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Native American Religious Liberty: Five Hundred Years after Columbus

WALTER R. ECHO-HAWK

INTRODUCTION

Freedom of worship is a protected liberty that most Americans commonly take for granted. However, for Native Americans today, there is a growing crisis in religious liberty created by two recent Supreme Court decisions.[1] These cases deny First Amendment protection for ancient tribal religious practices that predate the founding of the United States and the writing of its Constitution. This loophole in religious liberty has created a human rights crisis in Indian Country and a call to Congress for a new law to protect the First Amendment rights of the First Americans. Senator Daniel K. Inouye, chairman of the Senate Indian Affairs Committee, and seven co-sponsors introduced the "Native American Free Exercise of Religion Act of 1993" (NAFERA) (S. 1021) on 25 May 1993. As Indian tribes gather for this legislative battle, it is useful to find a framework for understanding why such legislation is necessary in a nation that prides itself in protecting individual freedom.

For most citizens, it is puzzling how any religious faith—much less the native religions of the land—can be excluded from the ambit of the First Amendment and placed in an unprotected class. Is it a simple legal anomaly? Failure of American jurisprudence to incorporate basic indigenous values? Or something darker?

Walter R. Echo-Hawk is a senior staff attorney with the Native American Rights Fund, Boulder, Colorado.

Viewed narrowly, this human rights problem is the embarrassing product of an increasingly insensitive Supreme Court, stacked with conservative political appointees. However, there is a larger, more profound cultural and racial problem at issue. For five hundred years, religious intolerance and suppression have been primary features characterizing the relationship between the native people of the Western Hemisphere and the newcomers from the Old World. To address this long-standing problem, the Native American Free Exercise of Religion Act has been introduced, setting the stage for a monumental human rights struggle that Indian tribes—fighting for their cultural survival in the United States—cannot afford to lose.

This article attempts to place the new Supreme Court doctrine and the pending legislation into larger perspective by examining the impact of Columbus's voyage and subsequent colonization on native religious freedom.

HISTORICAL SUPPRESSION OF NATIVE RELIGION

Christopher Columbus's baggage included Europe's long heritage of religious intolerance. In 1492, Spain—fresh from centuries of religious crusades against the infidels for possession of holy places in the Middle East—was filled with intolerance. In that historic year, the Spanish Inquisition was in full force and effect. The King expelled the Jews from Spain on August 2, and, on January 4, military unification as a Christian nation was achieved with the Moorish defeat, which led to the expulsion of the Moslems.

In addition to expulsions, the Inquisition used other means to rid Spain of undesirable religious influences. Heretics, Africans, gypsies, and others faced persecution, imprisonment, and death because of their spiritual beliefs. This development contributed to the invention of race as a form of categorization and to the rise of Eurocentrism as an intellectual principle in legal reasoning.

On 12 October 1492, Columbus wrote this about the native inhabitants he encountered on his arrival in the Western Hemisphere:

> They ought to be good servants and of good intelligence . . . . I believe that they would easily be made Christians because it seemed to me that they had no religion. Our Lord pleasing, I

> will carry off six of them at my departure to Your Highnesses, in order that they may learn to speak.[2]

Although Columbus did not tarry after first contact ("I do not wish to delay but to discover and go to many Islands to find gold"—15 October 1492),[3] his remarks on converting the Indians initiated Europe's goal to colonize the New World, "complete with conquest, religious conversion, city settlements, fortresses, exploitation, international trade, and exclusive domain."[4]

Other European colonizers brought similar attitudes to North America. Since the Pilgrims landed at Plymouth Rock in 1620, a basic feature of the newcomers' relationship with American Indians has been government insensitivity to native religious beliefs and practices, which at times has included actual formal policies of suppression in order to "civilize" the Indians. As historian Perry Miller put it in reference to the Puritans, "To allow no dissent from the truth was exactly the reason they had come to America."[5] To Europeans, New World indigenous religions were simply inferior.

Old World attitudes of religious intolerance became ingrained in the United States government's Indian policies from the very inception of this nation. In 1979, the secretary of the interior submitted a report to Congress that recounts much of the historic treatment of native religion by the federal government.[6] A basic goal of federal Indian policy was to convert the "savage" Indians into Christian citizens and separate them from their traditional ways of life. President Jackson's Indian removal policy was justified in the name of converting and civilizing the Indians.[7] During this removal period, Supreme Court decisions that upheld the government's taking of Indian lands and the reduction of tribal sovereignty from independent nation to "domestic dependent nation" status under discovery and conquest principles of international law referred to Indians as "heathen" savages.

Christian missionaries, hired as government Indian agents, were an integral part of federal Indian policy for over one hundred years. The government placed entire reservations and Indian nations under the administrative control of different denominations to convert the Indians and separate them from their traditions. A number of federal laws, still on the books today, authorize the secretary of the interior to give Indian lands to missionary religious groups for "religious or educational work among the Indians," 25 U.S.C. 348.[8] In *Quick Bear v. Leupp*, 210 U.S.

50, 81–82 (1908), the Supreme Court upheld the use of federal funds to establish a Catholic school on the Rosebud Indian Reservation despite a claim that this government support of religion violated the Establishment Clause of the First Amendment.

As a matter of policy, separation of church and state was entirely disregarded in the government's treatment of Indians. A 1909 secretary of interior report to Congress reflects the extent to which the fission of church and state impacted federal Indian policy:

> That Christianity and federal interests were often identical became an article of faith in every branch of the government and this pervasive attitude initiated the contemporary period of religious persecution of the Indian religions. It was not, to be certain, a direct attack on Indian tribal religions because of their conflict with Christianity, but an oblique attack on the Indian way of life that had as its by-product the transformation of Indians into American citizens. Had a Christian denomination or sect, or the Jewish community, been subjected to the same requirements prior to receiving affirmation of their legal and political rights, the outcry would have been tremendous. But Indians, forming an exotic community which few understood, were thought to be the proper subject of this concern. [9]

Despite the government's goal to supplant tribal culture with Christianity, many Indians clung to their beliefs and practices even after they were confined on reservations. Chief Walking Buffalo's remarks show defiant native resistance to government-enforced proselytization:

> You whites assumed we were savages. You didn't understand our prayers. You didn't try to understand. When we sang our praises to the sun or moon or wind, you said we were worshipping idols. Without understanding, you condemned us as lost souls just because our form of worship was different than yours.
>
> We saw the Great Spirit's work in almost everything: sun, moon, trees, wind, and mountains. Sometimes we approached him through these things. Was that so bad? I think we have a true belief in the supreme being, a stronger faith than that of most of the whites who have called us pagans . . . . Indians living close to nature and nature's ruler are not living in darkness. [10]

Consequently, in the 1890s, federal authorities become more belligerent toward Indian religion. In that decade, United States troops were called in to quell the Ghost Dance, a widely practiced tribal religion that impeded government assimilation policies. In 1890, more than one hundred Lakota Ghost Dance worshipers were massacred at Wounded Knee, South Dakota. In 1892, Pawnee Ghost Dance leaders were arrested in Oklahoma. In the same year, the BIA outlawed the Sun Dance religion and banned other ceremonies that were declared "Indian offenses" and made punishable by withholding of rations or thirty days' imprisonment.[11] Facing the threat of military intervention, arrest, and starvation, many Indians stopped practicing the Ghost Dance and took other rituals underground.

Formal government rules suppressing tribal religions continued well into the 1900s. In 1904, the BIA promulgated regulations for its Court of Indian Offenses, including "offenses" that banned Indian religious leaders and ceremonies:

> Fourth. The "sun dance", and all other similar dances and so-called religious ceremonies, shall be considered "Indian offenses", and any Indian found guilty of being a participant in any one or more of these offenses shall . . . be punished by withholding from him his rations for a period of not exceeding ten days; and if found guilty of any subsequent offense under this rule, shall be punished by withholding his rations for a period not less than fifteen days nor more than thirty days, or by incarceration in the agency prison for a period not exceeding thirty days.
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> * * * *
>
> Sixth. The usual practices of so-called "medicine men" shall be considered "Indian offenses" . . . and whenever it shall be proven . . . he shall be adjudged guilty of an Indian offense, and upon conviction . . . shall be confined in the agency guardhouse for a term not less than ten days, or until such time as he shall produce evidence satisfactory to the court, and approved by the agent, that he will forever abandon all practices styled Indian offense under this rule. [12]

Even though this ban was lifted in 1934, serious government infringements on native religious freedom continued into the 1970s. Tribes witnessed governmental suppression of their religious practices in numerous ways: arrests of traditional Indians

for possession of tribal sacred objects such as eagle feathers; criminal prosecutions for the religious use of peyote; denial of access to sacred sites located on federal lands; actual destruction of sacred sites; and interference with religious ceremonies at sacred sites. After hearings held in 1978, Congress finally recognized the need to protect Indian religious freedom.

To afford remedial relief for this long-standing problem, Congress enacted the American Indian Religious Freedom Act of 1978 (AIRFA). AIRFA established a federal policy

> to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Although AIRFA was a landmark breakthrough, tribes have since found that it has "no teeth" and that federal agencies continue to ignore its provisions.

The treatment of native worship by the Supreme Court in the recent *Lyng* and *Smith* decisions, analyzed below, is especially troubling when considered in the context of the above history. Given the long history of government suppression of tribal religions, it is highly doubtful that these unique and irreplaceable indigenous religions can continue to survive without any American legal protection.

THE *LYNG* DECISION: NEED FOR FEDERAL SACRED SITES LEGISLATION

All world religions share a unifying dependence, in varying degrees, on sacred sites, including the indigenous religions of American Indian tribes, Native Hawaiians, and Alaska Natives. Pilgrimages to holy places are religious obligations in Judaism and Islam "imposed by explicit commandment upon the whole community."[13] Throughout history, Christians have also shared a fundamental attachment to Christian holy places and sanctuaries:

> The attachment to Holy Places springs from another source, namely the love of the faithful for the person of Christ; love for Christ the human being—*homo factus est*—and this love is

> shared by many who cannot be considered Christians in the strict sense of the word. Just as in ordinary life, we are drawn to the places associated with those who were dear to us, and visit their graves to be near to them, thus the Christian is drawn to the Sanctuaries for the sake of his love for Christ, and he seeks in the place His person. This love . . . runs like a golden thread through the whole texture of Christian history . . . . It is the ultimate root and essence of the Christian attachment to the Holy Places, and independent from theology and dogmatic controversies will prevail as long as Christianity itself. [14]

Worship at sacred sites is a basic attribute of religion itself. Since the inception of the major world religions, control over holy places in the Middle East has always been of deep international concern. Beginning around A.D. 1000, the Christian world engaged in a number of military/religious crusades, spanning several centuries, to wrest control of its holy places from the non-Christian world. Following the Crusades, Christian nations resorted to numerous treaties with countries in control of the Holy Land to preserve sacred sites and protect freedom of worship there. The Crimean War between France and Russia was fought over control of Christian holy places.

However, when most Americans think of holy places, they think only of well-known Middle Eastern sites familiar to the Judeo-Christian tradition, such as the Church of the Holy Sepulcher (Grave of Christ) and Basilica of the Nativity in Jerusalem and Bethlehem; Mecca; the Wailing Wall; or Mount Sinai. In the recent war against Iraq, our government and its allies took special care not to destroy sensitive religious areas. None doubt that these important Middle East religious sites are entitled to stringent legal protections for the practitioners of those faiths. Indeed, the laws of Israel do just that. Israel's Protection of Holy Places Law of 5727 (1967) (Sefer ha-Chukim, 1967) reads as follows:

> 1. The Holy Places shall be protected from desecration and any other violation from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places.
>
> 2. (a) Whosoever desecrates or otherwise violates a Holy Place shall be liable to imprisonment for a term of seven years.

> (b) Whosoever does anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places shall be liable to imprisonment for a term of five years.

Under this legislation, Israel goes to great lengths to protect the religious character and sanctity of holy places. For example, rules posted outside holy places safeguard not only against desecration but also against acts of carelessness and ignorance, and inappropriate behavior:

> INSTRUCTIONS TO THE VISITING PUBLIC
>
> 1. The visitor should dress and act in a manner appropriate to the holiness of the site.
>
> 2. Eating, drinking, smoking, bringing in animals, bearing arms, and creating a disturbance are forbidden.
>
> 3. It is forbidden to enter with babies.
>
> 4. The use of radio-transistors, loud conversation, and creation of a disturbance are forbidden.
>
> 5. Strict attention to local authorities, in all that relates to proper behaviour, is obligatory.
>
> 6. Those who do not abide by these instructions will be asked to leave the premises.[15]

Unfortunately, American law and social policy overlook that our own landscape is dotted with equally important American Indian religious sites that have served as cornerstones for indigenous religions since time immemorial. As former representative Morris Udall stated on the floor of the House of Representatives in 1978,

> For many tribes, the land is filled with physical sites of religious and sacred significance to them. Can we not understand that? Our religions have their Jerusalems, Mount Calvarys, Vaticans and Meccas. We hold sacred Bethlehem, Nazareth, the Mount of Olives and the Wailing Wall. Bloody wars have been fought because of these religious sites.[16]

Traditional Native American religious sites—some of which rank among the most beautiful and breathtaking natural wonders left in America—serve a variety of important roles in tribal religion, which should be readily understandable to most people.[17] However, in truly understanding and protecting Native American holy places, society may have to confront and modify basic values first implanted in this hemisphere by Columbus, because native sacred sites are natural, not man-made, sites. Columbus brought with him Old World pragmatic human secularism, which was "a progressive ejection of God from nature and its laws."[18] It is undoubtedly difficult for a culture with an inherent fear of "wilderness" and a fundamental belief in the "religious domination" of humans over animals to envision that certain aspects of nature can be sacred. As summarized by historian Kirkpatrick Sale:

> What [European rationalism] had to achieve, in short, was—in Schiller's later masterful phrase—the "de-godding of nature." At the time, even with the best efforts of the Church, there still lingered in many places in Europe the common wisdom that gods and spirits inhabited the elements of nature—trees, certainly, streams and rivers, forests, rocks—or in some parts of the Church itself, that nature was sacred because God was immanent in all He created. The task of rationalism, through science, was to show—no better, to *prove*—that there was no sanctity about these aspects of nature, that they were not animate or purposeful or sensate, but rather nothing more than measurable combinations of chemical and mechanical properties, subject to scientific analysis, prediction, and manipulation. Being de-godded, they could thereby be capable of human use and control according to human whim and desire, and Europeans—uniquely, as near as we can tell, among all cultures—could assume, in Descartes's words, that humans were the "masters and possessors of nature."[19]

Such a cultural outlook is fundamentally different from the Native American tenet that nature is inherently sacred:

> "Land is sacred"—it is, really, as simple as that common phrase, known in one way or the other in almost every tribe. Like the sun and wind and clouds and air, land was understood to be part of the numinous cosmic spirit, but it was so obviously precious and life-giving that it had to be accorded

> special reverence and respect; it had its special holy spots, besides—snow-capped mountains and fissured rocks and ancient mesas and thunderous waterfalls—which gave evidence of the holiness of creation.[20]

Indeed, any remnants of similar European beliefs in the sanctity of nature were stamped out in the witch hunts of the 1500 and 1600s, when 100,000 to 200,000 people were burned at the stake:

> What was this witchcraft all about? It was, in essence, the name given by the established authorities to the various surviving forms of paganism, animism, and goddess-worship that still played a large part in certain European belief-systems, particularly in rural areas, stemming from roots deep in fertility cults and nature-worship from the past that the Church had never been able to suppress.[21]

This basic culture conflict over human beings' relationship to the land has ever divided the descendants of Columbus and those who were here first. Summing up these differences, the Sioux chief Luther Standing Bear wrote,

> The white man does not understand America. He is too far removed from its formative processes. The man from Europe is still a foreigner and an alien. And he still hates the man who questioned his path across the continent. But in the Indian the spirit of the land is still vested; it will be until other men are able to divine and meet its rhythm. Men must be born and reborn to belong. Their bodies must be formed of the dust of their forefathers' bones.

Despite this sharp cultural conflict in viewing nature and land, AIRFA brought hope to Indians that legal protection for their worship at sacred sites would finally be incorporated into American law and social policy. Since then, however, federal agencies such as the Forest Service and the National Park Service have repeatedly destroyed irreplaceable native sacred sites. The courts have consistently been unwilling to find any protections for Indians under the First Amendment or any statute.[22] The struggle in the courts culminated in 1988, when the Supreme Court ruled in *Lyng* that Indians stand outside the purview of the First Amendment entirely when it comes to protecting tribal religious areas on federal lands for worship purposes.

In *Lyng*, a sharply divided Court denied First Amendment protection to tribal worship at a sacred site in northern California that would admittedly be destroyed by a proposed Forest Service logging road. The frightening aspect of the Court's refusal to protect worship at this ancient holy area was that the Court withheld protection, knowing that "the threat to the efficacy of at least some religious practices is extremely grave":

> Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O Road will "virtually destroy the Indians' ability to practice their religion," 795 F. 2d at 693 (opinion below), the Constitution simply does not provide a principle that could justify upholding respondents' claim (485 U.S. at 452–53).

In short, government may destroy an entire Indian religion under *Lyng* with constitutional impunity, unless it also goes further and punishes the Indians or forces them to violate their religion. The Court reached this result by an unprecedented narrow construction of the Free Exercise Clause. It held that Free Exercise protections arise *only* in those rare instances when government *punishes* a person for practicing religion or *coerces* one into violating his religion. Because it is hard to imagine rare instances in which that will happen, the Court's narrow interpretation renders the Free Exercise Clause a virtual nullity. This crabbed reading of the Bill of Rights is one that should deeply concern all citizens who cherish religious freedom principles, because, under *Lyng*, United States law guarantees less religious freedom than most other democracies and some nondemocratic nations.

As to the Indians in *Lyng*, the Court disclaimed judicial responsibility to safeguard religious freedom from government infringement, stating that any protection for them "is for the legislatures and other institutions."[23] Former Justice Brennan's dissent noted the "cruelly surreal result" produced by the majority decision:

> [G]overnmental action that will virtually destroy a religion is nevertheless deemed not to "burden" that religion.[24]

He described the need for a federal law to protect the native worship at sacred sites in the wake of the majority's holding:

> Today, the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the

> practice of that faith in a manner recognized by the Free Exercise Clause. Having thus stripped respondents and all other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, the Court assures us that nothing in its decision "should be read to encourage governmental insensitivity to the religious needs of any citizen . . . .
>
> Given today's ruling, that religious freedom amounts to nothing more than the right to believe that the religion will be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of the "policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise their traditional religions," [quoting AIRFA], it fails utterly to accord with the dictates of the First Amendment.

As a result of *Lyng*, there are no legal safeguards for native worship at sacred sites under the United States Constitution and laws, laying bare a basic attribute of religion itself. This legal anomaly has frightening implications for remaining tribal religions struggling to survive. In 1991, for example, the traditional Blackfeet Indians of the Crazy Dog Society, who are attempting to protect their place of worship from destruction by the Forest Service, stood without any legal protections in American jurisprudence. The Crazy Dog Society recently received an ominous letter from that federal agency, threatening,

> We both know a point of view the same as yours has been argued before the U.S. Supreme Court and they decided that while a government action may significantly affect a person's ability to pursue spiritual fulfillment, the government's action doesn't coerce individuals into violating their religious beliefs. [25]

From a policy standpoint, no religious group should be stripped of First Amendment protections in a democratic society so that its ability to worship is made wholly dependent on administrative whim. This is especially true for unpopular or despised minority religious groups, such as American Indians, who have suffered a long history of government religious suppression.

The failure of American law to protect holy places illustrates a larger failure of law to incorporate indigenous needs into a legal system otherwise intended to protect all citizens. Certainly, if this country contained holy ground considered important to the Judeo-

Christian tradition, American law and social policy would undoubtedly accord stringent protections. Because important Judeo-Christian sites are located in other nations, it is understandable that, as American law developed in the United States, it never addressed this aspect of religious freedom. Thus, when native religious practitioners—who are the only ones with religious ties to holy ground located in this country--petitioned the courts, they found that the law was ill equipped to protect their religious liberty. However, if the purpose of law is to fairly protect all fundamental interests of our diverse and pluralistic society, then it must someday address indigenous needs, so that all basic human rights are fairly and equally protected.

The *Lyng* decision is unjust. It is impossible to imagine that the same result would have pertained if holy ground important to the Judeo-Christian tradition, such as sacred sites in the Middle East, were at stake. Agreeing with St. Augustine that "an unjust law is not a law at all," in his famous Letter from Birmingham City Jail, Martin Luther King, Jr. defined an unjust law as, "a code that a majority inflicts upon a minority that is not binding on itself."[26]

To begin to correct *Lyng*, society must first understand native sacred sites for what they are—holy places—rather than mislabeling them as "archaeological resources" or "historic properties," which places religious sites in wholly inappropriate categories insofar as federal law is concerned. Worship at holy places is not unique, nor is it difficult to understand. Society must correct this injustice. It is morally intolerable to condone government infringement on worship that predates the founding of this nation without providing Native Americans with lawful means to safeguard basic human rights.

But, perhaps more importantly, if American society were to acknowledge that nature and land can be sacred, all Americans could become "native" or "indigenous" to this land, after five hundred years, and find better ways to adapt to it. Western Hemisphere values must prevail over alien Old World concepts introduced by Columbus if non-Indians are ever to become "native" to the place in which they live. Such basic changes in social values are long overdue, based on the dangerous environmental changes since 1492:

> Rainforest area in the Western Hemisphere, originally 3.4 billion acres, is down to 1.6 billion, and going fast, at the rate of 25 million acres a year, or 166 square miles a day; U.S.

> forestland, originally more than a billion acres, is down to 500 million commercially designated acres, some 260 million having gone for beef production alone.
>
> Topsoil depletion and runoff in the United States reaches a rate of 80 million feet per day, nearly 30 billion tons a year.
>
> Twenty-five years after the U.S. Endangered Species Act went into effect, listing 500 of the several thousand threatened species in the country, twelve of the protected species have become extinct and 150 more are losing population at a rate that will lead to extinction within a decade. Two hundred threatened plants native to the United States have become extinct in the last five years. At least 140 major animals and bird species have become extinct since 1492 . . . . Wilderness areas, officially designated at 90 million protected and 50 million unprotected acres, have been reduced from about 2.2 billion acres in pre-Columbian times—a decrease of roughly 96 percent.[27]

Although broader social recognition of native worship at American holy places may not reverse the above damage, it will facilitate a new way of looking at the land and lay the foundation for a new environmental ethic needed to strengthen our species' ability to meet the present environmental crisis.

THE SMITH CASE: FREE EXERCISE DECLINE

In 1990, the Supreme Court denied constitutional protection, for an entire Indian religion of pre-Columbian antiquity, against state criminal prohibition of peyote use.[28] For Indians who lost constitutional protection for worship in the name of the "Drug War," *Smith* was devastating. In the rest of society, *Smith* caused an outcry because it departs dramatically from First Amendment law, weakens the Free Exercise Clause and religious liberty, and makes it easier for government to intrude upon freedom of worship.

Peyote is a cactus that grows in the desert along the Rio Grande River in Texas. Religious use of peyote by Mexican and American Indians predates the arrival of Spaniards and Americans. Peyotism is a spiritually profound religion and way of life that is ranks among the oldest tribal religions in the United States.[29] It is so interwoven with native culture that contemporary tribal culture cannot be completely understood without knowledge of the long history of peyote worship.

Although harmless, peyotism is controversial because the cactus plant has psychedelic qualities and is unlawful in many states. Indian religious use was prosecuted in some places earlier in this century, but today the federal government and about twenty-seven states exempt the religious use of peyote by American Indians from drug laws—and have done so for decades without experiencing law enforcement, public health, safety, or other problems.[30] Not one single medical problem among Indians has ever been documented over the centuries of sacramental use. In upholding the First Amendment right of Indians to practice this age-old religion, a California court noted,

> [T]he right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California.[31]

In *Smith*, the Court was asked to protect the First Amendment rights of members of the Native American Church who were fired from their jobs for their religious use of peyote during off-duty hours. Oregon asserted that the First Amendment should not protect this religious practice because state law made peyote use illegal and contained no exemption for native religious use.

Prompted by "Drug War" fear and speculation and urged by Oregon, the Court went to great lengths to deny protection for the Indian Peyote Religion, even though peyotism is far removed from Oregon's and America's drug problem. First, the court threw out the traditional "compelling state interest" test[32]; then it exempted an entire body of law—all criminal laws and all civil laws of general application not overtly hostile to religion (i.e., 99.9 percent of all laws on the books)—from First Amendment limitation altogether; and, finally, it suggested that Free Exercise rights may not be entitled to protection unless some other constitutional right is also impaired by government action.

The Court discarded the First Amendment test that had been applied by the courts for decades in religion cases, because it

believed that the test too strictly protected individual religious liberty, stating that religious diversity is a "luxury" that our democratic pluralistic society "cannot afford" (id. at 892). The Court left any government accommodation of religion up to legislatures' political processes instead of the courts and the Bill of Rights, despite admitted hardship on unpopular or minority faiths:

> It may be fairly said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred . . . ." [33]

Justice O'Connor joined in the result and therefore apparently was not concerned about the impacts of the decision on native religion. However, for the rest of society, she expressed deep concern:

> In my view, today's holding dramatically departs from well settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's commitment to individual religious liberty.[34]

She warned of the danger of making freedom dependent on politics, quoting from an earlier decision:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . . . One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[35]

Mourning the declining importance of the Bill of Rights in protecting basic freedoms, Justice O'Connor warned about harsh times ahead in the Whiteman's political arena, where native religious practitioners now find themselves:

> [T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact

> majoritarian rule has had on unpopular or emerging religious groups . . . ."[36]

Today, other religious groups are being treated like Indians by federal courts.[37] The Eighth Circuit dryly observed that *Smith* "does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners."[38] While courts have begun to apply the *Smith* rule to exempt civil laws from the First Amendment, some have done so only with "profound regret."[39] Entire segments of our population are now adversely affected by *Smith*, as noted by the Seventh Circuit:

> *Smith* cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences: the doctrine on which all the prison religion cases are founded. [40]

Thus, mistreatment of American Indian religion by federal courts has seriously weakened religious liberty for all Americans. Mainstream religious groups, who were previously unconcerned about the fate of Indian religious practitioners, are now deeply concerned about their own religious liberty. This irony gives meaning to Reverend King's statement, "Injustice anywhere is a threat to justice everywhere."[41] *Smith* and its progeny demonstrate that when law cannot protect the basic freedoms of the weakest, it lacks vitality to protect the rest of society.

THE NEXT 500 YEARS: LEGISLATION TO STRENGTHEN NATIVE AMERICAN RELIGIOUS FREEDOM UNDER A FEDERAL MANDATE

NAFERA is important Native American human rights legislation intended to close the Indian loophole in the Bill of Rights. The bill was developed by the Indian Affairs Committee in consultation with a native coalition following field hearings held throughout the country in 1992 and 1993. It does five things: (1) protects Native American sacred sites through procedural and substantive legal standards; (2) protects Indian religious use of peyote by essentially codifying existing DEA regulations and making them uniform nationally; (3) protects religious rights of Native American prisoners; (4) protects Indian religious use of eagle feathers

and other surplus animal parts in ceremonies by streamlining the present United States Fish and Wildlife Service permit system under existing law; and (5) establishes a private course of action to protect native religious practices under the "compelling state interest test."

NAFERA is supported by a broad, historic coalition of native organizations, environmental groups, church groups, human rights organizations, and the entertainment community. As the Senate field hearings have been held around the country, a unique Native American human rights movement has begun which seeks to change basic social attitudes toward society's relationship with native people and toward the land itself. Passage of the legislation should ordinarily be a relatively easy matter, since most people appreciate the rich Native American cultures and want them preserved. However, strident opposition from federal agencies and wealthy developer interest groups is expected. The battle will test America's commitment to the values embodied in the Bill of Rights.

CONCLUSION

The American legal system must protect holy places located in the United States and the endangered indigenous religions of tribal people. This requires a new law. We can only regret the enormous loss of our nation's heritage caused by a long history of government suppression of tribal religions. It is not enough, however, to mourn that loss. Rather, the challenge of our generation is to safeguard what little remains.

After five hundred years since the arrival of Columbus, the time is long overdue for his descendants to come to terms with those who were here first. Society must rethink Old World attitudes toward the land and forge a productive new relationship with native peoples. This social change is especially important for a nation built on diversity, because plurality cannot be achieved until law protects the needs of indigenous peoples. Moreover, until that day arrives when New World indigenous values become respected by the larger society, Columbus's descendants can never begin to adapt to the land as the native peoples have done, as pointed out by Chief Standing Bear, nor can they become "native" to place. Ultimately, such adaptation is America's unfinished business.

NOTES

1. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990); *Lyng v. Northwest Indian Cemetery Assn.*, 485 U.S. 439 (1988).
2. Quoted in Kirkpatrick Sale, *The Conquest of Paradise* (New York: Alfred A. Knopf, 1990), 96–97.
3. Ibid., 104–105.
4. Ibid., 112.
5. Perry Miller, *Errand in the Wilderness* (Cambridge, MA: Belknap Press of Harvard University Press, 1956), 145.
6. See *American Indian Religious Freedom Act Report P.L. 95-341*, Federal Agencies Task Force, Secretary of the Interior (Department of the Interior, August 1979). This report was submitted to Congress as required by section 2 of the American Indian Religious Freedom Act, 42 USC 1996.
7. Ibid., 3.
8. See also 25 U.S.C. sections 280, 280a; 36 Stat.781, 814 (1909).
9. *American Indian Religious Freedom Act Report P.L. 95-341*, 4.
10. Quoted in Rennard Strickland, "Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony," *Arizona State Law Journal* 24 (Spring 1992): 175.
11. *American Indian Religious Freedom Act Report P.L. 95-341*, 6.
12. See Regulations of the Indian Office, effective April 1, 1904, Secretary of the Interior (Washington, DC: U.S. Government Printing Office, 1904), 102–103.
13. Walter Zander, *Israel and the Holy Places of Christendom* (New York: Praeger Publishers, 1971), 5.
14. Ibid., 36–37.
15. Zander, *Israel and the Holy Places of Christendom*, 104.
16. Congressional Record at H6872 (18 July 1972).
17. See, e.g., Vine Deloria Jr., "Sacred Lands and Religious Freedom," *Native American Rights Fund Law Review* 16:2 (Summer 1991).
18. Zander, *Israel and the Holy Places of Christendom*, 156, quoting Carl J. Freidrich, *Inevitable Peace* (Cambridge, MA: 1948), 92.
19. Sale, *The Conquest of Paradise*, 40.
20. Ibid, 313.
21. Ibid., 249.
22. See *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983) (Hopi and Navajo sacred site and shrines on San Francisco Peak destroyed by U.S. Forest Service to make room for a new ski lift); *Fools Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983) (Intrusions on Sioux vision questing at Bear Butte by U.S. Park Service); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980) (Destruction of Navajo sacred site at Rainbow Bridge and intrusions upon Navajo ceremonies by U.S. Park Service and Bureau of Recreation upheld); *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir. 1980) (Cherokee sacred site flooded by TVA); *Inupiat Community of Arctic Slope v. U.S.*, 548 F. Supp. 182 (D. Ala. 1982) (Eskimo religious activities on ice disrupted by federally permitted off-shore drilling). See also *United States v. Means*, 858 F.2d 404, 407 (8th Cir. 1988); *Havasupai Tribe v. U.S.*, 752 F.Supp. 1471 (D.Ar., 1990); *Dedman v. Hawaii Bd. of Natural Resources*, 740 P.2d 28 (Haw. 1987) (Destruction of volcano sacred site by geothermal development upheld).

23. Ibid.
24. Ibid., 472.
25. Letter from John Gorman, forest supervisor, to Ronald West, 28 March 1991.
26. James M. Washington, ed., *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* (San Francisco, CA: Harper, 1986), 293–94.
27. Sale, *The Conquest of Paradise*, 363–64.
28. *Employment Division v. Smith*, supra, 108 L.Ed.2d 876 (1990).
29. See Omer Stewart, *Peyote Religion: A History* (Norman, OK: University of Oklahoma Press, 1987).
30. The constitutionality of the federal and Texas religion exemption was recently upheld in *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991).
31. *People v. Woody*, 394 P.2d 813, 821–22 (Ca., 1964)
32. The court limited the test to unemployment compensation cases and gives no hint as to what judicial test should be applied to civil statutes that remain subject to First Amendment limitations. Ibid., 888–93.
33. Ibid., 893.
34. Ibid.
35. Ibid., 901–902.
36. Ibid., 901.
37. See *Intercommunity Center for Justice and Peace v. I.N.S.*, 910 F.2d 42 (2d Cir. 1990); *Salvation Army v. N.J. Dept. of Community Affairs*, 919 F.2d 183, 194–95 (3d Cir. 1990); *South Ridge Baptist Church v. Indus. Com'n of Ohio*, 911 F.2d 1203, 1213 (6th Cir. 1990); *Cornerstone Bible Church v. City of Hastings, Mich.*, 740 F.Supp. 654, 669–70 (D. Mich., 1990); *Montgomery v. County of Clinton, Mich.*, 743 F.Supp. 1253, 1259 (W.D. Mich., 1990); *Yang v. Sturner*, 750 F.Supp. 558, 559 (D.R.I. 1990).
38. *Salam v. Lockhart*, 905 F.2d 1168, 1171 n.1 (8th Cir. 1990).
39. *Yang v. Sturner*, supra at 558–59. In *Yang*, the court wondered "what is left of Free Exercise jurisprudence."
40. *Hunafa v. Murphy*, 907 F.2d 46, 48 (7th Cir. 1990).
41. Washington, *A Testament of Hope*, 290.