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Secularism, Civil Religion, and the Religious Freedom of American Indians

VINE DELORIA, JR.

In 1978, Congress passed the American Indian Religious Freedom Resolution. At that time, most American Indians believed that the status of their right to practice their traditional religions was protected by that special legislation, even though in floor debate congressman Morris Udall had specifically stated that no major laws were being changed and no disruption of the existing state of affairs would take place. In the decade-and-a-half since then, Indian litigants have cited the religious freedom resolution as an indication on the part of Congress that it was federal policy, to be followed by all federal agencies, that the particular needs of traditional religious practitioners would be accommodated.

In 1988, the Supreme Court turned aside the Indians of northern California, refusing to prohibit the building of a minor logging road that would ruin the high country where they held vision quests and gathered medicines (*Lyng v. Northwest Indian Cemetery Assn.*, 485 U. S. 439 [1988]). In the spring of 1990, the Supreme Court ruled that the state of Oregon did not have to present a compelling interest in order to pass legislation that would have the effect of virtually eliminating a religion, in this instance the use of peyote for religious ritual purposes (*Employment Div., Dept. of Human Resources of Oregon v. Smith*, *U. S.*, 108 L. Ed. 2d 876 [1990]). The consternation that has arisen among American Indi-

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ans since these decisions is genuine, and many people feel betrayed by both the Congress and the Supreme Court.

The Supreme Court is decidedly anti-Indian. That much is clear. The turning point probably was *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584 (1977), which returned a devastating 9–0 against the tribe. Since then, through *Montana v. U. S.*, 450 U. S. 544 (1981), and *Sioux Nation v. U. S.*, 448 U. S. 371 (1980), it has seemed as if the Supreme Court simply weaves an argument out of thin air to deprive tribes of long-standing rights. But there is a basic question underlying the *Smith* decision that many people have not yet asked themselves: Was the case lost because it was an Indian case or because it was a religious case? Setting aside the Indian question for the moment, let us consider the religious issue.

THE HISTORICAL BACKGROUND OF FREE EXERCISE

Medieval Europe achieved an intellectual synthesis in which faith and reason were regarded as equally valid paths to truth. The true faith was revealed in the Bible and the teachings of the church, but it was believed possible to arrive at a similar set of propositions by reasoning from the natural laws revealed in the design of creation. With the translation of Aristotelian philosophy in the 1200s, reason was given a comprehensive framework within which all aspects of knowledge and experience could be related. Faith thereafter acted as a conscience and control device to reign in the exuberant adventures of reason. Western science, endorsed by religion—providing it discovered the laws established by the Creator—was free to experiment and investigate to its heart's content.

Martin Luther applied reason to the theological realm, posted his *95 Theses*, and shattered the homogeneity of Christendom by maintaining that the individual could achieve salvation by faith alone, without the intercession of the church. Thereafter, among the Protestant wing of Christianity, a process of dissent and fragmentation began, as small groups chose minor aspects of the Christian revelation around which to build their version of the true faith. Reason in the natural sciences reached the conclusion, with the philosophy and psychology of René Descartes, that the world consisted of mind and matter, mind being a province in which the church still had a voice, and matter being the indissoluble atoms of the physical world.

By the time Europeans began to look seriously at the New World as a place for settlement, religious conflicts had ravaged the European continent, countries were forced to choose between the Catholic and Protestant versions of Christianity, and a significant segment of European intellectuals had become secular, if not agnostic thinkers. Expanding technology gave secular science the edge in demonstrating to the civilized world the truth of its method and results. Hence, while religious movements contained considerably more heat than light, the process of secularization was well under way by the time the Pilgrims arrived at Plymouth Rock.

A substantial number of colonizing groups arriving on the Atlantic seaboard were driven there because of religious persecutions in their homelands. Some, such as the people in Massachusetts, promptly established theocracies equally as brutal as the situations they had fled in their original homelands. It is a historical fact that during colonial times, Catholics and Quakers were executed in Massachusetts for preaching their versions of Christianity. Other groups, such as the people in Rhode Island and Pennsylvania, saw religious conflict as disruptive of the civil order and forbade persecution of individuals because of their religious beliefs.

During the writing of the Constitution, it became apparent that some provisions had to be inserted in the nation's basic organic, political document ensuring certain freedoms that had been badly abused by the King of England and by various colonial legislatures. Thus, we had the adoption of the Bill of Rights, which contained two clauses dealing with religion: (1) the prohibition of the establishment of a state religion and (2) the guarantee of free exercise of religion. Ideologically, even these clauses contained the possibility of misunderstanding, since religion itself had been carelessly defined. Jefferson saw religion as a matter of belief and felt that the state could not interfere with the manner in which people chose to view the world. Madison went further and connected religious belief with religious acts, to advocate a much larger sphere in which the guarantee and prohibitions would be operable.

American society was predominantly Protestant/secular in its early years, with few Catholics and no Asian religions; the religions of the Indians, like their other customs and beliefs, were totally outside the realm of constitutional concerns. Christianity shattered on the American shore. Ethnic immigrants reconstituted their own versions of the national churches of their home countries, but American society was subjected to periodic "revivals,"

surges of religious energy that left in their wake new denominations with less sophisticated and more practical theologies. The rigor and personal discipline required by Lutheranism and Calvinism became translated into the quick, emotional experience of "salvation" on the American frontier. This process of fragmentation has been a major characteristic of American Christianity ever since.

Real controversy over religious freedom did not take place until American society had to deal with the Mormon movement in the 1860s. One tenet of the Mormon faith, taken directly from the pages of the Old Testament, with certain American innovations, was polygamy, and the Mormons practiced it with some vigor and notoriety. Beginning in 1862 and continuing until the Tucker Edmund Act of 1887, Congress attempted to prohibit the practice of polygamy in spite of the constitutional prohibition of this effort, justifying its attempts on the basis that Utah was a territory ruled by Congress and therefore not entitled to Bill of Rights protection until it had become a state. In *Reynolds v. U. S.*, 98 U. S. 145 (1879), the Supreme Court adopted the Jeffersonian interpretation of religion, ruling, in effect, that Mormons were free to believe in polygamy but not free to practice it.

Other than the Mormon controversy, little was done in the religious realm until the Second World War. Congress prohibited the use of federal funds in support of sectarian schools on Indian reservations, but the Supreme Court, in *Quick Bear v. Leupp*, 210 U. S. 50 (1908), found that churches could use tribal funds for their schools, since Catholic Indians needed to have religious freedom. During the First World War, some cases arose but were as easily characterized as free speech cases as instances of oppression of religious practice. With the surge of patriotism in the Second World War came the flag salute cases, in which the Supreme Court first said it was permissible to require Seventh Day Adventist children to salute the flag and then reversed itself and ruled otherwise.

In the interim period between the adoption of the Bill of Rights and the advent of the Second World War, a process of rapid secularization took place. During colonial days, churches dealt with most of the social problems that government handles today. Charity for the poor was a church function, as were education, hospital care, and even some aspects of penitentiary administration. With the great fragmentation of Christendom in America, it was impossible that any one denomination could resolve societywide problems, although the Roman Catholics, from start

to finish, insisted on having their own school system. Nevertheless, over the decades, churches withdrew from active involvement in domestic problems and confined their activities to gathering new members and issuing pious pronouncements endorsing the actions of government.

Only since the end of the Second World War has there been a significant amount of litigation involving either free exercise or the establishment of religion. In general, the free exercise cases have involved overly zealous members of recognized Protestant churches whose allegiance to the articles of faith, in practice, have created conflicts with civil law. Establishment cases have dealt primarily with efforts to provide financial support to Catholic school systems or with the presence of Christian symbolism in displays of public celebration, particularly on what were once religious holidays. Supreme Court justices have tiptoed with extreme caution through the thickets of the free exercise clause, hoping not to arouse a religious constituency. Thus, numerous "tests" have been devised by the Court to provide guidance for lower courts in handling religious free exercise cases. Until *Smith*, the test most frequently used originated in *Sherbert v. Verner*, 374 U. S. 398 (1963), which involved a three-step process for determining when the state could constitutionally impinge on religious activities, the most important step being a demonstration that the state had a compelling interest in controlling specific kinds of behavior.

With *Smith*, the *Sherbert* test was discarded. In its place was substituted the strange and nonhistoric proposition that the right of free exercise of religion had to be linked to some other freedom guaranteed in the Bill of Rights: Free exercise could not stand alone. It is important to note that the Court did not say anything about Indians, although it had the opportunity to do so with the Indian position fully briefed and the presence of a federal regulation specifically exempting the Native American Church from the enforcement of drug laws because of its religious ritual use of the cactus.

AMERICAN INDIAN RELIGIOUS FREEDOM

Government treatment of traditional Indian religions has been inconsistent, fluctuating with the perceptions of Congress and the Bureau of Indian Affairs. Early treaties sought only to obtain the permission of the tribes for missionaries to visit them; later treaties gave some denominations grants of land in exchange for provid-

ing educational or health services. During the Grant administration, churches were allowed to appoint Indian agents for most reservations, and suppression of tribal religions was seen as a positive step in preparing Indians for American citizenship. This program failed dismally when many of the church-appointed agents proved incompetent and others embezzled tribal and government funds during their tenure as representatives of civilization. In the 1890s, an Indian agent named "Pussyfoot" Johnson prowled the Oklahoma Indian settlements, attempting to quash the use of peyote, while in Washington, D. C., the commissioner of Indian affairs denied that such activity was taking place.

At the close of the First World War, hearings were held to consider a prohibition against the use of peyote, but social scientists, defending this practice as cultural, turned back the efforts of major missionary churches to ban use of the substance. With the New Deal, religious freedom for traditional religious activities was encouraged; and since 1934, more and more Indians have felt free to bring suppressed ceremonies into the open. Throughout this period, Indians traveled to off-reservation sites to conduct ceremonies in sacred places, as they had for thousands of years. Congress even provided legislative authority for the people of Taos Pueblo to use the sacred Blue Lake area, which had been confiscated and placed in a national forest preserve. There was not much conflict between federal agencies and Indians until the 1960s, when it became apparent that tribes wanted to reclaim certain sacred areas from the government.

Taos Pueblo, in pursuing its land claim in the Indian Claims Commission, informed the government that it did not want financial compensation for its Blue Lake area—it wanted the land returned. By severing this region from its claim and seeking congressional legislation, Taos was able to get Blue Lake restored. That law was quickly followed by the return of a portion of Mount Adams to the Yakima for religious purposes. Fearful that these precedents would enable Indians to reclaim more lands, the Forest Service and the National Park Service tightened up the regulations allowing the traditional Indians to perform ceremonies at sacred places.

During the seventies, tensions increased. New conservation and ecological laws meant the writing of new administrative regulations, and with each effort by the federal government to protect and administer its lands, traditional Indian practitioners were increasingly restricted in their ability to conduct ceremonial activities. Sporadic conflict over eagle feathers and other animal

parts needed for ceremonial costumes and medicine bags meant further oppression. As an illustration of the inconsistencies of the situation, an Indian could have eagle feathers only for religious ceremonial purposes, while senators and congressmen could have eagle feather war bonnets for decorative purposes.

In 1978, Congress adopted the American Indian Religious Freedom Resolution, which directed federal agencies to survey their rules and regulations and try to accommodate the practice of Indian religions. Congressman Morris Udall assured the House of Representatives that the resolution had no practical effect; later, when this resolution was cited by Indians in court, judges and justices quoted Udall and turned them aside. The resolution was, therefore, simply a cosmetic attempt to speak to an extremely complicated subject without any knowledge of the subject at all. Litigation based on this resolution increased substantially after its passage, and courts attempted to find a test by which they could determine the probable validity of the Indian claims. But determining a central belief or practice for religions that regarded the physical world as a living entity proved almost impossible.

RELIGIOUS FREEDOM TODAY

A major phenomenon of this century has been the erosion of the power and influence of organized religion in American society. The trend has been one of secularization, in which churches, in order to receive the blessings of the government, have increasingly characterized their religious activities as basically secular in nature. Secular science, which routed religion in the courtroom in the 1925 *Scopes* trial in Tennessee, has gradually become entrenched as the final authority on the natural world, so that during the 1980s, when fundamentalist churches sought to include "creation science" in state curricula, the churches were turned away. The religious message increasingly has become one of simple belief, and religious hucksters now imply that the purpose of Christianity is to enable people to make money and live affluent lives. Only with the rise of the abortion question has organized religion made a move toward involvement in secular affairs, and on this question there is no united religious front.

As secularization has progressed, there has been a strange melding of political and religious beliefs, which has been charac-

terized by Robert Bellah as the new "civil religion." In medieval Europe, after the crowning of Charlemagne by the Pope, political power was believed to be validated by the church. Civil religion—a blending of theological concepts, a generalized religion that endorses and affirms the state—moves society back towards that condition. But whereas the Pope could energize Europe by calling for a Crusade, today the churches wait for the president to announce state policy so they can endorse it. The beliefs of the civil religion blend vaguely with mythical American history, so that America somehow gets a Judeo-Christian heritage sanctified by the blood of its pioneers and enthusiastic about current military adventures. The recent orgy of parades after the Persian Gulf bombing was an example of the fervor of civil religion.

Indian tribes encounter civil religion when dealing with the various federal agencies charged with administering public land and federal projects. Here the bureaucrats act in a priestly role, presiding over their forests, national monuments, and irrigation projects with the care and paranoia that formerly characterized village priests and New England ministers. But their perspective is wholly secular, determined in large part by the spate of environmental legislation passed over the last three decades. In the National Environmental Protection Act, the Wild Rivers Act, the Wilderness Act, the Clean Air Act, and many other recent federal statutes, we find an articulation of the relationship between humans and nature as defined and understood by inadequately educated federal employees.

Although the hard sciences—physics, chemistry, et al.—define modern scientific methodology, the social sciences, which purport to deal with human beings, follow the general perspectives of the scientific community, which understands birds, plants, animals, and all living things, including human beings, as merely phenomena that can be subjected to scientific inquiry. No other values are recognized or admissible. It is hardly a surprise, then, to understand that one of the issues of real conflict is that of the treatment of human skeletal remains. American Indians are the chief victims of the perceived scientific need to investigate; and since the founding of the United States, it has been the practice of scientists, whether their theories are well founded or not, to use Indian human remains for scientific work, teaching materials, and public displays.

The attitude of the federal agencies toward Indian remains, an attitude supported and applauded by museum directors and

archaeologists, has been that they were resources, comparable in most respects to timber, oil, and water, belonging to the federal agency on whose land they were found. The Native American Rights Fund, led by Walter Echo-Hawk, challenged this conception and, in a series of negotiations, secured restoration of many human remains and saw enacted several state and federal statutes placing Indian human remains on a near-equal standing with non-Indian skeletons. Make no mistake about the power of secularity in this struggle, however, since the attitude of federal employees and social scientists was that there is no evidence that we have any relationship to the departed, once bodily functions cease. Consequently, in their view, any belief or *experience* relating to the dead or to spirits of the dead was wholly superstition. Civil religion thus denies the possibility or importance of the after-life and limits human responsibilities to tangible things that we can touch.

A further aspect of civil religion is that the practice of religion must be within the boundaries of municipal law and civil order. Thus, state police powers are believed to be the final arbiter of values in human society. Beliefs and practices must conform to city ordinances, state laws, and federal regulations; and insofar as they conflict, they must surrender themselves to civil authority. In *Lyng*, the Forest Service was determined to build a road, apparently merely in the interests of symmetry, since the evidence revealed no practical or economic reason for construction; and the practice of Indian religions had to step back.

The power of civil religion and the inability of organized religion to articulate a set of values superior to those of the state combine to define the present situation in the following manner: Religious behavior must be justified on secular grounds in order to be protected. The possible examples of this proposition are frightening. A rock concert promoter could get permission to use a natural amphitheater, but a traditional Indian could not get permission to use the same location if he wished to perform a ceremony. A person could wear long hair as a symbol of freedom of speech but could not do the same thing if his motive were religious belief. A municipality can display a manger scene at Christmas only if it is interpreted as a generally accepted cultural tradition and not if it is for the purpose of religious devotion. That explains, perhaps, the inclusion of Rudolph, the Ninja Turtles, and some Disney characters in Christmas displays.

Since *Smith*, lower courts have discarded the old balancing test and are now placing churches under municipal ordinances, deny-

ing requests for dietary exemptions, authorizing autopsies when they are against the practices of religious groups, and generally allowing civil laws, particularly criminal laws, to be the definitive statement of what is acceptable religious behavior. The chief victims of *Smith* are mainline churches and their members, insofar as those members take their religious duties seriously.

THE QUEST FOR RELIGIOUS EXPERIENCE

The psychological subconscious of American society and its constituent members is a tempestuous sewer. Americans crave some form of religious experience, and they are unable to obtain it from any of the old, mainline Christian denominations. This condition became obvious in the sixties, when people began to take drugs to help them deal with the pressures of modern society. Two responses were forthcoming. The right-wing fundamentalists diluted their message even more, making Christianity a talk show phenomenon and asking only for uncritical obedience to a set of slogans articulated by reactionary politicians and huckster preachers. Fundamentalist Christianity, which loves the unborn and hates the living, has become a powerful political force in this country primarily because it has aligned itself with reactionary economic oligarchies and parroted their concerns about the status quo. The evidence is there to see: Ronald Reagan, a divorced man whose second wife was pregnant when he married her and who neglected his children, overwhelmingly was preferred by the electorate to Jimmy Carter, a Baptist who believed that beliefs should result in behavior.

Mainline Protestant churches, such as the Episcopalians, Presbyterians, Lutherans, Disciples of Christ, and United Church of Christ, responded to the public's desire for religious experience by transforming Christian doctrines into permissive declarations that endorsed secular values. Whatever problem seemed to be bothering the unchurched, these denominations found a way to endorse the most blatant secular version of the problem. In their attempt to be relevant to modern society, they became its greatest expositors. It is now impossible to find any sinful behavior that would not be endorsed or advocated by these churches. In the middle ages, there were seven deadly sins and a whole host of minor or venial sins. In the past three decades, the fundamentalist Christians have taken one of the deadly sins—GREED—and made

it the primary Christian virtue. The mainline churches then promptly made the multitude of venial sins respectable.

The response of serious Americans has been to look elsewhere. Asian religions—including various aspects of martial arts—old European religions such as witchcraft and devil worship, astrology, reincarnation, and a bewildering variety of self-help techniques have offered a religious experience buffet to a hungry American society. A sizable number of people have come to American Indians, seeking to join tribal religious practices or take from the tribal traditions those things they find most attractive. Thus the proliferation of “medicine wheels” and “pipe carriers” in the non-Indian population has become astronomical. Even the simplest kind of religious experience in an Indian setting or with an Indian theme is held as a cherished memory by non-Indians.

Traditional people in every tribe have made astounding progress in reviving the old ceremonies. Dances and ceremonies that had not been held for generations are now common once again in the isolated parts of the reservations. Traditional religion and customs are widely believed to be the real solution to many of the pressing social problems plaguing Indian communities today. Within a decade, it will be necessary to be a traditional religious leader to be elected to office in many tribes. If the rest of American society is not solving its basic quest for religious experience, Indians are doing so.

Most people miss the critical distinction between New Age “religious” life and tribal ceremonies. American society, particularly its organized religions and its political institutions, is built on the idea of the solitary individual as the foundation of everything else. A gathering of individuals becomes a congregation, a corporation, a legislature, or a club. In a mass society, rules must apply equally to everyone, since everyone is regarded as interchangeable, and that is the ideology underlying our institutions today. New Age movements, lacking an institutional base, are not hierarchical organizations designed for manipulation of the masses but are networks of people—strings of people who are linked together by similar philosophies, experiences, or desires.

Indian tribes violate this basic reality of mass society in that they are communities, as are the major Christian groups that have run afoul of the free exercise clauses—primarily Amish and Jehovah’s Witnesses (held together by rigid discipline but easily identifiable). It is impossible for the institutions of mass society to reach within the tribal community and manipulate individuals, since

the community is held together by blood and common sets of experiences. Hence, Indian tribes will always be askew in comparison with everything else in America, and particularly with political institutions.

Traditional religions are under attack not because they are Indian but because they are fundamentally religious and are perhaps the only consistent religious groups in American society over the long term. If kidnapping children for boarding schools, prohibiting religious ceremonies, destroying the family through allotments, and bestowing American citizenship did not destroy the basic community of Indian people, what could possibly do so? The attack today on traditional religion is the secular attack on any group that advocates and practices devotion to a value higher than the state. That is why the balancing test has been discarded and laws and ordinances are allowed primacy over religious obligations. Under the auspices of civil religion, there can be no higher value than the state. Communism was the civil religion of the Soviet Union, and it failed; chauvinistic patriotism is the civil religion of the United States right now, and it will soon break into bickering pressure groups and oppression and suppression of all dissenting views. But the quest for religious experience by human beings cannot be suppressed permanently. Consequently, we will find a solution, although we might thereby create an exceedingly unpleasant condition.

The movement to secure religious freedom in all its aspects by the Indian coalition is now getting under way. It should receive support from all serious American citizens who wish to preserve the right to have their own philosophy and their own religious experiences. This act will be the first step in rolling back the intrusions by the institutions of mass society that have changed our lives into a gray uniformity of acts and opinions. Indians can always retreat to the isolated places on the reservations, so the impact of the *Smith* decision really affects only those Indians who wish to practice their religion outside the reservations. But unless this group is protected within the constitutional framework, what chance have other groups, even Christian groups, of following their consciences or religious dictates? For the first time in American history, then, Indians have a common cause with other Americans.