could be addressed, but they were in every other sense a part of the process of these parties attempting to persuade each other to a particular course of action. It was all part of the mix. There were no pre-negotiations. There were only negotiations.

My second concern with the notion of this being labelled as pre-ADR work is that it makes the status of the work conditional. By this way of

¹⁴³ Perhaps the best-known exemplar of this approach is in GARY FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* (2008). *But see*, Christopher W. Moore, *Challenging Conflict Mediation Through Understanding*, 15 DISP. RESOL. MAG. 28 (2009) (promoting caucus use in certain circumstances); Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 327–29 (1994) (presenting an economic argument for caucus-based mediation, relying on the parties' willingness to provide confidential information to the mediator); Christopher W. Moore, *The Caucus: Private Meetings That Promote Settlement*, 16 MEDIATION Q. 87, 88–90 (1987) (arguing in favor of the use of caucuses in mediations generally). *See generally* JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* (2001) (surveying different mediator practices on the question of caucusing); DWIGHT GOLANN & MARJORIE CORMAN AARON, *MEDIATING LEGAL DISPUTES* (1996).

¹⁴⁴ Definitional qualifiers such as "real" are what J. L. Austin described as "trouser words," meaningful only if we permit a negative to provide the content of the definition. J. L. AUSTIN, *SENSE AND SENSIBILIA* 70 (1962). For a critique of such definitions in the context of mediation, *see* Moffitt, *supra* note 142, at 72.

circular thinking, it is pre-ADR work if (and only if) it eventually results in something we are more comfortable calling ADR. With loose apologies to Schrödinger's cat, the idea that work is ADR-related based on something that might or might happen down the road is taxonomically flawed.

Or maybe a more culturally relevant analogy: Yoda would have us to understand that there is Do, or there is Do Not. There is no Try.¹⁴⁵ In my mind, this is conflict resolution work, or this is not conflict resolution work. There is no pre.

If we find the burial locations of the Cayuse Five, the Tribe and others will then have decisions to make about whether to engage in some form of historical reconciliation process. I do not have any prediction about the likelihood of a subsequent reconciliation process. My point is not that the Tribe and others should not get to make that decision. Rather, my point is that they have not made that decision yet. And we should be skeptical of a system suggesting that one can only categorize the nature of a kind of work once one learns of subsequent decisions or outcomes.

Maybe this is just cognitive dissonance on my part. Maybe I just do not want my work to "count" or "not count" within my field based on things like the currently unknown avulsions of a creek during a flood in what is now northern Oregon in 1861, the flow and pH levels of water in the region, the accuracy of historical records and modern technologies, or the future decisions of tribal leaders.

The Cayuse, their colleagues, and my students have been striving to find answers. For some, that striving has involved years of work. I am confident that this striving matters. And I think it should matter in a way that the conflict resolution community recognizes.

D. What If It's Striving That Matters Most?

I readily concede that "striving" does not currently appear under the umbrella of conflict resolution processes. "Striving" fails appropriate definitional tests. What constitutes striving? How much work does one need to do in order to be rightfully named as striving? "Striving" fails or at least challenges normative boundaries. What of the slippery slopes? What is the internal morality or ethic of striving, if such a thing exists?¹⁴⁶ What would keep the works of zealots with whom we disagree from earning perhaps-precious real estate under our field's big umbrella?

¹⁴⁵ STAR WARS: THE EMPIRE STRIKES BACK (Lucasfilm 1980).

¹⁴⁶ I can scarcely imagine the thoughts Lon Fuller, widely considered the "founding" jurist of our field, might offer on the question of the relevant "moral integrity." Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution*, 2003 J. DISP. RESOL. 319, 341 (2003). See generally LON L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* (2001).

All good questions. But I am not the first to suggest a confluence between unarguably substantive work and the core of our field. Jen Reynolds has challenged us to consider the prospect that activism is part of our larger umbrella.¹⁴⁷ Larry Susskind has for decades urged that mediators have a responsibility to assure things like environmental justice as a core part of their work.¹⁴⁸ Bernie Mayer and Jackie Font-Guzmán have recently urged that “[t]he worlds of conflict engagement and social change are much more powerful, sustainable, and effective when they overlap, reinforce, and learn from each other, especially in the face of system resistance.”¹⁴⁹ Examples abound in which mediators explicitly take on, as part of their mediation role, substantive matters such as race, social justice, and discrimination in various forms.¹⁵⁰ None of these is without controversy, of course, principally because of the way(s) in which such stances may sit in tension with mediation’s long-held adherence to some form of neutrality or impartiality.¹⁵¹ Still, my urging of a more expansive view of the role(s) of those in our field is hardly new.

I cannot entertain comfortably the notion that unless we happen to find the gravesites from 170 years ago, and unless the Tribe and others subsequently engage in a particular process around that fact, this work has been meaningless to the cause of peacemaking or of just reconciliation.

Instead, I am grateful for the opportunity to share these thoughts under the banner of Saltman Center for Conflict Resolution, in the context of the

¹⁴⁷ Jennifer W. Reynolds, *The A is for Activism*, in *THE NEGOTIATOR’S DESK REFERENCE* 743, 745 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017).

¹⁴⁸ Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 4 (1981).

¹⁴⁹ BERNARD S. MAYER & JACQUELINE N. FONT-GUZMÁN, *THE NEUTRALITY TRAP: DISRUPTING AND CONNECTING FOR SOCIAL CHANGE* 215 (2022).

¹⁵⁰ See, e.g., Lydia Nussbaum & Jennifer W. Reynolds, Book Review, *Activist Mediators; Mediator Activists: The Neutrality Trap*, 10 NEGOT. J. 327, 334 (2023) (reviewing BERNARD S. MAYER & JACQUELINE N. FONT-GUZMÁN, *THE NEUTRALITY TRAP: DISRUPTING AND CONNECTING FOR SOCIAL CHANGE* (2022)) (describing Resolutions Northwest’s explicit inclusion of “race and social justice”); Amy J. Cohen, *The Rise and Fall and Rise Again of Informal Justice and the Death of ADR*, 54 CONN. L. REV. 197, 202–03 (2022) (claiming “transformative justice as mediation,” including “emancipatory politics among Black Lives Matter and prison and police abolitionist organizers”); Deanna Pantín Parrish, *Just Diversion: Designing Eviction Mediation to Address Incentives and Inequities*, 68 WASH. U.J.L. & POL’Y 63, 65 (2022) (housing and foreclosure prevention); Dan Berstein, *Mental Illness Discrimination Breakthroughs at Mediate.com*, AM. BAR ASS’N (Oct. 26, 2022) https://www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/october-2022/mental-illness-discrimination-breakthroughs-at-mediate-com/ [https://perma.cc/PP7Y-PZ6E] (preventing discrimination on the basis of mental health).

¹⁵¹ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. BAR ASS’N 2005); see also Bernard Mayer et al., *Panel Discussion—Core Values of Dispute Resolution: Is Neutrality Necessary?*, 95 MARQ. L. REV. 805, 807 (2012); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 87 (1981). For a modern re-visitation of the themes Professors Susskind and Stulberg considered, see generally DISCUSSIONS IN DISPUTE RESOLUTION: THE FOUNDATIONAL ARTICLES (Art Hinshaw et al., eds., 2021).

Beecroft Lecture, precisely because I believe this work to be consistent with the values of conflict resolution. Precisely because I believe it to *be* conflict resolution work.

Rather than overly fetishize a particular set of process parameters, the umbrella of our field ought to embrace such striving. The world has no shortage of historical wrongs with unresolved underlying factual questions. We should do all we can to urge more to join in the striving.