The Struggle to Protect the Exercise of Native Prisoners' Religious Rights

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Article Abstract

This article examines the record of the American judicial system in the protection of American Indian prisoners in the exercise of their religious rights. The article briefly examines the factors related to the high rates of Indian incarceration and the important role of Indian spiritual values and the exercise of Indian religious practices in the process of rehabilitation. The Supreme Court has ruled that all prisoners retain the right to practice their religion if the exercise of these rights does not interfere with legitimate penological interests. Whether due to ignorance of spiritual native values and practices, latent discrimination, or the overly strict interpretation of judicial tests, Indian inmates in the last decade have found it difficult to obtain support from the courts for the exercise of their religious rights.

> *On or about December 10, 1987, I received an order from Major Charles E. Harris that I was to get a haircut before 4:00 p.m., or that I would be locked up in the hole if I did not get it cut. I tried to explain to Maj. Harris that I am a full-blooded Native American Indian and Maj. Harris told me that I was not an Indian as there are no Indians in his prison system and that I was really a white boy trying to get over on him. I even told Major. Harris that he could look in my files and see*

that I am really an Indian and verify my heritage but he said that was all lies, too. Well, since I did not want my hair cut Maj. Harris handcuffed me and put me in the hole.

. . . Just before Christmas, Maj. Harris, Capt. Rosenburg and about 9 or 10 other guards handcuffed me behind my back real hard and put leg shackles on me and made me go in a room with all of them. Then they shoved a table in front of the door so nobody could get out. Then, Dan Henry, the Asst. Supt. said that I am going to get a haircut one way or the other [and] that they didn't care if I was Geronimo. I told them that the courts also said us Indians could keep our hair and Dan Henry said for me and the court to go and fuck our selves [sic]. I am sorry about that word but that is what he really said.

Well, Dan Henry, Maj. Harris, Capt. Rosenburg and the guards all took my leg shackles and handcuffs real hard and held me down and this inmate barber named Earl Wells came over and cut my hair into a raggedy mess. That is when they all started laughing and Maj. Harris said that now I could get some white religion.[1]

In 1988 Robert Iron Eyes charged the administrators of the Missouri state penitentiary with violating his right to religious freedom by forcing him to cut his hair, which is against his spiritual beliefs. At the time of the lawsuit, Iron Eyes' hair had only been cut five times in his twenty-seven years of life: the first three times were in accordance with the traditional Lakota religion, as a show of respect for the death of a loved one; the last two times were against his will, by prison officials.

When prison officials ordered Iron Eyes to cut his hair in conformity with prison requirements, he requested an exemption, as provided by prison regulations.[2] Prison officials, claiming they had no proof of Iron Eyes' Indian heritage, denied his request, as they had the requests of the prison's four other Indian inmates.

Iron Eyes refused to have his hair cut. Prison officials sent Iron Eyes to disciplinary segregation and while he was shackled and handcuffed, had a prison barber cut his hair. Ten months later, prison officials again ordered Iron Eyes to cut his hair. Iron Eyes appealed to the district court and obtained a restraining order against the prison. While awaiting the hearing and in violation of the restraining order, the prison again placed Iron Eyes in disciplinary segregation, "not for not cutting his hair, but for disobeying a direct order to cut his hair." As appellate Judge Gerald Heaney would later write in his dissent, "I find this position incredible. Missouri argues that although prison officials were enjoined from cutting his hair, they were entitled to discipline him for not cutting his hair."[3]

At trial, prison officials contended that Iron Eyes' religious convictions were not sincerely held and the wearing of long hair was not an essential component of his religious beliefs. The court found Iron Eyes' religious convictions to be

sincere, but nonetheless ruled in favor of the prison officials' actions. The court pointed out that an inmate, by breaking the law, brought upon himself "the necessary withdrawal or limitations of many privileges and rights, a retraction justified by the considerations underlying our penal system."[4] The court further agreed with the prison's claim that allowing Iron Eyes an exemption would cause delays in searches and provoke prison unrest because of the special treatment accorded to Indian prisoners.

The majority court did express two points in Iron Eyes' favor. Given his appearance and name, requiring Iron Eyes to prove he was Indian bordered on harassment. Second, prison officials had come perilously close to having the court levy sanctions against them for forcing Iron Eyes to cut his hair while a restraining order was in effect.

The lone dissenter to the decision, Judge Heaney, summarized the situation more directly: "There seems to be a pattern here of disciplining Iron Eyes or forcing him to have his hair cut each time he attempts to secure his rights."[5] To the prison's argument that allowing Indians to wear their hair long would make it more difficult to identify them, Judge Heaney pointed out that prison officials had never updated Iron Eyes' photograph taken when his hair was long. Heaney further postulated that it should be easier to identify four Indians with long hair out of seventeen hundred inmates. The fact that most state prisons, like the federal system, had no requirement for wearing short hair appeared to dispute the prison officials' claims.

Judge Heaney also spoke to the testimony of one prison barber who related how another prison barber had "scalped" the hair of another Indian inmate, cutting his hair to the skin on some parts of his head, but leaving it long in other areas. "If true, this makes mockery of any claim that the defendants were just doing their job in making sure everyone's hair was simply above their collar. Native Americans believe that the hair is tied to communication with God and that without it one cannot get to heaven. Being scalped is a sign of subjugation and humiliation."[6]

The preceding summary of the *Iron Eyes* case illustrates the obstacles to the practice of their religions that Indian inmates frequently incur in the court system. And as the Iron Eyes' story reveals, the disregard for Indian prisoners' religious rights stems from ignorance, judicial bias, and outright discrimination. Protecting the rights of Indian inmates to practice their religion is of special salience when one considers the extent to which Indian people are over-represented in prisons, the reasons for the high numbers of Indians in prison, and the highly effective role of Indian religious practices in inmate rehabilitation.

Indian Prisoners

Historical accounts of Indian communities in the 1700s and 1800s detailed a community life virtually devoid of crime. Prisons were nonexistent in Indian societies. Every culture handled violations of tribal law differently, but in gen-

eral, punishments depended upon processes designed to restore tribal harmony and balance. In extreme cases, an individual faced exile if their behavior proved unduly disruptive. More common was a system of restitution. For example, when Crow Dog killed Spotted Tail in 1883, Lakota law dictated that he provide for Spotted Tail's family, thereby preventing two families from becoming destitute. The high values placed on honor and assuming responsibility generally ensured that offenders accepted the penalties levied by the community. The incident of Timmie Jack, the Creek Nation's last execution before the federal government disbanded their tribal government in 1906, illustrates this point.

In 1896, an all-Creek jury of the Muscogee Nation sentenced Timmie Jack to be executed for the death of James Brown. Between his trial in January and his execution date five months later, Timmie Jack was allowed to return home to spend time with his family and to put his affairs in order. On May 1, Timmie Jack and his wife returned to the Creek Nation courthouse in Okmulgee, Indian Territory. He sat on a box in the courthouse yard, pinned a white cloth over his heart and, as was the Creek custom to select his executor, requested his close friend to fire the fatal shot.

The reality today is vastly different from a century ago. Indians, as do all minorities, comprise a disproportionate number of inmates in federal and state prisons. In 1999, in the first comprehensive government report on Indians and crime, the Department of Justice reported that violent crime among Indians, both as victim and perpetrator, is rapidly escalating.[7] Indians are more than twice as likely as other citizens to fall victim to a violent crime. Indians incur 124 violent crimes—murder, assaults, robberies and rapes—per 100,000 people.[8] Although murder rates among Indians equals that of whites (but remains only a fifth as high as among African-Americans), Indians are twice as likely as African-Americans and three times as likely as the nation at large to be victims of aggravated assault or rape.[9]

On any given day, one in 25 Indian adults is under the control of the criminal justice system—or 63,000 individuals.[10] The number of Indians in state and federal prisons is 38 percent above the national average. In South Dakota, according to a report in 1991, Indians comprise 7 percent of the general population, but 25 percent of the prison population.[11] The number of Indians incarcerated in local jails is four times the national average. Because crimes committed on reservations fall within federal jurisdiction, 60 percent of all youths in federal prisons are Indian.[12] Indians, who account for only 0.5 percent of the national population, comprise 1.5 percent of all federal inmates. And because of the disparity between federal and state penalties, Indians receive harsher penalties than individuals tried in state courts.[13] According to the 1990 census, there are as many Indians living in prison cells as living in college dorm rooms.[14]

Factors Contributing to Indian Incarceration

Why Indians are incarcerated in such large percentages is attributable to

several factors. Discrimination in sentencing and probation play a role, but the extent of that role is not well documented. One study found that Indians receive longer sentences than non-Indians for similar crimes, and once jailed, serve 35 percent more time for the same offense as a non-Indian.[15] State laws that pool jurors from tax, voting, or phone records reduce the number of Indian jurors, calling into question the premise of "a jury of peers." [16]

Poverty and economic deprivation has an impact on the prevalence of economic related crimes as well as the ability to hire competent lawyers. Though a few gaming tribes have improved the living standards of their tribal citizens, numerous Indian communities have remained unaffected by the nation's period of unparalleled prosperity and low unemployment. According to figures for 1999, 31 percent of all Indians continue to live below the poverty level, compared to 13 percent nationally. According to the 1990 census, the median household income on reservations was $19,897, compared to the national median income of $30,056. While unemployment in 1999 dropped to record lows, 4.2 percent nationally, unemployment remains a serious and intractable problem on many reservations, hovering around 50 percent.[17] Currently the Pine Ridge Reservation in South Dakota possesses the highest unemployment rate in the nation at 73 percent.[18]

James B. Waldram, in his 1997 study, *The Way of the Pipe: Aboriginal Spirituality and Symbolic Healing in Canadian Prisons*, provides the most comprehensive analysis detailing why native people become involved in the judicial system.[19] Though Waldram's study focuses on Canadian native prisoners, smaller research projects conducted in the United States confirm Waldram's findings. Through interviews with 300 aboriginal inmates about their backgrounds, Waldram found that many native inmates are products of economic deprivation and a subculture of violence. As a group, they possess a high rate of alcoholism, and as individuals, they exhibit deep feelings of inadequacy and cultural conflicts.

Sixty-six percent of the inmates Waldram interviewed grew up in homes with physical violence, 80 percent had at least one parent or guardian with drug or alcohol problems, 35 percent grew up in foster care, 5 percent were adopted, and 30 percent spent their lives away from their home reserves in residential schools. Working from these interviews, Waldram suggests that many native peoples (and even whole communities), and especially those who find themselves in the correctional system, suffer from a type of a post traumatic stress disorder (PTSD).

According to the APA's Diagnostic and Statistical Manual of Mental Disorders a diagnosis of PTSD is applied when there is an "extreme traumatic stressor" which revisits the individual through traumatic memory, such as flashbacks and nightmares: "Symptoms can include irrational fears, insomnia, nightmares, digestive complaints, depression, anxiety or nervousness, irritability and outbursts of anger. Also experienced are feelings of guilt, shame, fear, and hopelessness. Self-destructive and impulsive behavior has also been noticed."[20]

Waldram points out that sociologists and psychologists are increasingly finding that a diagnosis of PTSD can be applied to victims who have experienced natural disasters or received physical and psychological abuse, such as abused wives and children and victims of concentration camps and torture: "Traumatic events destroy the victim's fundamental assumptions about the safety of the world, the positive value of the self, and the meaningful order of creation."[21] Psychologist Joe Couture writes, "Because of the acculturation pressures, Aboriginal communities present, in many cases, a damaged collective self, reverberating through community and its component families."[22]

Waldram posits that if one reconceptualizes PTSD as not simply one traumatic experience, but as a "lived experience," and takes notion of community trauma, a damaged communal self, and long-term, cumulative trauma and considers them in light of a long history of forced assimilation and colonialism, one begins to understand how "a whole community or society which is victimized by trauma is likely to develop aberrant moral reference points for its citizens, leading to the intergenerational transmission of pathological behavior. The experience of trauma then becomes the lived experience of a whole culture."[23]

Scholars have long recognized that prolonged or intense alcohol use represents an attempt to self-medicate the body and soul. In light of the previous discussion, one would expect to find high rates of alcohol use among Indian people. In a 1999 report by the National Center on Addiction and Substance Abuse, drugs and/or alcohol were involved in 80 percent of the crimes committed by the national population of 1.7 million prison inmates.[24] A previous study by the Native American Rights Fund and the Navajo Nation Corrections Project found that Indian inmates, who possessed a median age of 23, reported using alcohol in 95 percent of the crimes for which they were given an average sentence of six years.[25] Indians were more than twice as likely to be arrested for alcohol-related crimes than the national population in 1996. In another sample conducted in the mid-1970s at the Oklahoma State Penitentiary in McAlester, the researcher found that of the more than 100 Indian prisoners interviewed, all except one were under the influence of alcohol at the time of the commission of their crimes. Alcohol plays a role in 90 percent of all Indian-related homicides.

Alcohol is prevalent in all aspects of Indian life. Ronet Bachman, in *Death and Violence on the Reservation: Homicide, Family Violence, and Suicide in American Indian Populations*, reports that in a survey undertaken by the Indian Health Service on one midwestern reservation, approximately one in three Indians over the age of fifteen drank excessively.[26] Among young male Indians, the incidence of excessive drinking rose to almost 95 percent. A study in 1995 reported that 26.5 percent of deaths for Indian men and 13 percent for Indian women were related to alcohol—a figure 5.6 times higher than the national rate.[27]

Rehabilitation Through Spiritual Revitalization

As Waldram described, the destruction of Indian religion, culture, and iden-

tity has caused entire native communities to suffer a collective trauma. A reawakening of religious values and identity has proven to be one of the most effective tools to break this cycle of destruction: "Aboriginal spirituality, as a form of therapy, appears well suited to deal with these issues of trauma, abuse, racism, and identity confusion."[28] In 1994, Elizabeth Grobsmith, in a published study of Indian prisoners in Nebraska prisons, reported that Indian spirituality had played a significant role in rehabilitating native offenders.[29]

Justice William J. Brennan, in his dissent to the *O'Lone* case discussed below, remarked on the importance of religion to prisoner rehabilitation, "Incarceration by its nature denies a prisoner participation in the larger human community. To deny the opportunity to affirm membership in a spiritual community, however, may extinguish an inmate's last source of hope for dignity and redemption."[30] Religion in prison supports the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality.

Religion can be a powerful tool in the lives of all prisoners, helping them to reclaim their self-esteem, control their tendencies toward violence, and provide meaning to their lives.

The work of the Navajo Nation Corrections Project, a highly successful project devoted to meeting the spiritual needs of Indian inmates, attests to the rehabilitative impact of providing Indian prisoners with access to spiritual ceremonies and leaders. According to a study in 1989, the recidivism rate among former Indian inmates is 7 percent for those who have participated in the traditional religious services offered by the Project, compared to a 54 percent recidivism rate for those who did not.[31] A 7 percent recidivism rate is one-fifth to one-tenth the national average.[32] In testimony before the Senate Select Committee in 1992, Len Foster, director of the Navajo Nation Corrections Project, stated, "we know through our experience that self-esteem and dignity can only be restored if we are allowed to counsel and work with our own people through traditional spiritual counseling and ceremonies . . . those inmates who participate in these programs while incarcerated become more culturally viable, responsible contributing members of their respective communities."[33]

Traditional values emphasize understanding, forgiveness, racial harmony, nonviolence, responsibility, and respect—respect for oneself, family, community, the environment in all its forms, and the Creator. Native teachings require inmates to examine, understand and take responsibility for their behavior. Understanding the sacred nature of one's body and those around them requires that one remain free of drugs and alcohol, and of physical and sexual abuse.

Traditional Indian spiritual beliefs are taught and reinforced as in all religions through the practice of ceremonies and rituals, such as the sweat lodge, the Pipe, the Native American Church, and other ceremonies of spiritual renewal. To properly fulfill native spiritual teachings, inmates need to participate in these sacred ceremonies, need access to spiritual leaders and sacred objects, and need to express their religious tradition by wearing headbands, medallions,

and long hair.

Having established the critical role religion plays in inmate rehabilitation, this article will now examine the legal disposition of the courts in interpreting the rights of all prisoners, and Indian prisoners in particular, to practice their religions while incarcerated. Do prisoners, in general, possess a First Amendment right to practice their religion in prison? If so, must prisons treat Indian inmates (as well as practitioners of other minority religions) equally in terms of the religious benefits prisons accord to Christian inmates?[34]

Protection of Inmates' Constitutional Rights

Until the middle of the twentieth century, the prevailing social assumption was that if you broke the law, you did the time, with little regard to the quality or conditions of the "time." In the late 1960s and 1970s, the country's civil rights reforms extended to the incarcerated. In a series of decisions referred to as the *Black Muslim* cases, the courts intervened in the operation of several prisons, noting poor sanitary conditions, severe overcrowding, and excessive levels of violence. By the late 1970s, prison systems in 32 states faced constitutional challenges ranging from cruel and unusual punishment to the denial of religious practices.

In 1972 the Supreme Court heard its first challenge regarding prisoners' religious rights, *Cruz* v. *Beto*.[35] Cruz, a Buddhist, charged that several of the prison's actions—including forbidding him to worship in the prison chapel, refusing to allow him to speak to his spiritual advisor, and locking him in solitary confinement for two weeks on bread and water for sharing his religious materials with fellow inmates—violated his First Amendment rights, especially given that the prisons extended those privileges to all Christian inmates. The Supreme Court ruled that although "prison officials must be accorded latitude in the administration of prison affairs," the courts are charged with enforcing "the constitutional rights of all 'persons,' including prisoners."[36] Five years later, the Supreme Court reiterated the holding that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison," and they "enjoy freedom of speech and religion under the First and Fourteenth Amendments."[37] However, the Court reminded, "Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of [inmates'] constitutional rights."[38] In certain instances, the Court ruled, "judgment calls" regarding prison management must be left to the expertise of prison administrators.[39]

That prisoners retain their First Amendment right to practice their religion is clear. What is less clearly defined, and therefore the subject of numerous court cases, is the extent to which prisons are *obligated to ensure* that inmates are provided with the personnel and accouterments needed to practice their particular religions. While it is clear that prisons commonly hire a chaplain to offer spiritual counseling and a weekly prayer service for Christian inmates, it is less

clear whether prisons are obligated to offer Saturday prayer services for Seventh Day Adventists, to permit Muslims to go unshaven, or to provide kosher meals for Jews. The more unfamiliar prison officials are with the tenets and practices of a particular religion, the more difficulties inmates have in obtaining the items, space and personnel needed for religious practices.

This is certainly the dilemma faced by many Indian prisoners. Participation in a sweat lodge ceremony is as central to many traditional native beliefs as the communion and baptismal services are to Catholics and Protestants. To Indian people who follow the way of the Pipe, having access to a sacred pipe and a Pipe Carrier is as vital as the Bible to a Christian, the Torah to a Jew, and the Koran to a Muslim. Yet to many prison administrators, the Pipe for the Pipe Ceremony and the rocks and branches needed for a sweat lodge represent little more than potential weapons.

In general, the courts have supported prisoners in their demands for religious expression only when it is determined that the prisoners' need to exercise their religious rights outweighs the prison's interests to maintain public security and the health of the prisoners. How the court analyzes and balances inmates' rights against prison objectives is therefore critical. In the last three decades, the courts have employed two tests to determine if prison regulations legitimately interfere with a prisoner's constitutional rights.[40] The older of the two is the "least restrictive means" test. This query requires prison officials to meet prison objectives by using the least restrictive procedures or methods available.[41] Under this test, the onus falls upon the prison officials to prove there is not an alternative policy by which prisons could achieve their objective without interfering with prisoners exercising their religious rights. The Supreme Court generally applied this test from 1972 until 1987, when the Court handed down the *Turner* and *O'Lone* decisions discussed below.

By the mid-1980s, the rise in crime had become a political issue. Candidates, as illustrated by George Bush's Willie Horton campaign ad, were running on an anti-crime platform. Legislators passed mandatory sentencing and three-strike rules, and appropriated new funds for building prisons, with few dollars earmarked for rehabilitative programs. In tandem with society's reemphasis on punishment, the courts reassessed their view toward prisoners' rights.

The Supreme Court's decisions in *Turner* v. *Safley*[42] and *O'Lone* v. *Estate of Shabazz*,[43] replaced the "restrictive means" test with a "reasonably related" test which severely weakened the ability of inmates to successfully prove the validity of their needs when balanced against penological concerns. Under the new *Turner/O'Lone* test, prison regulations could lawfully interfere with First Amendment guarantees if "reasonably related" to the legitimate interests of the prison facility.

To assist the judiciary in their analysis, the Supreme Court devised a four prong test to determine the validity of a prison regulation in the face of constitutional guarantees. The courts could assume the correctness of prison policy if

1) a "valid, rational connection" existed between the regulation and the reason for its existence; 2) an alternative means was available to allow for the exercise of the right in question; 3) the manner in which an accommodation would affect the prison resources and the impact the accommodation would have on prison guards and other inmates is demonstrated; and 4) an alternative exists to the impeding prison function.[44] In summary, prison officials need only show (or as some critics have argued, need only to assert) that the regulation that prohibited a religious activity is "reasonably related to a legitimate penological interest" for the inmates' religious rights to be legitimately disallowed.

Five years after the *Turner/O'Lone* decisions, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993. Passed in response to the Supreme Court's decision in the *Smith*[45] case, an Indian peyote case, this Act directed the Supreme Court to use the least restrictive means test in deciding First Amendment religion cases. Congress also enacted the legislation with the explicit purpose of "[restoring] traditional protection afforded to prisoners' claims prior to *O'Lone*."[46] As Senator Orrin Hatch, one of the original sponsors of RFRA, stated in the Senate, "We want religion in the prisons. It is one of the best rehabilitative influences we can have. Just because they are prisoners does not mean all of their rights should go down the drain."[47] Congress further underscored its intentions by rejecting a proposed amendment to exclude prisoners' free exercise claims from the compelling interest standard in RFRA.

Despite Congress' best intentions, the Religious Freedom Restoration Act had little positive impact on inmate cases.[48] And in 1996, the Supreme Court ruled RFRA unconstitutional, thereby allowing the courts to continue their reliance on the "reasonably related" test.[49]

The Indian inmate cases reviewed below follow the general outline of all prison rights cases. The courts were more likely to protect the religious rights of Indian inmates prior to when the courts employed the "least restrictive means test." Following the institution of the "reasonably related" test in 1987, and despite the brief existence of the Religious Freedom Restoration Act, Indian prisoners have found it far more difficult to convince the courts that their need to practice an aspect of their religion outweighed the interests of the correctional system.

Legal Efforts to Protect Freedom of Religious Expression

In 1972 Indian inmates in the Nebraska State Penitentiary filed a class action suit charging the prison with the violation of their religious and cultural rights. As a result of the litigation, Nebraska prison officials signed Consent Decrees in 1972 and 1974 which secured for Indian inmates the right to wear traditional (long) hairstyles; allowed Indian inmates access to religious leaders; provided facilities for religious services; and extended official recognition to an Indian spiritual culture club.

Despite these impressive gains, Nebraska inmates were forced to return to

court several times over the next two decades to seek clarification of their rights. Prison officials continued to handle religious objects, such as the Sacred Pipe and medicine bundles, disrespectfully and to harass prisoners by requiring shakedowns during a sweat lodge ceremony. In other lawsuits, Nebraska inmates challenged the prison's interpretations in the consent decrees for "routine access" to the sweat lodges at "reasonable times," and the warden's requirement for a quorum of nine inmates to sweat. The prison also failed to adequately pay Indian spiritual leaders, despite routinely budgeting salaries for ministers and priests. The burning of sage, sweetgrass, cedar, and sacred herbs necessary for purification purposes, was also a source of controversy.

Since these early Nebraska cases, Indian prisoners have filed scores of cases seeking recognition of their rights to worship in accordance with their traditional beliefs. In 1993 alone, the Native American Rights Fund received 40 requests from native inmates for assistance in protecting their First Amendment religious rights.[50] In general, the cases have requested: 1) exemptions from dress codes so as to wear hair long; to wear headbands and/or to wear medicine pouches; 2) access to religious leaders; 3) right to possess spiritual items such as sacred herbs (sweetgrass, sage, cedar, tobacco), eagle feathers, medicine pouches, and pipes; and 4) right to conduct Sweat Lodge and Pipe Ceremonies.

Dress Codes

The opening discussion of Iron Eyes' battle to wear his traditional hair style illustrates the conflict between prisons and Indian inmates over the issue of dress codes. Prison officials maintain that dress codes, including hair length provisions, ensure cleanliness and easy identification, prevent the hiding of weapons and contraband, and decrease homosexual behavior. Dress codes also have the psychological advantage of minimizing individuality and individual behavior. For the vast majority of prisoners these requirements represent little hardship. For many Indian people prohibitions against the wearing long hair, headbands and sacred articles inhibits significant religious expression.

In 1975 Jerry Teterud, one-half Cree, challenged Iowa prison regulations that required him to wear his hair short.[51] Native religions teach that the body is sacred, a gift from nature that symbolizes an individual's link with the universe. The body should not be altered, including cutting the hair. In many cultures, such as the Plains, an individual cuts their hair to show respect and humility, as with the death of a loved one. Braiding the hair expresses the integration of the mind, body, and spirit. In testimony before the court, Teterud stated, "I would feel spiritually just dead. I would feel empty. Mentally, it would be a tremendous strain. I would have to feel – I would feel it would be necessary that I felt that my whole individual being, my being was going to die."

Prison officials reputed Teterud's claims. They argued that Teterud's beliefs were not sincerely held and not central to his religion, and therefore not protected by the First Amendment. Administrators also claimed that allowing

an inmate to exercise a particular religious right would undermine the health, security, and safety objectives of prison facilities. Short hair was necessary for sanitary food preparation, the safe operation of machinery, easy identification, prevention against smuggling of contraband, and personal hygiene habits.

The Eighth Circuit repudiated both of the institution's claims. To the argument that long hair represented only racial pride and personal preference, the court responded that it was not within the government's province to determine religious sincerity or orthodoxy. In response to the administrators' hygiene, safety, and security claims, the court found that the penitentiary's concerns were without substance and overly broad. The prison could require hair nets in food preparation and around machinery, mandate prisoners to keep their hair clean and neat; re-photograph inmates for identification purposes; and search for contraband through general body searches. "Justifications founded only on fear and apprehension," the court emphasized, "are insufficient to overcome rights asserted under the First Amendment."[52]

During this period prior to the *Turner/O'Lone* decisions, the judicial system also acknowledged the importance to the expression of native religion of wearing headbands and medicine pouches, much as the wearing of a cross is to Christianity. In 1984, in *Reinert* v. *Haas*, inmates challenged the Iowa State Penitentiary's regulations that prevented wearing religious apparel except at religious services and in cells.[53] Prison regulations allowed the confiscation of religious apparel worn outside these venues. Iowa prison administrators testified that they had instituted a dress code following a serious prison riot in 1981; they cited the use of clothing, including headbands, as signifiers of the gang membership that contributed to the riot. While acknowledging the prison's objective of de-emphasizing gang violence, the court expressed doubt that the prison would have restricted the wearing of headbands had they been an important Christian symbol. The court further pointed to provisions allowing other inmates to wear crosses or religious medals with the permission of prison officials.

The court, accepting the sincerity of the plaintiff's religious beliefs, noted that "Indian religion and Indian culture are one and the same. It is a way of life that is practiced constantly. Its essence, as a way of life, is living in harmony with all of one's surroundings. The circle is highly significant in Indian culture and religion, and this significance is expressed in the 'cosmic circle,' a visual representation of basic forces of life and the universe. The headband is a symbol of the cosmic circle; however, the headband is not just symbolic, it is sacred."[54] Adherents to Indian religion should always keep something on their persons to remind them of the unity of all things under the Great Creator: "a headband serves an adherent of the Native American Religion much as a small cross or religious medal on a neck chain serves adherents of other faiths."[55] As does a cross for Catholics, the headband allows the individual to remain in constant touch with his faith. In conclusion, the court ruled that while the public is interested in prison security, "The public interest, of course, is always well served

by protecting the constitutional rights of all its members."[56]

The *Teterud* and *Reinert* cases, discussed above, decided prior to *Turner* and *O'Lone*, quickly became anomalies in law. The courts now found that by employing the "reasonably related" test that requests for exemptions to hair regulations on the basis of religious rights were outweighed by prison security interests. The creation of this new test clearly shifted the balance in controversies over religious rights from inmates to the prisons. Indian inmates now found it far more difficult to convince the courts that their religious needs outweighed the prisons' emphasis on security and retribution over rehabilitation and prisoners' rights.

Within three years the courts[57] were ruling that prison regulations against wearing religious headbands were "logically connected" to prison objectives to maintain security.[58] A year later, the Sixth Circuit stated that "After balancing the defendant's interest in keeping prisoners' hair short against the right of the plaintiff to exercise the religion of the Lakota Indians, we hold that the regulation restricting hair length . . . is not unconstitutional."[59] Two years later, in *Iron Eyes* v. *Henry*, the description of which opens this article, a Standing Rock Sioux inmate challenged the hair code of the Missouri penal system, arguing that it infringed upon his right to wear traditional hair style for religious purposes. The court accepted the prison's complaint that to allow such a small number of Indian inmates to wear their hair long would create resentment and unrest among other prisoners. As Judge Heaney, the author of the pro-Indian *Teterud* decision, pointed out in his dissent, this argument in effect allowed other prisoners a veto power over which inmates received the rights to practice their religion. The Supreme Court's new test effectively overruled the *Teterud* finding.

Before the Supreme Court overturned the Religious Freedom Restoration Act's (RFRA) directive to the judicial system to alter its tests in evaluating challenges to First Amendment rights, RFRA provided assistance to Indian inmates in a few cases. For example, in a 1996 Massachusetts case, Kevin Greyhawk LeMay argued that the Massachusetts Department of Correction (DOC) had violated his First Amendment rights by denying him access to his spiritual necklace and medallion, cedar and sage. The prison's refusal to allow him to wear and use these items, according to LeMay, "makes it impossible for me to acknowledge and call upon those spirits that provide me with safety, well being, knowledge, wisdom and guidance."[60] LeMay further stated that the sage and cedar, as purifying agents, were "a necessary mandate prior to prayer."

According to the court, the Religious Freedom Restoration Act required that a government may not substantially burden a person's exercise of religion unless the law or directive is in furtherance of a compelling government interest and is the least restrictive means of so doing. That the prison allowed inmates to wear religious medals and medical alert medals of a certain design, but did not allow LeMay to wear his religious medal, the court stated, raised concern. The prison had not proved their contention that the small bone in LeMay's medallion was truly a security risk, or that other inmates had worn such items as gang

insignia. Even if such medallions were worn by gangs, the court contended, the prison could have handled the concern by less restrictive means, such as requiring inmates to wear all such necklaces inside their shirts except during religious services.

The purpose of the Religious Freedom Restoration Act, the court stated, was to make courts "more sensitive to religious feeling" and less likely to make judges "the arbiter of religious law." Using this standard LeMay had proven that the confiscation of his personal religious property had created "a substantial burden on religiously motivated conduct that has substantial religious significance to him even if not religiously mandated."[61] The court ordered the DOC to return LeMay's necklace and medallion and to permit him to wear them in the same manner that other inmates were allowed to wear their religious necklaces.

Access to Ceremonies: Sweat Baths and the Pipe

Europeans and Americans have long misunderstood the significance of sweat baths in Indian society. At the time of the first colonies, Europeans regarded bathing as indecent and unhygienic—and by extension, the Indian ritual of sweat baths. Europeans generally took one bath a year, using liberal doses of cologne between baths—which explains the Indian view of colonists as dirty and unhealthy and the saying that you could always smell a European before they arrived.

Sweat baths perform various functions in several Indian cultures. They help to maintain good hygiene by cleansing the body of impurities.[62] Psychologically, the sweat ceremony offers an opportunity to heal the mind, bringing clarity of purpose and direction. In many societies, sweat baths are a rite of passage, offering an individual the opportunity to test endurance, strength, and courage. Most significantly, the lodge serves a role similar to that of a church in the Christian faith, as a place where that which is sacred is invited, "a holy place where Native Americans can renew their connection to the cosmos and God."[63]

Tribes construct lodges using poles or planks in four, or multiples of four, to signify the four directions.[64] The entrance faces east to greet the rising sun, the direction of the beginning of creation and of all understanding. To produce heat, rocks are placed in a fire outside the lodge. The fire represents the sun, "the light of the world – eternity, equality, unity and life."[65] The participants placed the heated rocks inside the lodge in a central pit representing the womb of the world. The rocks, respectfully referred to as "grandfathers" by many tribes because of their existence on earth before all other life, represent life and spirit. "The rock symbolizes endurance, strength, and sacrifice. We must learn to endure pain and suffering to find healing and growth."[66] Once in the pit, the rocks are covered with sacred herbs, such as cedar, sage, and sweetgrass. Cedar symbolizes the eternal legacy of natural life. Sage reminds one of the hardships and efforts necessary to overcome adversity, while sweetgrass recalls the pleasure and happiness of life. Like all plants, these sacred herbs are produced by

the creative interaction of the earth, water, sun, and air.

Participants often use the ashes from burned sweetgrass braids to smudge themselves before entering the lodge. Sweetgrass braids, comprised of twenty-six to thirty strands, have three plaits, which represent the interconnectedness of oneself, the community, and the Creator and the balance that must exist among the mind, body and spirit. Smudging is a purification ritual that reminds each participant to rid their mind of misconception, untruths, and prejudices, ensuring that the discussion within the lodge is truthful with each participant listening to the other with respect and an open mind.

Once the flaps are closed the participants are enveloped in total darkness, a darkness symbolizing the womb of Mother Earth. The union of the stones (symbolic of the earth, or female) with the fire (symbolic of the sun, or male) represents the completeness of the physical realm. Each individual is linked in union with those around the circle. The water that is poured over the rocks is flowing and powerful, as is the love of the Great Creator: "We should even be as water which is lower than all things, yet stronger than even the rocks."[67] The steam which arises from the rocks carries the prayers of each participant to the Creator.

The darkness removes all distractions as wisdom eradicates ignorance. The darkness also reemphasizes the equality of all. Status, skin color, and one's past all disappear into the darkness, having no meaning and no place. During the ceremony, the flaps are opened four times, once for each of the Four Directions, and for the four stages of life – infancy, childhood, adulthood, and old age. During the ceremony, which takes five to seven hours, inmates pray and meditate on the various aspects of their lives. Hashke Naba, a Navajo prisoner at the federal prison in Tucson, explains how the intense prayer and meditation within the Seat Lodge Ceremony changes the lives of many prisoners: "A lot of the men come in here (prison) because there is disharmony that has taken place. When something happens in their life to disrupt the universal order problems come. The sweat lodge enables him to bring that harmony back to himself through the grandfather."[68]

Like the Sweat Lodge Ceremony, the Pipe Ceremony is found throughout Indian country. According to Paper in *Offering Smoke*, "The centrality of the pipe to the religious life and understanding of many of the native peoples of North America can best be compared to the role of the Torah in Judaism and the Koran in Islam; it is the primary material means of communication between spiritual power and human beings."[69] Father Jacques Marquette, on his travels in 1673, wrote, "[The Sacred Pipe] is the most mysterious thing in the World. The Scepters of our Kings are not as much respected; for the Savages [sic] have such a Deference for this Pipe, that one may call it the God of Peace and War, and the Arbiter of Life and Death."[70] As Ochankugahe, known to the whites as Dan Kennedy, explained, "as Moses of biblical times received the Ten Commandments on the sacred tablets, so has the Redman the sacred Pipe as the symbol of the Manitou's Covenant."[71]

As with the sweat lodge, each part of the Sacred Pipe and of the Pipe Cer-

emony is highly symbolic. The pipe's bowl, which is female, signifies the earth. The stem is male; the two parts become procreative only when joined. The pipe itself can become a sacred object, capable of possessing the power to heal, to locate food, to overcome enemies, and to offer insights into dreams, problems, and mysteries.[72]

The Pipe Keeper opens each ceremony by grasping the bowl in both hands and offering the pipe as a symbol of respect and thanksgiving to the Earth, Sky, and the Four Directions. The participants, sitting in a circle, take turns puffing on the pipe, offering their own thanksgiving and prayers. The ritual signifies and helps to cement the interrelationship of the entire cosmos: human relationships including the family, clan, and "people" or nation; animal relations, including "those who walk on the earth in the four directions; those who fly in the sky above; and those who crawl through the earth below or swim in the sea."[73] Last, the Pipe Keeper pays respect to the Four Directions and the Sky and Earth. Tobacco, regarded by many tribes as a spiritual substance, burns in the pipe's bowl. As the sacred smoke drifts upwards, it carries the prayers and offerings to the Creator.

In general, Indians have found it difficult to convince judges that their religious needs regarding Sacred Pipe and Sweat Ceremonies outweighed the prison's arguments in favor of security, health and expenditure of funds. For example, in 1987 in *Allen* v. *Toombs*,[74] two Indian inmates in the Disciplinary Segregation Unit (DSU), the maximum security area within the Oregon State Prison, filed suit requesting access to the prison's sweat lodge and that a Pipe Carrier be allowed to perform the Sacred Pipe Ceremony in front of their cells as needed. Prison regulations allowed Indian inmates in the general prison population to use the lodge each Saturday afternoon, but not those in the DSU. An outside spiritual leader or inmate Pipe Keeper conducted a weekly Pipe Ceremony for the general population as well. The suit further pointed out that the prison allowed ministers and rabbis to minister to other DSU inmates as needed and that Indian inmates comprised the third largest religious group in the prison, exceeded only by Catholics and Protestants.

The court denied the inmates' request to attend the prison sweat lodge, agreeing that allowing DSU prisoners access to the sweat lodge would jeopardize prison safety concern. The Sweat Lodge Ceremony required inmates to use a pitchfork, an axe, and extremely hot coals. The court also dismissed the inmates' equal protection argument that the Indians' lack of access to a Pipe Ceremony was inherently unfair when compared with the immediate access that Christian inmates had to full-time chaplains. As the inmates reminded the court, they were not asking for a full-time spiritual advisor, only that an inmate Pipe Keeper be allowed to perform the ceremony as needed.

In response, the court cited the Supreme Court's ruling in the *Cruz* case that a prisoner of a minority religion must be afforded "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts."[75] However, as the court clarified in

a footnote, "We do not suggest . . . that every religious sect or group within a prison – however few in number – must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand. But reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty."[76] Based on the *Cruz* ruling, the court found that the Oregon State Prison policy provided a reasonable opportunity for the inmates to exercise their faith.

In 1992, the Seventh Circuit issued a similar ruling, noting that an Indian prisoner's attendance at three ceremonies within a four-month period provided him with an adequate opportunity to practice his religious ceremonies.[77] That same year, the Sixth Circuit ruled in *Walker* v. *Celeste* that the Ohio Orient Correctional Institution was under no constitutional obligation to even build a sweat lodge.[78]

In 1994, Ralph Thomas filed suit against Nebraska prison authorities, arguing that prison officials violated his First and Fourteenth Amendment rights by denying him daily access to the prison's sweat lodge for prayer: "An integral part of the Sweat Lodge Ceremony is the offering of prayer to our Creator, and daily prayer is a necessary and essential tenet of my religious beliefs."[79] The prison, Thomas pointed out, allowed Christian and Muslim inmates daily access to equivalent locations for prayer.

The Eighth Circuit acknowledged that the Supreme Court had "clearly established" in *Cruz* v. *Beto* that prison officials could not deny an inmate "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts."[80] But when the court compared the number of hours that the prison allowed various groups access to their respective areas of worship, the court found that the prison actually provided Indian inmates with a greater number of hours (when weekend hours were included). The court further ruled that Thomas' request to use the lodge for four hours each day would interfere with other prison activities. Finally, the Eighth Circuit agreed with the prison's assertion that the location of the sweat lodge (near a truck delivery entrance) posed unacceptable security risks to prison officials.

The court's decision is instructive nonetheless for what it did not consider. The court, while in keeping with the tenor of other court decisions, did not take note of Thomas' change in request from four hours to half an hour a day. Why the court chose to make its decision on outdated information is unclear. The court also failed to consider that the central issue in Thomas' request was not the number of hours, but the opportunity to offer daily prayers. Prior to the *Turner/O'Lone* decisions the court most likely would have considered whether the facility could accommodate the requests by other means, such as moving the location of the sweat lodge away from the delivery entrance.

In contrast to the Nebraska courts, when posed with a similar need to bal-

ance access to a sweat lodge against security concerns, the Utah courts ruled in favor of Indian inmates. Beginning in 1984, the Navajo Corrections Project, an organization working on behalf of Indian inmates, requested the Utah correctional system to allow Indian prisoners the right to sweat. The Project offered repeatedly to construct a sweat lodge free of charge (the sweat lodge costs approximately $50 in materials). Despite pointing out that 19 other western states now possessed sweat lodges for Indian inmates and had never experienced security problems, the state refused to amend their policy. In 1986, the Utah Corrections Executive Director, Gary DeLand, issued a policy statement on religion, asserting that Utah prisons made every effort to meet religious needs within the confines of security concerns. Unable to persuade the Utah Corrections system to allow Indian inmates the right to sweat, six inmates filed suit in March 1987.

At the trial, Utah authorities argued that because guards could not see inmates inside the lodge, the lodge posed too great a security risk. In response to this concern, the Indian inmates offered a number of concessions, including that the prison could regulate who used the lodge, how often and how long the lodge was used, and the items taken into the lodge. The inmates even offered to allow guards to participate in the ceremony. Only if a window could be placed in the blankets that lay over the sweat lodge so that prison guards could see inside, however, would correctional officers consider the request.

U.S. District Judge J. Thomas Greene ruled that the state's concerns were excessive and that the prison's ban on sweat lodges was an "impermissible burden on prisoners' religious freedom." Forbidding the lodge to be closed and cloaked in darkness, "is like saying to a Christian, you can have the religious ceremony, but don't mention Christ."[81]

The Utah correctional system decided not to appeal. In July 1989, Indian inmates invited Arvol Looking Horse, a Lakota keeper of the sacred Pipe, to construct and bless the sweat lodge and to conduct the first ceremony. The sweat lodge ceremony is permitted once weekly, although Mormon prisoners, which make up the majority of prisoners, have the opportunity to attend Mormon services seven days a week. The Utah State Prison in Draper was the twenty-ninth prison to allow the Sweat Lodge Ceremony. Minnesota and Wisconsin, with large Indian inmate populations, have allowed the use of sweat lodges since early to mid-1980s. Contrast this outcome with that from the state of Indiana, where in 1993 the director of religious services for the Indiana prison system pointed out that the state has allowed pipe ceremonies since 1988, has a more lenient policy on long hair, and allows for the possession of medicine pouches and sacred items, but will probably never allow sweat lodges due to prison policy that states prisoners are never to be out of sight of prison personnel.

Conclusion

As the preceding discussion reveals, despite the Supreme Court's admoni-

tion that prisoners do not lose their right to practice their religions, and despite the overwhelming importance of spiritual teachings and practices to prisoner rehabilitation, Indian inmates cannot depend upon the legal system to protect their religious rights. Whether the courts will support the exercise of Indian inmates' First Amendment religious rights is heavily dependent upon the tenor of the times, the particular legal test favored by the courts, and the vagaries of judicial interpretation.

Notes

1. *Iron Eyes* v. *Henry*, 907 F.2d 810, 817 (8th Cir. 1990).
2. "Those inmates belonging to an Indian tribe, who have received a court ruling permitting them to grow long hair, will be allowed to do so. Other inmates who claim to belong to an Indian tribe must present written documentation . . . for a determination of whether they will be allowed to grow their hair long." At 812. In 1990 prison officials removed the exemption from prison regulations.
3. At 818.
4. At 815.
5. At 818.
6. At 823.
7. Lawrence A. Greenfield and Steven K. Smith, *American Indians and Crime*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, February 1999, NCJ173386.
8. Id. at 2.
9. Id.
10. Id. at iii and viii.
11. *Star-Tribune*, Casper, WY, March 7, 1993.
12. *American Indians and Crime*, Id. at 30.
13. Indians remain victims of interracial crimes at a higher rate than any other population in the United States. See Id at 2.
14. Matthew Snipp, *American Indians: The First of This Land* (New York: Russell Sage Foundation, 1989) at 106.
15. Little Rock Reed, ed., *The American Indian in the White Man's Prisons: A Story of Genocide* (Taos, NM: Uncompromising Books, n.d.) at viii.
16. See for example, Rupert Ross, *Dancing with a Ghost* (Ontario, Canada: Octopus Publishing Group, 1992).
17. Garth Massey and Audie Blevins, "Reservation Employment Dependent on Government," *Wind River News*, December 2, 1999, 1.
18. David Melmer, "Empowerment Underway at Pine Ridge," *Indian Country Today*, December 8, 1999, B3.
19. James B. Waldram, *The Way of the Pipe: Aboriginal Spirituality and Symbolic Healing in Canadian Prisons* (Ontario, Canada: Broadview Press, 1997).
20. DSM-IV, 1994 at:424 , cited in Waldram at 44.
21. Id. at 44.
22. Id. at 45.
23. Id. at 46.
24. *South Bend Tribune*, January 9, 1998.
25. Len Foster, "The Navajo Nation Corrections Project," no date.
26. Ronet Bachman, *Death and Violence on the Reservation: Homocide, Family Violence, and Suicide in American Indian Populations* (New York: Auburn House, 1992), at 51.
27. *Parade Magazine*, July 18, 1999, 7.

Alcoholism also plays a role in the high rate of Indian suicides. The suicide rate for Ameri-

can Indians is 17.3 percent - a figure 70 percent higher than the rate for the general population. According to Bachman, "A vast majority of American Indian suicides appear to be related to heavy alcohol use." Bachman, Id. at 110. As the book and later the television program, *The Broken Cord*, so poignantly demonstrated to the larger public, the birth of fetal alcohol syndrome (FAS) babies among Indians is increasing at an alarming rate.

28. Waldram at 68.

29. Elizabeth S. Grobsmith, *Indians in Prison: Incarcerated Native Americans in Nebraska* (Lincoln: University of Nebraska Press, 1994).

30. *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 1987) at 386.

31. Little Rock Reed, Id., citing Dr. Hilligoss, ix.

32. "Fact Sheet," Len Foster, Navajo Nation Corrections Project, no date.

33. *The Independent*, Gallup, NM., March 13, 1992.

34. Walter Echo-Hawk, Native American Rights Fund, "Study of Native American Prisoner Issues," May 1996.

35. 405 U.S. 319 (1972). See also *Pell* v. *Procunier*, 417 U.S. 817 (1974).

36. *Cruz* v. *Beto* at 321.

37. *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979).

38. At 546-47.

39. At 562.

40. See: Comment, "The Religious Rights of the Incarcerated," 125 *U. Pa. L. Rev.* 812, 838-56 (1977) which posits that the courts have employed at least seven different standards to determine prisoner free exercise claims.

41. *Teterud* v. *Burns*, 522 F.2d 357, 359 (8th Cir. 1975). The first case by an Indian inmate to press for the right to wear his hair long in accordance with Lakota religious dictates is *U.S. ex rel. Goings* v. *Aaron*, 350 F. Supp. 1 (D. Minn. 1972).

42. 482 U.S. 78 (1987).

43. *Estate of Shabazz*, 482 U.S. at 349.

44. *Turner* v. *Safley*, 482 U.S. 78, 89-91 (1987).

45. *Employment Division* v. *Smith*, 494 U.S. 872 (1990).

46. S. Rep. No. 111, 103d Cong., 1st Sess. (1993).

47. 139 Cong. Rec. S14, 367 (daily ed. Oct. 26 (1993).

48. In a study by Professor Ira Lupu, a well known First Amendment specialist, of the 168 federal and state cases decided by the federal and state courts in which plaintiffs relied on RFRA, plaintiffs won in only 25 cases, or 15 percent. Of the 168 total cases, 144 were filed in federal courts and 24 in state courts. Of the 144 filed in federal courts, 94 were prisoners' rights cases (with most of these originating in state courts). Of the 24 state cases, five involved prisoners' litigation. The courts granted relief under RFRA in only 9 of the 94 prison cases in federal courts. In the five state cases, the courts ruled against the inmates in all instances. Ira C. Lupu, "The Failure of RFRA," 20 *University of Arkansas Law Journal* (Spring 1998): 575-617.

49. *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).

50. The Native American Rights Fund (NARF) is a privately funded public interest Indian law firm located in Boulder, Colorado. Long active in the protection of inmates' rights, NARF's, as well as other cases, often allege a violation of the Equal Protection Clause in addition to the violation of First Amendment rights. The Equal Protection argument points out, for example, that Christian inmates receive unlimited access to ministers and chapels, while access to tribal ceremonies and spiritual advisors is limited in comparison.

51. *Teterud* v. *Burns*, 522 F.2d 357, 362-63 (8th Cir. 1975). See also *Alabama & Coushatta Tribes* v. *Big Sandy Sch. Dist.*, 817 F. Supp. 1319, 1329 (E.D. Tex. 1993) which ruled that in light of the *Teterud* decision, Indian children in school could not be required to cut their hair to conform to a school dress code.

52. At 361-62. See also *Gallahan* v. *Hollyfield*, 670 F.2d 1345 (1982).

53. 585 F.Supp. 477 (1984).

54. At 479.

55. Id.

56. At 481.

57. *Standing Deer* v. *Carlson*, 831 F.2d 1525 (9th Cir. 1987).

58. Id. at 1528. *Holloway* v. *Pigman*, 884 F.2d 365 (1989) ruled that lack of access to sweetgrass and sage was reasonably related to legitimate penological interests as stated in *O'Lone*.

59. *Pollock* v. *Marshall*, 845 F.2d 656 (6th Cir. 1988), *cert. denied*, 488 U.S. 897 (1988), and *reh'g denied*, 488 U.S. 987 (1988). See also: *Cole* v. *Flick*, 758 F. 2d 124 (3rd Cir. 1985); Holmes v. *Schneider*, (Eighth Cir. 1992); *Adams* v. *Moore*, 861 S.W.2d 680 (1993). Campbell v. Taylor, (1998) (overturning Gallahan); Diaz v. Collins, 114 F.3d 69 (1977); Abordo v. State of Hawaii, 902 F. Supp. 1220 (1995); Bettis v. Delo, 14 F.3d 22 (1994) (also denied use of medicine bags, pipes, and other religious items); Adams v. Moore, 861 S.W.2d 680 (1993); Escalanti v. Lewis, 1991 WL 83900 (9th Cir. (1991) (unpublished opinion); Capoeman v. Reed, 754 F.2d 1512 (1985).

60 . Kevin Grayhawk LeMay v. Larry Dubois et al., Civil Action No. 95-11912-PBS, United States District Court for the District of Massachusetts, 1996 U.S. Dist. LEXIS 11645. LeMay Aff. at 12.

61. At 23.

62. Bruchac, Joseph, *The Native American Sweat Lodge: History and Legends* (Freedom, CA : Crossing Press, 1993). According to Bruchac, the heat in combination with the steam cleans the skin of toxins, kills viral agents and bacteria that cannot live at temperatures higher than 98 degrees, stimulates endocrine glands, and combats fatigue and tension through a release of negative ions into the air. At 10.

63. Id. at backcover.

64. Methods of construction, teaching and the symbolic representation varied among tribal cultures. The description here is generally representative.

65. Waldram at 86.

66. Id. at 89.

67. Id. at 89.

68. Jeff Herr, "Indian Inmates Seek Religious Rebirth Guidance in Sweat Lodge Ceremony," *The Arizona Daily Star*, Tucson, June 19, 1991.

69. Jordan Paper, *Offering Smoke: The Sacred Pipe and Native American Religion* (Moscow, ID: University of Idaho Press, 1988).

70. Paper at xvii.

71. Id. at 13.

72. According to tribal oral history, there are certain sacred pipes which the great Creator bestowed upon certain individuals, families, societies, clans, or tribes. Only a small number of people may handle these pipes, which are frequently housed separately in their own structures outside of the home.

73. Paper at 39.

74. 827 F.2d 563 (9th Cir. 1987).

75. *Cruz* v. *Beto*, 405 U.S. 319, 322 (1972).

76. *Allen* v. *Toombs*, 827 F.2d 563 (9th Cir. 1987). (N.2) In 1988, the Eighth Circuit affirmed that prison regulations forbidding inmates in Protective Custody from attending a sweat lodge ceremony were not in violation of the First amendment.

77. *Frederick* v. *Murphy*, unpublished (7th Cir. 1993). The same year, the Ninth Circuit ruled that a prison's right to maintain security outweighed an individual's right to attend congregate services; *Frank* v. *Agnos*, unpublished (9th Cir. 1992).

78. 1992 U.S. app. LEXIS 2821, *3 (6th Cir. 1992) Indian prisoners were also successful in two other district court cases, *Bear Ribs* v. *Taylor*, Civ. No. 77-3985RJK(G) (C.D. Calif. April 1, 1979) and *Marshno* v. *McMannus*, Case No. 79-3146 (D. Kan., Nov. 14, 1980). In these cases Indian inmates argued respectively that the warden's refusal of access to sweat lodges, and access to sacred objects, religious leaders, and drum ceremonies violated their first amendment rights.

79. At 18.

80. At 322.

81. Editorial, "To Further Oppose Sweat Lodge Waste of State Money, Prestige," *The Salt Lake Tribune*, Salt Lake City, UT, March 20, 1989, Section A, page 10.