The Prison Journal

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The Prison Journal 2007; 87; 195
DOI: 10.1177/0032885507303746

The online version of this article can be found at:
http://tpj.sagepub.com/cgi/content/abstract/87/2/195

Published by:

http://www.sagepublications.com

On behalf of:

Pennsylvania Prison Society

The Prison Journal
Volume 87 Number 2
June 2007 195-210

10.1177/0032885507303746
http://tpj.sagepub.com
hosted at
http://online.sagepub.com

Harmony Behind Bars

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As prison populations swell across the country, lawmakers and prison officials must face difficult questions concerning how to accommodate growing numbers of inmates. Aside from where to house them and what kind of medical care to provide, decision makers must also consider the constitutional rights of prisoners to practice their religion behind bars as guaranteed under the First Amendment. This is no simple task, however. Native American spirituality comes in many forms, ranging from traditional ceremonies such as the Sun Dance to organizations modeled after Christian sects. But which ceremonies and practices are permissible for Native Americans to practice behind bars remains unclear. Courts have applied various tests to balance these interests with the security concerns of individual prisons, leaving many Native prisoners without a spiritual outlet, which is neither constitutional nor constructive. This article assesses the health of Native American spirituality in prison and reports its well-being in various jurisdictions.

Keywords: *constitutional rights; incarceration; Native American; prison*

Religion plays a special role in many people's lives. This is particularly true for Native Americans, whose religion is embodied in their daily lives and colors their view of the world. When Native Americans are denied the right to practice their religion, the harmony in the world is lost, yet religious needs do not always fit neatly within prison regulations. The skepticism of prison officials, who doubt the authenticity of these needs and suspect religion being used as a cover illegal activity, compounds the problem. The situation has forced Congress and the Supreme Court to spar over the boundary line separating Native American religion and prison regulations for decades, producing an unclear doctrine to govern incarcerated Native Americans seeking to maintain their spirituality and constitutional rights.

The religious rights of Native American prisoners denied by prison regulations are protected under two different clauses in the Constitution—the Free Exercise of Religion Clause and Equal Protection Clause (U.S. Const. amend. I, XIV, §1). The first prohibits the government from burdening an individual's right to free exercise of religion. The second ensures that

individuals will enjoy equal protection with other people under the law. The cases discussed below all stem from claims brought under one or both of these clauses and reached mixed results.

A General Overview of the Religious Rights of Native Americans

By the 1970s, two Supreme Court cases, *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972), laid out a test for determining when a government burden on the right to free exercise of religion, protected under the First Amendment, was unconstitutional. For a law that burdens the exercise of religion to be upheld, the government must show a compelling reason for burdening religion and that there is no less restrictive way. Even at this early date, Native American prisoners used the test to argue that prison regulations violated their rights under the Free Exercise Clause or Equal Protection Clause or both.

The most prominent religious rights cases brought by Native Americans in the 1970s actually focused on the rights of prisoners. In *Teterud v. Burns* (1974/1975), the court found that the prison's justifications for a ban on long hair did not sufficiently show a compelling interest and therefore violated the religious rights of prisoners.[1] The court also found that the ban was not the least restrictive means available. Several other courts also found that prison bans on hair length violated the religious rights of Native American prisoners, who regarded hair "as a sense organ, a manifestation of being, and a symbol of growth" (*Gallahan v. Hollyfield*, 1982; also see *Weaver v. Jago*, 1982). These favorable decisions owe their outcomes to the demanding compelling interest test fashioned in earlier cases such as *Sherbert* (1963) and *Yoder* (1972).

During this time, the American Indian Religious Freedom Act (AIRFA) of 1978 became the first piece of legislation to directly deal with the religious rights of American Indians. AIRFA responded to widespread bans on Native American ceremonial practices and religious articles, which prison officials often associated with symbolism for illegal activity.[2] The need for such a reform was well documented. A federal task force created to justify the need for AIRFA issued a report that cited specific problems occurring in Indian country. According to letters and other documents gathered by the task force, one third of the problems related to Native American ceremonies came from state prisons (Federal Agencies Task Force, U.S. Department of the Interior, 1979).

Despite the language in AIRFA protecting the "use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites," the act did little to help Native Americans (Federal Agencies Task Force, U.S. Department of the Interior, 1979). Within one decade of the passage of AIRFA, the Supreme Court found the legislation to be more of a guiding principle on recognizing Native American religion than a guarantee of specific legal rights (see *Lyng v. Northwest Indian Cemetery Protective Association*, 1988). The opinion noted several restrictions found in the legislative history of AIRFA. The act was not intended to "confer special religious rights on Indians or change any existing State or Federal law" but rather to acknowledge the importance of Native American religion (*Lyng v. Northwest Indian Cemetery Protective Association*, 1988, p. 455). The first piece of legislation to focus on the religious rights of Native Americans had no teeth.

This compelling interest standard was relaxed by the Court in two later decisions, *Turner v. Safley* (1987) and *O'Lone v. Shabazz* (1987), which specifically dealt with the religious rights of prisoners.[3] The compelling government interest was downgraded to a reasonable one, making it even more difficult for prisoners to prevail on claims that prison regulations violated their right to the free exercise of religion. Under this revised test, a prison official could ban the sacred sweat lodge ceremony if doing so was reasonably related to a penological interest.

After *Turner* (1987) and *O'Lone* (1987), courts affirmed the wide discretion of prison officials on a large scale, denying many constitutional challenges to prison regulations. The restrictive policies were usually meant to deter or diffuse illegal activity within prisons but by their very nature inhibited the religious rights of Native American prisoners. Courts upheld prison regulations with the slightest connection to security or sanitary concerns, which included bans on long hair and even the confiscation of religious articles such as animal tooth necklaces and medicine bundles.[4]

The new reasonable standard was troubling not only for prisoners but for the dissenting justices as well. Justice Stevens, who wrote the dissenting opinion in *Turner* (1987), opined that the new standard would "permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern" (p. 101). Prison officials could then ban sweat lodge ceremonies as long as the ban was reasonably related to a penological concern—a very low bar. In theory, even the suspicion of contraband being exchanged or a conspiracy taking shape would be enough reason to make such a ban.

The Supreme Court dealt another blow to the religious rights of Native Americans in 1990 in *Employment Division of Oregon v. Smith* (1990). This

decision eliminated the requirement that government must have a compelling reason to curtail the exercise of religion and do so by the least restrictive means available. Laws of general application were presumed to be constitutional provided the burden on religion was incidental. The decision made it virtually impossible to challenge state criminal laws with no apparent connection to religion (see Brooks, 1997).

In response to *Employment Division of Oregon v. Smith* (1990), Congress passed the Religious Freedom Restoration Act (RFRA) in 1993. RFRA was designed to restore the compelling government interest test for burdens on religious exercise. The second part of the test, requiring the least restrictive means of furthering that compelling interest, was also included in the act. Unless both parts of the test are met, government cannot substantially burden a person's exercise of religion. For RFRA to be invoked, prison regulations must "significantly inhibit or constrain conduct or expression that manifests some central tenet of a prisoner's individual beliefs" (*Werner v. McCotter*, 1995, p. 1480).

The question of whether RFRA directly applied to Native American prisoners was essentially answered in a report from the Senate Judiciary Committee. As applied to prisoners, the act was intended to restore the "traditional protection afforded to prisoners to observe their religions, which was weakened by the decision in *O Lone v. Estate of Shabazz*." Even the application of RFRA to Native Americans in penal institutions was only temporary relief in the fight for religious freedom behind bars.

The high bar RFRA set for prison regulations did not always work in favor of Native American prisoners seeking religious freedom. In *Werner v. McCotter* (1995), the court ruled that a Cherokee prisoner's claim that prison officials denied him access to a Cherokee spiritual advisor did not violate RFRA. Native American spiritual advisors from other tribes were available, but the plaintiff refused to meet with them because they belonged to another tribe. The court held that a prison does not need to employ "clergy from every sect or creed within its walls" when sufficient alternative methods of worship are available (*Werner v. McCotter*, 1995, pp. 1480-1481).

Some questions surrounding the religious rights of Native Americans were still unanswered after RFRA and led to a proposed bill called the Native American Cultural Protection and Free Exercise of Religion Act of 1994. The bill was extremely comprehensive in that it was designed to ensure Native American prisoners were afforded the legal protection to the "same extent as prisoners of other faiths." Among the bill's provisions were protections on traditional hairstyles, on the use of peyote, eagle feathers, and animal parts, and on the ceremonies (pp. 21-22).

Unfortunately, any promise the bill had to protect the rights of Native American prisoners disappeared shortly thereafter. After being referred to the Senate Energy and Natural Resources Committee, the bill came to an abrupt halt because of disagreement over who should make decisions concerning Native American religion—the tribes or the federal government (Brooks, 1997). Still, even without the Free Exercise of Religion Act, courts did apply RFRA to cases involving Native Americans in prison, but the applications and outcomes substantially varied.

Despite the best efforts of Congress, RFRA only confused courts even more on the issue of religious rights for Native American prisoners. In some cases, courts applied the relaxed test articulated in RFRA, whereas other courts continued to use the compelling government interest test found in *Turner* (1987). In one case, a court applied both the *Turner* test and the RFRA test and reached the same conclusion (*Hamilton v. Schriro*, 1996). A prison required a Native American prisoner to cut his hair and denied him access to a sweat lodge, citing security reasons. The court found these policies rationally related to the prison's penological interest (security) and the "least restrictive means of maintaining the prison's compelling [government] interest" (Brooks, 1997).

The RFRA did little to convince the Ninth Circuit that the rights of Native Americans were worthy of protection. The Ninth Circuit Court of Appeals shed its liberal image in 1999 when it upheld summary judgment in the case brought by two Native American prisoners in California. They challenged a prison regulation prohibiting hair longer than 3 inches. and worn below the collar as violating their right to Free Exercise of Religion under the First Amendment.[5] The court affirmed the district court's decision, finding the regulation "reasonably related to prison security," which is a legitimate penological interest, returning to an unpopular standard challenged several times over the years (*Landers v. Terhune*, 1999). Perhaps this case led Congress to pass the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000.

The inconsistent protection afforded to religious exercise of Native American prisoners by the RFRA was short lived. In 1997, the Supreme Court found the act unconstitutional in *City of Boerne v. Flores* (1997), describing the compelling interest test as the "most demanding test known to constitutional law." The *Boerne* decision found that the act went beyond Congress's power under the Fourteenth Amendment, making the compelling government interest test unconstitutional and giving significant discretion about the religious exercise of Native American prisoners to state correctional officials.

If Native American activists and scholars are correct about the benefit of Native spirituality in prison, the implications of *Boerne* (1997) went far beyond denying prisoners free religious exercise. The decision was a roadblock to prisoner rehabilitation because it prevented the spiritual growth of Native Americans in prison. Purification ceremonies and sweat lodges are credited with teaching important values such as "teaching respect, responsibility and sobriety" to prisoners.[6] One study noted that "enforced separation from one's ancestral cultural practices" contributes to identity crises and violent behavior.[7]

The ceremonies themselves are not indicators of recovery for inmates suffering from alcoholism, drug addiction, or emotional problems. "Ceremonies and sacred objects," rather, "help provide a sense of identity, purpose, and strength," which are necessary to deal with such problems (Grobsmith, 1994, p. 172).[8] Sweat lodges and pipe ceremonies and talking circles are believed to heal the spirits of Native American prisoners while building pride in their culture. One scholar even described sweat lodge ceremonies as "the single most important and widespread religious activity among Native American prisoners in the United States" (Grobsmith, 1994, p. 49).

The emotional and spiritual benefits of the sweat lodge and other Native American ceremonies command significant respect under federal prison regulations. In the *Technical Reference Manual* published for chaplains, the Federal Bureau of Prisons (2002) describes the sweat lodge ceremony as a "return to the womb of Mother Earth for purification, strength, guidance, and for physical, mental, emotional and spiritual healing." Because the federal government recognized the value of religion to incarcerated individuals and supported their religious rights in the past, it made another attempt to secure religious freedom for prisoners.

Congress addressed the right to free exercise of religion for prisoners in RLUIPA of 2000, which brought back the compelling government interest test stated in RFRA. RLUIPA goes further, however, by requiring the plaintiff prisoner to show that the regulation being substantially challenged burdens his or her exercise of religion. In addition, RLUIPA prohibits the government from regulating land use in a way that treats religious assemblies (religious activities) on less equal terms than nonreligious assemblies (recreation activities). Excluding religious assemblies from using a penal institution's space altogether or unreasonably limiting them also violates the act. The vast majority of Native American prisoners need outdoor space

(and, in some cases, building materials) to practice their religion, highlighting the importance of RLUIPA's provisions.

Native American Prisoners and Their Religious Rights Today

RLUIPA is the current standard for judging the regulations that restrict the religious rights of Native Americans in prison. Since the passage of RLUIPA in 2000, courts have affirmed restrictive prison regulations tailored to security interest, leaving Native American prisoners uncertain of their rights. A Florida court recently found in favor of prison officials who denied their Native American prisoners an area to practice their religion and sweat lodges, both protected under RLUIPA (*Wilson v. Moore*, 2003). The court held that denying Native American prisoners holy ground was not a substantial burden on their faith because it did not bar prisoners from engaging in other religious practices (*Wilson v. Moore*, 2003, p. 1350). The sweat lodge ban was deemed reasonable because "prisons cannot be expected to set aside and police patches of land for every [religious] sect." Many courts have reached similar conclusions, leaving Native American prisoners to doubt RLUIPA's protection of their religious rights (*Wilson v. Moore*, 2003, p. 1350).[9]

Although the Florida court's decision seemed to silence all claims of free religious exercise by Native American prisoners, one claim was still available after the court's ruling. One of the prison's more restrictive policies was not upheld by the court because of its blatant violation of the equal protection guaranteed by the Fourteenth Amendment. The prison required an assigned number from the Bureau of Indian Affairs or membership in a (federally) recognized tribe to participate in Native American religious observances. The prisoner claimed the regulation places "racial restrictions upon those who would follow the Native American path, restrictions placed on no other faith group" (*Wilson v. Moore*, 2003, p. 1347). Such a regulation is extremely restrictive, however, in that it denies access to prisoners who belong to state recognized tribes, tribes in the process of seeking federal recognition, and tribes dealt with by the federal government solely under its Bureau of Indian Affairs power.

The case law upholding the right to hold and participate in sweat lodge ceremonies, however, is equally substantial. Prisoner access to sweat lodge ceremonies on a weekly and holiday basis has been affirmed several times in the past decade, but daily access has not.[10] In 2002, the Massachusetts

Appeals Court recommended that the Department of Corrections settle a case with Native American prisoners over a ban on purification lodges in state prisons or else the court would rule in favor of the appellant prisoners.[11] A settlement in 2003 led to purification ceremonies in three Massachusetts state prisons several months later. Many other states have acknowledged the importance of sweat lodges to Native American prisoners and offer regular ceremonies under detailed guidelines that courts generally uphold.

In spite of the general agreement of courts that prisoners have a right to sweat lodge ceremonies, their decisions have met with disapproval from a small segment of the public. One popular Massachusetts talk show host and newspaper columnist criticized the state's high court for conferring what he perceived to be special benefit on Native American prisoners while denying other prisoners the amenities. This claim not only mistakes Native American religion for a recreational activity, it also fails to recognize Native American religion as a right codified in statutes and presumes it to be a privilege bestowed on prisoners by the penal system.

The unresolved status of religious rights for Native Americans in prison and the contradicting court decisions are understandably alarming to people in Indian country. In 2002, the National Congress of American Indians (NCAI) saw an "emergency need to protect the free exercise of religion of Native American Prisoners" and acted soon thereafter. NCAI passed a resolution encouraging the Bush administration to issue directives to state prison systems to "comply [with] and enforce existing statutes, laws and policies to allow the free exercise of religion by Native American Prisoners" (NCAI, 2002, p. 1). All of the court decisions and legislation protecting the religious rights of Native Americans in prison have not settled the matter. The Free Exercise Clause and Equal Protection Clause continue to be defined as they apply to Native Americans in prison.

Regulations

Of the two kinds of regulations governing prison administration—state and federal—both deal with Native American religion in some way. State regulations are more restrictive of these Native American religious practices in prison and produce the vast majority of court challenges based on rights guaranteed under the First and Fourteenth Amendments. Federal prison regulations are more tolerant of religious rights but govern fewer prisoners and, when juxtaposed to state regulations, mark a very strong tension between the two.

State Regulations

Since *City of Boerne v. Flores* (1997), civil rights claims by Native American prisoners against their correctional institutions have increased and attract more attention. These claims have been brought in a number of states, including Arizona, California, Florida, Minnesota, Montana, North Dakota, and Washington, most of which have large Native American populations. Some, but not all, of these states recently revised their policies to eradicate civil rights violations in their facilities.

A claim filed by four Native American prisoners against Montana State Prison officials led to a settlement between both parties and several noteworthy changes in prison policy. The claim stated in part that prison officials discriminated against them by confiscating their medicine bundles and decorated eagle feathers but allowed Christian prisoners to keep their religious crosses and medals. Prison policy required these articles to be store bought or ordered through the prison's chaplain, a Catholic priest. Articles obtained by other means were considered contraband (Wolf, 2003).

After the prisoners and prison officials agreed to the settlement in 2003, the prison established a policy barring officials from inspecting sacred items such as medicine bundles and pipes by hand.[12] Prior to the settlement, some Native American prisoners abandoned wearing medicine bundles altogether because they were subject to searches by prison guards. The guards, according to one prisoner, "[did] not realize the power of [medicine bundles]—that power will sometimes go out totally by their handling or that it will go into them in a bad way."[13]

Although state prison policies tend to be restrictive by nature, several states still maintain policies that directly conflict with the exercise of Native American religions.

California's Department of Corrections subjects all religious items to routine searches and requires official approval for a prisoner to possess or wear a religious artifact "at any time other than regular religious or sweat events or facility sponsored events."[14] The policy also restricts the length of prisoners' hair to 3 inches. and requires it be neatly groomed, directly conflicting with some Native American beliefs about hair.

In Florida, the Department of Corrections allows sacramental wine to enter the facility with prior approval but never mentions other sacred substances such as peyote or sweet grass. Florida also requires its chaplain to conduct or supervise "all religious services," without considering impropriety of having a religious leader from one faith officiating the service of another.[15] This policy cannot be said to protect all prisoners in Florida equally under the

law, however. It would go against Catholic Church's teaching to ask a rabbi to consecrate the Eucharist or a priest to lead a bar mitzvah.

The Washington State Department of Corrections publishes a list of 22 recognized religions available to prisoners. The list includes Native American Religion and the Native American Church but does not elaborate on the practices of either (Shannon, n.d.).[16] The distinction is significant because the Native American Church adheres to some Christian teachings while regarding peyote as the embodiment of the Creator, Deer Person, using it during religious ceremonies and gatherings (Washington State Department of Corrections, 2003, p. 57). Beyond this organized Christian sect, Native American spirituality differs from tribe to tribe, even person to person.

Minnesota's Department of Corrections promulgated a list of questions for new religious groups seeking space for ceremonial purposes using phrases and concepts molded by dominant (non-Native) society. The questions include "What is the official name of the group?" and "Who is the head of the faith grouping?" and "Does the faith group have ministers or teachers?" (Fikes, 1996).[17] Native Americans do not always describe their religions in such terms, however. Oral histories and creation stories are generally not codified in reference books, and spiritual leaders are not ordained or produced by seminaries. Because the questions are not phrased in terms that apply to tribal spiritual leaders, there is no guarantee that Minnesota will recognize Native American holy men and women in the near future.

One recent case from North Dakota has raised the issue of who gets to dictate the terms of religious rites and ceremonies in prison. In *Brown v. Schuetzle,* 368 F.Supp. 2d 1009 (D.N.D. 2005), defendants claimed prison officials burdened their religious exercise by refusing to allow a Native American inmate from their tribe to conduct regular sweat lodge ceremonies.[18] The Native American prisoners felt the decision to put an inmate from another tribe in charge of the sweats rendered the ceremonies meaningless.

Although the case is not resolved, the outcome looks grim for the prisoner plaintiffs. Current law requires a compelling government interest to be served by this action using the least restrictive means available. The prison officials did not dissolve the sweat lodge ceremonies or restrict access, however. They barred a single inmate from supervising the sweats because his record indicated a security concern. The sweats were still allowed in general for the benefit of other prisoners under the supervision of a different inmate. Although the inmate in charge of the sweat lodge did not meet the protocol, this assignment of responsibility was the least restrictive

means available because no other inmate spoke his tribal language or possessed documentation of his participation in the Sun Dance.

The Arizona Department of Corrections religious observance policy is perhaps the most progressive of all state institutions, recognizing "Native American" as a major faith group because of the large number of Native American prisoners in that state's penal system.[19] The policy devotes three pages to Native American religious observances alone and sets out detailed guidelines for a variety of ceremonies, including sweats, talking circles,[20] pipe ceremonies, and powwows.[21] It also guarantees Native American prisoners religious tobacco and smoking pipes, even when the prisoner is housed in isolation for disciplinary reasons. The more restrictive part of the policy requires a facility chaplain to compile the list of participants and schedule Native American religious ceremonies, even though he or she may not have any connection with or understanding of Native American religious rites.

Arizona's policy of recognizing the religious freedom of its Native American population does not extend to just anybody, however. In several states, including Arizona, the practice of Native American religion is contingent on the successful completion of a qualification exam of sorts. Arizona requires verification of Native American *ethnicity* before authorizing an inmate's participation in a Native American ceremony. This verification comes in three forms: (a) descent from a U.S. Indian tribe, (b) current membership to a U.S. Indian community, and (c) recognition by an Indian community. Such a requirement ignores the reality that many Native Americans do not have documentation for their ethnicity, but it is more relaxed than required enrollment in a federally recognized tribe.

Although state regulations concerning religious exercise in prison widely vary, most have revised or relaxed during the past 5 years, most likely in response to changes in federal law. This did not diminish the frequency of Free Exercise and Equal Protection challenges brought against states by their Native American prisoner population, however.

Federal Regulations

In general, the federal government does a more thorough and explicit job of protecting the religious rights of Native American prisoners under the Free Exercise Clause and the Equal Protection Clause. In 1996, President Clinton signed an order accommodating access to and ceremonial use of Indian sacred sites.[22] The order defined Indian sacred sites as those identified by an Indian tribe or individual as having an established religious significance or those used for ceremonial purposes by an Indian religion.[23]

Although the order did not explicitly apply to prisoners, it did not prohibit Native Americans in federal prisons from enjoying the rights protected by the order either.

The U.S. Bureau of Prisons maintains a liberal policy that requires that an outdoor area of prison facilities be provided for a sweat lodge and other religious ceremonies as long as security is not compromised.[24] The guidelines and procedures manual published by the Bureau for federal prison chaplains even recommends dimensions for the lodges while highlighting the religious significance of the structure's position and building materials.[25] References like these make it clear that unlike state institutions, federal prisons are required to facilitate religious practices for Native American prisoners.

Unlike many state correctional facilities, federal facilities do not have blanket restrictions on which religious articles enter the facility and require only minimum inspections. Articles brought by visiting spiritual leaders "should ordinarily not be handled by staff" because of their sacred significance (Federal Bureau of Prisons, U.S. Department of Justice, 2002). It is also recommended that medicine bundles, drums, and animal bones belonging to a prisoner be inspected visually rather than by hand.

Although federal prison regulations seem more accommodating to the religious rights of Native American prisoners than state regulations, restrictions still exist. One such restriction regards the possession of eagle feathers by prisoners and requires the filing of special forms through the Department of the Interior's Fish and Wildlife Service. Eagle feathers can only be obtained or possessed by prisoners who have a Bureau of Indian Affairs registration number, which automatically excludes prisoners who do not belong to federally recognized tribes but do practice Native American religion (Federal Bureau of Prisons, U.S. Department of Justice, 2002). This policy is still more lenient than the policies of some states, including Montana, which considers any items not obtained through the chaplain or prison store to be contraband.

Perhaps state prison officials could follow the example set by the federal government and one day do more to preserve the rights of Native American prisoners. This goal might not be realized anytime soon, however, because of limitations on state budgets and prison staff. Moreover, the federal government has a trust responsibility with respect to Native Americans, whereas state governments do not. That justification for liberal federal regulations must fail, however, because the Constitution—not treaty rights—guarantees Native American prisoners the free practice of their religion.

Conclusion

The constant tug-of-war between Congress and the Supreme Court has left the religious rights of Native American prisoners unresolved in 2004. It is important to note, however, that the issue of religious rights for Native American prisoners has loudly resounded through all branches of government for more than a decade and is now reflected in both state and federal regulations. The denial of sweat lodges and medicine bundles for Native Americans continues to garner attention, however, because of the blatancy and frequency with which such denials occur today. More must be done for Native Americans and all other incarcerated people who struggle to maintain or search for faith until the denial of religious rights is completely eradicated within the penal system.

Notes

1. This denied the prison officials' assertions that long hair could be used to smuggle contraband or change the appearance of an escaped convict and found that less restrictive means, such as comparison photos and requiring thorough hair care, were available.

2. Many prison officials were skeptical of Native American religious practices and therefore tried to minimize their presence in prisons. For example, the colorful beadwork and headbands commonly used by Native Americans were thought to represent gang insignias. The use of sacred pipes and tobacco was also considered part of the "drug culture" rather than ritual implements.

3. These upheld a prohibition on Muslim inmates who work outside the prison from attending weekly services.

4. See *Standing Deer v. Carlson* (1987, upholding prison regulation against Native American inmates wearing headbands in prison dining halls because of security and sanitary concerns) and *Hall v. Bellmon* (1991, affirming a prison's policy of confiscating sharp objects, including animal tooth necklaces, and neckwear, including medicine bundles).

5. The length of one's hair has significant meaning for many Native Americans. "Hair is considered a gift from the Creator. . . . It embodies the strength needed to endure difficult times. If an Indian's hair is removed, his life is drained of all energy" (Norman, 1993, p. 192). Also see Reed (1993).

6. See Foster (1998). Foster was National Coordinator of National Native American Prisoners Rights Advocacy Coalition after its formation in 1995 and held that position at the time of this writing.

7. See http://tlc.wtp.net/american_indian_religious_rights.htm. A study conducted by anthropology professor Elizabeth Grobsmith (1994) surveyed state prisons with large populations of Native American prisoners to determine the effect, if any, of Native American religion in penal institutions. California responded that Native American religion reduces violence and provides a sense of pride in brotherhood, a cooperative attitude that aids reintegration into society. Oregon added that Native American spirituality promotes a sense of self worth, well-being, and acceptance.

8. The Navajo Nation Correction Project found that a mere 7% of incarcerated Native Americans who participated in Native American ceremonies reoffended on release from prison.

9. Also see *Gonzalez v. Litscher* (2002), *Tart v. Young* (2001, holding that not providing sweat lodge ceremonies to inmates does not violate free exercise clause of the First Amendment because the Smith and O'Lone tests are satisfied), and *McElhaney v. Elo* (2000, holding that tools used to build sweat lodges threaten prison security, a penological interest).

10. See *Thomas v. Gunter* (1994, weekend and holiday access to sweat lodge permitted) and *Thomas v. Gunter* (1997, permitting access to sweat lodge two to five times a week, but denying daily access). But see *Bear v. Nix* (1992, individual access to sweat lodge improperly denied).

11. See D'Errico (n.d.). Also see *Trapp v. Dubois* (1995, denying plaintiffs' request for a purification lodge in prison but enjoining defendants from interfering with plaintiffs' possession of ceremonial items and return to plaintiffs' all ceremonial items previously seized).

12. See Mont. Dept. of Corr., 5.6.1 Section IV.

13. Interview by Laura Brooks with Owisnii Oswiiguh, Sandusky Seneca/Mingo-Zaishta, incarcerated in Washington state (available at http://www.geocities.com/CapitolHill/9118/home.html).

14. Cal. Dept. Corr., Art. 1 § 3213.

15. Fla. Dept. of Corr., 33-503.001, 2003.

16. In the Catholic Church, only ordained priests can consecrate the Eucharist because "the priest's role remains essential [to the Mass]: He is the presider who leads the assembly and, in the person of Christ and on behalf of the people, asks God to send the Holy Spirit on the bread and wine and also on the assembly." The Sacrament of Holy Orders describes priests as "[possessing] the authority to act in the power and place of the person of Christ himself" (see Catechism 1548; also see http://www.catholicweb.com).

17. The Native American Church has approximately 250,000 members nationwide and combines beliefs and practices from both tribal and Christian traditions. Native Americans who belong to the Native American Church may use peyote under federal law but it is unclear what membership requirements or records exist for the Church.

18. See Minn. Stat. §241.05, "Religious Programming," (2003).

19. Defendants claimed the inmate was the only person in the facility who met the ceremonial protocol set forth by Arvol Looking Horse, spiritual leader at a 2003 religious intertribal council from the northern plains. The protocol requires a sweat lodge leader to have participated in the Sun Dance four times, to have had several vision quests, and to speak in his traditional tongue.

20. Ariz. Dept. of Corr. Sect. 904.04. Also see Ariz. Dept. of Corr. Annual Report for Fiscal Year 2002, noting that Native Americans accounted for 4.8% of the prison population, including male and female prisoners, and 6.4% of new admissions in 2002 (pp. 56, 61).

21. See Federal Bureau of Prisons, U.S. Department of Justice (2002). Talking circles are decision-making meetings where participants try to reach consensus through discussion and prayer.

22. Ariz. Dept. of Corr. Sect. 904.04.

23. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

24. See Exec. Order No. 13,007 (1996).

25. See U.S. Bureau of Prisons Program Statement, "Religious Beliefs and Practices," 12(c) §548.13.

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