Colonialism and Civilisation: the Impact of "Civilisation" Policies on Suppressing Indigenous Religious Practices in American Jurisprudence.

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Introduction

Invariably the courts must self-consciously grapple which the legal categories and doctrines handed down through precedent to address new situations and fill in the interstices' of statutory enactments. This process is not simply the neutral and detached application of rules to facts at a particular historical point but is the product of a sequence of decisions which have embedded and institutionalised certain outcomes.[1] Within these outcomes history and the present are compressed into a decision and legal doctrine which in turn conditions subsequent decisions. This process in turn implicates and reflects a wider legal tradition, socio-political order and governmental policy which undergird that tradition. "Rules and functions operate," John Bell argues "as part of a tradition of legal ways of doing things which has various complex relationships to the kind of society in which it operates and the functions it accords to law."[2]

An area where the legacy of cultural, socio-economic, and political attitudes in the law manifests itself today is in those legal decisions relating to the religious freedom of Native Americans. This law is premised on a liberal conception of individual rights, culture and economic development. For several centuries after the European settlement of America, settler governments, as part of the colonisation process, sought to suppress indigenous religions as part of the "civilisation" process premised on culturally superior attitudes and the bias toward western conceptions of religion. This process ignored the idea that indigenous individuals had religious choice.

[1] Martin Shapiro and Alec Stone-Sweet, *On Law, Politics and Judicialization* (Oxford: Oxford University Press, 2002), 114-5.
[2] John Bell, "Comparative Law and Legal Theory," in Werner Krawietz, Neil MacCormick and Georg Henrik von Wright, (eds.), *Prescriptive Formality and Normative Rationality in Modern Legal System* (Berlin: Dunker & Humblot, 1994), 24.

This paper will discuss the impact of historic policies relating to the suppression of Native American religious activity in recent case law. It will argue that the previous policies of suppressing Indian religious practices as part of the civilisation process, premised on western conceptions of religion, and liberal conceptions of individual rights, property and economic development, have continued to inform the jurisprudence under the First Amendment of the U.S. Constitution and the Religious Freedom Restoration Act of 1993 (RFRA) despite policy changes in the United States which have encouraged tribal self-determination and support for Indian cultural rights.

The Suppression of Indigenous Religious and Cultural Practices

The twin goals of civilisation and Christianization of Indians were central and mutually dependent objectives of the American missionary movement as well as government. [3] In this process, religious freedom was ignored as the missionary efforts to convert the Indian became merged with government policy aimed at settling the frontier and transforming them into American citizens. The goals were supported by the belief that Indian institutions and character had to be transformed to allow the "savage" to enjoy the benefits of the superior Christian civilisation.

The American government supported and relied on missionaries as agents for implementing policy from the early days of the Republic. In 1819 the Federal government created a Civilisation Fund through which it began to subsidize missionary schools. Christianity (and the concomitant discouragement of native religion practices) was an essential element of these religious schools curriculum.

After the American Civil War, the Grant Administration initiated the "Peace Policy" to root out corruption and bring the comforts of civilisation "through the instrumentality of the Christian organizations, acting in harmony with the Government…." The policy established a Board of Indian Commissioners, composed of prominent Christians (an unstated requirement), which was given general supervisory responsibilities over Indian Affairs, sought to replace all Indian agents, and allotted the various Indian agencies among the

[3] Robert F. Berkhofer, Jr., *The White Man's Indian: Images of the American Indian, from Columbus to the Present* (New York: Vintage Books, 1979), 113.

various Christian groups. The policy was opposed by westerners and was terminated after 1881.

Despite the demise of the Peace Policy, efforts to civilize and Christianize the tribes through the suppression of religious practices continued. The government continued to award contracts to religious groups to educate the tribes and virtually every major denomination operated schools under the federal contract system. As part of this project the government attempted to ban what officials called "pagan" or "heathenish" tribal dances and other religious practices, such as forbidding funerary bundles and giveaways considered necessary to assist departed souls.[4] The ceremonies were proscribed because some agents disputed their religious character and/or because they were understood to be a barrier to governmental objectives relating to pacification of the frontier, destroying the tribal structure of Indian society and economic development. From 1882 Indian agents were told to compel discontinuance of dances should the tribes be unwilling to discontinue them on their own accord.[5] The suppression of these practices was attempted in various ways: government rations were withheld from dance participants -- forcing Indians confined to the reservation with a choice of ceasing to engage in the ceremonies or starvation, destroying dance houses, preventing Indians from leaving the reservation to participate in dances elsewhere, imprisonment and military intervention, an eventuality which resulted in the 1890 Wounded Knee atrocity. In 1892 the Bureau of Indian Affairs issued regulations to be enforced by Courts of Indian Offense designed to suppress dances.[6] The courts also were charged with enforcing regulations suppressing medicine men, polygamy and the destruction of property which accompanied some religious ceremonies.

At the end of the century, there was an increased recognition that contract schools could violate the First Amendment. By 1900 all funding for sectarian contract schools was cut. In part opposition was not advocacy for religious choice or seperation of church and state but was due to the success of the Catholic Church, which had procured almost two-thirds of the

[4] Raymond J. DeMallie, "The Lakota Ghost Dance: An Ethnohistorical Account," (1982) *Pacific Historical Review* 51: 401.
[5] Allison M. Dussias, "Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases" (1997) *Stanford Law Review* 49: 792
[6] *ibid.*

contract funds – a proselytisation success rate that aroused Protestant concern.[7] In 1904 President Roosevelt approved the use of Tribal Trust monies for church-run schools should the tribe choose to participate, a policy approved by the Supreme Court in *Quick Bear v. Leupp*.[8]

Nevertheless the ban on dancing continued to be the target of suppression efforts. In 1921, the Office of Indian Affairs released Circular no. 1665 (April 26, 1921) which read:

> The sun-dance, and all other similar dances and so-called religious ceremonies are considered "Indian Offenses" under existing regulations, and corrective penalties are provided. I regard such restriction as applicable to any dance which involves...the reckless giving away of property...frequent or prolonged periods of celebration...in fact any disorderly or planning excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.[9]

However in light of the increasing problems on the reservations, all efforts to suppress dances and traditional activities were abandoned in 1934 with the passage of the *Indian Reorganization Act*. The Act, reversing a century of policy aimed at breaking up the tribes and tribal lands, sought to encourage limited self-determination, cultural plurality and the revival of tribalism as a means of securing economic development and Indian adaptation to American society. This vision of tribal integration and Native American citizenship however remains contested.

The Legacy of the Civilisation Policy in Religious Case law

Despite the "embeddedness" of legal decision making in the wider society, the effect of previous governmental policy and the underlying rational and ethos which drove the policy as it was formulated, implemented and enforced by subsequent legal decision-making after the particular policy was abandoned by the elected branches of government has been relatively unexplored. While procedural and substantive legal rules are crucial determinants to policy efficacy in a particular dispute, it is likely that previous attitudes and paradigms relating to

[7] *ibid*, 785.
[8] 210 U.S. 50 (1908).
[9] United States. Dept. of Interior. *American Indian Religious Freedom Act Report*, P.L. 95-341: 13-4.

particular areas of law would survive a policy change. First, previous decisional frameworks and legal doctrine, which reflect a certain way of looking at the particular legal area, continue to be used and applied as a template to understand and make sense of that particular law and policy area. Second, unless policy change has been accompanied by a whole scale normative and cognitive rejection of previous policy-frames and the creation of new institutional structures, new policy is often build upon previous policy and its ultimate effects are conditioned by the sequence of historical decisions, which in turn reinforce societal commitments to certain policies and policy frames. Finally, rules and functions of law reflect an underlying sense of what kind of society and what is appropriate to that society within which the court operates – a context and a constellation of ideas which are unlikely to change quickly.

In Native American religious jurisprudence these historical elements are more pronounced as the interaction of indigenous concepts and cultural frameworks necessarily needs to be reconciled with the detritus of historical policy shifts -- emphasizing different aspects of the Native American/governmental interaction -- and western legal categories and cultural sensibilities within the context of a particular tribal-governmental history. In these cases, the courts have held that the government can burden or disregard the religious rights of Indians in a manner which suggests that these religions are perhaps less deserving of protection; for their protection would necessarily mean an embrace of a spiritual and cultural framework contrary to the idea of liberal economic development embodied in those earlier policies.

It is ironic that the Supreme Court's decision to expand governmental authority to burden religious practice was announced in a case involving a Native American's use of peyote as part of a religious ceremony. In *Employment Div., Dept. of Human Resources of Ore. v. Smith* the Supreme Court abandoned the "compelling interest" test in favour of an approach which held that general laws that incidentally burden religious practices are not subject to First Amendment scrutiny.[10] Justice Scalia argued for the majority that it was not "appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test" and this inherently subjective enterprise would "court anarchy" as

[10] 494 U.S. 872 (1990).

it would presumptively invalidate "any regulation of acts that does not protect an interest of the highest order."[11]

In response, Congress enacted RFRA which stated that the government would not "substantially burden" the exercise of religion unless it demonstrates that the action is in furtherance of the compelling public interest and the means chosen are the least restrictive. RFRA expressly adopted the compelling interest test "as set forth in earlier case law overruled by *Smith*."[12] While the Supreme Court has held that RFRA does not to apply to state and local governments by the, it has been used to invalidate some laws that that would not have been protected under *Smith.*

Nevertheless, Native American religious practitioners have had difficulty arguing that their religious practice has been "substantially burdened" or that the government must recognize claims on areas where the tribes have no current proprietary interest. This is because the courts have generally narrowly defined the concept of "substantial burden" and the incompatibility the preferred definition has with Native American religious practices and beliefs. For example, in *Navajo Nation v. United States Forest Service*[13] the Court of Appeal found that the use of treated effluent to make snow in a San Francisco Peaks ski hill does not substantially burden the religious practice of the 16 tribes who held the Peaks sacred. The affected tribes argued that the treated effluent would be offensive to their religious sensibilities and destroy the sacredness of the Peaks which were an integral and indispensible part of their religious practice.

The Court of Appeal noted that the tribe's religious beliefs were sincere and that the religious activities on the Peaks constituted an "exercise of religion" within the meaning of RFRA. However it held that an action would only "substantially burden" (thus triggering heightened scrutiny) religion under the statute to two situations: first, where someone was forced to forgo a governmental benefit due to his/her religious belief or practice and second, where the individual is coerced into acting contrary to the religious sentiments because of the

[11] *ibid,* 887-8.
[12] *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972); RFRA § 2000bb(b)(1).
[13] 535 F.3d 1058 (9th Cir. 2008) [*Navajo Nation*].

threat of criminal or civil sanctions.[14] In this case, the Court reasoned, where practitioners were neither precluded from access nor coerced into performing or refraining from some practice by criminal or civil sanctions, the use of recycled water on the Peaks would only be offensive to the tribes "religious sensibilities". This damage to the subjective nature of the Indian's religious experience is not the "kind of objective danger" RFRA and the First Amendment were designed to prevent."[15] Thus for the Native Americans who held the Peaks to be sacred, "the diminishment of spiritual fulfilment – serious though it may be – is not a "substantive burden" on the free exercise of religion."[16]

The *Navajo Nation* reasoning, with its determination that only certain government actions can produce a "substantial burden" rather than considering the *effects* of governmental action on Native religions is a re-articulation of colonialist and culturally biases evident in earlier suppression efforts. As an initial matter, it to conceives of religion and "culture" as analytically separate, a proposition not likely to be accepted by Native American religious practitioners. This conceptual separation provides for less protection for Indian religions; a governmental activity which impacts a "cultural practice or belief" is not only beyond the reach of RFRA, it need only be rationally related to the governmental objective in order to withstand judicial scrutiny. In addition, the fundamental distinction between "subjective" religious experience and "objective" religious practice is generally not useful in Native American religions because practice and religious feeling are often bound up within particular context, often a particular parcel of land. Unlike western "revealed" religions which have an institutional basis to maintain an accepted dogma, and which generally accord the location (as opposed to the act itself) of a particular ceremonial act as a secondary consideration, Native American religions are non-dogmatic, and envision spirituality as the individuals continually interacting within a communal/environmental context through various ceremonial acts. With the analytical bifurcation of "culture" from "religion" and depreciation of the context of Native American religious practice., *e.g.* the natural environment of the San Francisco Peaks in the case of *Navajo Nation*, the courts have conflated religious experience (protected by RFRA) with equal access to public lands, the protection afforded by generally

[14] *ibid*, 1069-70.
[15] *ibid.*
[16] *ibid.*

applicable environmental statutes and the romantic/transcendentalist spirituality concerning the "wilderness".

The equating of Native American religion with "culture", equal access, the protection afforded environmental statutes and a philosophic spirituality is likewise evident in *South Fork Band v. United States Department of the Interior*.[17] In *South Fork* the Band sought to enjoin a Bureau of Land Management (BLM) approval of an expansion of an open pit and underground gold mine in an area considered sacred. While the Court did not question the sincerity of the beliefs, it dismissed the RFRA action noting that the Band "will continue to have access to the areas identied as religiously significant..." It further noted that the BLM, as part of its duty to protect Indian "sacred sites" under an Executive Order "went to great lengths to evaluate potential impacts on Native American *traditional values and culture.*"[18]

The hestitancy of the Courts to recognize the territorial aspect of various Native America religions is also related to a concern about the extent to which recognized religious claims would impact land use and development. This can be no small consideration given the amount of governmental land having religious significance to tribes should the courts be amenable to finding a substantial burden on a Native American religious practice. As the Supreme Court stated in *Lyng v. Northwest Indian Cemetery Protective Association* which concerned the building a road across approximately 17,000 acres territory deemed sacred to the Indians:

> No disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property. Even without anticipating future cases, the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would in this case be far from trivial….[19]

Similarly in *Navajo Nation* the Court of Appeals noted that within the "Coconino National Forest alone, there are approximately a dozen mountains recognized as sacred" and that some of the plaintiffs to the case "consider the entire Colorado River to be sacred". Moreover

[17] *South Fork Band v. United States Department of the Interior*, 643 F. Supp. 2d 1192 (Nev. 2009) [*South Fork*].
[18] *Ibid*, n. 9, [emphasis added].
[19] *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 at 453 (1988).

"[n]ew sacred areas are continuously being recognized" by the Plaintiff tribes.[20] This notion that government can and should be able to proceed to use it property without concern for the religious sentiments of those affected, *i.e.* because it is the government's land it *cannot* be a "substantial burden" is seemingly at odds with the thrust of the First Amendment and RFRA.

The concern about the extent of religious claims to territory is reinforced by an unwillingness to see the nuances in Native American religions as they relate to land use and preservation at religiously significant sites. As the dissent in *Navajo Nation* pointed out the types of "sacred" sites recognized across the Peaks vary in religious importance. In effect, the courts have treated all "sacred" sites as analogous to a holy shrine or church in western religion, an analogy if realized in law which would prevent the large scale use of much territory – yet one which has little traction in Native American religions. Ironically, this unwillingness to disaggregate the religious significance of particular sites, or make determinations about the relative impact various non-Indian uses (*e.g.* logging v. hiking) would have on religious practices, has led the courts to find an Establishment Clause violation where the government has made an effort to set aside territory for religious uses by restricting various activities.[21]

Conclusion

The colonialist and liberal ethos did not extend automatically to indigenous peoples and justified Federal policies which sought to suppress Native American religion as incompatible with American civilisation. Despite the change to more solicitous policies since the 1930s, the underlying rationale and paradigm of previous civilisation policy continues to impact American jurisprudence. Indeed, an examination of the precedent and interpretation of religious rights and cultural rights in various judicial opinions suggest that American courts continue to narrowly circumscribe Native American rights. In part, this failure to broadly construe Native American religious practices in order to bring them under the ambit of RFRA and the First Amendment is due to cultural and religious considerations as well as the courts continued commitment to liberal notions of economic development and property rights. As

[20] *Najavo Nation, supra* note 13: 1066.
[21] *Wyoming Sawmills, Inc. v. The United States Forest Service,* 179 F. Supp. 2d 1279 (Wyo. 2001).

such, the burden of proof upon Native American litigants asserting religious claims remains high and given the continued support for governmental authority shown by the current American Supreme Court this seems unlikely to change in the foreseeable future.

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